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Indonesian Syariah



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Indonesian Syariah

*Defining a
National School of
Islamic Law*

M.B. HOOKER



INSTITUTE OF SOUTHEAST ASIAN STUDIES

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Preface:

Indonesian Syariah: A Work in Progress

In its classical sense syariah means ‘path to water’—hence, allegorically, to life, and this means duty to God. But what that duty is, how it is to be defined, who does the defining and for whom it is being defined is a matter of intense and often divisive debate in Indonesia as elsewhere. Duty, in the context of the real, temporal world, has a myriad reference points. These include the classical *fiqh*; local Muslim and pre-Muslim practice; the politics of religion; national state codes and texts; philosophies; political commentary; public orthopraxy; and the ever-present weight of history, about which there is no consensus in Indonesia. The syariah is not now one path, if it ever were. Instead, many paths are offered. The essays in this book are likewise offered as examples from one place at one time to illustrate what choices have been made and to try and judge whether those choices are in reality viable routes to attaining the purpose of the journey, which is fidelity to revelation.

The concept of a distinctly Indonesian school of legal thought (*mazhab*) is necessarily complementary to the definition of syariah; we are talking about a specific syariah that is ‘national’ because it is ‘Indonesian’. Movement towards defining and establishing a national *mazhab* began with the rise of nationalist aspirations in the 1930s, and became especially focused in the 1940s with the successful achievement of independence and the debates as to what the proper foundation of the new state should be. As it happened, that foundation turned out to be secular principles, not the syariah. However, this did not prevent the parallel discussion of a national *mazhab* from continuing and may even, in reaction, have intensified it. By the late 1960s and early 1970s the idea of a national *mazhab*—a specifically Indonesian syariah—was being debated in sophisticated terms by the late Professor Hazairin. His proposals were resisted by both the (secular) state authority and the religious scholars (*‘ulamā’*) and went nowhere. The climate of the times was against him.

The 1940s and 1960s are now behind us. However, the debates of those times still resonate strongly, and for this reason I begin with the 1940s, a period of political turmoil in Indonesia. This obviously had serious repercussions for law generally and for syariah in particular. Indeed, some would hold that the past half-century has seen the destruction of Indonesia's legal system. On the other hand, it has also seen the development of a formal syariah to a degree unimaginable in pre-independence times (Chapter 1). Similarly, I believe that we can now identify five schools of syariah philosophy (Chapter 2), although I do not claim that each is wholly discrete. The overall impression is of ambiguity and uncertainty, but there is nothing to be afraid of in this situation. It is normal in all systems of law, and an overemphasis on certainty, while uncomfortable for policy makers, is always damaging. As the history of any law tradition clearly shows, pluralism in the philosophy of law is natural and beneficial, and this includes the orientalism debate.

The next two essays (Chapters 3 and 4) are both concerned with how syariah is transmitted from one generation to the next. Part of the process is to define the object being communicated. Any such process has to: (a) convey basic principles; (b) explain them; and (c) present them in a coherent and justifiable form. I have chosen two examples. The first is the syariah curricula used in Indonesia's Islamic colleges and universities (Chapter 3). They cover formal instruction in the principles of syariah, as well as reasoning about syariah. The various curricula are consciously and specifically defined for Indonesian needs and circumstances. As such they are always controversial and generate considerable tension at the national and local levels. Argument over content and method is continuous. The second example is the *khutbah*, the Friday sermon (Chapter 4). Although it may appear simpler in content, it is equally important because it is a public expression of syariah values and reaches many millions of Muslims each week. Of course, working from written collections is less than ideal. The whole theatre of *khutbah* presentation is lost, but the collections at least allow us to see how syariah values are transmitted to the ordinary person. They also give us a permanent record of the issues, addressed critically, through time.

Chapter 5 takes us into the Department of Religion (established in 1946). In direct contrast to the *khutbah*, which is completely independent of the state, the department is a total syariah bureaucracy. Its formal structure is not my direct concern here; instead, I take one of its most important duties—the pilgrimage (*hajj*)—as an illustration of how the department works. This also gives us the chance to see how the modern *hajj* is constructed.

The final essay (Chapter 6) takes us into regional varieties of syariah values, with examples from Aceh, West Sumatra and South Sulawesi. In this chapter, I also examine the proposal for a national syariah criminal code. Each code in its own way aims to express syariah values through the use of compulsion. It is noticeable that the major, indeed sole, emphasis in 'implementing syariah' is on conduct in public. This includes dress, 'proper' behaviour (that is, male–female relations), recitation of the Qur'ān and payment of *zakat*. Penalties up to and

including physical mutilation are proposed or recommended. There seems to be a somewhat naive belief that orthopraxy will make the person a ‘better’ Muslim. However, it is too easy to criticize: values issues always appear naive to those who prefer so-called pragmatism, which is really just shorthand for expediency or, in extreme cases, amorality and political opportunism.

The thesis put forward in this book is that there is a *syariah* that has been formulated to meet the needs of Islam in Indonesia on its own terms. I am speaking of an indigenous originality in which there is a high degree of public trust (which is more than can be said for the general secular state system). However, the significance of the Indonesian originality has wider implications. First, for general studies in Islamic law, Indonesia gives us a version of the classical inheritance that has been adapted so as to reflect (via selection) the social, political and intellectual structures in one place at one time (the 1940s to 2006). To anticipate, we find that the classical inheritance is fundamental but not primary for public or private law. This is an important lesson for generalist studies of ‘Islamic law today’.

Second, in the wider world of comparative law, local studies such as this act as necessary correctives to the tendency to construct grand theories about the nature of law itself. Until recently comparative law was largely Euro-American-centric, and the laws of the East, including *syariah*, were pretty much dismissed as pre-modern, irrelevant or, at worst, only marginally law at all. Fortunately this has now changed, and Islamic law in both its classical and modern versions is now emphatically recognized as part of international comparative law.

Having said this, it is still true that contemporary comparative law has difficulty with modern Islamic law because, as a general class, *syariah* has within itself so many variant references as to make it quite amorphous. That is a challenge for comparative law theory. It is also a vital challenge for the modern world, where ‘sharia’ is used by the media, in Muslim and non-Muslim countries, in a wholly indiscriminate way. I hope that the Indonesian material may act as some corrective in this respect (see also the epilogue).

I must stress that this book is very much a work in progress; in this it reflects the Indonesian *syariah*, which has always been a work in progress. I make no pretence to completeness; other scholars of Islam and *syariah* in Indonesia will have their own personal sets of significant issues. I do claim, however, a reasonable degree of comprehensiveness so far as formal *syariah* structures are concerned. What these formal structures are and what they mean is the subject of this book. I am aware that the essays in this book raise more questions than they provide answers, but that too is my intention—to initiate debate and suggest a framework within which it might take place.

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My colleagues in Indonesia were unfailingly generous with their time and advice. In particular, I acknowledge with gratitude the assistance of Drs. H. Suryadi, now Chief Judge of the Islamic High Court in Banten, and Professor Azyumardi Azra, formerly Rector of UIN Syarif Hidayatullah Jakarta. Drs. Yasrul Huda M.A., IAIN Imam Bonjol, and Akh. Muzakki M.Phil., IAIN Sunan Ampel, provided a great mass of primary material for which I am most grateful. For detailed discussions I am indebted to Dr H. Al Yasa Abubakar, Head of Dinas Syariat, Aceh, and Dr Khoiruddin Nasution, UIN Sunan Kalijaga, Yogyakarta.

In Australia, Ms Helen Pausacker and Mr Rowan Gould (both from the University of Melbourne) made translations and summaries of very difficult legal–bureaucratic material. Their care and competence are beyond praise. Mr Jeremy Kingsley and Ms Katheryn Taylor, also from Melbourne, and Ms Jemma Parsons and Mr Ismatu Ropi (both from the ANU) gave me considerable assistance. I am especially grateful to Ms Linda Elford of the ANU Law Library for searching out and alerting me to relevant material.

Initial formatting was done by Mrs Claire Smith with unfailing good humour. The editing and final formatting was done by Ms Beth Thomson and I am most fortunate to have had the benefit of her considerable technical skills. Mr Alan Walker compiled the index. I join a long list of authors who owe him a huge debt for the material improvement he has made to our books.

Mrs Triena Ong and her staff at the Institute of Southeast Asian Studies have been most helpful. I hope this book can take a place in the now well-established ISEAS Islamic series.

Materials, Dates and Spelling

Much of the material in the book is from primary sources. A collection has been lodged with the Asian Law Centre, University of Melbourne, much of it now online or in the process of going online (see <http://www.law.unimelb.au/alc/bibliography>).

Dates are always a problem in Indonesian law generally, and for syariah as well. The practice of cross-referencing and back-referencing laws, regulations, instructions, decisions and letters is a minefield for anyone fixated on certainty of time(s). No doubt I have made errors, and for this reason I give dates as well as I can throughout each chapter rather than a comprehensive or final date for the whole law. I do not believe the latter is possible at the moment.

My guide to Indonesian spelling has been:

Alan M. Stevens and A. Ed. Schmidgall-Tellings (2004), *A Comprehensive Indonesian–English Dictionary*, Athens OH: Ohio University Press.

The main problem is that transliterations from Arabic are still not standardized in Indonesia, although there is a consistent trend towards following the system adopted in *Studia Islamika*. I use its system of transliteration except in cases of doubt, where I use that of *Encyclopaedia of Islam* (second edition). I have tried to strike a balance between fidelity to the primary sources and standard usage that directs the reader to the correct (Arabic) technical classes. However, the reader must accept that inconsistency is the norm.

Translations from the Qur'ān are taken from:

Abdallah Yousuf Ali (1934), *The Glorious Kur'an*, Lahore: Call of Islam Society

and

M.A.S. Abdel Haleem (2004), *The Qur'an*, Oxford: Oxford University Press.

The former may appear archaic to the modern reader, although to those brought up on the King James version of the Old and New Testaments it has a sort of

comfortable resonance. Haleem (2004: xxvi ff.) provides a good short introduction to the issues involved in translating the Qur'ān into English. For some striking examples of just how much translations can differ, the reader may wish to consult Ruthven (2006: 100–3).

Glossary

<i>adab</i>	civilization, culture
<i>adat</i>	customs, customary laws
<i>ahkam</i>	system of prescription
<i>ahl al-Kitab</i>	‘People of the Book’; term used in the Qur’ān to refer to Jews and Christians, who, like Muslims, have scriptures recognized as having been revealed by God
<i>ahlus sunnah waljamaah</i>	‘those who follow the tradition of the Prophet and the [consensus of the] community’; long-hand term for the majority Sunni branch within Islam, though some self-ascribed Sunni groups use the term in a narrow and exclusivist way
<i>ahwal al-shakhisiyah</i>	Islamic civil law
<i>akhlak/ akhlaq</i>	ethics, character
<i>‘alim</i>	singular of <i>‘ulamā’</i>
<i>aqidah</i>	creed, religious belief, theology
Arafah	the name of a plain 27 kilometres southwest of Mecca where all pilgrims must assemble on the ninth day of the pilgrimage month to perform <i>wukuf</i>
<i>azan</i>	the call to prayer
Badan Wakaf Indonesia	Indonesian Wakaf Board
<i>bahtsul masail</i>	forum for the examination of disputed issues
Baitulmal/ <i>bait ul-mal</i>	‘State Treasury’, a centralized institution for administering <i>zakat</i>
BAZ	Badan Amil Zakat (Zakat Collection Board)
BPAH	Badan Pengelola Asrama Haji (Board for Management of Hajj Accommodation)
BPH	<i>biro perjalanan haji</i> (<i>hajj</i> travel agency)
BPHI	Balai Pengobatan Hajj Indonesia (Hall for the Medical Care of Indonesian Pilgrims)
CE	Common Era

<i>dakwah</i>	outreach, proselytizing
Dana Abadi Umat	Islamic Community Perpetual Fund
<i>dar ul-harb</i>	‘realm of war’; non-Muslim lands
<i>dhimmi</i>	non-Muslims accorded protection of life and property in Muslim lands
<i>din</i>	religion, faith; more specifically, living in obedience to God (for which one will be held accountable on the Day of Judgment)
<i>do’a</i>	prayers
DPR	Dewan Perwakilan Rakyat (People’s Representative Council); also known as the House of Representatives or parliament
DPRD	Dewan Perwakilan Rakyat Daerah (regional assembly)
<i>dzikir / dzikr</i>	‘remembrance’; repetition of phrases containing the name of God, chanted repeatedly to ‘remember’ or be mindful of God
Dzulhijjah	the last month in the Muslim calendar; the <i>hajj</i> is performed during this month
<i>ekonomi Islam</i>	Islamic economics
<i>ekonomi syariah</i>	syariah economics
<i>farā’id</i>	rules on inheritance set down in the Qur’ān and Hadith
<i>fatāwā</i>	plural of <i>fatwā</i>
<i>fatwā</i>	ruling on a point of law or dogma given by a scholar who has the authority to do so
<i>fiqh</i>	formal rules of classical law, prescriptions
<i>fitnah</i>	deviation
<i>fitrah</i>	payment required at the end of Ramadan
five pillars of Islam	(1) profession of faith (<i>shahadah</i>); (2) performance of ritual prayers (<i>shalat</i>); (3) fasting (<i>sawm</i>); (4) payment of the wealth tax (<i>zakat</i>); and (5) performance of the pilgrimage (<i>hajj</i>)
FPI	Front Pembela Islam (Islamic Defenders Front)
Guided Democracy	the system of government during the Soekarno era (1945–65)
Hadith	report or account of the words and deeds of the Prophet Muhammad transmitted through an accepted chain of narrators
Hajar Aswad	the Black Stone (in the Ka’bah)
<i>hajj / haji</i>	the annual pilgrimage to Mecca (and one of the five pillars of Islam)
<i>halal</i>	lawful, permitted

<i>haram</i>	forbidden, something prohibited by <i>fiqh</i>
Haramain	the cities of Mecca and Medina
Hijri	the Islamic calendar
Hijrah	the Prophet's flight from Mecca to Medina (622 CE); New Year; the base date for the Muslim calendar
<i>hikmah</i>	underlying rationale for a new case (see ' <i>illa</i> , <i>qiyas</i> '); wisdom, insight
HTI	Hizbut Tahrir Indonesia (Liberation Party of Indonesia)
<i>hudud</i>	plural of Arabic <i>hadd</i> ('limit', 'prohibition'); a legal term for the offences and punishments set out in the Qur'an and Hadith, with the prescribed penalties ranging from various forms of corporal punishment to death
<i>hukum negara</i>	law state, law-based state
IAIN	Institut Agama Islam Negeri (State Islamic Institute); provides degrees at tertiary level
<i>ibadah</i>	worship, prescribed ritual duty
Idul Adha	religious festival celebrated during the <i>hajj</i> , commemorating Abraham's willingness to sacrifice his son for God
Idul Fitri	religious festival at the end of Ramadan
<i>ihram</i>	a state of ritual purity for pilgrims before beginning the <i>hajj</i> and <i>umrah</i> , signified by special dress and behaviour
<i>ijma'</i>	consensus of expert legal opinion
<i>ijtihad</i>	independent judgment, based on recognized sources of Islam, on a legal or theological question (in contrast to <i>taqlid</i> , judgment based on tradition or convention)
<i>'illa</i>	effective cause for the extension of an existing principle to a new case/circumstance
<i>imam</i>	an Islamic leader, often the leader of prayers in a mosque
<i>iman</i>	faith
Isra'	the Night Journey (of the Prophet)
<i>istihsan</i>	finding the right principle from texts by exercising reason
<i>jamrah/jamarat</i>	see <i>lontar jamrah</i>
<i>jihād</i>	'to strive', 'to exert', 'to fight'
<i>jilbab</i>	head covering, headscarf (for women)
<i>jinayah</i>	criminal matters

Ka'bah	cube-like building located in the Grand Mosque (Masjid Haram) in Mecca
<i>kabupaten</i>	district, region
<i>kalam</i>	dialectical theology/philosophy
<i>kecamatan</i>	subdistrict
<i>khatib</i>	preacher at a mosque, mosque official
KHI	Kompilasi Hukum Islam (Compilation of Islamic Law)
<i>khilafah Islamiya</i>	Islamic caliphate
<i>khutbah</i>	the Friday sermon
<i>kitab kuning</i>	'yellow books' (a reference to the colour of the pages); commentaries on the Qur'ān and Islamic law used as teaching texts in <i>pesantren</i>
<i>kloter</i>	<i>kelompok terbang</i> (travel group)
<i>kota</i>	city, municipality
KPPSI	Committee for the Enforcement of Islamic Syariah (Komite Penegakan Syari'at Islam)
KPSI	Committee for the Preparation of Enforcement of Islamic Syariah (Komite Persiapan Penegakan Syari'at Islam)
KUA	Kantor Urusan Agama (Religious Affairs Office)
KUHP	Kitab Undang-Undang Hukum Perdata (Civil Code)
<i>kyai</i>	religious expert, title for the head of a <i>pesantren</i> (Java)
Lailatul Qadar	the Night of Power (during Ramadan)
Landraad	civil native court (Dutch period)
LAZ	Lembaga Amil Zakat (Zakat Collection Agency)
LIPI	Lembaga Ilmu Pengetahuan Indonesia (Indonesian Institute of Sciences)
<i>lontar jamrah</i>	ritual 'stoning of the devil' during the <i>hajj</i> at Mina
<i>mabit</i>	waiting, staying; one of the rites of the <i>hajj</i> and <i>umrah</i>
<i>madrasah</i>	Islamic school
Mahkamah Agung	Supreme Court
Mahkamah Syariah	Syariah Court
Majlis Tarjih	Majlis Tarjih dan Pengembangan Pemikiran Islam (Council on Law-making and Development of Islamic Thought); founded by Muhammadiyah in 1927
<i>maqasid al-syariah</i>	the five purposes or aims of syariah: protection of religion, protection of life (self), protection of

	generations (family), protection of property and protection of intellect
<i>masālah al-mursalah</i>	public interest, the public good
<i>masjid</i>	mosque
Masjid Haram	the Grand Mosque (in Mecca)
Masjid Nabawi	the Prophet's Mosque (in Medina)
<i>masalahah</i>	benefit, the public good (see <i>masālah al-mursalah</i>)
Masyumi	Majelis Syuro Muslimin Indonesia (Indonesian Muslim Consultative Council)
<i>mazhab</i>	'direction'; school of legal thought; the four main schools in Sunni Islam are Shafi'i, Maliki, Hanafi and Hanbali, distinguished from each other by their different methods of jurisprudential reasoning
<i>mazhab nasional</i>	a national school of legal thought
<i>mazhab syariah</i>	a national syariah
Mi'raj	the Ascension (of the Prophet, during the Night Journey)
MKDK	Mata Kuliah Dasar Keahlian (Basic Skills Subjects)
MKDU	Mata Kuliah Dasar Umum (General Basic Subjects)
MKK	Mata Kuliah Keahlian (Specialist Skills Subjects)
MMI	Majelis Mujahidin Indonesia (Council of Indonesian Mujahideen)
MPR	Majelis Permusyawaratan Rakyat (People's Consultative Assembly)
MPU	Majlis Permusyawaratan Ulama (Consultative Council of Ulama) (Aceh)
<i>mu'amalat</i>	principles of law dealing with non-ritual human/social relations, especially contracts
<i>muballigh</i>	itinerant or lay preacher or speaker (male)
<i>muballighah</i>	itinerant or lay preacher or speaker (female)
Muhammadiyah	modernist Islamic organization founded in 1912
MUI	Majelis Ulama Indonesia (Indonesian Council of Ulama)
New Order	the Soeharto era (1966–98)
NU	Nahdlatul Ulama (Revival of the Religious Scholars); traditionalist Islamic organization founded in 1926
Nuzulul Qur'ān	the day on which the Qur'ān was first revealed to the Prophet (in Indonesia, the 17th day of Ramadan)

Old Order	the Soekarno era (1945–65)
P-4	Pedoman Penghayatan dan Pengamalan Pancasila (Guidelines for Instilling and Experiencing Pancasila) (official government publications)
Pancasila	the five guiding principles of the Indonesian state (belief in God, humanitarianism, national unity, democracy and social justice)
<i>pengadilan agama</i>	religious court
<i>peraturan</i>	regulation, decree
<i>perda</i>	<i>peraturan daerah</i> (regional regulation)
<i>perna</i>	<i>peraturan nagari</i> (district regulation, West Sumatra)
Persis	Persatuan Islam (Islamic Association); reformist Islamic organization founded in 1923
<i>pesantren</i>	traditional Islamic boarding school
PKI	Partai Kommunis Indonesia (Indonesian Communist Party)
PPIH	Panitia Penyelenggaraan Ibadah Haji (Hajj Management Committee)
PPOH	Panitia Pelaksanaan Operasional Haji (Committee for the Operational Implementation of the Hajj)
Priesteraad	priests' court (Dutch period)
<i>puskesmas</i>	<i>pusat keselamatan massa</i> (community health centre)
<i>qanun</i>	regional statute or regulation (Aceh)
<i>qath'iy</i>	a definitive or categorical principle in the Qur'ān or Hadith whose meaning cannot be negotiated or reinterpreted
<i>qisas</i>	retribution through compensation as punishment for capital crimes and assault, the extreme form of compensation being 'a life for a life'
<i>qiyas</i>	in Islamic law, reasoning by analogy to solve a new issue
Qur'ān	God's word revealed to the Prophet Muhammad and the supreme source and absolute authority for Islam
Ramadan	ninth month of the Islamic calendar during which fasting is required
<i>riba</i>	interest, increase on capital
<i>sa'i</i>	'seeking', 'trying'; one of the rites of the <i>hajj</i> and <i>umrah</i>
<i>salat</i>	see <i>shalat</i>

Shafi'i	one of the four main schools in Sunni Islam and the dominant school in Southeast Asia
<i>shalat</i>	the prescribed ritual prayer to be performed five times a day
Shi'a	second largest branch of Islam after Sunni
<i>siyasah</i>	policy, the practical application of the Qur'an and Sunnah in the world
<i>siyasah-jinayah</i>	constitutional and public law
SK	<i>surat keterangan</i> (letter of instruction)
STAIN	Sekolah Tinggi Agama Islam Negeri (State Islamic College)
Sufism	mysticism; its doctrine
Sunnah	custom, usage; established custom and normative precedent in Islam based on the example of the Prophet Muhammad
Sunni	following or followers of early established traditions; the majority branch of Islam; in law, it means the law schools (Shafi'i, Maliki, Hanafi, Hanbali)
syariah	Islamic law in the broadest sense, concept of law
<i>ta'zir</i>	punishment administered at the discretion of the judge, as opposed to <i>hudud</i> or <i>hadd</i> (punishments for certain offences fixed by the Qur'an or Hadith)
<i>tafsir</i>	exegesis of the Qur'an
<i>taqlid</i>	close following of accepted texts/authority of one of the four Sunni schools, unquestioning acceptance
<i>taqwa</i>	consciousness of God, fear of God
<i>tasawwuf</i>	Mysticism
<i>tauhid</i>	the doctrine of the unity of God; in Sufism, merging with the unity of the universe
<i>tawaf</i>	circumambulating the Ka'bah seven times during the <i>hajj</i> and <i>umrah</i>
UIN	Universitas Islam Negeri (State Islamic University)
' <i>ulamā'</i>	Islamic scholars (plural of ' <i>alim</i>)
<i>ummah</i>	the Islamic community in the sense of 'all Muslims'
<i>umrah</i>	a pilgrimage to Mecca that can be undertaken at any time of the year [delete]
<i>undang</i>	law, law text
<i>ustadz</i>	teacher (male)
<i>ustadzah</i>	teacher (female)

<i>wakaf</i>	donation for pious purposes
<i>wali</i>	guardian
<i>waris</i>	heir
Wilayatul Hisbah	the syariah police authority in Aceh
<i>wukuf</i>	‘stopping’ or ‘staying’ on the plain of Arafah; one of the obligatory rites of the <i>hajj</i>
<i>yurisprudensi</i>	decision of a court
<i>zakat maal</i>	general calculation of <i>zakat</i> based on disposable income
<i>zakat</i>	‘wealth tax’, the payment of which is one of the five pillars of Islam