Religion and the Indonesian Constitution: A Recent Debate

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This article examines the recent debate on the position of syari'ah *in Indonesian constitutional amendments (1999–2002). The article operates at two levels: a historical review of the debate on Islam and state in Indonesia and a theoretical effort to situate the Indonesian debate in the broader context of debates over Islam and constitutions. It argues that the rejection of the proposed amendment to Article 29, dealing with Islam, has shown that Indonesian Islam follows the substantive approach of* syari'ah, *not the formal one.*

In August 1945, at the last moment, seven words were removed from the Preamble to the Indonesian Constitution (known as the Jakarta Charter or *Piagam Jakarta*). These seven words were '*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*' (with the obligation for adherents of Islam to follow *syari'ah*, or Islamic law). The omission of the seven words from the Preamble has acted as a point of contention for many Islamic groups in Indonesia, and has influenced their relationship with the government since Independence. During the last half century, Indonesian Islamic-based parties have periodically attempted to have the seven words reinstated, without success.[1]

Suharto's departure in May 1998 provided the opportunity for several Muslim groups and political parties to propose the introduction of *syari'ah* into the Constitution. During the period of constitutional reform from 1999 to 2002, all political parties, Members of Parliament and the government examined the issue; no presidential decrees to unilaterally stop the discussion were issued, and no military force was used to influence the process. More significantly, during this period debates over the inclusion of

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1   For a full account of this historical debate see M. C. Ricklefs, *A history of modern Indonesia, c. 1300 to the present* (London: Macmillan, 1981); Endang Saefuddin Anshari, 'The Jakarta Charter of June 1945: A history of the gentleman's agreement between the Islamic and the secular nationalists in modern Indonesia' (M.A. thesis, McGill University, 1976); H. Muhammad Yamin, *Naskah persiapan undang-undang dasar 1945*, vol. I (Jakarta: Yayasan Prapanca, 1959); Adnan Buyung Nasution, *The aspiration for constitutional government in Indonesia: A socio-legal study of the Indonesian konstituante 1956–1959* (Jakarta: Pustaka Sinar Harapan, 1992); B. J. Boland, *The struggle of Islam in modern Indonesia* (The Hague: Martinus Nijhoff, 1982); and Faisal Ismail, '*Pancasila* as the sole basis for all political parties and for all mass organizations: An account of Muslims' response' (Ph.D. diss., McGill University, 1995).

the seven words shifted from the idea of Islam becoming the foundation of the state *(Dasar Negara)* to the implementation of *syari'ah* in Article 29 of the Constitution, which declares that 'The State shall be based upon the belief in the One and Only God.' In other words, whilst the previous debate examined the Preamble to the Constitution, which could change the state ideology of the Indonesian Republic, the contemporary debate was more concerned with the special rights of Muslims and the obligation for the government to implement *syari'ah.*

It is essential to note that during the constitutional debate none of the Islamic political parties proposed the adoption of a caliphate system, thus acknowledging the nation-state, nor did they propose the establishment of an Islamic state like those in Iran, Egypt or Saudi Arabia. However, some of them made it clear that they wanted a constitutional guarantee that their rights to observe *syari'ah* would be fully implemented. In this case, they held the views that the amendment to Article 29 was necessary for the new constitution. In order to understand this proposal, several issues will be examined in this article. Amongst them are the position of public religion in the plural society of Indonesia, the choice between Islamic law and an Islamic state, and the issues of Islamic and non-Islamic states and their relationship to *syari'ah.*

These discussions are a reflection of the struggle between a secular approach, which is considered as normal, progressive and enlightened, and a religious approach, which is seen as backward and reactionary. In Indonesia one of the basic areas of discussion has been the extent to which it is legitimate to use religion as a basis for political decisions on public policy. There are many people who believe that the use of religion for such purposes ultimately results in a violation of the separation of church and state – one basis of a secular state – and thus of other people's religious liberty. Other religious believers, however, argue that it is wrong to exclude religion from public debates, and that such a policy effectively constitutes discrimination against religion and believers.

In Islamic terms, the distinction between an Islamic state and a non-Islamic state, with all its legal consequences, has been discussed by many classic and modern Islamic thinkers. In this article, I will demonstrate the substantive approach to *syari'ah*, as opposed to the formal approach, on these issues.[2] The substantive approach advocates an emancipated understanding of the *syari'ah*, stressing its original meaning as a 'path' or guide, rather than a detailed legal code.[3] Advocates of the substantive approach demand the recovery of *ijtihad* (independent legal reasoning) in order to do justice both to

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2   Nadirsyah Hosen, 'Constitutionalism and *syari'ah*', *Murdoch University Electronic Journal of Law*, 11, 1 (2004) available at http://www.murdoch.edu.au/elaw/issues/v11n1/hosen111.html; and Hosen, 'In search of Islamic constitutionalism', *American Journal of Islamic Social Sciences*, 21, 2 (2004): 1–24.
3   For instance, Muhammad Sa'id Ashmawi takes the view on the evolution of the meaning of *syari'ah* that the original meaning of *syari'ah* in the Arabic language can be traced to the meanings of 'the path' *(al-thariq)*, 'the method' *(al-manhaj)* or 'the way' *(al-sabil)*. He refers to the fact that the term *syari'ah* means the path of Islam consisting of three streams – worship *(al-`ibadat)*, ethical code *(al-akhlaqiyat)* and social interactions *(al-mu`amalat)* – but not the imputed meaning of 'legal system' in an 'Islamic state'. This original meaning of *syari'ah* was initially applied by the first generation of Muslims; over time its meaning was expanded to include the legal rules found in the *Qur'an* and finally to incorporate the whole body of legal rules developed in Islamic history, including all the interpretations and opinions of the legal scholars. See Muhammad Sa`id al-Ashmawi, *Al-Sya'riahal-Islamiayah wa al-Qanfn al-Mishr* (al-Qahirah: Makatbah Madbuli al-Shaghir, 1996), pp. 7–21.

modern needs and to the original spirit of the *syari'ah*. This group argues that the *syari'ah* is silent on certain topics, not because divine revelation was incomplete or faulty, but because the revelation intentionally left certain issues for humans to choose. According to this view, the revelation is divine, but interpretation is human, fallible and plural. This suggests that religious diversity is inevitable, not just among religious communities but within Islam itself. This position is not supported by the formal *syari'ah* group, which holds the view that all constitutional issues should be based on *syari'ah* as practised by the Prophet Muhammad and the companions in Madinah fifteen centuries ago.

This article will bring together these theoretical issues to examine the recent debate on Article 29 of the 1945 Constitution. In August 2002, the People's Consultative Assembly (Majelis Permusyawaratan Rakyat – MPR) officially rejected the call for the inclusion of *syari'ah* in Article 29 of the Constitution.[4] Several Islamic parties, including Partai Persatuan Pembangunan (PPP – United Development Party) and Partai Bulan Bintang (PBB – Crescent Moon and Star Party), failed to convince other parties to support the inclusion of *syari'ah* into Article 29. The aim of this article is to evaluate this recent constitutional debate.

Public religion in the constitutional debate

There are at least three different interpretations of the notion of religion and state. The first view sees the unity of state and religion. The second view maintains that the state should not establish, or fund, religious activities. This is a strict separation of church (or religious institutions) and state, which rests on the assumption that the independent and autonomous institutions of church and state should rigorously be kept separate. This requires the government not to involve itself in the affairs of religious institutions, by keeping religious beliefs out of the motivations of public policies, preventing interference from religious authorities into state affairs, and disapproving of political leaders expressing religious preferences in the course of their duties. According to this view, when the power, prestige and financial support of government are placed behind a particular religious belief, indirect coercive pressure is placed on religious minorities to conform to the prevailing officially approved religion. Therefore, to ensure freedom of religion such separation is necessary.[5]

According to Ira Lapidus, however, there are numerous examples of the interaction of church and state in many nations, including the West. As Lapidus has argued, such a stance often:

> ignores the numerous examples of state control of religion, the phenomenon of established churches (such as the Anglican church in England), and the concordats in Italy. It ignores

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the integral connection between religious and political nationalism in such countries as Ireland or Poland. It ignores the close identity between religious affiliation and nationality in Holland and Spain. Finally, it ignores the connection between religion and activist political movements, such as the liberation churches in Latin America.[6]

This leads to the third interpretation of secularisation, which sees separation of church and state as a notion related to, but separate from, freedom of religion. There are many countries with an official religion, such as the United Kingdom or Belgium, where freedom of religion is also guaranteed. This school of thought holds that religion is a fundamental and essential part of many moral and ethical values, and that the removal of public displays of religion from government is a form of religious discrimination in that it prohibits the exercising of views (in this case, religious) in the forum of government.

Instead of insisting on 'the wall of separation', this third view seeks mutual cooperation to acknowledge and preserve the harmonious existence of religion and state, without necessarily being in favour of their intermixing. In other words, the state should recognise and respect the cultural and religious heritage of its citizens, by developing a policy of benevolent neutrality towards religious groups. This type of neutrality requires the government to treat various religious groups with a policy of impartiality. In this sense, not only is the relationship between religion and state in the private domain, but also religion can play its role in the public area.

According to sociologist Jose Casanova, the privatisation of religion is 'mandated ideologically by liberal categories of thought which permeate not only political ideologies and constitutional theories but the entire structure of modern Western thought'.[7] This has united religious movements 'by a common enemy – Western secular nationalism – and a common hope for the revival of religion in the public sphere'.[8] Focusing on the issue of the social role of religion, beyond that of personal belief, Casanova looks at five cases from two religious traditions (Catholicism and Protestantism) in four countries (Spain, Poland, Brazil and the United States). In Spain and Poland, Casanova analyses the positive role of the Catholic Church in the transition from authoritarian to democratic regimes. In Brazil, the case of Liberation Theology is examined as an instance of the church's commitment to human rights, and the defence of society and its autonomy from the incursions of the state. The final cases deal with evangelical Protestantism and Catholicism in the United States. Here too, his analysis centres on the politicised nature of religion, its intervention in public debates (around military power, economic justice and abortion), and its role in participating in, and restructuring, the public sphere of what Casanova terms civil society.

These cases challenge post-Second World War assumptions about the role of modernity and secularisation, the idea that contemporary religion in those societies rooted in the Christian tradition is a marginal or, at most, a private matter. Casanova argues a strong case for the 'repoliticisation' and 'deprivatisation' of religion at the close

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6   Ira Lapidus, 'State and religion in Islamic societies', *Past and Present*, 151 (1996): 3.
7   Jose Casanova, *Public religions in the modern world* (Chicago: University of Chicago Press, 1994), p. 215.
8   Mark Juergensmeyer, *The new Cold War? Religious nationalism confronts the secular state* (Berkeley and Los Angeles: University of California Press, 1993), p. 4.

of the twentieth century. This deprivatisation is not restricted to Western society and Christianity.[9] Instead, its horizons are widened to include other religious traditions as well, such as Islam, Judaism and Hinduism.

Casanova is not alone. The rejection of the thesis of secularisation as religious decline is increasing.[10] Peter Berger, for instance, admits that his 'big mistake which [he] shared with almost everyone who worked in this area in the 1950s and '60s, [was] to believe that modernity necessarily leads to a decline in religion'.[11] This means that treating religion as purely a private matter, as a prerequisite of modernity, should be called into question. Instead of suggesting 'separation', Casanova takes the view of secularisation as differentiation. Religion must be differentiated from other spheres of public life, such as the state.[12] David Hollenbach explains this position further:

> The differentiation of religion and various dimensions of public life has a different connotation than does 'separation'. . . . Religious influence in public and even political life can occur, however, even where state and church are institutionally distinct. Thus, there is a third alternative to 'integralism' [church-state unity] on one hand and the privatization of religion on the other. In this third alternative, religious communities can have an impact on public life, while at the same time, free exercise and non-establishment of religion are fully protected.[13]

Hollenbach has also argued that religious beliefs and traditions may have their influence on law and state policy in an indirect way. This occurs through the activity of self-governing citizens, informal discussion, voting, political campaigns and lobbying.[14] Thus, the role of religion in public life does not imply that all political institutions are under the control of religion. It is neither theocratic nor linked to any particular belief. General belief in God can be upheld by the state, but not the beliefs of any one specific religion. Religion is seen as value, virtue, common good, inspiration and moral obligation. In this third alternative, differentiation of religion from the domain of state power does not rule out all religious influence in public life, nor in politics, broadly conceived. This can happen because the main role for public religion is to strengthen civil society *vis-à-vis* the state.[15]

9   Casanova, *Public religions in the modern world*, pp. 10, 69–207.

10 It is interesting to note the choice of title of Rodney Stark's 'Secularization, R.I.P. – Rest in Peace', *Sociology of Religion*, 60, 3 (1999): 249–73. At the end of the article, Stark writes: 'After nearly three centuries of utterly failed prophesies and misrepresentations of both present and past, it seems time to carry the secularization doctrine to the graveyard of failed theories, and there to whisper "requiescat in pace".'

11 Peter Berger, 'Protestantism and the quest for certainty', *Christian Century*, 15, 23 (1998): 782. Berger also states that 'I think what I and most other sociologists of religion wrote in the 1960s about secularization was a mistake. Our underlying argument was that secularization and modernity go hand in hand. With more modernization comes more secularization. It wasn't a crazy theory. There was some evidence for it. But I think it's basically wrong. Most of the world today is certainly not secular. It's very religious.' Peter Berger, 'Epistemological modesty: An interview with Peter Berger', *Christian Century*, 114, 30 (1997): 974; see also Berger, 'Secularism in retreat', *The National Interest* (Winter 1996/97): 3–12.

12 Casanova, *Public religions in the modern world*, p. 15.

13 David Hollenbach, 'Politically active churches: Some empirical prolegomena to a normative approach', in *Religion and contemporary liberalism*, ed. Paul J. Weithman (South Bend: University of Notre Dame Press, 1997), p. 301.

14 David Hollenbach, 'Contexts of the political role of religion: Civil society and culture', *San Diego Law Review*, 30, 4 (1993): 878.

15 Casanova, *Public religions in the modern world*, p. 219.

In this regard, Saiful Mujani also argues that people who are religious and active in religious activities become democratic, and contribute to democratic development as well. For instance, in the context of Indonesia, participation in religious organisations like Nahdlatul Ulama or Muhammadiyah influences the community to be more open towards the complexities of social life. Since democracy requires political engagement and political participation, it can be argued that the involvement of religious organisations in public life in various other, non-religious civil society activities (such as *arisan* [social gatherings with door-prizes], voluntary activities in the village or ward, sports, cultural clubs, cooperatives, labour unions and professional organisations) is important as the social capital of democracy.[16] In short, having conducted two national mass surveys in 2001 and 2002, Mujani argues that religious people tend to be supportive of democracy.[17]

In Indonesia, *Pancasila* (the five pillars that eventually became the state foundation: Belief in one God, Humanitarianism, National Unity, Representative Democracy and Social Justice) is basically a compromise between secularism, where no single religion predominates in the state, and religiosity, where religion (especially Islam) becomes one of the important pillars of the state. An Islam-inspired agenda is welcome to the extent that it corresponds with, and does not contradict, *Pancasila*. In other words, it is a common belief that Indonesia is neither a secular nor an Islamic state. Both terms have negative images in Indonesian society, and therefore the use 'secular' and 'Islamic state' has been avoided in legal and political areas. Under the 1945 Constitution, Indonesia has been designed to stand in the middle, or – borrowing Hollenboch's term – to follow 'the third alternative'. The *Pancasila*-based state, which begins with the principle of 'One Godhead', not only allows, but also encourages, religion to inspire Indonesian public life in humanitarianism, national unity, representative democracy and social justice.

It is misleading to say, however, that there was no attempt at advocating Islam as the state ideology prior to the end of the twentieth century. In fact, some Muslim groups, as will be explained below, were unhappy with the 'third alternative'. They demanded that the Constitution have a clear position: the logical consequence of a Muslim-majority state was to have Islam as the state foundation. The presence of an Islamic state, then, was perceived as an efficient tool to bring all Indonesian Muslims' faith to a higher level, which was not possible with *Pancasila* as the national ideology. Following Suharto's resignation after a 32-year presidency, two Islamic political parties proposed inserting a clause into the 1945 Constitution that would guarantee the implementation of *syari'ah*. This movement advocated not the establishment of an Islamic state, but only the application of Islamic law for Muslims.

With regard to these demands came a number of questions related to the requests for implementation of *syari'ah*. Since one of the aims of constitutionalism is to protect minority rights, such a request for the implementation of Islamic law and belief in a

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16 Such developments in the Muslim world resemble what the German sociologist Jürgen Habermas described some years ago as the emergence of the 'public sphere' in the West; Robert W. Hefner, *Civil Islam: Muslims and democratization in Indonesia* (Princeton: Princeton University Press, 2000), p. 11.
17 Saiful Mujani, 'Religious democrats: Democratic culture and Muslim political participation in post-Suharto Indonesia' (Ph.D. diss., Ohio State University, 2004).

Muslim-majority nation is questionable. The proponents of *syari'ah* often believed that, as a majority group, their rights and freedoms had been overlooked in the 1945 Constitution. In addition, the question of whether or not their proposal was only a 'bridge' for greater demands (the establishment of an Islamic state) was also a consideration. Finally, the difference between having Islamic law fully implemented and establishing an Islamic state came under consideration. I will examine these issues in the next section of this article, firstly by looking at constitutional provisions on religion. Afterwards, an analysis of the concept of an Islamic state in Islamic literature will be used to understand the proposal to implement *syari'ah*.

Political context

It is worth noting that for more than half a century Indonesia has been unable to conduct an un-interrupted dialogue concerning the position of *syari'ah* in the Constitution. In 1945 and 1955, efforts were hampered by the pressure of time, and political manoeuvrings by Sukarno and the military. Under Suharto debate on the issue was forbidden, since his government was afraid of its disruptive potential. There was concern that such discussion on Article 29 in the post-Suharto era would persuade some elites, particularly the military and the government, to use unconstitutional methods to end the debate, as had happened in the past. It is essential to note that the debate, as part of the constitutional process, went smoothly.

It is misleading, however, to say that there were no heated discussions over Article 29. In fact, debate and discussion took place inside and outside the Parliament building during the constitutional reform period from 1999 to 2002. It was clearly a sensitive issue which invited comment from diverse voices in Indonesian society. For instance, the Front Pembela Islam (FPI – Islamic Defence Front) mobilised thousands of its supporters outside the Parliament building in support of Article 29.[18] In addition, the First Indonesian Mujahidin Congress of November 2000 called for the inclusion of the Jakarta Charter in the Constitution, and for *syari'ah* to be applied as state law.[19] Some went even further. The periodical *Tempo* reported on student cells in the Bogor Agricultural Institute (IPB) and the Bandung Institute of Technology (ITB), two leading Indonesian state universities, which had sworn oaths of allegiance to the Proclamation of the Islamic State of Indonesia, which was declared in 1948 by Kartosurwiryo, the leader of the Darul Islam rebellion. These student cells declared the Sukarno–Hatta declaration of an independent republic in August 1945 as null and void.[20]

Within Parliament, the PPP and PBB parties lodged a formal proposal to amend Article 29 by reinserting *syari'ah* into the Constitution. Both parties, however, had a limited numbers of seats in the Parliament, together accounting for only 12 per cent (71 seats) of its members. Of interest in the historical context of this debate, the two biggest Islamic organisations in Indonesia, Nahdlatul Ulama (NU) and Muhammadiyah, which

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18 'UUD bukan Kitab Suci' [The Constitution is not the Holy Book], *Sabili*, 23, 16 May 2002.
19 Documents from the Kongres Mujahidin (Yogyakarta, 5–7 August 2000) are available at http://www.geocities.com/kongresmujahidin/.
20   *Tempo Interaktif* , 28 February 2000.

(as part, then, of the Masyumi Party) pushed for an Islamic state in 1955, now no longer share the agenda of formally adopting the *syari'ah* into the Constitution.[21]

Hasyim Muzadi of Nahdlatul Ulama takes the view that the struggle for *syari'ah* to be enforced in Indonesia is not realistic. He has urged the promotion of universal values for the people's prosperity, instead of pushing the idea of *syari'ah*.[22] According to Syafi'i Ma'arif of Muhammadiyah, members of Laskar Jihad (Jihad warriors) in Solo felt disappointed with Muhammadiyah for not supporting the restoration of the Jakarta Charter in Article 29. Due to these developments, some Muslim hard-liners have alleged that NU and Muhammadiyah are no longer Islamic, or are no longer articulating Muslim aspirations. Ma'arif was reported to have said: 'I believe that many people within our (NU and Muhammadiyah) community will condemn our stance, but I have warned them that we must be committed to promoting unity, which our founding fathers declared when establishing this nation'.[23]

Leaders of both NU and Muhammadiyah assert that even without formal acceptance of *syari'ah* in the Constitution, Muslims' demands can be met by the state. In the words of Anies Rasyid Baswedan, 'The focus is no longer on how to bring Islam into the foundation of the State, but how to bring Islamic coloration into policies produced by the State'.[24] This reflects a *syari'ah* approach from these two Islamic organisations. In the Parliament, PKB (Partai Kebangkitan Bangsa, 51 seats) and PAN (Partai Amanat Nasional, 35 seats), which have close connections with NU and Muhammadiyah respectively, rejected the proposal to include *syari'ah* in Article 29.

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21 Generally it can be said that there are two groups of Indonesian Muslims: the traditionalists and the modernists. The traditionalists are mainly concerned with pure religion, *din* or '*ibadah*. Islam for them is mostly *fiqh* (Islamic jurisprudence); they recognise *taqlid* (the obligation to follow the '*ulama's* opinion without reserve) and reject the validity of *ijtihad* (independent legal reasoning). In other words, they tend to restrict the role of *ijtihad* in favour of, and out of deference for, the established opinions of the masters of the schools of Islamic jurisprudence. The traditionalist Muslim is represented by the Nahdlatul Ulama (NU), at the moment, the biggest Islamic organisation, numbering 30 million supporters. More information can be found in *Nahdlatul Ulama: Traditionalist Islam and modernity in Indonesia*, ed. Greg Barton and Greg Fealy (Monash: Monash University Asia Institute, 1996); and Nadirsyah Hosen, 'Collective *ijtihad* and Nahdlatul Ulama', *New Zealand Journal of Asian Studies*, 6, 1 (2004): 5–26. The modernists are concerned with the nature of Islam in general; to them Islam is compatible with the demands of time and circumstance. They recognise the *Qur'an* and *Hadis* as the basic sources of their ideas and thought. Furthermore, they maintain that 'the gate of *ijtihad*' is still open and they reject the idea of *taqlid*. Muhammadiyah is the organisation which represents modernist Muslims; it has 28 million supporters in Indonesia, and has built many schools, universities and hospitals. Moreover, it reinterprets Islam within the modern context. More information can be found in M. Sirajuddin Syamsuddin, 'Religion and politics in Islam: The case of Muhammadiyah in Indonesia's new order' (Ph.D. diss., University of California at Los Angeles, 1991) and Nadirsyah Hosen, 'Revelation in a modern nation state: Muhammadiyah and Islamic legal reasoning in Indonesia', *Australian Journal of Asian Law*, 4, 3 (2002): 232–58.

22 *Jakarta Post*, 30 Dec. 2002.

23 *Jakarta Post*, 25 July 2002. Abdurrahman Wahid also 'does not aspire to an Islamic state for Indonesia, and therefore rejects any "formalization" of religion within the state'; Mujiburrahman, 'Islam and politics in Indonesia: the political thought of Abdurrahman Wahid', *Islam and Christian–Muslim Relations*, 10, 3 (1999): 344. Amien Rais reaffirmed that the Islamic state is not the appropriate model for Indonesia, given its diversity (*Tempo Interaktif*, 11 Jan. 1999).

24 Anies Rasyid Baswedan, 'Political Islam in Indonesia: Present and future trajectory', *Asian Survey* (forthcoming).

With only 71 combined seats, it was understood that the PPP and PBB did not want members of the MPR to vote for their proposal since it would be an embarrassing loss. Other political parties and appointed police, military and functional representatives, who together held a majority of the seats in the MPR, rejected in committee meetings proposals to amend the Constitution to include *syari'ah*, and the measure never came to a formal vote. Yusril Ihza Mahendra, general chairman of the PBB, argued that the truth (the *syari'ah*) cannot be subject to voting.[25] Lukman Hakim Saifuddin also stated that they were aware that their struggle would not succeed this time, but that they would reopen the debate in the future. That is why they did not want to have a formal vote, since this would prevent their efforts to re-propose this issue in the future.[26]

According to Mutammimul Ula of Partai Keadilan (PK), it would take 50–70 years to re-open the debate, in reference to the period of more than 50 years (1945–2000) before discussion of Article 29 began in a constitutional way. Ula also opined that unless Islamic political parties gain two-thirds of the parliamentary seats, a requisite to changing the Constitution, the issue would never arise.[27] In the words of Hamdan Zoelva from PBB, 'our party has proposed to include *syari'ah* in Article 29. We have to stop our struggle due to limited support from other members of the MPR, but the idea is still there, and we will never withdraw our proposal. In terms of constitutional debate, this is not the end of our struggle'.[28]

When I met him in December 2003, Zoelva also promised to use the issue of Article 29 in PBB's political campaign during the 2004 General Election. In 1955, the supporters of the Jakarta Charter obtained 40 per cent of the seats. However, in 1999, the proponents of the inclusion of *syari'ah* in the 1945 Constitution won only 12 per cent. In the 2004 General Elections the PPP party won 8.2 per cent of the votes and PBB only 2.6 per cent.[29] Thus, the two parties together received 10.8 per cent of the vote, a slight decrease from 12 per cent in 1999. This result shows that almost 90 per cent of the Indonesian people were not in favour of the PBB and PPP's campaigns to implement *syari'ah* at the state level.

Article 29 in question

It is worth noting that the Suharto regime prohibited all advocacy of an Islamic state. With the loosening of restrictions on freedom of speech and religion following the fall of Suharto in May 1998, proponents of the Jakarta Charter resumed their advocacy efforts. In this section, the focus will be on the constitutional debate over Article 29, looking first at the arguments put forth by several Islamic political parties and then at the counter-arguments.

25 *Kompas*, 25 July 2002.
26 Lukman Hakim Saifuddin, personal communication, 10 Dec. 2003. He was a Member of Parliament (1999–2004) from PPP.
27 Mutammimul Ula, personal communication, 5 Sept. 2003; he was a Member of Parliament (1999–2004) from PK.
28 Hamdan Zoelva, personal communication, 15 Dec. 2003; he was a Member of Parliament (1999–2004) from PBB.
29 Numerous parties received votes in the election. Besides Golkar, PDI-P and PD, only parties mentioned in this article are listed. For a full account of the 2004 General Election see National Democratic Institute for International Affairs (NDI), 'Advancing democracy in Indonesia: The second democratic legislative elections since the transition', June 2004, available at http://www.accessdemocracy.org/library/1728_id_legelections_063004.pdf

TABLE 1:

Indonesia 2004 National Legislative Election Results

Party (in order of seats won)	National Vote (per cent)	DPR Seats
Golkar	21.6	128
Indonesian Democracy Party-Struggle (PDI-P)	18.5	109
Development Unity Party (PPP)	8.2	58
Democrat Party (PD)	7.5	57
National Awakening Party (PKB)	10.6	52
National Mandate Party (PAN)	6.4	52
Prosperous Justice Party (PKS)	7.3	45
Star and Crescent Moon Party (PBB)	2.6	11

Source: Data from http://www.accessdemocracy.org/library/1728_id_legelections_063004.pdf

During the debate on Article 29, four main opinions were advocated. There was a group which proposed the reinsertion of the famous seven words; another group suggested modifying Article 29 by mentioning not only Islam, but all religions; others tended to believe that all five pillars in *Pancasila* should be added to Article 29 – not only the first pillar; finally, the majority of Members of Parliament took the view that Article 29 should not be amended.

The main argument for reinserting the famous seven words (alternative 2) is that since Muslims have accepted a *Pancasila* state – and this could be seen as 'the greatest gift and sacrifice of the humble Indonesian Muslims as a majority population for the sake of Indonesian national unity and integrity' – Muslims should ask for 'compensation', namely that the Constitution guarantees the implementation of Islamic law as part of their freedom to exercise religion.[30] This means that the PPP and PBB, which proposed

TABLE 2:

List of Alternative wordings to Article 29

Alternative 1	The state is based on Belief in One Almighty God.
Alternative 2	The state is based on Belief in One Almighty God with the obligation upon the followers of Islam to carry out Islamic law.
Alternative 3	The state is based on Belief in One Almighty God with the obligation upon the followers of each religion to carry out its religious teachings.
Alternative 4	The state is based on Belief in One Almighty God, Just and Civilised Humanitarianism, the Unity of Indonesia, Democracy Guided by the Wisdom of Representative Deliberation, and Social Justice for all Indonesians.

30 See the statement by Minister for Religious Affairs Alamsjah Ratuperwiranegara in *Pelita*, 12 June 1978.

introducing *syari'ah*, were not asking for Indonesia to establish an Islamic state; they only advocated the implementation of Islamic law for Muslims.[31]

This proposal invites several important questions. Firstly, after Islamic law is fully implemented, what will be the differences between an Islamic state and the *Pancasila* state? Secondly, a number of questions relating to Islamic law also appear. What precisely is meant by 'syari'ah' – does it mean, for example, the inclusion of *hudud* (punishments as determined by *syari'ah*)? Will Islamic law become one of the sources of Indonesian law, which would change the Indonesian legal system dramatically? Thirdly, it is also important to note that even without the incorporation of the famous seven words, the government has accommodated Muslim aspirations by, for instance, issuing numerous laws and regulating Muslim affairs. If they want another regulation or statute in order to support their practice of Islam as a way of life, Muslims or Muslim parties can propose such bills through the Parliament, as has been done on several occasions. Why is it necessary to amend Article 29, when Islam can be practised freely? Each of these issues will be examined in detail.

By presenting the argument that Islamic political parties did not want to establish an Islamic state and asked only for the right to practise Islamic law, the positions of both the PPP and PBB parties led to the assumption that *syari'ah* is not the most important ingredient in an Islamic state. This assumption can be questioned, however, since Islamic literature shows that the test of whether the state can be called Islamic or not is precisely whether *syari'ah* is fully enforced or another body of law is in operation. It is notable that the definition of what constitutes an Islamic state is debatable. In Ashar Ali Engineer's words, 'there is no fixed concept of an Islamic state'.[32] To put it differently, Muslim scholars have not reached an agreement regarding the concept of what is an Islamic or non-Islamic state. However, for proponents of an Islamic state, it is important to divide the world into at least two divisions: the 'territory of Islam' (*dar al-Islam*) and the 'territory of unbelievers' (*dar al-Kuffar*), known also as the 'territory of war' (*dar al-Harb*).[33]

What then are the main elements which constitute the differences between the two worlds? Abu Yusuf (d. CE 798) took the view that if *syari'ah* is enforced, the territory becomes *dar al-Islam*.[34] Muhammad al-Shaybani (d. CE 805) also stated that once *dar al-Islam* replaced Islamic law with foreign law, it would no longer be considered an Islamic state.[35] These opinions are based on the fact that Islamic law is an essential part of

31 'Pendapat akhir fraksi persatuan pembangunan MPR RI', Sidang Tahunan MPR, Jakarta 15 Aug. 2000 in *Risalah sidang tahunan MPR tanggal 7 sampai dengan tanggal 18 Agustus 2000*, 3, 9 (Jakarta: Setjen MPR, 2000), pp. 477–9.

32 Asghar Ali Engineer, *The Islamic state* (New York: Advent Books, 1980), p. 199.

33 One of the leading modernist expositions of Islam international law dismisses the *dar al-Islam/dar al-Harb* distinction as an idea introduced by certain medieval legal thinkers in response to their own historical circumstances, but which has no basis in Islamic ethics; Mohammad Talaat al-Ghunaimi, *The Muslim conception of international law and the Western approach* (The Hague: Martinus Nijhoff, 1968), p. 184. Further countering this classification, Taha Jabir al-Alwani points out that scholars in the past were unanimous in their view that the Earth was the land of Allah and was not divided into separate spheres; Taha Jabir al Alwani, 'Globalization: Centralization not globalism', *The American Journal of Islamic Social Sciences*, 15, 3 (1998): vii.

34 al-Mawardi, *Al-Ahkam as-Sultaniyah* (al-Qahirah: Mustafa Babi al-Halabi wa Auladuh, 1996), p. 138.

35 For a full account see Majid Khadduri, *The Islamic law of nations: Shaybani's* siyar (Baltimore: Johns Hopkins Press, 1966).

Islamic faith. Accordingly, Islam encompasses all domains, including law and the state, so that the state and the religious community are one and the same.

Habib Rizieq Shihab, the leader of Front Pembela Islam, has stated clearly that 'if *syari'ah* is enforced, then Indonesia will become an Islamic state automatically; whether you want to call it the "Islamic Republic of Indonesia" or maintain the title "Republic of Indonesia" is not a problem'.[36] Accordingly, submission to the rule of Islam necessitates the existence of the Islamic state. If that is the case, then enforcing *syari'ah* in a formal way, as proposed by some Islamic political parties during the constitutional debate in 1999–2002, could be suspected of being a 'bridge' to the planned establishment of an Islamic state.

In the context of enforcing Islamic law, *syari'ah* can be split into five levels: personal status (marriage, divorce); economic matters (banking); proscribing practices seen as un-Islamic (alcohol consumption, gambling, inappropriate dress); criminal law; and a guide for government matters.[37] Islamic scholars agree that *syari'ah* is the sum total of God's normative categorisations of human acts. God has placed every conceivable act into one of five ethico-legal categories: obligatory (*wajib*), recommended (*mandub*), permissible (*mubah*), reprehensible (*makruh*) and forbidden (*haram*).[38] Muslims must strive to determine what acts fit into what categories and to live their life accordingly. However, these basic points of agreement quickly give way to innumerable disagreements. Islamic scholars disagree as to the appropriate way to analyse the *Qur'an* and the traditions of the Prophet in order to discover the rules of *syari'ah.* They thus group themselves into competing schools, defined by their different methods of deriving rules from the dictates of the *Qur'an* and the example of the Prophet Muhammad. Because they use different ways of deriving and expanding God's law, the competing schools ultimately have ended up with different rules and regulations. Each champions its own rules as the true rules of *syari'ah.* Therefore, the question is: What do proponents of this proposal mean by *syari'ah*?

In contradiction to the five legal spheres explained above, Lukman Hakim Saifuddin of the PPP explains that there are three levels of *syari'ah.* Firstly, *syari'ah* is a universal value system in relation to justice, humanity and equality; *syari'ah* in this context should be implemented for all people. Secondly, *syari'ah* contains special regulations for all Muslims, such as those with regard to pilgrimage and charity, and non-Muslims are not subject to these regulations. Thirdly, *syari'ah* is interpreted and practised differently by various schools of thought (*mazahib*). He mentions the wearing of the veil (*jilbab*) and implementing *hudud* as examples of the third level, which is the subject of controversy even amongst Muslims themselves. According to Saifuddin, PPP is always striving for the

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36 Habib Rizieq Shihab, 'Jika syariat Islam jalan, maka jadi negara Islam', *Tashwirul Afkar*, 12 (2002): 104. The FPI arose almost at the same time as the fall of the New Order regime and the birth of the Reformation (*Reformasi*) movement. It has carried out many actions of defence in the interests of Islam and its people. FPI troops in a number of cities (particularly Jakarta, Tangerang and Solo) have conducted many actions aimed at 'preventing evil' in the form of 'sweeping' (raiding) places of iniquity, prostitution, gambling, alcohol and drugs.

37 Daniel Price, *Islamic political culture, democracy, and human rights: A comparative study* (Westport, CT: Praeger, 1999), p. 145.

38 Mohammad Hashim Kamali, *Principles of Islamic jurisprudence* (Cambridge: Islamic Text Society, 1991).

first meaning of *syari'ah* (i.e., universal values). He also asserts that PPP will not ask for the implementation of *syari'ah* at the third level since not all Muslims agree with it; the proposal to amend Article 29 is aimed at guaranteeing the implementation of *syari'ah* at the second level.

However, when I asked Saifuddin whether Indonesian Muslims already enjoy special regulations on Islamic law – since Indonesia already has a *syari'ah* judicial system, based on Law No. 7 of 1989, operating through a network of Religious Courts (*Pengadilan Agama*) with jurisdiction over marriage, divorce, inheritance and *waqf* (religious endowment) – he admitted that this was correct. He quickly stated, however, that the constitutional debate provides 'momentum to re-open the matters which were prohibited by Suharto. We do not want to miss this opportunity since our supporters want to see us delivering their aspirations, and who knows, if Allah wills it, we will succeed [in amending the article]'.[39]

Attempts to amend the article were also seen in the context of previous governments' regulations with regard to Islamic matters. According to Hamdan Zoelva, although several regulations were implemented (particularly during the later period of the Suharto regime and also under the Habibie government), there is no guarantee that the next government and Parliament would not abandon such regulations. Statutes can easily be replaced by other statutes, explaining why a constitutional guarantee is necessary.[40] In response to the argument that Article 29 (2) already guarantees that everyone is free to exercise his/her own faith, Zoelva replied, 'It is not enough! What we need is a clear provision that there is an obligation for the state to give Muslims their right to observe Islamic law'.[41] When the right to freedom of religion or belief is mentioned, the first thing that comes to mind is the right of individuals to act in accordance with conscientious beliefs, to worship freely, and to be able to enjoy life in society without discrimination on the basis of such beliefs. However, emphasising one religion in the Constitution over others will invite problems of inequality.

Article 29 and the position of other religions

Equality may mean identical treatment for everyone; the simplest version of this concept forbids laws from excluding anyone, or drawing any distinctions between people. Therefore, the Constitution should protect minority groups and individuals. It can be argued that the Constitution should not be interpreted by majoritarian institutions such as the legislature.[42] In Indonesia, judges at the Supreme Constitutional Court (*Mahkamah Konstitusi*) are not elected and are not accountable, and therefore are considered most capable of interpreting the Constitution in a way which will protect minorities. Accordingly, this principle would be contaminated if Article 29 is amended by mentioning Islamic law, thus raising questions about the status and practice of other religions.[43]

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39 Saifuddin, personal communication.
40 Zoelva, personal communication.
41 Ibid.
42 Kenneth W. Simons, 'Equality as a comparative right', *Boston University Law Review*, 65, 37 (1985): 387.
43 For instance, Gregorius Seto Harianto of the PDKB (Partai Demokrasi Kasih Bangsa) faction has stated that the inclusion of Islamic law in the Constitution will discriminate against other religions; see 'Piagam Jakarta terganjal lagi', *Suara Hidayatullah*, Sept. 2000.

It is in this context that the PKB, PAN and PKS parties proposed this alternative to Article 29: 'The state is based on Belief in One Almighty God with the obligation upon the followers of each religion to carry out its religious teachings.'[44] These parties believed that this version would satisfy all groups. T. B. Soemandjaja of the PK (Justice Party), for example, emphasised that this proposal would suit the plural society of Indonesia.[45] According to Hidayat Nur Wahid, President of the PK, instead of proposing the reintroduction of the famous seven words of the Jakarta Charter, his party refers to the Madinah Charter which was created by the Prophet along with the Jewish community.[46]

The Madinah Charter declared all Muslim and Jewish tribes of Madinah to be one community; at the same time, each tribe retained its identity, customs and internal relations. Among the rights it protected was the right to freedom of religion.[47] Another reason to refer back to the Madinah Charter rather than to the Jakarta Charter is provided by Mutammimul Ula, one of the leaders of the PK. He stated firmly that his small party was trying to avoid any sentiment related to the Jakarta Charter owing to its connection to the historical and political context of the Indonesian past. In essence, he said, like the Jakarta Charter, the Madinah Charter also enforces Islamic law, since it stipulates that 'in case of any dispute or controversy which may result in trouble, the matter must be referred to Allah and Muhammad'. He then admitted that by proposing the Madinah Charter his party was able to avoid the dilemma that, on the one hand, the national political atmosphere does not support the inclusion of the Jakarta Charter, and, on the other hand, PK constituents support the enforcing of Islamic law through the amendment of Article 29.[48]

If other political elites and the military did not want to use words from the Jakarta Charter, then why were the PPP and PBB not willing to compromise on the wording? Saifuddin replied that 'the famous seven words represent a symbolic defeat of the Muslim struggle in Indonesian history to enforce Islamic law. And it is also important to borrow the famous seven words of the Jakarta Charter, since the Presidential Decree of 5 July 1959 stipulates that the Jakarta Charter inspires the 1945 Constitution'.[49] Zoelva provides other interesting arguments over the wording. He takes the view that his party does not want to adopt the variant stating that 'the state is based on Belief in One Almighty God with the obligation upon the followers of each religion to carry out its religious teachings', since they believe that only Islam has a holy law. Based on this stance, Zoelva argues that other religions do not have special laws; they only provide ethics and theology. He added further, 'this is the reason why other religions will also reject Alternative 3, since

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44 However, it should be noted that the final position of the PKB (Partai Kebangkitan Bangsa) is not to amend Article 29.

45 T.B. Soemandjaja, personal communication, 30 Nov. 2003; he was a Member of Parliament (1999–2004) from PK.

46 Hidayat Nur Wahid, 'Mewujudkan konstitusi yang adil dan demokratis (kasus amandemen pasal 29 ayat 1 UUD 1945)', paper available at the official website of Partai Keadilan at http://www.keadilan.or.id. I also phoned him to confirm this position (1 Dec. 2003). He was president of PK and has been elected recently as speaker of the MPR.

47 The full text of the Madinah Charter can be found at http://msanews.mynet.net/books/lessons/constitution.html

48 Ula, personal communication.

49 Saifuddin, personal communication.

they are aware that this alternative is a sneaky way. We do not want to use ambiguous language. We want the famous seven words back into the 1945 Constitution'.[50]

Zoelva's statement may be questioned on at least four grounds. Firstly, it is not entirely true that other religions do not have their own sacred laws. For instance, the juridical law of the Roman Catholic Church is Canon Law, which is the body of laws and regulations made by, or adopted by, ecclesiastical authority.[51] Canon Law is not a moral code, it is the administrative, civil, jurisdictional, procedural and penal law of the Catholic Church. In addition, Patrick Glenn has shown that the Hindu religion also has its own legal tradition, which consists of a body of rules, customs and usages guiding the beliefs and ways of life of the Hindus.[52]

Secondly, the rejection by other political parties of Alternative 3 is due to the fact that it is redundant. Article 29 (2) already guarantees freedom of religion, and therefore there would be a repetition once Alternative 3 of Article 29 (1) is adopted. It is for the same reason that Alternative 4, which borrows all of the pillars of *Pancasila*, was rejected. From both technical and legal viewpoints, such repetition should be avoided. Thirdly, another reason for the rejection of Alternative 3 by other parties is to avoid losing in a vote, since offering too many alternatives would split votes, making it possible that the proposal to insert the seven words of the Jakarta Charter would succeed. Therefore, opponents of the proposal chose to keep the original Article 29 and reject any alternative to modify it.[53]

Fourthly, Christian scholars reject Alternative 3, since they do not want the state to be involved in religious affairs; they believe that faith cannot, and should not, be regulated by the Constitution, as this would lead to the politicisation of religion. T. B. Simatupang, a Protestant scholar, stated clearly that 'there is nothing in the *Pancasila* that is in contradiction with the Christian faith'.[54] Eka Darmaputera, another Protestant scholar, takes the view on the relationship between church and state in Indonesia that 'there is separation but not division'.[55] Therefore, he believes that

> Once religion allows itself to be co-opted by a certain political power, it will instantly lose its transcendental character. And the society will lose the opportunity to enjoy the very characteristic contribution only religion could give, i.e. its transcending-critical engagement. At the same time, when politics allows itself to become merely a tool of certain religious interests, it will also immediately lose its most noble function, namely to protect the well-being of all its citizens, without discrimination. Both the politicization of religion and the religionization of politics are actually suicidal, for all the parties concerned.[56]

50 Zoelva, personal communication.
51 The full text of the Code of Canon Law can be read at http://www.vatican.va/archive/cdc/index.htm
52 H. Patrick Glenn, *Legal traditions of the world* (New York: Oxford University Press, 2000), pp. 251–78.
53 See Sekretariat Jenderal MPR, *Risalah rapat panitia ad hoc I badan pekerja MPR RI ke-21 s.d 30 tanggal 28 Maret 2002 s.d 19 Juni 2002* (Jakarta: Setjen MPR, 2002).
54 T.B. Simatupang, 'Sebagai penutup: Sepuluh dalil', in *Iman Kristen dan Pancasila* (Jakarta: BPK Gunung Mulia, 1985), p. 206.
55 Eka Darmaputera, 'Aspek-aspek etis teologis hubungan gereja-negara', in *Hubungan gereja dan negara dan hak asasi manusia*, ed. Weinata Sairin and J. M. Pattiasina (Jakarta: BPK Gunung Mulia, 1996), pp. 19–20.
56 Eka Darmaputera, 'Prinsip-prinsip hubungan agama-negara', in *Pergulatan kehadiran Kristen di Indonesia: Teks-teks terpilih Eka Darmaputera*, ed. Trisno Sutanto (Jakarta: BPK Gunung Mulia, 2001), p. 367.

However, Darmaputera does not suggest strict separation between religion and state. He believes that there is always a religious character to the state and a political dimension to religion. To put it differently, although religion and state should not be united in institutional terms, religion is inseparable from politics in terms of the involvement of society (including the church) in public affairs. In this sense, Darmaputera asserts that the *Pancasila* state is the only viable alternative if Indonesia wants to maintain its unity and pluralistic character.[57]

Frans Magnis Suseno, an Indonesian Catholic scholar, has similar views. He rejects a secular state as well as a religious state. He explains that:

> Though there are differences between Islam and Christianity, in terms of religious tasks towards people's life, basically, as far as I see, they both agree that religious life could not be restricted to mosque or church buildings, nor limited to Fridays or Sundays, but should also be extended to all aspects of man's life. Christians are also Christians when they get involved in economics, and Muslims would not leave their faith behind when they participate in politics.[58]

In short, the *Pancasila*-based state is a place where no religion in Indonesia wins, and no-one loses. It is a win-win solution for all religions, since it is a state where religious life is supported and advanced on one hand, and thus it is not secular; on the other hand, religion is not directed at other faiths coercively, and thus it is not a religious state, either. Moreover, *Pancasila* values, Suseno claims, do not oppose, but indeed harmonise with, the Christian faith.[59] This does not imply that the church's participation in Indonesia would lead to the establishment of a Catholic or a Protestant country.[60]

The fear of non-Muslims regarding their status under *syari'ah* can be understood by looking at the concept of *zimmi* (non-Muslims under Muslim rule). Non-Muslims tend to stress the inequality of non-Muslim residents as citizens of secondary rank under the term *zimmi*, whereas Muslims emphasise the tolerance of Islam. Muslims, for instance, point out that Islamic law entitles non-Muslim communities living under Islamic rule to legislative and judicial autonomy with regard to their religious and personal-status affairs. Al-Shaybani explains that as *zimmi*, Christians have the freedom to trade in wine and pork in their towns, even though such practices are considered immoral and illegal among Muslims. However, *zimmi* are prohibited from doing so in towns and villages controlled by Muslims.[61] Al-Mawardi recognises the right of *zimmi* to hold public office, including the positions of judge and minister.[62]

The *zimmi*, who include monotheists such as Jews and Christians but not followers of many other faiths, are allowed to practise their religions and follow their own

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57 For a full account see Eka Darmaputera, *Pancasila and the search for identity and modernity in Indonesian society: A cultural and ethical analysis* (Leiden: E.J. Brill, 1988).

58 Frans Magnis Suseno, *Kuasa dan moral* (Jakarta: Gramedia, 2000), p. 104.

59 Ibid, pp. 110–15.

60 Th. Sumartana (*et al.*), *Agama dan negara perspektif Islam, Katolik, Hindu, Buddha, Konghucu, Protestan* (Yogyakarta: Interfidei, 2002) compiles articles from prominent scholars in Indonesia on the relationship between state and religion. In general, they support the notion that Indonesia is neither a secular nor a religious state.

61 Majid, *Islamic law of nations*, p. 32.

62 Mawardi, *Al-Ahkam as-Sultaniyah*, p. 59.

community laws as long as they accept a politically subordinate, tributary status. Karen Armstrong has pointed out that 'in the Islamic empire, Jews, Christians and Zoroastrians enjoyed religious freedom. This reflected the teachings of the *Qur'an* which is a pluralistic scripture, affirmative of other traditions. Muslims are commanded by God to respect the People of the Book, and reminded that they share the same belief and the same God.'[63]

However, under Islamic rule non-Muslims cannot be appointed caliph or president. Under a formal *syari'ah* approach, it seems that the value of non-Muslims' leadership skills and other qualities is seen as less than that of Muslims, the suggestion being made that a person's righteousness can create a basis for unequal treatment. The *zimmi* are freed from military obligation and *zakat* but have to pay *jizyah* (tax) to guarantee their loyalty toward the country and the Islamic government protecting their security.

Currently, many liberal Muslims such as Fahmi Huwaydi, who adopt a substantive *syari'ah* approach, suggest that a differentiation based on faith only applies when standing individually before God, and forms no basis for any civil inequities. They reject the *zimmi* classification of non-Muslims as an historically bound concept.[64] Modern states have been established by the joint struggle of both Muslims and non-Muslims; the imposition of *jizyah* has therefore become irrelevant and impractical. In fact, Islam makes no difference between Muslims and non-Muslims, as stipulated in the *Qur'an*.[65] If Indonesia enforces *syari'ah*, non-Muslims are afraid that the concept of *zimmi* would be applied to them. Although Muslims claim that such fears are unjustified, it is essential to note that by modern standards of citizenship and rights, this *zimmi* minority status would now be a form of second-class citizenship.

State law and its obligations

When asked whether the legal consequences of modifying Article 29 on the basis of his party's proposal would lead to *syari'ah* being one of the sources (or, indeed, the primary source) of law, as is the case in Egypt, Zoelva admitted to his lack of knowledge as to what applies in Egypt, asserting that there would be a shift from the current position that 'any law should not contradict with Islamic teachings' to a new position that 'Islamic law becomes one of the sources of any law in Indonesia'.[66] This new feature would change the face of Indonesian law significantly. According to MPR Decree III/MPR/2000 on the sources of law and the hierarchical order of legislative rules, the sources of Indonesian law are the 1945 Constitution, MPR decrees, laws *(Undang-Undang)*, government regulations in lieu of a law *(Perpu)*, government regulations, presidential decrees and regional regulations. Zoelva did not reject the possibility that this list would be modified by mentioning *syari'ah*, if Article 29 was amended. Perhaps there would be a judicial review to examine the existing laws which do not refer to *syari'ah* as well as proposals for more laws and regulations on Muslims' daily affairs.

Before speculating further on what would happen if Article 29 was amended, the experience of Egypt should be taken into account. In 1980 the Egyptian government

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63 Karen Armstrong. 'The curse of the infidel', *The Guardian*, 20 June 2002.
64 See Fahmi Huwaydi, *Muwatinun la zimmiyun* (Cairo: Dar al-Syuruq, 1985).
65 *Qur'an*, 2:126.
66 Zoelva, personal communication.

decided to amend the Constitution to make *syari'ah* 'the principle source of Egyptian legislation'. The wording of Article 2 of the Constitution was thus changed from '*mabadi' al-Syari'ah al-Islamiyyah mashdar ra'isi li al-tasyri*`' (The principles of the Islamic *Syari'ah* are *a* principal source of legislation) to the more forceful statement, '*mabadi' al-Syari'ah al-Islamiyyah al-mashdar al-ra'isi li al-tasyri*`' (The principles of the Islamic *Syari'ah* are *the* principal source of legislation). The Supreme Constitutional Court of Egypt (SCC) has interpreted this clause to mean that all future legislation respects a number of broad principles which it identifies as the 'universals' or 'fundamental principles' of *syari'ah*. These principles, according to the Court, are mentioned in the sacred texts of Islam and have always been accepted as essential premises of Islamic law, although they have been applied differently in different places to come up with Islamic laws appropriate to a particular time and place.[67] The implication of the Court's interpretation is that any law which respects all of the broad, universal and fundamental principles of *syari'ah* is acceptable as Islamic law. One may argue that despite the formal approach taken by the 1980 Amendment, the SCC interprets Article 2 in a substantive way.[68]

This ambiguous position seems to explain that the Court does not have much choice given political and legal tensions. The government must prevent fundamentalist groups taking Article 2 as their legal basis for the '*syari'ah*-isation' of Egypt.[69] On the other hand, as Clark Lombardi points out, the SCC must come up with a way to recognise the higher principles of Islamic law which are suitable for the accommodation of 'modern notions of human rights and modern economic institutions'.[70]

In the Indonesian context, there is also some speculation that the proposal from the PPP and PBB to reinsert the seven words from the Jakarta Charter would make *syari'ah* state law. In this regard, Khaled Abou El-Fadl makes an important statement:

> the law of the state, regardless of its origins or basis, belongs to the state. Under this conception, no religious laws can or may be enforced by the state. All laws articulated and applied in a state are thoroughly human and should be treated as such. These laws are a part of Shari'ah law only to the extent that any set of human legal opinions can be said to be a part of Shari'ah. A code, even if inspired by Shari'ah, is not Shari'ah.[71]

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67 According to Islamic jurisprudence legislation must not contradict the general spirit of *syari'ah*. One of the most important and fundamental principles of the law is the principle that no law should create hardship (*masyaqqah*) for people. See Clark Benner Lombardi, 'State law as Islamic law in modern Egypt: The amendment of Article 2 of the Egyptian Constitution and the Article 2 of jurisprudence of the Supreme Constitutional Court of Egypt' (Ph.D. diss., Columbia University, 2001) and Lombardi, 'Islamic law as a source of constitutional law in Egypt: The constitutionalization of the sharia in a modern Arab state', *Columbia Journal of Transnational Law*, 37 (1998): 82.

68 Bernard Botiveau, *Al-syari'ah al-Islamiyah wa al-qanun fi al-mujtami'at al-'Arabiyah*, translated from *Loi islamique et droit dans les sociétés arabes* (al-Qahirah: Sina li al-Nasyr, 1997), pp. 238–41.

69 Tamir Moustafa, 'Law versus the state: The judicialization of politics in Egypt', *Law and Social Inquiry*, 28 (2003): 833–69.

70 Lombardi, 'Islamic law as a source of constitutional law', p. 121.

71 Khaled Abou El Fadl, 'Islam and the challenge of democracy: Can individual rights and popular sovereignty take root in faith?', *Boston Review*, Apr./May 2003, available at http://bostonreview.net/BR28.2/abou.html

As can be seen, there are two interesting views here. The SCC of Egypt asserts that any law that respects all of the broad, universal and fundamental principles of *syari'ah* is acceptable and treated as Islamic law, whilst El-Fadl argues that a law which is only inspired by *syari'ah* should not be claimed as being part of *syari'ah*. These two views reflect two sides of the same coin. For liberal Muslims, any law which confirms the universal aspect of *syari'ah* is as Islamic as *syari'ah* itself, and therefore there is no need to Islamise such laws. For non-Muslims, any law which is enforced by the state cannot be treated as Islamic law, even when such law is inspired by *syari'ah*.

The first view is based on the theory of public utility.[72] It extrapolates from the principles a putative social goal. This theory is now manifested in the expansive doctrine of government discretion. From about the eleventh century, Islamic jurisprudence came to accept the idea of *al-siyasah al-syari'yyah*, which accords the terrestrial ruler a reservoir of discretionary power of command in the public interest. If deviations from the strict *syari'ah* doctrine were required to protect the public interest in implementing the guiding principles behind *syari'ah*, then such deviations were allowed.[73]

The theory of public utility in the Islamic legal system is based on the notion of *maqasid al-syari'ah* (the objectives of Islamic Law).[74] Securing benefit and preventing harm in this life and in the hereafter is the intent of *syari'ah*. This consideration is an extremely important factor for jurists in the contemporary Islamic world. Under this theory, the flexibility of Islamic law is secured. For instance, according to this approach, *daruriyyat* (essentials or necessities), changes of condition and *mashlahah al-'ammah* (public interest) allow for the adoption of measures which are normally and textually disallowed.[75] The second view, which is supported by El-Fadl, is based on the rejection of the theocratic concept; he believes that Islam is compatible with democracy: 'according to this paradigm, democracy is an appropriate system for Islam, because it both expresses the special worth of human beings – the status of vice-regency – and at the same time deprives the state of any pretense of divinity, by locating ultimate authority in the hands of the people, rather than the *"ulama"*'.[76]

It seems that El-Fadl is trying to avoid claims that any law which is not against the fundamental principle of the *syari'ah* will be seen as Islamic law, which could then lead

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72 Ihsan Abdul Bagby, 'Utility in classical Islamic law: The concept of *mashlahah* in *Ushul al-Fiqh*' (Ph.D. diss., University of Michigan, 1986).

73 'Abdul Wahab Khallaf, *Al-Siyasah al-Syari'yyah* (al-Qahirah: Salafiyah, 1350 H), p. 5.

74 Most jurists classify *mashlahah* into three categories, each of which must be protected: (1) the *daruriyyat* (essentials), (2) the *hajiyya* (complements) and (3) *tahsiniyyat* (embellishment). Each divine ruling aims at one of these three. See Husain Hamid Hasan, *Nazhariyyah al-maslahah fi al-fiqh al-Islam* (al-Qahirah: Dar al-Nahdah al-'Arabiyyah, 1971).

75 One should not confuse *mashalah al-'ammah* with *mashalah al-mursalah*. The latter is one of the methods in Islamic legal theory, supported by Hanafi, Hanbali and Maliki theorists but rejected by the Syafi'i and Zahiri schools. Al-Ghazali illustrates *mashalah al-mursalah* with this example: 'If unbelievers shield themselves with a group of Muslim captives, to attack this shield means killing innocent Muslims – a case which is not supported by textual evidence. If the Muslim attack is withheld, the unbelievers will advance and conquer the territory of Islam. In this case it is permissible to argue that even if Muslims do not attack, the lives of the Muslim captives are not safe. The unbelievers, once they conquer the territory, will root out all Muslims. If such is the case, then it is necessary to save the whole of the Muslim community rather than to save a part of it.' Abu Hamid Muhammad al-Ghazali, *Al-Mustasfa min 'Ilm al-Usul*, vol. I (Al-Jami'ah al-Islamiyah al-Madinah al-Munawwarah, n.d.), pp. 294–5.

76 El-Fadl, *Islam and the challenge of democracy*.

to the divinity of such laws. Thus, state law is processed and enforced through state mechanisms; it therefore belongs to the state and cannot be claimed as belonging to divine law, despite the fact that any state law should consider values (including Islamic ones) in society. El-Fadl's argument seems to confirm the idea of public religion at the level of civil society and not the state – as proposed, for instance, by Casanova.[77] This distinction is useful in terms of employing the middle position of the role of secularism and the unity of church and state in public life.

Civil society is the sum of political, economic, social and cultural institutions, which act each within its own field – independently of the state – to achieve a variety of purposes. These include political purposes, such as participating in decisionmaking at national level, an example of which is the activity in which political parties engage. Civil society is based on voluntary participation, whereas the state is based on coercion. Society consists of a wide variety of orders, such as the family, the economy, religion and non-governmental organizations (NGOs). All these elements have interests in influencing and contributing to any law or bill drafted and discussed in parliamentary meetings, which will affect them either as individuals or as parts of society. Civil society is believed to contribute to democratic consolidation as it assists in bridging the gap between democratic government and the citizen.

In this context, Robert Hefner has coined the term 'civil pluralist' Muslims.[78] He explains that:

> Civil pluralist Muslims deny the necessity of a formally established Islamic state, emphasize that it is the spirit and not the letter of Islamic law (*shariah*) to which Muslims must attend, stress the need for programmes to elevate the status of women, and insist that the Muslim world's most urgent task is to develop moral tools to respond to the challenge of modern pluralism.[79]

The proposal to include *syari'ah* in the Constitution would put religion's role at the state level. I will examine this issue by looking at the seven famous words. If they are adopted, which has the obligation to observe *syari'ah* – the state or Muslim society? If the legal consequence of adopting the phrase is to put an obligation on the state to implement *syari'ah*, then the phrase will be seen as breaking the 'third' position discussed earlier, that Indonesia is neither a secular nor a religious state.

Apart from the problem of having *syari'ah* as a source of law, there is also the problem with the word 'obligation' *(kewajiban)* from the phrase '*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*' ('with the obligation, for its adherents, of implementing the Islamic *syari'ah*'). What does this word '*kewajiban*' mean? The obligation for Muslims to practise Islamic teachings comes from God, not from the state. It is essential to note that whether or not the phrase is included in the Constitution, Muslims are obliged by God to follow His rules. Constitutionally speaking, by adopting this phrase the state must ensure that every Muslim practises his/her religion; if they do not, the state

77 Casanova, *Public religions in the modern world*, p. 61.
78 Robert W. Hefner, 'Islam, state and civil Society: ICMI and the struggle for the Indonesian middle class', *Indonesia*, 56 (1993): 1–35.
79 Robert W. Hefner, 'Secularization and citizenship in Muslim Indonesia', in *Religion, modernity, and postmodernity*, ed. Paul Heelas (Oxford, Blackwell Publishers, 1998), p. 148.

may punish them. Again, one should note that the state is based on coercion, whilst civil society is based on voluntary participation. For instance, the state can punish those who are not fasting in Ramadan or not going to the mosque five times daily.

When discussing this issue, Zoelva explained that while it is true that the obligation comes from God, not from the state, there are some areas in *syari'ah* which need the latter's involvement. Under the current form of Article 29, such involvement is voluntary. The phrasing of the seven words would place the state under a 'constitutional obligation' to facilitate Muslims practising their faith. This suggests that the word 'obligation' refers to the government.[80]

If that is the case, the phrase '*dengan kewajiban menjalankan Syariat Islam bagi pemeluknya*' is vague, and Zoelva's explanation is not convincing. The phrase does not specify clearly that it is the state which has an obligation to implement Islamic law. In the words of M. B. Hooker, 'while the [Jakarta] Charter specifically refers to sharia, it is vague as to its exact scope and competence, leaving much room for debate over its jurisdiction'.[81] In addition, the government has already facilitated Muslims (and members of other religions) in the practise of their beliefs by establishing the Ministry of Religious Affairs. Each year the government assists Muslims in performing the pilgrimage to Saudi Arabia; it has also established the Religious Courts, and some Muslim holidays are celebrated as national holidays. These steps have been taken under the current version of Article 29.

Conclusion

This article has focused on the dispute over the meaning of the phrase '*dengan kewajiban menjalankan Syariat Islam bagi pemeluknya*', and is centred on crucial interpretive questions surrounding the Islamisation of the sources of Indonesian law. Apart from the meaning of the phrase, we have also examined some objections to the proposal to include *syari'ah* in Article 29, such as the belief that the full implementation of formal *syari'ah* will lead to the establishment of an Islamic state, possibly creating inequality amongst Indonesian citizens. We have also considered other alternatives to modify Article 29 and the reasons why they have been rejected.

Within the above framework it is unfortunate that the PPP and PBB parties did not learn from the Egyptian experience. It would be more reasonable if these two Islamic parties, using the formal approach to *syari'ah*, proposed to modify Article 29 by stating that *syari'ah* is one of the sources of Indonesian law. They did not have to propose *syari'ah* as the primary source, since it is sufficient to suggest *syari'ah* as one of the sources. For example, they could have argued that Dutch law, *adat* (traditional, customary) law and Islamic law are the three components of Indonesian national law. Although there would still be no guarantee that this proposal would be accepted by other parties, in terms of comparative constitutional law, at least, the Egyptian model (prior to the 1980 Amendment) could be worthy of consideration. In this sense, from the formal *syari'ah*

80 Zoelva, personal communication; see also 'Pendapat akhir fraksi Partai Bulan Bintang MPR', in *Amandemen UUD 1945 tentang Piagam Jakarta*, ed. Ramlan Mardjoned and Lukman Fatullah (Jakarta: DDII, 2000), pp. 3–26.
81 M. B. Hooker, 'The state and *shari'a* in Indonesia', in *Shari'a and politics in modern Indonesia*, ed. Arskal Salim and Azyumardi Azra (Singapore: ISEAS, 2003), p. 38.

approach point of view, the aim and the target of modifying Article 29 would be much clearer: to recognise *syari'ah* as one of the sources of law.[82]

I take the view that one of the main reasons why the PPP and PBB pushed for the adoption of the famous seven words was the historical symbolic meaning of this phrase. It should be remembered that many Muslim leaders in 1945 were not happy with the last-minute cancellation of these seven words. This historical context has remained in the memory of Muslim activists, making their position (as articulated by the PPP and PBB during 1999–2002) inflexible. They were not open to the use of other alternative words or sentences, believing that it would hinder their two simultaneous goals: the implementation of *syari'ah* and 'revenge' for their 1945 defeat. Such rigidity has made them ignore the vagueness of the phrase and uncritically accept the famous seven words.

It is also worth noting that by not modifying Article 29 of the 1945 Constitution, the Indonesian Parliament has rejected secularisation, which would see the privatisation – or the decline – of religion. Indonesia still stands in – borrowing Hollenbach's term – the third alternative, in which 'religious communities can have an impact on public life',[83] while at the same time the role of religion in public life does not imply that all political institutions are subject to it as in a theocratic system. Under Article 29 of the 1945 Constitution, religion can play its public role at societal level. This once again proves that Indonesia is neither a secular nor an Islamic state. It is essential to note that this position is compatible with the substantive *syari'ah* approach.

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82 I am not suggesting that Indonesia should adopt Article 2 of the Egyptian Constitution (either before or after the 1980 Amendment) as a replacement for Article 29 of the 1945 Constitution. I have shown only that there is another alternative for the PPP and PBB: instead of insisting on the use of the phrase from the Jakarta Charter, to propose the inclusion of *syari'ah* in the Constitution.

83 Hollenbach, 'Politically active churches', p. 301.