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## ARTICLE

# RELIGIOUS FREEDOM IMPLICATIONS OF SHARIA IMPLEMENTATION IN ACEH, INDONESIA

ASMA T. UDDIN\*

### INTRODUCTION

On Monday, September 14, 2009, the provincial legislature in Aceh, Indonesia passed Sharia regulations imposing stringent criminal punishments for various sexual offenses, such as adultery and fornication.<sup>1</sup> Sharia, literally meaning “way to a watering place,” is a set of divine principles that regulate a Muslim’s relationship with God and man by providing social, moral, religious, and legal guidance. It is implemented through *fiqh*, or Islamic jurisprudence, which is the science of interpreting religious texts in order to deduce legal rulings. The Acehese Sharia regulations are the latest manifestations of a process of formal implementation of Sharia that began in 2002 in Aceh.<sup>2</sup> Given the gravity of the associated punishments, the regulations have caught national and international attention, with human rights activists across the world decrying the severity of the corporal punishments imposed by the regulations. Much less frequently scrutinized are the regulations’ implications for other human rights—such as religious freedom.

This paper analyzes these regulations’ religious freedom implications for both Muslims and non-Muslims. Part I begins with an introduction to the religious freedom climate in Indonesia, including an overview of international and domestic religious freedom law and the extent to which Indonesia conforms to that law. Part II focuses on Aceh: its history and special

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1. Katie Hamann, *Aceh Province Legislators Vote to Impose Stricter Sharia Law*, VOICE OF AM., Sept. 15, 2009, <http://www.voanews.com/english/news/a-13-2009-09-15-voa9-68709782.html>.

2. Karishma Vaswani, *On Patrol with Aceh’s Sharia Police*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8491195.stm> (last updated Feb. 2, 2010).

character, including its semi-autonomy from the national government, and the process of Sharia implementation in the region. Finally, Part III analyzes Acehese Sharia regulations in relation to international and domestic religious freedom law and explores the connection between the national state of religious freedom and the religious freedom problems unique to Aceh. Part III also raises broader questions of whether Sharia can ever be translated into positive law without implicating religious freedom. This paper concludes that Sharia regulations, insofar as they require the implementation of one interpretation of Islam to the exclusion of other interpretations, pose serious intra-Muslim religious freedom problems, particularly in the context of the modern nation-state, which lacks the types of checks on executive power that existed in classical Islam. Sharia implementation in the modern framework leads to the politicization of Islam; instead of the state serving Islam, Islam is manipulated to serve the state.

## I. INDONESIA'S RELIGIOUS FREEDOM CLIMATE

### A. *History of Islam's Spread in Indonesia*

Indonesia has the largest Muslim population in the world.<sup>3</sup> Indonesia has numerous ethnic groups, and while ninety percent of Indonesians are Muslims, the remaining ten percent belong to a wide variety of faiths.<sup>4</sup> Even the Muslim majority is internally diverse, colored by varying ethnic and native religious practices.

When Islam first arrived in Indonesia in the thirteenth century, it helped integrate disparate groups of people into a single culture.<sup>5</sup> It spread gradually and peacefully—and quite successfully—precisely because it accommodated existing cultures and faith traditions.<sup>6</sup> This process of Islam's spread falls into three distinct phases: acculturation, purification of acculturated Islam, and modern Islamization, or Islamization of the government and society.<sup>7</sup>

From the arrival of Islam in the fourteenth century through the early nineteenth century, Indonesia was in the acculturation phase—characterized by integrating Islam with indigenous custom. In the Java province, acculturation was evident among Indonesia's largest ethnic group, the Javanese, where “there were ongoing processes of both Islamization of Javanese and

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3. *Indonesia Country Profile*, BBC NEWS, [http://news.bbc.co.uk/2/hi/country\\_profiles/1260544.stm](http://news.bbc.co.uk/2/hi/country_profiles/1260544.stm) (last updated Sept. 5, 2010).

4. Brian Padden, *Tensions Test Indonesia's Moderate Muslim Image*, VOICE OF AM., Aug. 2, 2010, <http://www.voanews.com/english/news/asia/Tensions-Test-Indonesias-Moderate-Muslim-Image-99757334.html>.

5. Joko Mirwan Muslimin, *Islamic Law and Social Change: A Comparative Study of the Institutionalization and Codification of Islamic Family Law in the Nation-States Egypt and Indonesia (1950–1995)* 97 (Feb. 2, 2005) (unpublished Ph.D. dissertation, University of Hamburg) (on file with author).

6. *Id.* at 123.

7. *Id.* at 97, 102, 133.

Javanization of Muslims.”<sup>8</sup> The Javanese language, instead of Arabic, was used to teach crucial concepts of orthodox Islamic mysticism.<sup>9</sup> Reflections of such melding are easily observable even today.<sup>10</sup> For example, mosque architecture incorporates local style, elements of native ceremonies—such as rhythmic drumming—often precede the Muslim call to prayer, and some Islamic groups even drink traditionally made wine as part of their celebrations, despite clear Quranic injunctions against the consumption of alcohol.<sup>11</sup>

During the four-century-long acculturation phase, Indonesia coexisted peacefully with the colonial forces of Portugal, Spain, and Britain. Yet in the 1830s, tensions between Indonesian Muslims and Dutch colonial forces marked the beginning of the second phase of Islamization: purification of acculturated Islam. Indonesian Muslims sought to implement Sharia-based reforms while Dutch colonists attempted to establish colonial rules. A stark contrast between pious and acculturated Muslims also became apparent. In the Java province, nominal Muslims abandoned the five pillars of Islam, some converting to different faiths. Reformist Muslims, many returning from Meccan pilgrimages, wanted a “comprehensive and radical reform of Islam.”<sup>12</sup> These reformers saw the melding of Islam with indigenous cultural practices as heretical and harmful to the spread of fundamental tenets of Islam. The target of reform was to eliminate the “mystic synthesis” of indigenous culture and Islam, and to educate Muslims “who nominally already subscribed to the worldview of Islam, so they would become true Muslims with a more precise and righteous orthodoxy.”<sup>13</sup>

The conflict among Dutch colonists, nominal Muslims, recent converts, and reformist Muslims triggered a civil war. The reformers lost the war but have not given up their fight.<sup>14</sup> Reformist Muslims persist in their efforts to Islamize Indonesia, which has brought the country into the third and current phase of Islamization: Modern Islamization. This current phase seeks to spread Islam from above, through the government, and from below, through society.

Modern Islamization is divided into three periods. The first, focusing exclusively on Islamizing the government, lasted from the 1930s, shortly before Indonesian independence, through the “political consolidation of the New Order regime in 1968.”<sup>15</sup> The second period focused exclusively on

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8. ARSKAL SALIM, CHALLENGING THE SECULAR STATE 46–47 (2008) [hereinafter SALIM, SECULAR STATE].

9. *Id.* at 47.

10. Michael Finkel, *Facing Down the Fanatics*, NAT’L GEOGRAPHIC, Oct. 2009, at 76, available at <http://ngm.nationalgeographic.com/2009/10/indonesia/finkel-text/1>.

11. *Id.*

12. SALIM, SECULAR STATE, *supra* note 8, at 47.

13. *Id.* at 48.

14. *Id.* at 47.

15. *Id.* at 49.

Islamizing society and lasted until the fall of the New Order regime in 1998. The third period, currently ongoing, is focusing on Islamizing both the government and society.

The most significant attempt to Islamize the government was the Jakarta Charter of the Indonesian Constitution. In 1945, anticipating Indonesian independence, the Japanese occupation organized Indonesian groups to draft a constitution for the soon-to-be formed Indonesian state.<sup>16</sup> During these meetings, the first Indonesian president, Sukarno,<sup>17</sup> proposed *Pancasila*, a five-part philosophy he introduced to drive the formation of a pluralistic Indonesia. *Pancasila*, whose five tenets are belief in one supreme God, just and civilized humanity, nationalism, democracy, and social justice, was the source of much debate between two influential groups: the secular Nationalists and devout Islamists.<sup>18</sup> Nationalists sought to establish a national identity distinct from Western imperialism while devout Islamists sought to revive orthodox Islam.<sup>19</sup>

During a preliminary meeting on June 22, 1945, the Committee of Nine, consisting of five nationalists and four devout Islamists, met to draft an Indonesian Constitution.<sup>20</sup> They produced the Jakarta Charter, which added seven key words to the first tenet of *Pancasila*, Belief in One God: *dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya* (with the obligation for adherents of Islam to practice Islamic Sharia).<sup>21</sup> The Jakarta Charter contained this language of compromise in the preamble, the article on religion, and the religious qualification for the president—he must be Muslim.<sup>22</sup> With this compromise, the Nationalists believed that Indonesia would not be an Islamic state and the Islamists believed that, at a minimum, Sharia would be obligatory for Muslim citizens.<sup>23</sup> Sharia, based on tradition and the sacred text of the Quran, is the way of life for followers of Islam and includes principles of civil and criminal justice as well as personal and moral norms. Part II includes a more detailed explanation of Sharia.

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16. Koichi Kawamura, *Politics of the 1945 Constitution: Democratization and Its Impact on Political Institutions in Indonesia* 4 (Inst. of Developing Econ., Res. Paper No. 3, 2003), available at [http://ir.ide.go.jp/dspace/bitstream/2344/811/1/ARRIDE\\_ResearchPapers\\_No.3\\_kawamura.pdf](http://ir.ide.go.jp/dspace/bitstream/2344/811/1/ARRIDE_ResearchPapers_No.3_kawamura.pdf).

17. Like many Indonesians, Sukarno has only one name.

18. SALIM, *SECULAR STATE*, *supra* note 8, at glossary 223.

19. *Id.* at 51.

20. *Id.* at 63–64. The nationalists in attendance were Sukarno, Mohammad Hatta, A.A. Maramis, Achmad Subardjo, and Muhammad Yamin. The participating Islamists were Abikusno Tjokrosuyoso, Agus Salmi, Abdul Kahar Muzakki, and Wahid Hasjim.

21. *Id.* at 64.

22. UNDANG-UNDANG DASAR REPUBLIK INDONESIA [CONSTITUTION] 1945, art. 29 (Indon.).

23. SALIM, *SECULAR STATE*, *supra* note 8, at 64; Anthony L. Smith, *Indonesia: One State, Many States, Chaotic State?* 10 (Inst. of Se. Asian Studies Working Papers, Int'l Pol. & Sec. Issues No. 1, 2001), available at <http://web.iseas.edu.sg/ipsi12001.pdf>.

The Jakarta Charter was not ratified. Sukarno rejected the idea of having an official state religion.<sup>24</sup> Himself a child of an interfaith marriage—his mother was Hindu and his father Muslim—Sukarno feared that establishing a national religion would alienate minority religious groups in Indonesia.<sup>25</sup> Sukarno not only feared that Indonesia's Christian regions and islands would refuse to join the Republic if the Charter were included, but he also knew that the majority of Indonesians, generally lax in their religious observance, were against making Islam the official religion of the state.<sup>26</sup> This became evident on August 18, 1945, the day after Indonesia declared independence; Christians in the eastern islands threatened to secede from the archipelago should the seven words of the Jakarta Charter be retained.<sup>27</sup>

Other groups opposed the Jakarta Charter because of its religious freedom implications. The seven words were vague and ambiguous, making it unclear how they would be interpreted. The problem of legal dualism was also present. To what degree would Sharia govern Muslims, particularly if there was a conflict with customary law? The religious freedom implications of implementing Sharia in the Aceh Province will be addressed in Part III.

In 1966, Indonesia's second president, Suharto, took power in the aftermath of anti-communist violence that killed half a million Indonesians.<sup>28</sup> He sought to end hostilities by instituting a militarized regime, which he coined the "New Order," in contrast with that of his predecessor, Sukarno.<sup>29</sup> Suharto's regime saw the rise and fall of the second period of the modern phase of Islamization: influencing society. Shortly after taking power, Suharto "suspended all discussions regarding the Jakarta Charter, . . . forced all Islamic political parties to be fused into a single party, . . . and imposed Pancasila to replace Islam as the sole ideological basis of all political parties."<sup>30</sup> Reformist Muslims who had hope of Islamizing Indonesia from above by passing laws and electing leaders to advance Islamic ideals were forced to achieve their goals from below by embedding Islamic culture and values in society.<sup>31</sup> In 1998, a student-led, pro-democracy movement—consisting of a few million people, mostly Muslims—triggered Suharto's resignation and the collapse of the second period of Modern Islamization.<sup>32</sup>

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24. THE BROWN REFERENCE GROUP PLC, *WORLD AND ITS PEOPLES: INDONESIA AND EAST TIMOR* 1360 (2008) [hereinafter *PEOPLES*].

25. Finkel, *supra* note 10, at 7.

26. *PEOPLES*, *supra* note 24, at 1360.

27. SALIM, *SECULAR STATE*, *supra* note 8, at 69.

28. *Suharto*, N.Y. TIMES, Jan. 27, 2008, [http://topics.nytimes.com/topics/reference/timestopics/people/s/\\_suharto/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/s/_suharto/index.html).

29. SALIM, *SECULAR STATE*, *supra* note 8, at 49.

30. *Id.*

31. *Id.*

32. *Suharto's Resignation*, British Council, <http://www.britishcouncil.org/learnenglish-central-history-suharto.htm> (last visited Dec. 7, 2010).

The end of Suharto's regime exacerbated a pre-existing divide in the Muslim community between those who wanted to continue Indonesia's blending of cultures and ethnicities, and those who wanted to "purify" Islam from local customs and beliefs.<sup>33</sup> Islamic reformers wanting to purify Islam have sought to concurrently Islamize the government and society. That divide has been widened further by the infiltration of Indonesian society by literalist Wahhabi ideas and practices originating in Saudi Arabia, which fund numerous schools and Islamic universities in Indonesia.<sup>34</sup>

This rise in radicalism—that is, this increasing push to "purify" Islam and society according to a literalist understanding of the faith—during the past two decades is increasingly leading to religious tensions. A legal framework that recognizes only six religions as valid, requires that individuals register their religion with the government, limits religious expression through blasphemy laws, and bans proselytizing further worsens these tensions.<sup>35</sup> The following Part explores the tension that exists between these problematic laws and the international and constitutional requirements to respect religious freedom.

#### *B. International Religious Freedom Law Applicable to Indonesia*

Indonesia has committed to religious freedom in six international instruments: the United Nations Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Vienna Convention, the Association of South East Asian Nations Charter (ASEAN), and the Indonesian Human Rights Act of 1999.<sup>36</sup>

As a member of the United Nations, Indonesia has pledged to respect the principles set forth in the United Nations Charter, which commits member nations to "respect . . . human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>37</sup> Indonesia has also pledged to uphold the UDHR,<sup>38</sup> which states, in Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or

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33. Noorhaidi Hasan, Reformasi, *Religious Diversity, and Islamic Radicalism After Suharto*, 1 J. INDON. SOC. SCI. & HUMAN., 23–51 (2008), available at <http://www.kitlv-journals.nl/index.php/jissh/article/viewFile/URN:NBN:NL:UI:10-1-100073/4392>.

34. GIORA ELIRAZ, ISLAM IN INDONESIA: MODERNISM, RADICALISM, AND THE MIDDLE EAST DIMENSION 39–40 (2004).

35. The six official religions in Indonesia are Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism. NADIRSYAH HOSEN, SHARI'A & CONSTITUTIONAL REFORM IN INDONESIA 195 (2007).

36. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 4–6, RE: Request for Judicial Review of Act No. 1/PNPS/1965 on the Prevention of Mistreatment of Religion and/or Blasphemy Under the 1945 Constitution of the Republic of Indonesia, 140/PUU-VII/2009 (Const. Ct. of the Republic of Indon.).

37. U.N. Charter art. 55.

38. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>39</sup>

Moreover, Indonesia is obligated to protect religious liberty under the ICCPR,<sup>40</sup> which Indonesia ratified in 2005.<sup>41</sup> The ICCPR is the legal expression of the principles outlined in the UDHR and unequivocally protects an individual’s rights to freedom of thought, conscience, and religion,<sup>42</sup> freedom of association,<sup>43</sup> and equal protection under the law<sup>44</sup>—rights that the ICCPR specifically extends to religious minorities.<sup>45</sup>

The ICCPR also protects free expression. There are limitations on free expression premised on the rights of other persons or the community. However, the Human Rights Committee’s General Comment No. 10, which interprets ICCPR Article 19, emphasizes that these restrictions “may not put in jeopardy the right itself.”<sup>46</sup>

39. *Id.* art. 18.

40. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI), art. 18 (Dec. 16, 1966).

41. See Council on Foundations, *Country Information: Indonesia*, U.S. INT’L GRANTMAKING (Nov. 2010), <http://www.usig.org/countryinfo/indonesia.asp> (explaining that the ICCPR was ratified in Indonesia through the enactment of Law No. 12/2005 on October 28, 2005).

42. International Covenant on Civil and Political Rights, *supra* note 40, art. 18 (“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

43. *Id.* art. 21 (“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”).

44. *Id.* art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

45. *Id.* art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”).

46. Office of the U.N. High Comm’r for Human Rights, Human Rights Comm., General Comment No. 10: Freedom of Expression (Art. 19), ¶ 4 (Jun. 29, 1983), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (follow “Article 19 (Freedom of opinion)” hyperlink). The Human Rights Committee that issues General Comments is a body of independent experts that monitors implementation of the ICCPR. The Committee is empowered to hear individual and inter-State complaints alleging violations of the ICCPR and to issue interpretative General Comments of the ICCPR. OHCHR - HUM. RTS. COMM., <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Jan. 15, 2011).



The United Nations reiterated this point in General Comment No. 22 on ICCPR Article 18:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.<sup>47</sup>

According to General Comment No. 22, the right to freedom of religion in ICCPR Article 18 “is not limited in its application to traditional religions,” and discrimination against a religion or belief “for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community” is strictly prohibited.<sup>48</sup>

Indonesia is also a member state of ASEAN. Accordingly, it has agreed to uphold the ASEAN Charter, the principles of which include:

- h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.<sup>49</sup>

As such, pursuant to the Vienna Convention and the ASEAN Charter, Indonesia is bound under international law to adhere to the United Nations Charter.<sup>50</sup>

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47. Office of the U.N. High Comm’r for Human Rights, Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience, and Religion (Art. 18), ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993).

48. *Id.* ¶ 2. Amyebi Ligabo, Special Rapporteur on freedom of expression, has warned about the dangers of sacrificing free expression for the sake of religious feelings. In his 2008 report to the United National Human Rights Council, Mr. Ligabo states that “limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements. . . . [T]hey are not designed to protect belief systems from external or internal criticism.” See Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶ 85, U.N. Doc. A/HRC/7/14 (Feb. 28, 2008) (by Amyebi Ligabo).

49. ASEAN Charter art. 2(h)–(j).

50. Article 26 of the Vienna Convention on the Law of Treaties provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331. Article 27

Finally, the Preamble to the Indonesian Human Rights Act of 1999 incorporates the UDHR and the ICCPR into the corpus of Indonesian law: “as a member of the United Nations, the nation of Indonesia has a moral and legal responsibility to respect, execute, and uphold the Universal Declaration on Human Rights promulgated by the United Nations, and several other international instruments concerning human rights ratified by the Republic of Indonesia.”<sup>51</sup> Article 7 of the Act stipulates that international human rights regulations ratified by Indonesia are legally binding in Indonesia.<sup>52</sup>

### C. Indonesian Constitutional Framework

Indonesia’s Constitution, written in 1945, has two references to religion. The first reference is found in the preamble, which states that, “the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God.”<sup>53</sup> The second reference can be found in Article 29 of the Constitution: “The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.”<sup>54</sup>

There is some tension between these two references. The preamble frames the basis of Indonesia’s statehood on *Pancasila*, introduced by Sukarno in the 1940s.<sup>55</sup> *Pancasila* makes monotheistic belief a central tenet and, in doing so, calls into question the citizenship and rights of atheists and polytheists.<sup>56</sup> It is unclear whether Article 29 is to be read within the framework of *Pancasila* or whether it offers broader religious freedom protections.<sup>57</sup>

### D. Religious Freedom Violations in Indonesia

Religious freedom in Indonesia is challenged by blasphemy and deviancy laws, which require citizens to conform their religious expression to the official interpretation of their religion. Moreover, citizens are required to register their religion with the government, and religious land use is subject to community approval.<sup>58</sup>

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further provides that adherence to domestic law is no justification for failure to perform the obligations of a particular agreement. *See id.* art. 27.

51. Legislation Concerning Human Rights pmb. (d) (Act No. 39/1999) (Indon.).

52. *See* Vienna Convention on the Law of Treaties, *supra* note 50, art. 7(2).

53. UNDANG-UNDANG DASAR REPUBLIK INDONESIA [CONSTITUTION] 1945 Preamble (Indon.).

54. *Id.* art. 29.

55. SALIM, SECULAR STATE, *supra* note 8, at 64.

56. Becket Fund for Religious Liberty, Universal Periodic Review: Indonesia 1 (Oct. 2009) (unpublished manuscript prepared for the United Nations Human Rights Council Universal Periodic Review of Indonesia) (on file with the University of St. Thomas Law Journal).

57. *Id.* at 1–2.

58. *Id.* at 4–5.

### 1. *Blasphemy or Deviancy Laws*

Law 1/PNPS/1965 on the Prevention of Mistreatment of Religion and/or Blasphemy Act (“Blasphemy Act”)<sup>59</sup> makes it unlawful “to, intentionally, in public, communicate, counsel, or solicit public support for an interpretation of a religion or a form of religious activity that is similar to the interpretations or activities of an Indonesian religion but deviates from the tenets of that religion.”<sup>60</sup> According to the Elucidation of the Blasphemy Act (the “Elucidation”), one of the purposes of the Act is to “channel . . . religiosity”<sup>61</sup> toward six approved religions: Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.<sup>62</sup>

The Blasphemy Act seeks to protect Indonesia’s six official religions by punishing those who insult these religions or persuade others to convert to unofficial religions.<sup>63</sup> The Act also restricts intra-religious expression by making it illegal to advocate “deviations from teachings of religion considered fundamental by scholars of the relevant religion.”<sup>64</sup>

The Blasphemy Act also has been used to impose criminal punishments on people who belong to religions that derive from recognized religions. For example, in 2008, the Indonesian Minister of Religious Affairs, the Attorney General, and the Minister of the Interior issued the Joint Decree on the Ahmadiyya (“Joint Decree”).<sup>65</sup> The vast majority of Muslims do not recognize the Ahmadiyya as Muslim because of their perceived deviation from mainstream Islamic teachings.<sup>66</sup> The Joint Decree orders members of the Ahmadiyya sect, “as long as they consider themselves to hold to Islam, to discontinue the promulgation of interpretations and activities that are deviant from the principal teachings of Islam.”<sup>67</sup> This presents religious freedom problems. The sect is given the Hobson’s choice of following their faith in its entirety and being sanctioned, or abandoning precepts of their faith to avoid legal action.

The Blasphemy Act establishes civil and criminal penalties for violators. First and second offenses are punished by a civil penalty. On a first offense, the offender “shall be instructed and be warned severely to cease

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59. Prevention of Misuse of Religion and/or Blasphemy Act (Act No. 1/PNPS/1965) (Indon.).

60. *Id.* art. 1.

61. Elucidation of Enactment of the President of the Republic of Indonesia (No. 1/PNPS of 1965 Concerning the Prevention of Religious Abuse and/or Defamation) § I(3).

62. *Id.* § II, art. 1.

63. *See id.* § I(4).

64. *Id.*

65. Joint Decree of the Minister of Religious Affairs, the Attorney General and the Minister of the Interior of the Republic of Indonesia, KEP033/A/JA/6/2008 (June 9, 2008), available at <http://www.thepersecution.org/world/indonesia/docs/skb.html>.

66. *Id.*

67. *See id.* at 2.

his/her actions” by a minister of the federal government.<sup>68</sup> For a second offense, if the offender is an organization, the President of Indonesia may dissolve it and declare it to be banned.<sup>69</sup> Banned or dissolved organizations have no legal personality and may not own property or legally practice their beliefs in public.<sup>70</sup>

Another product of the Blasphemy Act is Article 156(a) of the Criminal Code, which makes blasphemy, or “deviant” interpretations, a crime punishable by up to five years imprisonment. It outlaws deliberate, public expressions of hostility, hatred, contempt, or disgrace against religion.<sup>71</sup> Article 157 of the Code restricts media dissemination of any such “deviant” ideas.<sup>72</sup>

These blasphemy laws have traditionally targeted Muslim sects considered to be heterodox by prominent Muslim leaders. One hundred fifty individuals have been detained or arrested under Article 156(a) in the last five years alone.<sup>73</sup> In 2007, police detained one hundred twenty-five members of the Muslim sect Al-Qiyadah al-Islamiyah, a group whose leaders claim to be prophets.<sup>74</sup> The sect’s leader, despite denouncing his beliefs publicly, was sentenced to four years in prison for “violating the criminal code by committing blasphemous acts.”<sup>75</sup>

## 2. *Ban on Proselytizing*

The 1979 decree, Guidelines for the Propagation of Religion, banned proselytizing for fear that it might disrupt inter-religious relations in the more religiously diverse parts of Indonesia.<sup>76</sup> The ban conflates proselytizing and blasphemy, negatively impacting religious groups for whom proselytizing is a religious obligation.

Religious speeches and literature are permissible only when they are delivered to members of the same religious group.<sup>77</sup> Religious groups must

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68. See Prevention of Misuse of Religion and/or Blasphemy Act, art. 2(1) (Act No. 1/PNPS/1965) (Indon.).

69. See *id.* art. 2(2).

70. *International Portrait: Indonesia (2007)*, THE PLURALISM PROJECT, available at <http://65.23.147.156/reports/view/32> (last visited Jan. 13, 2011).

71. U.S. Dep’t of State, *Indonesia*, ANN. REP. INT’L RELIGIOUS FREEDOM (2008) [hereinafter *Indonesia Religious Freedom Report*], available at <http://www.state.gov/g/drl/rls/irf/2008/108407.htm> (“Although the law applies to all officially recognized religions, the few cases in which it has been enforced have almost always involved blasphemy and heresy against Islam.”).

72. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANN. REP. 252–59 (2008).

73. See *id.* at 258.

74. *Id.*

75. *Id.*

76. *Country Profile: Indonesia*, in RELIGIOUS FREEDOM IN THE WORLD 203 (Paul A. Marshall ed., 2008).

77. *Indonesia Religious Freedom Report*, *supra* note 71, at 6. Foreign missionaries and religious organizations must gain permission from the Ministry of Religious Affairs for a religious worker visa. Some Christian organizations report varying difficulty getting a visa to the country. *Id.* at 9.

obtain a permit to host a public event; these permits are generally granted in an unbiased manner unless the government fears the event may disrupt public order by upsetting members of other faiths. It is unclear if the government enforces these laws, and, if so, how they are enforced. Because of decreased central authority, local authorities may vary in the enforcement of this legislation depending on the religious makeup of the regional population, the religious background of the local government, and the presence of perceived “disruptive” religious groups.

### 3. *Religious Registration*

The Indonesian government officially recognizes six religious groups: Islam, Catholicism, Protestantism, Buddhism, Hinduism, and Confucianism.<sup>78</sup> Although conversions between official religions occur and are legal,<sup>79</sup> the freedom to change one’s religion is constrained by the ban on proselytizing.<sup>80</sup> Atheism is illegal by virtue of its violating the *Pancasila* ideology’s monotheism precept. Unrecognized religions can register as a social organization, though these groups may encounter discrimination when registering, particularly when adherents try obtaining identification cards, marriage licenses, and birth certificates for their children.<sup>81</sup>

### 4. *Religious Land Use*

There is particular abuse at the local level of laws regulating the construction of religious buildings. These laws pose an obstacle to the free religious expression of religious groups seeking to build or expand houses of worship. Before construction can commence, the Housing Decree 1/2006 requires a religious group seeking to build a new building or expand a pre-existing structure for religious purposes to obtain the approval of at least ninety followers of that particular religious order and sixty community residents in the area where the structure is to be built, in addition to the final approval of the Joint Forum for Religious Tolerance (FKUB).<sup>82</sup> The FKUB is a provincial panel comprised of religious leaders chosen proportionally

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78. See Becket Fund for Religious Liberty, *supra* note 56, at 4.

79. *Id.*

80. Proselytizing is illegal as decreed in 1979 by the Ministries of Religion and Home Affairs. *Country Profile: Indonesia*, *supra* note 76, at 203.

81. National identity cards (KTPs) among other civil documents identify the holder’s religion—one of the six nationally recognized ones. Members of minority religions are allowed to leave this entry blank; however, in practice they often have to identify with one of the main religions in order to receive one. Citizens without a KTP report problems finding work; therefore, this results in civil discrimination against minority religions. Interfaith marriage presents another obstacle as some government officials will not register or marry a man and woman who practice two different religions. This poses problems as well when the couple wants to have children and therefore need to obtain birth certificates. Some individuals convert in order to overcome this impediment. *International Portrait: Indonesia (2007)*, *supra* note 70, at 7–8.

82. *Id.* at 3.

by the number of religious adherents in the province.<sup>83</sup> The decree is, on its face, problematic because it poses an unjust burden on religious groups. As applied, the decree is even worse; it accedes power to local officials, who can use the decree to abuse, discriminate against, and intimidate unpopular or minority religions.<sup>84</sup> According to representatives of minority religious groups, the Housing Decree specifically targets house churches and small Hindu temples. Some prominent Muslim leaders have contested that the decree may violate Article 18 of the ICCPR.<sup>85</sup>

## II. HISTORY OF SHARIA IMPLEMENTATION IN ACEH

### A. Overview of the Aceh Province

Aceh differs from other regions of Indonesia because it has a distinct political, religious, ethnic, and “arguably national”<sup>86</sup> identity, “formed by an indigenous pre-colonial state in the form of the Sultanate.”<sup>87</sup> Other regions of Indonesia developed their political identities with extensive influence from colonial powers and the nationalist movement.<sup>88</sup>

While Indonesian Muslims generally may not be conservative or even particularly devout, Muslims in Aceh are on the whole very religious and fiercely proud of their Islamic heritage. Aceh has a unique place in the history of Islam’s growth, as it was in Aceh that Islam first arrived in Southeast Asia.<sup>89</sup> The earliest recording of Islam’s presence in Indonesia is found in Marco Polo’s writings—he passed through the town of Perlak (now within the boundaries of East Aceh) in 1292 and described it as a Muslim town.<sup>90</sup>

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83. *Id.* at 8.

84. Since the government promulgated the Revised Joint Ministerial Decree on the Construction of Houses of Worship in 2006, many minority religious groups have reported instances of discrimination when trying to obtain approval of construction of houses of worship. For example, in the regency of Langkat, North Sumatra, local authorities delayed Catholic officials from building a church, despite the fact that the group had met the requirements to do so. In West Java, several churches report facing difficulty obtaining licenses to build. In Tangerang, West Java, The Hindu Association reports ongoing obstacles to building a temple. In November of 2007, the local government in Pura Penataran Agung Rinjani, Bayan, and West Lombok cancelled a permit to construct a Hindu temple. These are among many instances of discrimination cited by minority religions arising under The Housing Decree 1/2006. *Id.*

85. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM ANN. REP., *supra* note 72, at 256.

86. Kirsten E. Schulze, *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization*, 2 EAST-WEST CTR. POL’Y STUD. 1 (2004), available at [www.eastwestcenter.org/fileadmin/stored/pdfs/PS002.pdf](http://www.eastwestcenter.org/fileadmin/stored/pdfs/PS002.pdf).

87. Rodd McGibbon, *Local Leadership and the Aceh Conflict*, in VERANDAH OF VIOLENCE 315, 318 (Anthony Reid ed., 2006).

88. *Id.*

89. Arskal Salim, ‘Shari’a from Below’ in Aceh (1930s–1960s): Islamic Identity and The Right to Self-Determination with Comparative Reference to the Moro Islamic Liberation Front (MILF), 32 INDON. & MALAY WORLD 80, 83 (2004) [hereinafter Salim, *Shari’a from Below*].

90. *Id.*

The first Muslim kingdom in Southeast Asia was also located in Aceh.<sup>91</sup> The earliest evidence of a Muslim dynasty in the region is the gravestone of the first Muslim ruler of Samudra, Sultan Malik as-Salih, dated 1297.<sup>92</sup> Additional gravestones from the thirteenth century show that Muslim rule continued through that period.<sup>93</sup> The Moroccan traveler, Ibn Battuta, passed through the area in 1345 and 1346 and confirmed the prevalence of Muslim rule.<sup>94</sup>

### B. Political Structure in Aceh During the Sultanate

Prior to the Dutch conquest in 1873, the political structure of Aceh consisted of six political subdivisions: *kawom*, *gampong*, *mukim*, *uleebalangship*,<sup>95</sup> *sagi*, and *Sultanate*.<sup>96</sup> The smallest division was the *kawom*, or clan, composed of “all the descendents of a common ancestor in the male line . . . .”<sup>97</sup> The *gampong*, the second-smallest political division, bore much resemblance to a village and was comprised of geographically close *kawom*.<sup>98</sup> A group of *gampongs* formed *mukims*, or districts, and each *uleebalang*, or territorial chief, was “lord over several . . . *mukims*.”<sup>99</sup> Three federations or provinces formed from the three sides, or *sagi*, of the “triangular-shaped” Great Aceh.<sup>100</sup> Three *sagi* plus the “actual territory of the [s]ultan” formed the Sultanate.<sup>101</sup>

The sultan had *de jure* domain over the entire province, even though his actual territory was restricted to the *dalam*, the royal enclosure containing the capital and royal palace.<sup>102</sup> The sultan was vested with all “political, judicial, and economic power,” and enforced Islamic laws, making him vital to the religious life of Aceh.<sup>103</sup> In practice, however, the sultan “lack[ed] *de facto* power over his Sultanate.”<sup>104</sup> His territorial chiefs, the *uleebalang*,

91. *Id.*

92. *Id.*

93. Teuku Iskandar, Aceh as a Muslim-Malay Cultural Centre (14th–19th Century), Address before the First International Conference of Aceh and Indian Ocean Studies 2 (Feb. 24, 2007), [http://www.ari.nus.edu.sg/docs/CAceh-project/full-papers/aceh\\_fp\\_teukuiskandar.pdf](http://www.ari.nus.edu.sg/docs/CAceh-project/full-papers/aceh_fp_teukuiskandar.pdf).

94. IBN BATTUTA, TRAVELS IN ASIA AND AFRICA (H.A.R. Gibb trans., 1929).

95. While the other territorial words are of Acehnese origin, the term *uleebalangship* was invented by the Dutch to describe the hierarchy and authority of *uleebalang*. A. Mukti Ali, *An Introduction to the Government of Aceh's Sultanate*, 6 AL DJAMI'AH, 1962, at 16.

96. *Id.* at 9.

97. *Id.*; see also A.G.C. Van Duyl, *Dutch Success in Acheen and Its Lessons*, IMPERIAL & ASIATIC Q. REV. & ORIENTAL & COLONIAL REC., Jan.–Apr. 1895, at 437.

98. See 1 M. TH. HOUTSMA ET AL., E.J. BRILL'S FIRST ENCYCLOPEDIA OF ISLAM 506 (1913–1936).

99. *Id.*

100. *Id.*

101. Ali, *supra* note 95, at 9.

102. *Id.* at 19.

103. *Muslim Sultanate in South-East Asia*, WORLD OF ISLAM PORTAL (Oct.26, 2005), [http://islam.worldofislam.info/index.php?option=com\\_content&view=article&id=390:muslim-sultanate-in-south-east-asia&catid=106&Itemid=60](http://islam.worldofislam.info/index.php?option=com_content&view=article&id=390:muslim-sultanate-in-south-east-asia&catid=106&Itemid=60).

104. Ali, *supra* note 95, at 27.

often challenged him. The *uleebalang*, considered “the real rulers of the country,”<sup>105</sup> led the *uleebalangs* and appointed the *paglima*, or leaders, of the *kawom*, *gampong*, and *mukim*.<sup>106</sup> They also served as governors, judges, military leaders, and entrepreneurs of Aceh.<sup>107</sup> The diversity and expanse of their roles in Acehnese society earned the *uleebalang* the title, “lords of the country.”<sup>108</sup>

An Indonesian body, the Council of the State, consisting of *uleebalang* and *ulama* was given the authority to dethrone a sultan, but this power was rarely invoked.<sup>109</sup> In fact, only two of the thirty-six sultans were forced from the throne with the authority of the Council of State. The last sultan of Indonesia was dethroned after the Dutch-Aceh war when the Dutch declared the abolition of the Sultanate.<sup>110</sup>

The authority of local leaders dominated Acehnese society. Even though sultans ruled all Acehnese citizens, including the *uleebalang*, the Acehnese gave deference and respect to their local leaders. Each *gampong* had three local authorities: *keuchi*, *teungki*, and *ureuerg tuha*, each of whom was vested with different responsibilities.<sup>111</sup> The *keuchi* controlled marriage between members of different *kawom*, and movement among *gampong*.<sup>112</sup> Even though the *keuchi* was given authority to make decisions on marriage and relocation, he was expected to deliberate with his fellow leaders, the other *gampong* authorities, on matters affecting the entire *gampong*. Should the *keuchi* neglect this duty “in solving a common problem, he [would] quickly lose his influence.”<sup>113</sup> Because the people valued a close relationship with their leaders, loss of influence could lead to his displacement by a dissatisfied constituency.

*Imams* ruled the third social division, the *mukim*.<sup>114</sup> Initially, the *imams* served a wholly religious role, enforcing Sharia and ensuring proscribed rites were not neglected.<sup>115</sup> The *imams* cultivated “an Acehnese identity based on pride in being an Islamic state that was the ‘verandah of Mecca’—the greatest outpost of Islamic scholarship in the Far East.”<sup>116</sup> Enforcement of Islamic law in Aceh was at times more severe than elsewhere

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105. *Id.* at 18.

106. *Id.* at 9–10.

107. *Id.* at 15–16; ANTHONY REID, *BLOOD OF THE PEOPLE* 13 (1979).

108. Ali, *supra* note 95, at 15. The role of the *uleebalang* was also rooted deeply in ancient origins and their authority was “confirmed, not created by the Sultans.” *Id.* at 16.

109. *Id.* at 12.

110. ANTHONY REID, *THE ACEH CONFLICT: A LONG-TERM VIEW FOR LONG-TERM SOLUTIONS* 10 (2008).

111. LEE KAM HING, *THE SULTANATE OF ACEH: RELATIONS WITH THE BRITISH* 8 (1995).

112. *Id.* at 12.

113. *Id.* at 13.

114. *Id.* at 14.

115. *Id.*

116. JOHN BRAITHWAITE ET AL., *ANOMIE AND VIOLENCE: NON-TRUTH AND RECONCILIATION IN INDONESIAN PEACEBUILDING* 345 (2010).



in the Muslim world, including even Saudi Arabia.<sup>117</sup> In pre-colonial Aceh, penalties for those found guilty of alcohol consumption included “amputation of hands and pouring molten lead down the throats.”<sup>118</sup> Although they were elected and dismissed by *uleebalangs*, *imams* had more authority within the *gampong* than the *uleebalang* did because they were more closely connected to the people.<sup>119</sup>

The *uleebalang* governed the *uleebalangships*. The three most powerful and influential *uleebalangs* were elected to govern the *sagi*, which were “a federation of *uleebalangships*.”<sup>120</sup> While the *panglima sagi*, which the *uleebalang* elected to govern the *sagi*, held much authority over the Acehnese citizens, their authority was limited to general concerns, leaving the *uleebalangs* who governed the *uleebalangships* to manage the details.<sup>121</sup>

Even the sultan himself struggled with the populist tendencies of the Acehnese people. The “problem of succession to a Sultan depend[ed] on the will of the *uleebalang*. They elected the new [s]ultan, and decided who [would] reign over the country.”<sup>122</sup> Should the sultan not be in good stead with the *uleebalang*, he would be ousted from office. Such was the case for Sultan Mahmud Syan (1760–81), who was overthrown three times by the *uleebalang*, but managed to regain power each time.<sup>123</sup>

Aceh’s geography also made its governance difficult. With a long coastline, political unity and administrative control were nearly impossible.<sup>124</sup> The sultan resided in Banda Aceh, removed from the ports, which the *uleebalang* controlled. Ships would moor in port and *uleebalang* would transact directly with foreign traders. The distance between the sultan and *uleebalang* made the inland sultan removed and helpless in “enforcing duties and taxes on goods.”<sup>125</sup> Chaos would also break loose off the coast of Aceh. Piracy was on the rise, many blaming the *uleebalang* for pillaging the trade ships.<sup>126</sup>

### 1. *The Ulama and the Sultanate*

The *ulama*, or religious scholars, took on a prominent role in the royal establishment, serving as religious advisors to the sultans and sultanahs.<sup>127</sup>

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117. *Id.*

118. *Id.*

119. HING, *supra* note 111, at 15.

120. *Id.* at 17.

121. *Id.*

122. *Id.* at 19.

123. Lee Kam Hing, *Aceh at the Time of 1824 Treaty*, in VERANDAH OF VIOLENCE, *supra* note 87, at 72, 80.

124. *Id.* at 82.

125. *Id.*

126. *See id.* at 78.

127. M. HASBI AMIRUDDIN, THE RESPONSE OF THE ULAMA DAYAH TO THE MODERNIZATION OF ISLAMIC LAW IN ACEH 9–10 (2005). The Acehnese Sultanate was governed by queens from the period 1641–1699. *Id.* at 10.

The *ulama* were also seen as the people's representatives in the royal court. As appointed judges, the *uleebalang* mediated between the sultan and the people and needed the *ulama* to administer justice in order for the administration to be effective and credible.<sup>128</sup> The people needed the *ulama* to not only represent them but also to provide moral guidance.<sup>129</sup>

The *ulama* were teachers in the *dayah*, or religious schools, which were the only educational institutions available during the Sultanate.<sup>130</sup> As Aceh's moral guardians, when they perceived religious observance as weakening, the *ulama* led social and religious reforms to revive religious devotion.<sup>131</sup> And as the primary arbiters of knowledge, the *ulama* were able to exercise broad influence over the ruling elite, at times having greater control than the rulers.<sup>132</sup>

A historical partition divided the Sultan and *ulama* from the *uleebalang*. During periods of harmony, all three parties would relate well with a mutual respect for the division of the religious authority. Driven by their religious loyalty, the *ulama* educated the Muslim faithful in how to live orthodox Muslim lives and worked to establish society based on Islamic precepts by implementing Sharia in Aceh.<sup>133</sup> This was in direct contrast to the *uleebalang*, who wanted only to retain control of their territories and did not have broader religious aims or authority.<sup>134</sup> The *ulama* were loyal to the sultan, so long as they believed the sultan faithfully adhered to the precepts of Islam. In 1773, for example, the *ulama* endorsed the formal dethronement of Sultan Jauhar al-Alam under the pretext of jihad because of his failure to abide by Islamic precepts.<sup>135</sup>

### C. British Colonization

The Dutch and British established trade routes between India and China through their East India Companies as they colonized the South Pacific. Aceh was a strategic post along this trade route, and the British saw Aceh as important to regain a strong presence in the Malay Archipelago and to check Dutch expansion.<sup>136</sup> In hopes of establishing a stronghold in Southeast Asia, the British initiated contact with the Sultan of Aceh, Jauhar, who agreed to allow Britain to build a trading factory in the province.<sup>137</sup>

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128. *See id.* at 11.

129. *See id.*

130. *Id.* at 14. As the education system advanced, the *ulama* broadened their curricula to compete with the Dutch, instituting the *madrassa*. *See* REID, *supra* note 107, at 22.

131. AMIRUDDEN, *supra* note 127, at 14.

132. For example, the fourth Sultanah of Aceh, Keumalatsyah, was deposed by a *fatwa* stating that a female cannot be the ruler. *Id.*

133. *Id.* at 318.

134. *Id.*

135. HING, *supra* note 111, at 12, 194, 206.

136. Hing, *supra* note 123, at 88.

137. *Id.*

However, as Britain focused on Aceh, the Dutch were staking their claim in other parts of Sumatra. Seeing potential for conflict, the British and Dutch entered into the London Treaty of 1824 where Britain ceded its territorial holds in Aceh to the Dutch and the Dutch transferred their territories in India to Britain.<sup>138</sup>

#### D. Dutch Invasion and the Dutch-Aceh War

The Dutch sent delegates to Aceh in August of 1873 to compel the Acehnese to recognize Dutch sovereignty over Aceh by declaring the Sultanate abolished. When the Acehnese opposed this assertion of sovereignty, the Dutch declared war. In 1903, the Dutch partially conquered Aceh by suppressing and dispersing majority populations while strengthening minorities. Realizing the heavy influence the *ulama* had over the Acehnese, the Dutch placed the province under “political and religious quarantine,”<sup>139</sup> thereby preventing the region from receiving outside influence that may “exploit the *ulamas*’ dissatisfactions” with Dutch control.<sup>140</sup> In addition, the Dutch, with the help of the *uleebalang*, compelled Acehnese youth to enroll in semi-modernized secular schools instead of religious schools.<sup>141</sup> The secular education of these youth eventually led to a rift between orthodox and reformist Muslims, which the Dutch capitalized on by accentuating the division and further weakening the influence of the orthodox *ulama*.<sup>142</sup>

After the Dutch conquest, the relationship between the *uleebalangs* and the Acehnese deteriorated, in large part due to the greed of the *uleebalang*. Concurrent with their suppression of *ulama*, the Dutch befriended *uleebalang* and granted them administrative authority, which the *uleebalang* used to “define the rules of the game and control trade.”<sup>143</sup> The *uleebalang* embezzled religious tithes (*zakat*) and levied corvée for their own private purposes.<sup>144</sup> They also maintained virtual monopolies over and held nearly all the profit resulting from coffee, rubber, pepper, rice, and betelnut production.<sup>145</sup> The increase in *uleebalang* power, their corruption, and the resulting distrust of them by the people “widened the gulf between *uleebalang* and their subjects,” making the *uleebalang* reliant on the Dutch,

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138. Anthony Reid, *The Pre-Modern Sultanate’s View of Its Place in the World*, in VERANDAH OF VIOLENCE, *supra* note 87, at 52, 52.

139. NAZARUDDIN SJAMUDDIN, THE REPUBLICAN REVOLT: A STUDY OF THE ACEHNESE REBELLION 16 (1985).

140. *Id.* at 17.

141. *Id.*

142. *See id.* at 18. The reformists were primarily the Free Aceh Movement (GAM) and the PUSA.

143. John Braithwaite, *Aceh, Indonesia 2* (Peacebuilding Compared Project, Working Paper No. 5, 2010), available at [http://cijg.anu.edu.au/cijg/link\\_documents/Publications/Acehwebsitevers.pdf](http://cijg.anu.edu.au/cijg/link_documents/Publications/Acehwebsitevers.pdf).

144. REID, *supra* note 107, at 14.

145. *Id.*

rather than popular support, to meet their ends.<sup>146</sup> The Dutch still kept the *uleebalang* under their control. When it appeared the *uleebalang* were groveling for too much, the Dutch would float the idea of restoring the Sultanate, something the *uleebalang* vehemently opposed.<sup>147</sup>

As the connection between the *uleebalang* and the people weakened, the *ulama*'s relationship with the people became increasingly strong. Some of the *uleebalang* responded to the Dutch invasion by resisting it, while others defected to the Dutch side. Many vacillated between the two factions.<sup>148</sup> The *ulama*, on the other hand, emerged as the primary leaders against the Dutch invaders. They declared the struggle "jihad." By characterizing the war as a holy war and making it incumbent on all Muslims to engage in battle against the Dutch, the *ulama* injected the struggle not just with immense manpower but also tremendous passion and religious fervor.<sup>149</sup> Common phrases and concepts associated with jihad were employed in the *ulama*'s sermons about the war; the Dutch aggressor was a *kafir al-harb* (unbeliever at war), and anyone who died in battle against this *kafir* was a martyr, promised eternal rewards.<sup>150</sup> For those who waged battle and survived, war spoils were for the taking. In invigorating the Muslim spirit to wage war, the *ulama*'s scope of influence became increasingly prominent, such that the Dutch army offered monetary rewards for the capture of some of the more influential scholars.<sup>151</sup> Later attempts at Sharia implementation would be seen as a continuation of this religious mission; it was "seen as a continuation, but in different form, of their *jihad* during the Aceh war against colonial rule 'to encourage people to look beyond their local communities to the wider world of Islam.'" <sup>152</sup>

In 1941, Japan invaded Penang, Malaysia, across the Strait of Melaka.<sup>153</sup> Said Abu Bakar, a leader of All Aceh Ulama Association (*Persatuan Ulama Seluruh Aceh* (PUSA)), approached the Japanese offering them "active support" in ousting the Dutch "with no particular *quid pro quo*."<sup>154</sup> Bakar explained that as part of the *ulama*, he and the Acehnese were not only "extremely hostile to the Dutch government, but also to the *uleebalang* because they . . . oppressed the people even more than the Dutch."<sup>155</sup> It is important to note that the *ulama*'s fight against the *uleebalang* was not motivated by the desire to wrest control away from the

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146. *Id.* at 15.

147. *Id.* at 20.

148. AMIRUDDEN, *supra* note 127, at 16.

149. *Id.*

150. *See id.* at 17.

151. *Id.*

152. Salim, *Shari'a from Below*, *supra* note 89, at 84.

153. ANTHONY REID, *IMPERIAL ALCHEMY: NATIONALISM AND POLITICAL IDENTITY IN SOUTH-EAST ASIA* 125 (2010) [hereinafter *IMPERIAL ALCHEMY*].

154. *Id.*

155. *Id.*

*uleebalang*; instead, it was resistance against the *uleebalang*'s corruption and their pandering to the Dutch.<sup>156</sup>

The people's distrust of the *uleebalang* provided fertile ground for the re-emergence of the *ulama*, which started in the 1920s and culminated in 1939, with the founding of PUSA.<sup>157</sup> Days before Japan arrived in Aceh, the *ulama*-led PUSA revolted against the Dutch, forcing them to leave in March of 1942.<sup>158</sup> Because of the *ulama*'s persistent struggle against them, the Dutch had never managed to fully subjugate the Acehnese.<sup>159</sup> After the Dutch withdrawal, the Acehnese acceded to Japanese control without demanding independence.<sup>160</sup> Bakar and the PUSA demanded freedom only from "forced labour and tax, and punishment of the *uleebalang* . . . whom he and the PUSA . . . most opposed."<sup>161</sup>

Under Japanese control, the *uleebalang* lost their privileged status. They never earned Japanese sympathy because they "failed to compete with PUSA [the *ulama*] leaders in mobilizing the work-force" to serve as *romusha*, or forced laborers.<sup>162</sup> Like the Dutch before them, the Japanese did not give the *ulama* the freedom they sought. To weaken their influence, the Japanese arrested key members of the PUSA, including Daud Beureueh, who would be instrumental later in fighting for Acehnese autonomy from the Indonesian state.<sup>163</sup> The Japanese were forced to leave Aceh when Indonesia gained independence in 1945.<sup>164</sup>

Throughout the many rebellions, revolts, and uprisings in Aceh, the real conflict was between the *ulama* and the *uleebalang*. Colonial powers, like the Dutch and Japanese, would strengthen their control by exploiting the differences between the local *ulama* and *uleebalang*.

#### E. *The Ulama, Dutch Colonization, and the Fall of the Sultanate*

The height of *ulama* loyalty to the sultan was during the Dutch-Aceh war, where the *ulama*, who opposed the Dutch, gave full support to the sultan. The *ulama* saw the Dutch and their Western ideals as a threat to Muslim culture. The *ulama* resisted Dutch expansion and declared the struggle a "*perang sabil* or holy war against the foreign infidels."<sup>165</sup> In 1939, the young *alim* Daud Beureueh founded PUSA to unite reformist and

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156. Alfian, *The Ulama in Acehnese Society*, in READINGS ON ISLAM IN SOUTHEAST ASIA 82 (Ahmad Ibrahim et al. eds., 1985).

157. *Id.* at 83.

158. IMPERIAL ALCHEMY, *supra* note 153, at 125–26.

159. LUKMAN THAIB, THE ROOTS OF THE ACEHNESE STRUGGLE 15 (1999).

160. IMPERIAL ALCHEMY, *supra* note 153, at 126.

161. *Id.*

162. THAIB, *supra* note 159, at 21.

163. SJAMSUDDIN, *supra* note 139, at 21.

164. *Id.* at 23.

165. McGibbon, *supra* note 87, at 318.

orthodox *ulama* and advance Islamic culture in Aceh.<sup>166</sup> In the early stages of colonization, the *ulama* mobilized Islamic students and youth to eliminate the *uleebalang*.<sup>167</sup> Leading *uleebalang* either fled the region or were killed by activist *ulama*, resulting in a shift in power from the *uleebalang* to *ulama* when Indonesia gained independence from the Dutch in the 1940s.<sup>168</sup>

The *ulama*'s commitment to fighting the Dutch and preserving Aceh's Islamic character gave the war "a primarily religious character."<sup>169</sup> The Sultanate collapsed in 1903 with the surrender of Aceh's last sultan, Sultan Muhammad Daud Syah (1874–1903). Even with the fall of the Sultanate, the tenacity of the *ulama* and their constant pushback to Dutch control prevented the Dutch from gaining complete control of the region.<sup>170</sup> This would later augment Acehnese claims of semi-autonomy.

Even after the Dutch were ousted from Aceh and the *uleebalang* were dispersed, the *ulama* still faced conflict with the nationalists who believed the *ulama* were advocates of a "fanatical brand of Islam in Aceh," reflected most prominently in their desire to implement Sharia in the region.<sup>171</sup> Nationalists, lead by Sukarno, believed imposing Sharia on its citizens would fracture the burgeoning nation.<sup>172</sup>

#### F. *The Ulama After the Dutch Occupation*

The strife between the Indonesian nationalists and Acehnese autonomists came to a head in 1953. The central government incorporated Aceh into the North Sumatra province as nationalist leaders consolidated the nation into only ten provinces.<sup>173</sup> The Acehnese, infuriated by this perceived assault on their autonomy, revolted. Daud Beureueh of the PUSA joined the broader Darul Islam rebellion and led the Acehnese autonomists in revolt against Indonesian nationalists.<sup>174</sup> The PUSA and Darul Islam Movement were motivated to transform Indonesia into an Islamic state, with the implementation of Sharia, unlike the separatist forces of the Free Aceh Movement, who would not be satisfied until Aceh earned independence from Indonesia.<sup>175</sup> After six years of fighting, leaders in Jakarta quelled the uprising by giving Aceh autonomy to "manage local affairs in the areas of

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166. SJAMSUDDIN, *supra* note 139, at 5.

167. McGibbon, *supra* note 87, at 319.

168. *Id.*

169. SJAMSUDDIN, *supra* note 139, at 16.

170. *Id.*

171. McGibbon, *supra* note 87, at 319.

172. *See supra* notes 18–27 and accompanying text.

173. MICHELLE ANN MILLER, REBELLION AND REFORM IN INDONESIAN: JAKARTA'S SECURITY AND AUTONOMY POLICIES IN ACEH 42 (2009).

174. *Id.* at 42–43; McGibbon, *supra* note 87, at 319; Schulze, *supra* note 86, at 1.

175. MILLER, *supra* note 173, at 42–43.

religion, customary law and education,”<sup>176</sup> under the 1959 resolution to the Darul Islam Movement.<sup>177</sup> Although Aceh had formal recognition of its semi-autonomy, the nationalist republic did not honor the agreement. Indonesia feared that ceding control to Aceh’s religious *ulama* would “undermine the secular underpinnings of the state.”<sup>178</sup> This failure to honor the promise of Acehnese autonomy heightened the tension between the *ulama* and the secular nationalists.<sup>179</sup>

The 1960s saw the rise of the Indonesian Community Party (PKI), whom the *ulama* opposed.<sup>180</sup> Because the PKI led to “anticommunist pogrom and bloodletting across Indonesia,” including “an attempted coup that involved the killing of top military commanders,” the *ulama* collaborated with the military to mobilize youth and religious activists to resist the PKI.<sup>181</sup> The youth included religious followers of Islam as well as technocrats—students and intellectuals from state universities.

Importantly, the *ulama* capitalized on their relationship with the military to pressure the central Indonesian government to formally recognize Aceh’s semi-autonomous status. Only then could Aceh implement Sharia in lieu of *adat* (custom), or other conflicting Indonesian laws.<sup>182</sup> The spirited *ulama* effort was, however, to no avail. Although Indonesia issued a provincial regulation permitting the implementation of Sharia, the regulation failed to earn approval from the central government.<sup>183</sup>

Suharto ascended to the presidency in 1966 at the height of anti-communist vigor.<sup>184</sup> He sought a unified nation, which prevented him from appealing to the *ulama* or the *uleebalang*. The *ulama* resisted national unification to preserve their distinct Acehnese identity while the *uleebalang* lost their social authority after the Dutch rulers were forced to leave in the 1940s.<sup>185</sup> Suharto formed alliances with intellectuals and students of the state universities—the technocrats—who, along with the *ulama*, had allied with the military against the PKI.<sup>186</sup> The two parties were driven to resist the PKI for different reasons: the technocrats were concerned with breaking Aceh’s political and economic isolation in contrast to the *ulama*’s interest in protecting Aceh’s Islamic identity.<sup>187</sup>

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176. McGibbon, *supra* note 87, at 319.

177. *Id.* at 332.

178. *Id.* at 319.

179. *See id.*

180. *Id.*

181. *Id.*

182. *Id.* at 319–20.

183. *See id.*

184. *See id.* at 321–22.

185. *Cf. id.* at 322–23.

186. *Id.* at 320.

187. *Id.* at 323.

Suharto began a campaign to neutralize the *ulama*'s influence by "curb[ing] political participation and . . . put[ting] an end to the kind of ideological mobilization that Sukarno had encouraged."<sup>188</sup> The neutralization of the *ulama* was a decades-long affair that eventually undermined the *ulama*'s influence and disintegrated their unity. Suharto promoted *Pancasila* (the ideology of monotheism that serves as the foundation of the Indonesian state) in lieu of "religion and ethnic politics."<sup>189</sup> The military of the New Order suppressed political speech, leading to a decline in Islamic discourse.<sup>190</sup> In the 1970s, the Suharto government eliminated the multiple-party system. Indonesia once included a variety of "nationalist, Islamic, and communist constituencies," but now only permits two parties in opposition to the government party, Golkar.<sup>191</sup> Before the party consolidation, multiple parties represented different Islamic ideals. "The forced amalgamation of Islamic parties into the United Development Party (PPP) weakened the main political channels through which Islamic aspirations could be expressed."<sup>192</sup> Suharto also established a complicated system of "patronage and sanctions" that benefited the New Order supporters to the detriment of the *ulama*.<sup>193</sup>

As conciliation for ostracizing the once-powerful *ulama*, Suharto established the Islamic Scholars Council (MUI). The scholars that cooperated with the Suharto regime were appointed to this religious bureaucracy, where they could influence the New Order with Islamic ideals.<sup>194</sup> The most radical and orthodox scholars, however, would not earn an appointment on the MUI because they were principally opposed to Suharto's secular regime and had not earned Suharto's favor. The elevation of moderate *ulama* over the orthodox created a rift among the *ulama*. While many *ulama* saw an appointment to the MUI as the highest of duties and the most important institution for Muslims, rural *ulama* disagreed, believing *dayah* (boarding schools) to be the most important institutions.<sup>195</sup>

In 1982, the once-fledgling national Islamic party, the United Development Party (*Partai Persatuan Pembangunan* (PPP)) won a general Acehese provincial election, ousting the incumbent governor.<sup>196</sup> The PPP gained popularity by campaigning on its "special status theme and using Islamic symbols."<sup>197</sup> This loss signified the technocrats were losing popular

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188. *Id.* at 322.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 323.

194. *Id.*

195. *Id.* (within the *dayah*, the rural *ulama* could feed the minds of young Muslims educating them in the faith and teaching them to live courageously).

196. *Id.* at 324.

197. *Id.* (internal punctuation omitted).



support and Aceh was establishing its independent identity.<sup>198</sup> Even though the *ulama* had lost much formal authority, they still had a strong relationship with the Acehnese people.<sup>199</sup> The technocrats, in contrast, retained their control by relying on their “technical expertise and their links to the central government,” instead of popular support.<sup>200</sup> Although the technocrats regained political office in Aceh, the *ulama* continued to challenge the legitimacy of the technocrats.<sup>201</sup> Because of their dependence on the New Order government for legitimacy, the technocrats relied on tactics of political coercion to sustain their power. Acehnese citizens eventually became jaded by the technocrats’ claim to power.<sup>202</sup>

The New Order regime collapsed in 1998, resulting in the fall of the technocratic power. The technocrats relied on the support of the central government for their success. Such support sheltered the technocrats from popular demands.<sup>203</sup> By the time the New Order fell, the *ulama* had lost their social cohesiveness and their social base had been transformed.<sup>204</sup> The *ulama* who held political positions had the financial means to send their children to public university where they were influenced by technocrats. Instead of educating their children in the traditional *dayahs* and *madrasas*, the public education led to an erosion of the “social basis upon which the *ulama* constituted a coherent political force in Aceh and . . . blur[red] [the] traditional ideological and political divisions.”<sup>205</sup>

The radical Islamic group, the Free Aceh Movement (GAM), capitalized on the lack of political order by assembling student Islamic groups across the political spectrum to demand Islamic reform in Aceh.<sup>206</sup> Facing a collapsing government and fearful of GAM’s ability to mobilize his citizens, the Acehnese governor acceded to some of GAM’s demands.<sup>207</sup> The concession gave the impression that the Indonesian government, through its extension in Aceh, recognized “GAM as having some legitimacy as [sic] least as a dialogue partner.”<sup>208</sup>

President Habibie, Suharto’s successor and Indonesia’s third president, drafted a law granting semi-autonomous status to Aceh.<sup>209</sup> Habibie was motivated by the prospect of unifying Indonesia; he saw the GAM separatist movement as a serious threat to national unity and believed that giving the

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198. *Id.*

199. *See id.* at 325.

200. *Id.*

201. *Id.* at 327.

202. *See id.* at 330.

203. *Id.*

204. *Id.* at 328.

205. *Id.*

206. *Id.* at 330–31.

207. *Id.* at 331.

208. *Id.* at 332.

209. *Id.*

*ulama* authority to implement Sharia in Aceh would diminish GAM's strength and eliminate its motivations for secession.<sup>210</sup> He also believed that permitting Aceh to implement Sharia would restore the faith of the Acehnese in the central government.<sup>211</sup> As such, Habibie conceded to the PPP politicians who sought to revive the 1959 resolution of Acehnese autonomy granted to the Darul Islam Movement.<sup>212</sup>

The Habibie resolution, Indonesian law 44/1999, recognized Aceh's autonomy in religion, education, and local customary law.<sup>213</sup> It also granted the provincial legislature authority to create a council of *ulama* with the same status and authority as the provincial legislature.<sup>214</sup> Aceh's legislature implemented the 1999 law by creating the Consultative Council of *Ulama* (*Majelis Permusyawaratan Ulama* (MPU)), an independent advisory council of *ulama* charged with reviewing new provincial policies.<sup>215</sup> The MPU became a forum of active policy-making power for *ulama*,<sup>216</sup> and although it was an outgrowth of the MUI, the MPU, unlike the MUI, had independent legal authority to influence the legislative process.<sup>217</sup> Sharia did not, however, resolve the Acehnese conflict. Although the MPU strengthened *ulama* in the public square, the *ulama* remained fragmented,<sup>218</sup> no longer held the undisputed leadership position they possessed in the 1950s, and lacked the political support to enforce Sharia.<sup>219</sup>

### G. Modern Attempts at Sharia Implementation in Aceh

Sharia, literally meaning "way to a watering place," is the way of life for Muslims.<sup>220</sup> It regulates a Muslim's relationship with God and man by providing social, moral, religious, and legal guidance.<sup>221</sup> Unlike Western law—springing from thoughts of men—Sharia is believed to have a Divine foundation.<sup>222</sup> In addition to the Quran, three other sources comprise Sharia: the *sunnah*, or tradition, of the Prophet Muhammad as well as *ijma*, the consensus of the *ulama*, and *qiyas*, or analogical deductions.<sup>223</sup>

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210. MILLER, *supra* note 173, at 91–92; *see also* McGibbon, *supra* note 87, at 332–33.

211. ELIZABETH F. DREXLER, ACEH, INDONESIA: SECURING THE INSECURE STATE 163–64 (2008).

212. McGibbon, *supra* note 87, at 332.

213. *Id.*

214. MILLER, *supra* note 173, at 52.

215. *Id.* at 91.

216. McGibbon, *supra* note 87, at 333.

217. *See id.*; *see also* MILLER, *supra* note 173, at 91; SALIM, SECULAR STATE, *supra* note 8, at 155.

218. MILLER, *supra* note 173, at 91.

219. *Id.* at 92.

220. ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 2 (1984).

221. *Id.* at 7.

222. *Id.* at 6.

223. *Id.* at 7.

Sharia contains broad standards for how to live life. Its implementation depends on *fiqh*.<sup>224</sup> Islamic jurisprudence, *fiqh*, is a method for understanding the text of the Quran as well as interpreting law. Sharia is considered “immutable and transcendent” because of its breadth and divine nature, while specific legal rulings are “mutable and temporal” because they are issued by humans.<sup>225</sup> The first two sources of law (the Quran and *sunnah*) are no longer changing and evolving because Divine revelation has ceased and the Prophet has passed away—what is developing are the interpretations of these original sources of law. As such, *fiqh* today is arguably “treated as the primary source of law.”<sup>226</sup> *Ulama* are vested with much authority in advancing the practice of Islam because adding to the Sharia canon requires consensus of *ulama*, in the form of *ijma*.

Sharia can be bifurcated into legal rules and the moral and religious code.<sup>227</sup> The legal rules govern trade, commerce, crime, and government administration.<sup>228</sup> The moral and religious code requires Muslims to follow the five pillars of Islam: 1) *shahada*, professing “There is no God but God and Muhammad is God’s Messenger;” 2) *salat*, praying five times a day; 3) *zakat*, offering a tithe based on accumulated wealth; 4) *sawm*, fasting during Ramadan; and 5) *hajj*, making pilgrimage to Mecca at least once during one’s lifetime.<sup>229</sup>

A widely distributed booklet in modern Aceh, *A Brief Introduction to Islamic Sharia Law in Aceh*,<sup>230</sup> refers to the history of Sharia in the region as a motivation for modern attempts at Sharia implementation. The earliest clear records indicate that Sharia was implemented in Aceh around the late sixteenth or early seventeenth century, with an Islamic court applying Sharia punishments for theft, drunkenness, and offenses against members of the Acehnese royalty.<sup>231</sup>

*A Brief Introduction* refers to both “written records” and the “current collective memory of the people of Aceh”<sup>232</sup> and states that this memory reflects that the “people of Aceh had been relatively perfect in implementing Sharia in their daily life, in the community life and in the nation’s life during the period of the Sultanate, that is, before it was disturbed and inter-

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224. *Id.* at 12.

225. *Id.*

226. Ann Elizabeth Mayer, *The Shari’ah: A Methodology or a Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE* 177, 185 (Nicholas Heer ed., 1990).

227. Kathleen M. Moore, *Islamic Law*, in *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 752, 754 (Herbert M. Kritzer ed., 2002); SALIM, *SECULAR STATE*, *supra* note 8, at 12.

228. SALIM, *SECULAR STATE*, *supra* note 8, at 11.

229. Moore, *supra* note 227, at 753.

230. AL YASA ABUBAKAR, *A BRIEF INTRODUCTION TO ISLAMIC SHARIA LAW IN ACEH*, (Yasmin Purba trans., date unknown) (translation on file with author) [hereinafter *A BRIEF INTRODUCTION*].

231. SALIM, *SECULAR STATE*, *supra* note 8, at 83.

232. *Id.*

ferred with by the Dutch colonists.”<sup>233</sup> What *A Brief Introduction* fails to acknowledge, however, are the drastically different social and political circumstances of the original Sharia implementation as compared to the modern socio-political environment in Aceh. As will be discussed later, this distinction is key to any human rights analysis of modern day Sharia regulations.

### III. RELIGIOUS FREEDOM IMPLICATIONS OF SHARIA IMPLEMENTATION IN ACEH

#### A. Overview of Modern Sharia Qanun

Before Aceh began codifying Sharia, the MUI Aceh Council issued *fatwa*, or nonbinding decrees, to regulate social behavior. In 1980, the MUI issued a *fatwa* forbidding intermarriage between Muslims and non-Muslims and a year later another *fatwa* forbade Muslims from participating in any Christian ceremony.<sup>234</sup> These *fatwa* were issued to put a damper on religious intermixing, including intermarriage, even though religious pluralism can be traced back to the Prophet Muhammad when Jews and other religious sects lived among Muslims.<sup>235</sup>

In 1990, the MUI Aceh Council issued a *fatwa* ordering women to wear *jilbab*, which is the term used in Aceh to refer to the headscarf.<sup>236</sup> Women in the region, regardless of their religion, were ordered to “cover all of their body except for face, hands, and feet, and that when engaged in worship, women had to cover all but the face.”<sup>237</sup> The objective was to prevent young men from committing sex crimes and acts of violence, often propagated by sexual immorality.<sup>238</sup> Even though the *fatwa* was non-binding, GAM conducted *jilbab* raids on Acehnese women, often cutting their hair when it was uncovered.<sup>239</sup> No government regulation ever revoked the *fatwa*, even though effort has been made to make wearing *jilbab* an individual choice.<sup>240</sup> The fear and uncertainty generated by these *fatwa* has only been amplified with the recent codification of Sharia.

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233. A BRIEF INTRODUCTION, *supra* note 230. The written records referred to are *Mir'at al-Tullab*, by Sheikh Abdurrauf Syiah Kuala and *Safinatul Hukkam fi Takhlisil Khashsham* by Sheikh Jalaluddin Turasani. Each of these books was commissioned by the Sultanate to serve as guidelines for the Sharia court in resolving cases. According to *A Brief Introduction*, these judicial manuals spell out legal procedures in considerable detail. *Id.*

234. JOHN R. BOWEN, *ISLAM, LAW, AND EQUALITY IN INDONESIA* 235 (2003).

235. *Id.* at 240. The effect of prohibiting interreligious marriages, however, led to some people leaving Islam; an unwanted consequence of issuing *fatwa* aimed at making the country more “Muslim” was, ironically, causing some people to leave the religion. *Id.* at 245.

236. *Id.* at 231.

237. *Id.*

238. *Id.*

239. *Id.* at 232.

240. *Id.*

The Provincial Legislature of Aceh elected to formally enact Sharia, even though the vast majority of Acehnese followed the Sharia before it was codified.<sup>241</sup> Preserving the social and political identity of Aceh, promoting civil order, and increasing public morality in the face of globalization and tourism motivated the legislature in enacting these regulations. The Acehnese legislature also sought to preserve traditional Muslim values and Aceh's special identity, distinguishing itself from Dutch influences. Formally implementing Sharia was also intended to encourage the Acehnese to continue abiding by Sharia in their private lives, which is the basis of a strong moral society. Finally, the Acehnese legislature believed codifying Sharia would preserve civil order by providing a religious basis for the law; the citizens of Aceh now had incentive to honor what would otherwise be secular law. For instance, according to one Sharia scholar in Aceh, the Acehnese would not wear helmets when riding their mopeds until they were given a religious justification for the law.<sup>242</sup> As for the religious adherents themselves, they were torn between wanting and disavowing state-supported religion. They sought it because it provided a forceful hammer to suppress heterodox religious leaders, but it also led to unwanted state interference in ritual and worship.<sup>243</sup>

Immediately after the national legislature passed Law 44/1999 granting autonomy to the Acehnese legislature to enact Sharia, the provincial Acehnese legislature passed Regional Regulation No. 451.1/21249, requiring all female government employees to wear Islamic garb, that is, a headscarf and, in place of pants, a skirt.<sup>244</sup> Religious garb, like all other religious duties or practices, is dependent on a given believer's level of devotion and particular interpretation of his or her religion. By requiring female government employees to wear Islamic dress, the government imposed its own interpretation on women, usurping their freedom and abrogating the individual Muslim's "permanent and inescapable responsibility" to know and uphold Sharia.<sup>245</sup> This is also in contravention of Indonesia's and Aceh's accession to the Universal Declaration of Human Rights (UDHR) and the International Covenant of Civil and Political Rights (ICCPR), which requires that all citizens have the freedom of thought, conscience, and religion.<sup>246</sup> Although National Law 44/1999 grants Aceh semi-autonomy on matters of religion, education, and local customary law, Aceh is still bound to the national government on matters of international relations, specifically

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241. Interview with Muslim Ibrahim in Aceh, Indonesia (Apr. 2010).

242. Muslim Ibrahim claims he has statistical data to prove this, although it has not been provided to the author. *Id.*

243. BOWEN, *supra* note 234, at 240.

244. MILLER, *supra* note 173, at 54.

245. ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* 14 (2008).

246. Universal Declaration of Human Rights, *supra* note 38; *see also* Council on Foundations, *supra* note 41.

international treaties and covenants such as the UDHR and ICCPR. Because Aceh is bound by the national government on matters of international relations, by usurping Muslims' religious freedom, the Acehnese legislature has violated specific international treaties.

Even before the local regulations were in place, a public campaign to socially enforce Sharia erupted.<sup>247</sup> Women, even those privately employed, were pressured by vigilante mobs to wear *jilbab*.<sup>248</sup> In 2001, the national legislature passed a second law, 18/2001, granting Aceh greater autonomy to manage its economy, direct local elections, and establish Sharia courts.<sup>249</sup> That same year, under the authority of the two national statutes (44/1999 and 18/2001), Aceh established the MPU council of *ulama*, which held the same authority as the Provincial Legislature of Aceh, and a government Sharia agency (*Dinas Syariat Islam*).<sup>250</sup> Unlike the MUI, the MPU had the authority to enact enforceable Sharia laws, power it ultimately utilized. These two groups were in large part responsible for drafting the *qanun*, which codified Sharia for the region.

In 2002, the provincial legislature enacted a regulation, or *qanun*, for Islamic dress code and created the position of "lashing executioner," who would publicly cane those who commit religious offenses.<sup>251</sup> This same *qanun*, the *Qanun Aqidah*, stipulated that Sunni Islam is the only lawful interpretation of the faith, and requires all Muslims in Aceh to "faithfully embrace this creed."<sup>252</sup> Acehnese are thereby prevented "from subscribing to non-Sunni Muslim creeds, such as Shi'i [and] Liberal Islam."<sup>253</sup> Here, the government is regulating a personal choice: man's relationship with God.<sup>254</sup> By regulating belief as such, this *qanun* also conflicts with the Indonesian Constitution, which permits every citizen the freedom "to embrace and to practice the religion of his/her choice."<sup>255</sup> There are additional problems with this *qanun* because it fails to stipulate how a prosecutor

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247. EDWARD ASPINALL, *ISLAM AND NATION: SEPARATIST REBELLION IN ACEH, INDONESIA* 210 (2009).

248. *Id.*

249. Michelle Ann Miller, *The Role of Islamic Law (Sharia) In Post-Tsunami Reconstruction*, in *POST-DISASTER RECONSTRUCTION: LESSONS FROM ACEH* (Mathew Clarke et al. eds., forthcoming 2010) [hereinafter Miller, *Islamic Law*].

250. *Id.*

251. QANUN 11/2002 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

252. *Id.*; Arskal Salim, *The Sharia Bylaws and Human Rights in Indonesia* 15 (July 25, 2007) (unpublished manuscript) (on file with the University of St. Thomas Law Journal) (an earlier draft of this paper was presented at the International Conference of the Law and Society in the 21st Century, at Humboldt University in Berlin, Germany, July 25–28, 2007) [hereinafter Salim, *Sharia Bylaws*].

253. Salim, *Sharia Bylaws*, *supra* note 252, at 15.

254. *Id.*

255. UNDANG-UNDANG DASAR REPUBLIK INDONESIA [Constitution] 1945 Art. 29 (Indon.).

would prove a violation, what constitutes apostasy, and what the associated criminal sanctions are.<sup>256</sup>

In 2004, the Provincial Legislature of Aceh enacted *Qanun Zakat*, directing for public management of *zakat*, or religious tithes.<sup>257</sup> By codifying the *Qanun Zakat*, the Provincial Legislature, once again, removes from the believers the right to “freely choose a way to perform their religious obligations.”<sup>258</sup> That same year Aceh established the Sharia police (*wilayahul hisbah*), and the province experienced a subsequent rise in vigilante activism.<sup>259</sup> Sweeps of public places including beaches, hotels, and cafes were led by the *wilayahul hisbah* in search of *jilbab* violations.<sup>260</sup>

In 2006, the Provincial Legislature enacted the Law on Governing Aceh,<sup>261</sup> requiring all Muslims in Aceh to follow Sharia and all non-Muslims to respect it.<sup>262</sup> This law leaves undefined the meaning of “respect,” bearing the risk that non-Muslims may be held to the same standards as Muslims, particularly by a vigilante prosecutor.

#### B. Sharia Qanun Evaluated in Detail

In 2003, the Provincial Legislature of Aceh passed Sharia *qanun* governing alcoholic drinks,<sup>263</sup> gambling,<sup>264</sup> and illicit relations between men and women (*khalwat*).<sup>265</sup> Claiming “special autonomy” from the central government of Indonesia, the Provincial Legislature based these laws on Sharia “to enforce public order, security, peace, fair[ness] and prosper[ity] to obtain the blessing from God.”<sup>266</sup> With a broad scope and near-universal applicability, the *qanun* attempt to preempt other regulations that may conflict with them.<sup>267</sup> The Sharia-based *qanun* apply to all people living or working in the jurisdiction, regardless of the citizen’s religious belief, that

256. Salim, *Sharia Bylaws*, *supra* note 252, at 15.

257. QANUN 7/2004 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author) (explaining that in the Islamic Sharia tradition, there is no clear instruction on how to collect *zakat*, making it reasonable for Muslims to pay through an agency or directly to the needy); Salim, *Sharia Bylaws*, *supra* note 252, at 16.

258. Salim, *Sharia Bylaws*, *supra* note 252, at 16.

259. ASPINALL, *supra* note 247, at 210.

260. *Id.*

261. QANUN 11/2006 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author); *see* Miller, *Islamic Law*, *supra* note 249.

262. *See* Miller, *Islamic Law*, *supra* note 249.

263. QANUN 12/2003 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

264. QANUN 13/2003 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

265. QANUN 14/2003 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

266. *Id.* pmbL., at “Considering” § a.

267. *Id.* ch. VI, art. 16 (“Investigation and prosecution on violation against the prohibition of *khalwat* shall be conducted in compliance with the applicable laws and regulations *insofar as it is not regulated by this bylaw.*”) (emphasis added).

is, regardless if one is a Muslim or not.<sup>268</sup> The *qanun* prohibit citizens from committing the proscribed acts and from “facilitat[ing] and/or protect[ing]” anyone who commits the act.<sup>269</sup>

The *Qanun Khalwat* imposes an obligation on all people to prevent improper relations between men and women and grounds its authority in the “legally sinful” nature of *khalwat*.<sup>270</sup> The Sharia police (*wilayatul hisbah*), entrusted to enforce the Sharia-based law, are given broad authority to “supervise, monitor and promote the implementation” of the *qanun*.<sup>271</sup> Even with the appointed *wilayatul hisbah*, all citizens have an obligation to file a report when they are aware of a violation of the *qanun*.<sup>272</sup> Failure to do so could result in a violation under the aiding and abetting provision.<sup>273</sup> Violation of the *Qanun Khalwat*, either directly or by abetting another, is punishable by public caning.<sup>274</sup>

Realizing the *Qanun Khalwat* lacked force of law, the Provincial Legislature, in 2009, comprehensively overhauled the penal code to incorporate Sharia.<sup>275</sup> The 2009 *qanun*, *Qanun Jinayah*, brings into its fold regulations for acts proscribed by Islamic law. These acts, called *jarimah*, include intoxication (*khamar*), gambling (*maisir*), being alone with someone of the opposite sex to whom you are not married or related (*khalwat*), fornication (*ikhtilath*), male and female homosexuality (*liwath* and *musahaqah* respectively), adultery (*zina*), and accusing someone of adultery without producing the necessary four witnesses (*qadzaf*).<sup>276</sup>

The *Qanun Jinayah* explicitly applies to nearly all citizens or visitors in Aceh. Chapter II, Article 4 states that the *qanun* applies to:

- a) A Muslim who commits *jarimah* in Aceh;
- b) A non-Muslim who commits *jarimah* in Aceh with the participation of a Muslim who voluntarily chooses to abide under *jinayat* law; and
- c) A non-Muslim who commits *jarimah* in Aceh that is not stipulated under the Indonesian Penal Code or other provisions outside the Penal Code, but stipulated under this bylaw.<sup>277</sup>

268. *Id.* ch. III, art. 5 (“Every person is prohibited to commit *khalwat*.”) (first emphasis added); *id.* ch. III, art. 6 (“Every person or every group member of the society, or state apparatus and business entity are prohibited to facilitate and/or to protect anyone who commits *khalwat*.”) (first emphasis added); *id.* ch. III, art. 7 (“Every person, both individually and in groups, has the obligation to prevent *khalwat* from happening.”) (first emphasis added).

269. *Id.* ch. III, art. 6.

270. *Id.* ch. III, art. 4.

271. *Id.* ch. I, art. 1, § 11.

272. *Id.* ch. IV, art. 8, § 2.

273. *Id.* ch. III, art. 6.

274. *Id.* ch. VIII, art. 27.

275. QANUN\_/2009 intro. (Nanggroe Aceh Darussalam Provincial Bylaws, *Qanun Jinayah*) (unpublished translation on file with author).

276. *Id.* ch. II, art. 2 (requiring that an adultery allegation under Sharia be corroborated by at least four eyewitnesses in order for the adulterers to be charged).

277. *Id.* ch. II, art. 4(a)–(c).



The *Qanun Jinayah* requires competent authorities to enforce the regulations. Competent authorities include the Police Chief of Aceh and any other appointed authority, included the *wilayatul hisbah*.<sup>278</sup> Although Aceh is vested with the power to establish the *wilayatul hisbah* to monitor and supervise Sharia implementation, the *wilayatul hisbah* have limited power and authority, so they must rely on the assistance of other state officials.<sup>279</sup> Aceh lacks authority to “employ and train state officials, such as police, prosecutors, and judges, to implement and enforce those regulations.”<sup>280</sup>

The sanctions for violating the *Qanun Jinayah* are steep. Anyone who aids another in committing *jarimah* shall be punished with the same sanctions as the actual perpetrator.<sup>281</sup> Someone who forces another to commit *jarimah* will be punished twice as severely as an actual perpetrator.<sup>282</sup> If *jarimah* is committed due to the negligence of another, the negligent party will be punished half as severely as the actual perpetrator.<sup>283</sup> Depending on the severity of the *jarimah*, and the frequency with which the perpetrator has committed such acts, the sanctions include caning, fines, imprisonment, seizure of personal possessions, revocation of licenses and rights, and forced compensation.<sup>284</sup>

### C. *Religious Freedom Implications of Modern Sharia Qanun: Threats to Society*

The Indonesian Women’s Coalition reports that local governments throughout Indonesia have enacted more than one hundred explicitly Sharia ordinances—from requiring Islamic dress on Fridays in Padang, West Sumatra, and banning public displays of affection in Tangerang Regency and Banten Province, to enforcing Muslim tithing law in South Sulawesi and denying government services to women not wearing a headscarf.<sup>285</sup>

Many reports indicate these regulations are not heavily enforced.<sup>286</sup> Their mere existence, however, erodes the possibility of peaceful religious pluralism and serves as potential legal tools by which Islamic radicals can thwart moderate Islam and religious freedom in Indonesia. For example, radicals in Aceh force women to wear *jilbabs*, terrorize alcohol vendors,

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278. QANUN 14/2003 ch. 1, art. 1, § 17 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

279. *Id.* ch. V, art. 13, § 2.

280. Arskal Salim, *Politics, Criminal Justice and Islamisation in Aceh*, in ISLAM, SYARI’AH AND GOVERNANCE 5 (Univ. of Melbourne Law Sch., Background Paper Ser. No. 3, 2009) [hereinafter Salim, *Islamisation in Aceh*].

281. QANUN \_/2009 ch. II, art. 5, § 1 (Nanggroe Aceh Darussalam Provincial Bylaws, Qanun Jinayat) (unpublished translation on file with author).

282. QANUN \_/2009 ch. II, art. 5, § 2 (Nanggroe Aceh Darussalam Provincial Bylaws, Qanun Jinayat) (unpublished translation on file with author).

283. *Id.* ch. II, art. 5, § 3.

284. *Id.* ch. II, art. 6, § 2(a)–(f).

285. *Indonesia Religious Freedom Report*, *supra* note 71.

286. *Id.*

attack night clubs, and threaten people with stoning if they do not cease working or driving during prayer times.<sup>287</sup>

The *khalwat* bylaw promotes citizen arrest, which poses serious threats for religious freedom.<sup>288</sup> By encouraging citizens to report *khalwat* violations to the appropriate authorities, citizens are encouraged to spy on each other and invade privacy. This lack of trust is poisonous; people are prohibited from conducting themselves according to the dictates of their own consciences even in the privacy of their homes, as the *qanun* makes them fearful of retribution and punishment from the government.

The purpose of the *khalwat* bylaw is to prevent inappropriate sexual conduct. By allowing the government to intervene and neighbors to intrude, the *Qanun Khalwat* imposes top-down control instead of allowing individuals to determine appropriate boundaries for themselves. Additionally, it encourages citizens to report acts without verification, which breeds mistrust and degrades social solidarity. For instance, without asking for clarification, my neighbor may report me for having a male visitor he or she has never before seen. Even if the man is a relative whom I cannot marry, I would be subject to an investigation and possibly jailed or fined because the report was filed, even though I would not be violating *khalwat*. At the very least, I would be discouraged from having family visit.

Threats to women's rights are in fact the reality in Aceh and other areas where Sharia law is being enforced. The various *qanun* have restricted women's mobility and lead to mistaken arrests.<sup>289</sup> A bill in West Sumatra prohibited women from leaving their homes between 10 p.m. and 4 a.m. in an attempt to eradicate "prostitution, abortion, pornography, and drug abuse."<sup>290</sup> In the Tangerang municipality, one woman was mistakenly arrested for prostitution when in fact she was waiting for a bus late at night after leaving work.<sup>291</sup> The woman spent three days in jail because she was unable to afford the 30,000 rupiah fine.<sup>292</sup> The Tangerang mayor refused to repeal or amend the legislation, despite political abuses and false accusations, and, on appeal, the Supreme Court refused to invalidate the law on procedural grounds because it had "passed through a democratic process."<sup>293</sup>

Such cases of mistaken arrests have a deleterious effect on women's livelihoods, keeping women indoors despite pressing needs, such as the need to work in the absence of a husband who can provide financial sup-

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287. *Country Profiles: Indonesia*, *supra* note 76, at 204.

288. QANUN 14/2003 ch. IV, art. 8, §§ 1–2 (Nanggroe Aceh Darussalam Provincial Bylaws) (unpublished translation on file with author).

289. Salim, *Sharia Bylaws*, *supra* note 252, at 18.

290. *Id.* at 17.

291. *Id.*

292. *Id.*

293. *Id.* at 18.

port.<sup>294</sup> The existence of such bylaws also leads to unjustified accusations of sexual looseness, especially as the laws do not “draw on the presumption of innocence,” but instead make subjective opinion the primary evidence of a Sharia violation.<sup>295</sup> Even from an Islamic perspective, this result is highly problematic, as the false accusation of sexual wrongdoing (*qadhaf*), particularly as it pertains to women, is in itself a moral crime requiring physical punishment.<sup>296</sup>

There is also the question of efficacy. If the goal of Sharia norms is to achieve a more moral society, is it true that implementing Sharia through positive law is the best way of achieving that, or is even effective in doing so? As Arskal Salim notes in *Politics, Criminal Justice and Islamisation in Aceh*, despite the Sharia court’s increasing jurisdiction, its jurisdiction remains contested by *adat* authorities.<sup>297</sup> The *qanun* lay out formal procedures and sanctions for violations, yet these procedures and sanctions are often countered by local leaders, who have their own idea—based on Acehnese custom—of how to deal with violations more effectively.<sup>298</sup> In fact, the non-formal methods “frequently lead to effective resolution of disputes.”<sup>299</sup> Moreover, the *qanun* themselves stipulate that dispute resolution should happen first at the village level, which suggests that the village level authorities, which are not based on Sharia bylaws, are in some way more important than the Sharia laws themselves.<sup>300</sup> That is, disputants may enter the resolution process at various levels, and it usually happens that they enter at a point not including the Sharia courts.<sup>301</sup>

As such, if the local enforcement of *adat* norms is largely effective in bringing about the sort of moral society that the Sharia bylaws are intended to create, then what is the purpose of enacting Sharia bylaws? Perhaps more importantly, if a moral society is the end goal, are there better ways to attaining that goal than enforcing religious code? As discussed above, Sharia enforcement creates a culture of impunity. Focusing law enforcement on violent actors is a more effective means of achieving not just a moral society but also greater public order. Looked at another way, empowering citizens and law enforcement, or the *wilayatul hisbah*, to regulate people’s religious practices, opens the door for abuse of power and greater injustice, whereas social sanctions—like those imposed when local authorities enforce *adat* norms—are far more effective in creating, and maintaining, a moral, non-violent society.

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294. *Id.* at 17.

295. *Id.* at 18.

296. *Id.*

297. Salim, *Islamisation in Aceh*, *supra* note 280, at 14.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

This fact is particularly important because, to avoid clashing with national regulations denying local authorities the right to regulate religious matters, the bylaws “emphasize methods and measures to establish public order within the society, rather than implement Islamic law itself.”<sup>302</sup> That is, regulation of public order cannot be considered in conflict with national laws—as such, there is a lesser likelihood that bylaws will be annulled. If the stated purpose of the bylaws is public order, then its effectiveness in achieving such requires a closer look. As discussed above, there is substantial evidence that such bylaws exacerbate disorder rather than resolve it.

*D. Religious Freedom Implications of Modern Sharia Qanun:  
Discrimination Against Non-Muslims*

While the *Qanun Jinayah* on its face excludes some non-Muslims, its ambiguities can be interpreted to hold accountable *any person* who commits *jarimah*. Chapter II, Article 4 describes the scope of the *qanun*’s application. Article 4(b) applies the *qanun* to every non-Muslim who voluntarily chooses to abide by the *jinayah* bylaw or who commits *jarimah* in Aceh with the participation of a Muslim. Article 4(c) applies the *qanun* to any non-Muslim, so long as there is no other law regulating the proscribed act. This provision is aimed at guaranteeing “legal certainty in the implementation and enforcement of Islamic Sharia values.”<sup>303</sup> If another legal provision produces the same outcome with a non-Muslim, as would the *Qanun Jinayah*, the moral order of the society is retained.

There is no provision in Chapter II, Article 4(c) requiring the non-Muslim to voluntarily bind himself to *Qanun Jinayah*. When is a non-Muslim voluntarily bound to the *Qanun Jinayah*? The *qanun* provides no way to answer this question. Does this Article tacitly confer authority to presume a non-Muslim has voluntarily bound himself to the *qanun* by his actions, or perhaps by consenting to live or travel in Aceh? If a non-Muslim verbally and publicly binds himself to the *qanun*, can he later denounce his adherence to it? At what point is his adherence irrevocable? The *Qanun Jinayah* provides no answer to these questions.

In practice, there are cases where non-Muslims have, for example, chosen to have their crimes punished by caning—as prescribed by the *Qanun Jinayah*—instead of imprisonment.<sup>304</sup> The benefits of the former punishment are that it is relatively quick, whereas an equivalent jail sentence would be much longer. While such incidents are clear-cut examples of

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302. Salim, *Sharia Bylaws*, *supra* note 252, at 13.

303. QANUN \_/2009 intro. (Nanggroe Aceh Darussalam Provincial Bylaws, *Qanun Jinayat*) (unpublished translation on file with author).

304. During my visit to Aceh, Indonesia, I met with Alyasa Abubakr, one of the drafters of the Sharia regulations, and he noted this preference for Sharia punishments on the part of non-Muslims.

voluntary adherence by non-Muslims to Sharia regulations, as described above, the text of the *Qanun* is unclear, leaving it open to abuse.

*E. Religious Freedom Implications of Modern Sharia Qanun: Discrimination Against Muslims*

It is unclear who is a Muslim under the *qanun*. The *qanun* are poorly drafted and lack clarity and consistency with other laws,<sup>305</sup> leaving no clear indication of who is a Muslim and when, during the process of conversion, one stops being Muslim. This is particularly relevant if the *qanun* are interpreted to apply differently to Muslims and non-Muslims. If such is the case, people may insincerely follow the Islamic faith in order to avoid punishment by the government, even though they privately no longer follow Islam.

Chapter II, Article 4(a) unequivocally binds any Muslim who commits *jarimah* in Aceh, regardless of his intent or his voluntary adherence to *jinayah*. If the law is read to impose stricter standards on Muslims than non-Muslims, it remains unclear what makes someone Muslim under the *Qanun Jinayah*. Must he or she profess the *shahada*, or is being born into a Muslim family sufficient? How strictly must he adhere to the teachings of Islam, and which school of *fiqh* must he follow? What about *Ahmadiyyas*, who consider themselves Muslim, when most Muslims disagree because the *Ahmadiyya* deviate from traditional norms of Islam?<sup>306</sup> Will the *Ahmadiyya* be considered Muslim under the *Qanun Jinayah*? If so, who decides? What about people who choose to be less devout and more secular, that is, so-called “nominal Muslims”?

By giving itself the authority to answer these questions, the Provincial Legislature of Aceh strips from its people the freedoms of belief, conscience, and expression. The government appoints itself the primary arbiter of faith, the ultimate authority on what “Islam” is and how Muslims are to practice it. Varying interpretations are subsumed under one monolithic definition of the faith, and religiosity becomes subject to an external calculation, measured by the government in terms of how many and how well an individual fulfills the rituals and sexual injunctions of the faith.

Implementing such *qanun* with the force of law also induces hypocrisy rather than true belief. To practice Islam faithfully, one must embrace it with one’s own will, rather than be coerced into fulfilling religious obligations. Otherwise one risks acting in hypocrisy, putting on a charade merely to appear religious rather than truly living in accord with true faith. Given the Quran’s strong condemnation of hypocrisy in belief, this likely by-prod-

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305. Salim, *Islamisation in Aceh*, *supra* note 280, at 4.

306. For a discussion of the conflict between the majority of Muslims and the *Ahmadiyya* sect, see *supra* notes 65–67 and accompanying text.

uct of the Sharia *qanun* requires serious consideration.<sup>307</sup> If the purpose of the Sharia *qanun* is to strengthen the Islamic character of the Acehnese, potentially inducing hypocrisy runs counter to the very purpose of the *qanun*.

Part of the problem has to do with how “Islam” and “Islamic character” are defined—are these intrinsically related to a quest for Truth, where a Muslim evolves spiritually and interacts with his or her world in a way that leads him or her closer to God? Or is Islam primarily viewed as a political or social identity, something more external than internal, and thus more easily subject to external regulation? The Sharia *qanun*, especially as they relate to the Acehnese quest for political autonomy and the impulse to define Aceh as somehow different or “special,” appear to be rooted in the latter definition of Islam. Moreover, many Acehnese citizens strictly observed Sharia before the imposition of these *qanun*, which suggests—and is supported by the earlier historical account—that the effort to translate Sharia norms into positive law was motivated largely by social and political needs, rather than religious ones.<sup>308</sup> Sharia implementation raises serious religious freedom concerns when it purports to justify Sharia *qanun* on the basis of Divine displeasure and to regulate aspects of an individual’s private relationship with God.

In politicizing religion, the state defines it according to its own interests. The fluidity of the Sharia concept lends itself well to such political manipulation; despite the attempt to legislate aspects of Sharia, the meaning of “Sharia” remains unclear. “[A]lthough 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.’”<sup>309</sup> Some supporters of Sharia legislation argue that Sharia covers all aspects of a Muslim’s life, and yet, the legislation itself is quite limited and focuses not on general affairs but on very specific religious obligations.<sup>310</sup> In the end, then, what is regulated and what is not is defined by state interests, which may include, among other things, the state’s purported objective of maintaining public order, or its unarticulated purpose of bolstering its own legitimacy and demonstrating its loyalty to Acehnese identity.<sup>311</sup> Given state control, the definition of “Sharia” and of “Islam” inevitably becomes primarily a question of political expediency rather than a genuine spiritual endeavour.

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307. THE HOLY QUR’AN, *Sura Qasas* 63:1–7 (Abdullah Yusuf Ali trans., 2d U.S. ed. 1988).

308. McGibbon, *supra* note 87, at 333.

309. Salim, *Sharia Bylaws*, *supra* note 252, at 13.

310. *Id.*

311. ASPINALL, *supra* note 247, at 211.

F. *Islam, Secularism, and Religious Freedom*

Abdullahi Ahmed An-Na'im, in his recent book *Islam and the Secular State*,<sup>312</sup> forcefully argues that within the context of the modern nation-state, state-enforced Sharia and religious freedom are incompatible:

In order to be a Muslim by conviction and free choice, which is the only way one can be a Muslim, I need a secular state. By a secular state I mean one that is neutral regarding religious doctrine, one that does not claim or pretend to enforce Shari'a—the religious law of Islam—simply because compliance with Shari'a cannot be coerced by fear of state institutions or faked to appease their officials.<sup>313</sup>

While the phrase “secular state” rings of European colonialism and Western imperialism for many Muslims,<sup>314</sup> An-Na'im defines a secular state as “neutral regarding religious doctrine.”<sup>315</sup> He argues that to be freely Muslim, one must avoid a potentially fallacious state-imposed religion; the state must be secular. Neutrality requires the state facilitate the possibility of religious devotion, without mandating or enforcing it.<sup>316</sup> Although the state must be secular, society should not be. An-Na'im argues that citizens should influence public policy and enact legislation that reflects Sharia principles, so long as democratic concepts are preserved: citizens must use civic reason (that is, secular, not religious, arguments) and honor “constitutional and human rights safeguards.”<sup>317</sup> This active political role on the part of religious citizens is particularly important in religious societies where individuals need moral, even if not religious, justification for a given law or action.

An-Na'im explains that politics links the two separate but complimentary functions of religion and state. In the modern nation-state where the constitutional form of government guarantees certain basic human rights, the political sovereign protects freedom and promotes the common good by maintaining peace, regulating the economy, and providing defense against invasion.<sup>318</sup> The political authority of the state has coercive and exclusive power over territories and populations.<sup>319</sup> Political authority is gained by demonstrating on the macro level one's ability to effectively use coercion to administer the state for the good of the entire society and not a preferred class.<sup>320</sup> In contrast, religion is designed to regulate moral conduct and pro-

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312. AN-NA'IM, *supra* note 245.

313. *Id.* at 1.

314. *Id.* at 260.

315. *Id.* at 1.

316. *Id.*

317. *Id.* at 261.

318. *Id.* at 49.

319. *Id.* at 50–51.

320. *Id.* at 50.

vide a mode of worship.<sup>321</sup> Religious authority is gained on the micro level by developing personal relationships, earning confidence of one's followers through consistent piety, and demonstrating extensive knowledge of religion.<sup>322</sup>

For An-Na'im, freedom from coercion is the keystone for freely practicing one's religion. With only freedom to believe, but without freedom to worship, citizens are relegated to internalizing their prayers, religious life, and acts of piety. For a Muslim, prayer is a physical and mental act. Muslims recite their daily prayers while moving through prayerful positions with their bodies—from prostrating to kneeling to standing. Muslims, particularly male Muslims, are encouraged to perform their daily prayers in congregation, which implicates other aspects of religious freedom, such as the freedom to express religious belief in public and in community. Without religious freedom, a Muslim would be unable to do what Islam requires of him or her.

As An-Na'im discusses in his chapter on Indonesia, such restrictions on freedom of worship and religious expression exist in Indonesia. The Ministry of Religion recognizes only six official religions, effectively ostracizing many tribal religions that were practiced by Indonesians before any of the six official religions were brought to the region.<sup>323</sup> *Pancasila's* monotheism requirement provides law enforcement with a stick to use against atheists and polytheists.<sup>324</sup> The Ministry of Education, instead of the Ministry of Religion, dictates the parameters of the unofficial religions, including forcing adherents "to choose one of the officially recognized religions for the national identity cards."<sup>325</sup> Unofficial rituals of marriage and death are also outlawed, compelling adherents to follow instead the ceremonial traditions of a recognized religion.<sup>326</sup> These acts are coercive and cut against the freedom of religion, which includes the right of opinion, expression, and belief, as articulated in numerous international instruments ratified by—and thus binding upon—Indonesia.

Similar problems arise when translating Sharia norms into positive law in the context of the modern nation-state. An-Na'im argues that because of the various, reasonable interpretations of Sharia, freedom from coercion along with the freedoms of opinion, expression, and belief are necessary to work out the possible conceptions of Sharia.<sup>327</sup> Humans must interpret Sharia in order to apply it to their daily lives. It exists at a high level of abstraction that is neither "distinctly Islamic nor sufficiently specific for the

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321. *Id.* at 51.

322. *Id.*

323. *Id.* at 233.

324. *Id.* at 262.

325. *Id.* at 236.

326. *Id.*

327. *Id.* at 30.



purposes of public policy and legislation.”<sup>328</sup> Human interpretation gives rise to fallibility, which is evidenced by the four schools of *fiqh*: *Hanafi*, *Maliki*, *Shafi’i*, and *Hanbali*. Among these four, there are various ways of reading Quranic injunctions or interpreting the Prophet’s *Sunna*. Despite the fallibility of human interpretation and the diversity of valid opinions, when Sharia is translated into positive law and “a principle or norm is officially identified as ‘decreed by God,’ it is extremely difficult for believers to resist or change its application in practice.”<sup>329</sup>

According to An-Na’im, the Islamic state under the Sharia regime is not possible in the modern democratic state. When the state controls the implementation of Sharia, it invariably elevates one interpretation of Sharia above another, potentially equally reasonable interpretation. Whatever the state enforces under political power is a product of coercive authority and not superior religious authority.<sup>330</sup> Every Muslim has a “permanent and inescapable responsibility” to know and uphold Sharia.<sup>331</sup> When an institution—the state—and not a practicing Muslim makes the decision on which of the many interpretations of Sharia will be enforced, the duty to know and uphold Sharia is abdicated. An-Na’im, as such, asserts that Muslims must accept a secular state as a function of their religious obligations. That is, An-Na’im holds that “Muslims will reform non-conforming Islamic doctrines sufficiently so that for their own Islamic reasons they would respect the state’s religious neutrality.”<sup>332</sup>

An-Na’im’s reasons for asserting that Muslims must accept a secular state as a function of their religious obligations can be summarized as follows: First, “adherence to Islam must be voluntary in order for it to be Islamically normative, and . . . only a state that is neutral with respect to religion can guarantee the background conditions of a free and voluntary acceptance of Islam.”<sup>333</sup> As described above, by penalizing religious disobedience, the state corrupts that voluntariness and forces the individual to follow God’s law—not because God requires it of him, but because the state does; the state’s role thus induces hypocrisy. Second, “the idea of an Islamic state—to the extent it is understood to be a state that applies the *Shari’a* on the theory that it is God’s law—is rationally incoherent” because “human beings do not have direct access to the *Shari’a*’s rules.”<sup>334</sup> Thus, the Sharia being applied is in fact a product of human interpretation and inevitably leads to disagreements about the “precise contents of the

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328. *Id.* at 37.

329. *Id.* at 28.

330. *Id.* at 7.

331. *Id.* at 14.

332. Mohammad Fadel, *Islamic Politics And Secular Politics: Can They Co-Exist?*, 25 J.L. & RELIGION 187, 196 (2009–2010) (book review).

333. *Id.*

334. *Id.* at 197.

*Shari'a*.”<sup>335</sup> In the end, then, what is being applied is not Sharia but what a particular government decides is Sharia.<sup>336</sup> Third, the idea of an Islamic State does not have historical legitimacy because “even before the colonial interregnum in the Islamic world Muslims did not establish governments in which religion and state were fused.”<sup>337</sup> Politicians who managed the affairs of Muslim states consulted as needed with “religious scholars regarding the role of the *Shari'a* in the state’s governance.”<sup>338</sup>

This last argument is supported by Noah Feldman’s explanation in *The Fall and Rise of the Islamic State* that the rulers in classical Sunni Islam never claimed religious legitimacy except to the extent they were legitimized by the independent scholar class, which served as a check on the abuse of power.<sup>339</sup> If the ruler acted outside his bounds or otherwise committed an act of injustice, the *ulama* could strip him of his legitimacy by declaring that his actions contravene God’s law.<sup>340</sup>

[A] basically orthodox ruler could be tolerated even if he made theological or other errors; so long as the shari’a was followed, scholars should reprimand him and bring him to correct views. But with true infidels—taken to include those who failed to apply the shari’a—there could be no compromise.<sup>341</sup>

The precise ruler-*ulama* relationship described by Feldman is seen in the history of Aceh.<sup>342</sup> During the Sultanate, the *ulama* were loyal to the sultan only if they believed the sultan faithfully adhered to the precepts of Islam.<sup>343</sup> The sultan was dependent on the *ulama* insofar as it was the *ulama* who legitimized the ruler; the *ulama* had the power to dethrone the sultan and in fact did in the case of Sultan Jauhar al-Alam, as described above.<sup>344</sup> After Dutch colonization and under Suharto, the *ulama* were undermined and they lost their influence and internal unity. Even with the creation of MPU, which strengthened *ulama* in the public square, they remain fragmented.<sup>345</sup>

In modern-day Aceh, the architects of the current Sharia bylaws claim explicitly in their literature that Sharia is not new to Aceh—that is, Sharia was applied during the Sultanate.<sup>346</sup> What this explanation overlooks, however, is the different nature of the legal structure between the Sultanate era

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335. *Id.* at 198.

336. *Id.*

337. *Id.* at 200.

338. *Id.* at 200–01.

339. NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 29 (2008).

340. *Id.*

341. *Id.* at 33.

342. *See supra* Part II.

343. *See supra* Part II.B.

344. *Id.*

345. *See supra* Part II.F.

346. A BRIEF INTRODUCTION, *supra* note 230.

and present-day Aceh, including most fundamentally the role and influence of the *ulama* and their precise relationship with the ruler. Modern day Sharia implementation gives the ruler both religious and political authority, thus removing checks on power and inevitably leading to the type of authoritarianism evident in many parts of the Muslim world. Whereas in classical times Sharia was seen as a limit on state power, in the modern context, it enlarges that power and allows the state to regulate the public expression of religion in a way that best suits the state's interest. "Islam" thus serves the state, rather than the state serving Islam.

Other fundamental differences between classical Islamic society and modern Muslim-majority nation-states are globalization and increasing religious diversity. Whereas in classical Islamic society, political and religious identity was one and the same, "most Muslims today have moved away from this conjunction between religious community and political identity to a separation between the two . . . [and] most nation-states in the world, including the Muslim world, are [no longer] based on this strict identification."<sup>347</sup> Some scholars therefore contend that many classical Islamic rulings, such as those prescribing death for apostasy—then considered an act of treason because of the melding of religious and political identities—are no longer applicable.<sup>348</sup> Thus, it is not just the procedural and political aspects of implementing Sharia but also the substance of Sharia that is deeply affected by changing social circumstances. Attempting to implement Sharia without accounting for these changed circumstances arguably brings into question the religious legitimacy of the project.

*G. Arguing for Secularism from Within Islamic Tradition: A Critique of Islam and the Secular State*

In *Islamic Politics and Secular Politics: Can They Co-Exist?*, Mohammad Fadel argues that there are serious Islamic objections to An-Na'im's stated reasons for asserting that Muslims must accept a secular state as a function of their religious obligations.<sup>349</sup> These objections need to be addressed if An-Na'im's arguments are to be accepted by orthodox Muslims.

Although An-Na'im claims that he seeks to argue from within the Islamic tradition, he is not taking an exegetical approach in doing so and is thus not interpreting traditional Islamic texts. Instead, he seeks to provide a "new interpretative framework" for future analysis of Islam and secularism. It is precisely this lack of engagement with the traditional texts that, accord-

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347. ABDULLAH SAEED & HASSAN SAAEED, FREEDOM OF RELIGION, APOSTASY, AND ISLAM 169 (2008).

348. *Id.*

349. Namely: (1) the voluntariness requirement for religious obligations; (2) the Islamic state as rationally incoherent; and (3) the lack of historical legitimacy for the idea of an Islamic state. Fadel, *supra* note 332.

ing to his critics, becomes the Achilles' heel of his arguments.<sup>350</sup> To that end, Fadel provides some examples of what may serve as a traditionalist response to An-Na'im's arguments, then goes on to explain how An-Na'im may use traditional resources to bolster his argument.

With respect to An-Na'im's view on voluntariness, Fadel agrees that such is required by traditional Islamic scholarship on the issue of conversion to Islam. These same traditional teachings, however, would not necessarily extend the voluntariness requirement to other actions and "could very well argue that coercive application of Islamic law is rightful because the act of accepting the truth of Islam, by necessary implication, also entails acceptance of the rightness of its rules."<sup>351</sup> Punishing a Muslim's failure to comply with a given Sharia-based rule would be consistent with his moral integrity because the lack of compliance would be against the Muslim's own moral convictions.<sup>352</sup> The failure to comply does not reflect his lack of belief that the action is wrong; it merely reflects a present inability to abide by his conviction.<sup>353</sup> Fadel agrees, however, that forcing a non-Muslim to comply with Islamic rulings would be against his moral integrity, as the non-Muslim has not accepted the truth of Islam. Traditional teachings thus hold that Islamic rulings do not apply to non-Muslims.<sup>354</sup>

Regarding An-Na'im's argument that the idea of an Islamic state is rationally incoherent because humans do not have direct access to the Sharia rules, and thus what eventually comes to be implemented are not divine rules but human ones—"at the critical point of enforcement politics does the work, not religious truth"<sup>355</sup>—Fadel argues that An-Na'im overlooks "traditional Islamic distinctions" between aspects of the Sharia that can be known without legal interpretation ("e.g., the sinfulness of drinking grape wine or engaging in fornication") and those that do require legal skills ("e.g., whether drinking intoxicating beverages other than grape wine is also sinful").<sup>356</sup> The former rulings are based on unequivocal texts, and the latter on equivocal texts; that is, they involve those issues that do not have clear textual answers and require speculation.<sup>357</sup> Whereas An-Na'im's argument is relevant to equivocal texts, which require human interpretation, it is irrelevant with respect to the unequivocal ones.

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350. See, e.g., John Esposito, *Islam and the Secular State: The Challenge of Creating Change*, THE IMMANENT FRAME (Aug. 25, 2008, 3:30 PM), [http://www.ssrc.org/blogs/immanent\\_frame/2008/08/25/the-challenge-of-creating-change/](http://www.ssrc.org/blogs/immanent_frame/2008/08/25/the-challenge-of-creating-change/); Daniel Philpott, *Islam and the Secular State: Arguing with An-Na'im*, THE IMMANENT FRAME (Jul. 14, 2008, 7:37 AM), [http://www.ssrc.org/blogs/immanent\\_frame/2008/07/14/arguing-with-an-naim/](http://www.ssrc.org/blogs/immanent_frame/2008/07/14/arguing-with-an-naim/).

351. Fadel, *supra* note 332, at 197.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 198.

356. *Id.*

357. *Id.*

It appears likely, then, that An-Na'im is asserting that any aspect of the Sharia that may be considered legal "in the modern sense of the term" would require analysis of the equivocal texts. As Fadel notes, such a position "assumes that the only coherent sense in which the Shari'a could be applied is in situations where its application does not require any human judgment."<sup>358</sup> Sunni Muslims, however, reject such a position, and hold that religious obligations may arise from reason or interpretation of the texts or simply concluding, on the basis of the "preponderance of the evidence," that a given act or omission is morally required. The fact that the obligation is based on equivocal rather than unequivocal texts is relevant only to the extent that dissent is tolerated—it is tolerated only in the case of equivocal texts.<sup>359</sup>

Fadel goes on to argue that, even in cases where dissent is tolerated, it is still acceptable for a Sharia judge who is overseeing a dispute among two Muslims to resolve the case in accordance with the Shari'a:

If all the Shari'a requires is that the dispute be resolved using revelatory sources rather than a particular or substantively "correct" interpretation of those sources then the judge can be fairly said to have applied the Shari'a to resolve the dispute to the extent she applies those sources to the facts at hand in good faith and with integrity.<sup>360</sup>

A similar analysis would be applied to prospective rules legislated in accordance with the Sharia, except that unlike judicial judgments, they would be called "acts of state" (*tasarruf bi-l-imama*), and would be open to revision by future Islamic governments within the "limits of Islamic legality."<sup>361</sup>

In pre-modern Islam, when Muslims would dissent from such prospective laws, they would have the ability to opt-out, but only when compliance with the law would require them to sin.<sup>362</sup> The obligation to obey the government's rule arose not from the idea that the government's interpretation of Sharia was correct simply by virtue of it being the government's interpretation, but from the Sharia principle of a "duty to obey lawful commands of the government so long as obedience does not entail sin."<sup>363</sup> Fadel thus holds that An-Na'im's position completely misses the mark in terms of what is considered a legitimate Islamic ruling under the traditional conceptions—a ruling that is based on an unequivocal text or is derived from an equivocal text in an ethical manner holds the authority of the Sharia.<sup>364</sup>

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358. *Id.* at 198–99.

359. *Id.* at 200.

360. *Id.* at 199.

361. *Id.* at 200.

362. *Id.*

363. *Id.*

364. *Id.*

As for An-Na'im's historical argument about Islamic states, Fadel explains that the lack of an historical Islamic state does not somehow evidence that one should never exist.<sup>365</sup> "[R]aw experience is not normative absent some normative theory that makes history morally significant."<sup>366</sup> In the Shi'i Muslim context, the argument would also not hold any weight given the Shi'i belief in the divinely-inspired imam-ruler who holds religious legitimacy with or without the scholar class; such a conception of the imam-ruler defies any notions of the separation of church and state.<sup>367</sup>

In critiquing An-Na'im's arguments, Fadel makes the important point that Muslims have a "long tradition of theological, ethical and legal reasoning" that they will not forget nor overlook when analyzing An-Na'im's arguments for a secular state. To best win over orthodox Muslims, therefore, it is important to "tap into the resources of this tradition."<sup>368</sup>

One such traditional resource is the idea that careful readings and human experiences can produce multiple meanings and interpretations of Islamic texts.<sup>369</sup> Traditional legal scholars of Islam held that the plain meaning of the text should be enforced unless a "sufficiently strong countervailing factor is identified."<sup>370</sup> Countervailing factors may be rational or experiential; changing social circumstances also affect the way a text is interpreted.<sup>371</sup> There are established legal principles, for instance, that hold that even where a rule is based on explicit revelation, it may be revised if changing social norms requires it.<sup>372</sup>

An-Na'im's advocacy of a secular state is also supported by the Sunni position "that the state should not be thought of as a divine instrumentality."<sup>373</sup> Some Sunni scholars even go further than An-Na'im in claiming that the Prophet Muhammad did not fuse religion and politics but instead was divinely-inspired only when acting as a prophet and was otherwise wholly secular when dealing with matters of state.<sup>374</sup>

#### IV. CONCLUSION

Sharia implementation in Aceh is best understood within a framework informed by An-Na'im's arguments about the viability of a secular state premised on Islamic principles, especially as those arguments are strengthened by Fadel's critiques. Such a framework is rooted in both traditional Islamic notions of human rights and prevailing international law on the

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365. *Id.* at 201.

366. *Id.*

367. *Id.*

368. *Id.* at 202.

369. *Id.*

370. *Id.* at 203.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 203–04.

freedom of religion, belief, conscience, and expression, which together challenge the underpinnings of the Sharia implementation project. To the extent that this project is couched in public order terminology or promoted as a means of increasing religiosity among Aceh's Muslims, an analysis of the law as actually formulated and applied suggests that these aims are far from being served.