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'DEMOCRATIC' *SHARĪ'A*: AN ISLAMIC LEGAL DISCOURSE IN AN ERA OF NATION-STATES

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Abstract

The adoption of the modern nation-state in the Muslim world imposes structural transformation in Muslim society, not only introducing a distinction between public and private spheres but also putting the state as a legal body above all existing kinds of law, which had been long practiced and adopted in a given society. This development puts Muslim society in a big dilemma regarding the position of Islamic law, which is supposed to occupy a superior position due to its divine origin. A radical response to this new development comes from Islamist groups, which sought to 'Islamize' the state. In Indonesia they gained an important momentum in the post-authoritarian regime of Suharto. However, Islamization of the state is often seen by its opponents as paving the way for Islamic legal authoritarianism since only certain interpretations of Islamic law will be integrated to the state legal system and then imposed to all Muslim citizens who may disagree with all of the state interpretations of religion. Against the backdrop of the contestation between state secularization and Islamization, this paper will discuss the emerging attempt to bring the sharī'a back to its initial habitat, the Muslim society with all its unique dynamics. Looking at more specifically the Indonesian context, the paper will show how Muhammad Quraish Shihab as

a strong proponent of the attempt emphasizes the importance of valuing ikhtilāf, which constitutes the social reality of the sharī'a. Valuing ikhtilāf ini his view not only offers facilities to Muslims, but also gives a sense of democratic sharī'a against any religious authoritarianism.

Keywords : *Nation-state, Democratic Shari'a, Ikhtilaf.*

A. Introduction

Modernization in the Muslim world has often been linked with the presence of European colonialism, which gained its strength from new forms of military and economic power. European colonial powers brought about an unprecedented disruption in the Muslim world, pushing it outside the hegemonic power. Muslim powers played insignificant or peripheral role in the world contestation of power; the "Islamic world" weakened and became "Islam in the world". The modern West determined new concepts of humanity, history, society, and political legitimacy alien in the history of Islamic tradition. In this context, Muslims had to choose between two contrasting options, either to partake in the path of hegemonic modernity or to be isolated outside this dominant track.[1]

In response to the challenge of contemporaneity, the *'ulamā'* (Muslim scholars) as Muslim intellectual and cultural agents were to formulate a Muslim grip by rethinking and reinventing Islamic tradition. In doing so, they were divided in two groups. The traditional *'ulamā'* tended to oppose modernization altogether because of its perceived 'damaging' potential to Islamic tradition. On the other hand, the reform-minded *'ulamā'*, while standing against the secular elites who were much more concerned with Western modernization than religion, embraced modernization by revitalizing Islamic tradition in

[1] Yvonne Yazbeck Haddad, *Contemporary Islam and the Challenge of History* (Albany: State University of New York Press, 1982), p. 4.

order to compete with the inevitable challenges of modernity. Islamic reformist thrust can be seen mainly from rapprochement between religious texts and reason, and attempts to formulate a dynamic and progressive Islam. Islamic reformism first emerged the Indian subcontinent and Egypt in the nineteenth century, and then inspired a reform paradigm in the rest of the Muslim world, including Indonesia where encountered this "second" wave of Islamic reformism beginning in the twentieth century.[2]

One of the most central intellectual projects that Muslim reformists work on is Islamic law, which concerns Muslim society at large as it touches upon their day-to-day life. One of the most recurring themes in modern Muslim legal debates is the question of *ikhtilāf* (legal disagreements), especially in a context when the modern nation-state attempts to create a unified legal system that binds all of its subjects. The end of an era is just the beginning of another. A new international consensus emerges and directs the world order toward the virtues of democratic governance and society. The most populous Muslim country, Indonesia is a good case study. A growing tendency toward democratization in the country makes individual independency not only recognized but also increasingly valued despite the challenge of religious authoritarianism that sometimes troubles the democratic project. This paper observes how modern discourses on *ikhtilāf* emerge not only to provide legal facilities for Muslims, but also to give a sense of democratic *sharī'a* against legal authoritarianism.

B. *Ikhtilāf* as the Social Reality of *Sharī'a*

During the revelation period, the Prophet Muhammad was the only authority to interpret the messages of the Qur'an, the only authoritative

[2] I call the "second wave" of Islamic reformism because referring to Azyumardi Azra's study on Islamic intellectual network in Hijaz and the Indonesian archipelago, the first wave of Islamic reformism occurred in the shape of rapprochement between Sufi and legal approaches to Islam. This second wave puts more emphasis on the necessity of return to the Qur'an and the prophetic tradition and the revitalization of *ijtihād* (independent reasoning). See Azyumardi Azra, *The Origins of Islamic Reformism in Southeast Asia* (Crows Nest NSW: Allen & Unwin etc., 2004).

speaker in the name of God, who interpreted the general wording and abstract ideas of the Qur'an in more concrete and practical ways. The Prophet's interpretation widely known as *Sunna* functioned as a guide for practicing Islam during this time. The death of the Prophet has its initial consequence as to who succeeded him to speak for Islam. Interpretation of Islam has since become a shared enterprise among Muslim scholars of different generations. The changing realities and different cultural backgrounds of Muslim scholars make the wordings of both the Qur'an and the *Sunna* prone to various interpretatiB ons. The case of the *Sunna* is even more complex because Muslim scholars diverge in terms of the standards and criteria under which to verify the validity of its reports. Different categorization of the sound, the weak and the invalid *Sunna* intensifies Muslim divergence in understanding their religion.

Defining *sharī'a*, what it consists of, and how it is best realized and put in practice is a matter of contestation among different Muslim scholars. The word *sharī'a* itself is commonly used by the Arabic-speaking people to refer to a prophetic religion: *sharī'at Mūsā*, *sharī'at Īsā* and *sharī'at Muḥammad*. Within Muslim discourse, it is commonly used to designate Islamic law (*fiqh*), which consists of all-embracing principles and a code of conduct derived from the Qur'an and *Sunna* that govern and regulate the ritual, legal, and ethical lives of Muslims. *Sharī'a* represents the practical aspects of Islam —to distinguish it from the theoretical aspects of Islam, doctrinal belief.

Islamic law has never reached a form of uniformity since its early development; it emerged variedly from a region to another. Geographical differences feature variances among ancient schools of law, e.g., the Kufan, the Medinan and the Syrian schools. Yet, beginning in the second/eighth century, pupils within these ancient schools assembled around individual masters. The Kufans formed themselves around Abū Ḥanīfa (d. 150/767), the Medinans around Mālik ibn Anas (d. 179/795) and the Syrians around 'Abd al-Raḥmān

al-Auzā'ī (d. 157/774). Ancient geographical-based schools gradually transformed into "personal" ones. Some hundreds of personal schools of law are said to have existed in ancient times, and the number began decreasing by the beginning of the third/ninth century before they crystalized in four Sunni schools around the end of the seventh/thirteenth century. The schools of Abû Ḥanifa and of Mālik developed from ancient geographical schools, while the schools of al-Shâfi'ī and Aḥmad ibn Ḥanbal developed from personal schools.[3] The survival of certain schools of law can be explained from the role of their pupils in perpetuating and modifying their master's principles and methods of legal reasoning.

It goes without saying that each school of law proposes and develops its unique legal reasoning, which consequently produces legal conclusions that may differ from those of the others. This reasoning in general involves argumentation of the revealed texts by reconsidering social and cultural contexts in which members of a Muslim society live. This legal disagreement has been commonly termed as *ikhtilāf*, which, as a technical term, is used to designate legal divergences among authorities either from within one school of law or from different schools. The term is often used as opposed to the term *ijmā'* (consensus) or *ittifâq* (legal agreement).[4]

It has been widely argued that since the early development of Islamic law, *ikhtilāf* not only existed, but was also respected. When the Abbasids succeeded the Umayyads, they began consolidating their power, among others, by controlling Islamic law, which lacked uniformity due to the spread of *ikhtilāf*. They attempted to unify and consolidate Islamic legal practices, but the plan did not meet the approval of large numbers of Muslim jurists who refused to be drawn in close connection with the

[3] George Makdisi, *The Rise of College: Institutions of Learning in Islam and the West* (Edinburg: Edinburge University Press, 1981), p. 2; see also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982).

[4] Joseph Schacht, "Ikhtilāf," *Encyclopaedia of Islam* (Leiden & London: Brill and Luzaq & Co., 1986), p. 1061.

state.[5] This attempt was made by the Abbasid Caliph Abū Ja'far al-Manṣūr (r. 754 – 775) who proposed that *al-Muwaṭṭa'* of Mālik bin Anas be adopted as the foundation of the state law. Mālik disagreed, arguing that the plan might give troubles to many people who used to adopt the legal opinions of others. Mālik convinced the Caliph that people had already adopted and practiced several opinions, so it would be better to leave them with their own practices and what they preferred[6] rather than to force them to adopt a single set of legal opinions.

Earliest Muslim jurists like Abū Yūsuf (d. 182/788) and Muḥammad al-Shaibānī (d. 189/805), both disciples of Abū Ḥanīfa, had been occupied with the subject of *ikhtilāf*. Al-Shāfi'ī himself wrote chapters on *ikhtilāf* in his *al-Risāla* and *Kitāb al-Umm*. Muḥammad ibn Naṣr al-Mawarzī (d. 294/905), ibn Jarīr al-Ṭabarī (d. 310/923), Abū Ja'far al-Ṭaḥāwī (d. 321/933) and ibn 'Abd al-Barr (d. 463/1071) wrote books which specifically discuss this topic.[7] This fact suggests that although the *sharī'a* is imagined as a single entity, its manifestation across historical and cultural contexts has been always varied. In other words, *ikhtilāf* constitutes a social reality of the *sharī'a*.

C. *Sharī'a* between Immutability and Adaptability

The relationship between the *sharī'a* law and social change has been one of the most fundamental issues in Muslim intellectual debate of legal theory. Islamic law having its association with the divine law has been assumed to be fixed and permanent, and therefore is not subject to any changes. Yet, human life has always been confronted with the challenge of social change —developments and changes in a Muslim society. If Islamic law is perceived to be sacred and immutable, how does it face the challenge of this change?

[5] Schacht, *An Introduction to Islamic Law*, p. 56.

[6] Muhammad ibn Sa'd, *Kitāb Al-Ṭabaqāt Al-Kabīr*, ed. Ali Muhammad Umar (Cairo: Maktabat al-Khanji, 2001), VII: p. 573–74.

[7] Schacht, "Ikhtilāf," 1062; Muhammad Khalid Masud, "Ikhtilaf Al-Fuqaha: Diversity in Fiqh as a Social Construction," in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar (Seangor: Musawah, 2009), p. 70.

There have been two contrasting opinions regarding the relationship of Islamic law and social change. The first is represented by most traditional Muslim jurists, who maintain that the *sharī'a* law is immutable, and hence not subject to social changes. The idea of *sharī'a* immutability is based on an argument that the *sharī'a* law is derived from the divine origin, the revealed texts which are theologically considered final and eternal. Meanwhile, the second position, which is represented by the majority of Muslim reformists, maintains that the *sharī'a* is adaptable to social change. It implies that the existing body of law can be expanded or modified to meet new conditions.[8] The idea of the *sharī'a* adaptability is backed by the fact of the evolution of Islamic law and the continuous practices of *ijtihād* (independent legal reasoning) across Muslim history, which sufficiently demonstrates the adaptability of Islamic law to social change.

The proponents of the *sharī'a* adaptability develop their legal theory primarily based on the traditional concept of *maṣlaḥa* (human good), which has been subject to criticism for the lack of explicit basis from the revealed texts. In the pre-modern era, *maṣlaḥa* was put into marginal importance of authority, especially after the theory of "four Islamic legal sources" (the Qur'an, the *Sunna*, *ijmā'* or consensus, and *qiyās* or analogy) introduced by al-Imām al-Shāfi'ī (d. 204/820) came to dominance.[9]

The Shāfi'ī jurists classify *maṣlaḥa* in three categories: *maṣlaḥ amu'tabara*, which is authorized by the revealed text, *maṣlaḥa mulghā*, which is rejected by the text, and *maṣlaḥa mursala*, which is neither backed nor rejected by the text. Only the first category is considered valid by the Shāfi'ī jurists, while the third has to be further examined from the point of view of three grades: *ḍarūrāt* (necessities), *ḥājāt* (needs), *taḥsīnāt* (refinements). Of these, only *ḍarūrāt*-based *maṣlaḥa*

[8] Muhammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law*, 2nd ed. (New Delhi: Kitab Bhavan, 2009), p. 17; See also Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge [et al.]: Cambridge University Press, 2004).

[9] Masud, *Shāṭibī's Philosophy of Islamic Law*, p. 128.

is accepted, while the other two are invalid if not supported by specific textual evidence or in line with *qiyās* (analogy). On this basis, the Shāfi'ī jurists reject *maṣlaḥa* as an independent source of law.[10]

A radical shift in the *maṣlaḥa* conceptualization was introduced by a Ḥanbalī jurist, Najm al-Dīn al-Ṭūfī (d. 716/1316). He emphasizes *maṣlaḥa* as the basic and overriding principle of the *sharī'a*, elevating it to the extent that may set aside the revealed texts. However, in his final analysis, as Muhammad Khalid Masud observes, al-Tūfī regards *maṣlaḥa* still within the traditional framework of the "four legal sources" where reference to it is necessary only after those four sources has failed.[11]

A crucial conceptualization of *maṣlaḥa* in the pre-modern era was conducted by the celebrated Mālikī jurist, Abū Isḥāq al-Shāṭibī (d. 790/1388), who not only regards *maṣlaḥa* as an independent principle of legal reasoning, but also attempts to free legal obligation from theological determinism. Masud views that al-Shāṭibī's attempt to free legal theory from theology and morality is a step toward what he calls legal "positivism". Al-Shāṭibī distinguishes *'ibādāt* (spiritual affairs) from *'ādāt* (worldly affairs) because the former is closely attached to theology and metaphysics, a realm whose cause and effect are unknown by human experience. His distinction between *'ibādāt* and *'ādāt* on the basis of the observability of *maṣlaḥa* in the latter is understood as an important breakthrough to separate positive law — derived from consideration of observable phenomena— from purely religious elements.[12]

Al-Shāṭibī defines *maṣlaḥa* as "something which affects the sustainability of human life, the perfection of his livelihood, and the acquisition of what his emotional and intellectual qualities require of him in an absolute sense"[13] In his view, God has instituted the *sharī'a*

[10] *Ibid.*, p. 128, 142.
[11] *Ibid.*, p. 149–50.
[12] *Ibid.*, p. 20–21.
[13] Ibrāhīm ibn Mūsā al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'a*, ed. Abdullāh Darrāz (Cairo: Al-Maktaba al-Tijāriyya al-Kubrā, 1975), II, p. 25.

in order to maintain human good. All obligations sanctioned by the *shari'a* aim at protecting the objectives of religion, which in turn aim at protecting human good.[14] Unlike al-Ṭūfī, al-Shāṭibī does not treat *maṣlaḥa* in the framework of the four sources theory. The sources of law according to him are limited only to the Qur'an and the *Sunna*,[15] while *maṣlaḥa* acts as an operating principle to understand obligations and prohibitions in the revealed texts.

Maṣlaḥa as an independent legal principle reverberates in the modern age when social and political changes in Muslim society required Muslims to rethink their tradition. Traditional analogy and literal interpretation are deemed no longer able to serve the interests of Muslim society in the modern world. Accordingly, reform-minded Muslim scholars searched within Islamic scholarly tradition for a principle of adaptability that could help them cope with the changing realities. They eventually found such a principle in *maṣlaḥa*, which had been polemical for its alleged function to serve human utility.[16] They developed their legal theory on the basis of *maṣlaḥa* by subscribing to a set of principles laid down by pre-modern jurists, but modifying them according to the exigencies of their era.[17]

These reformist scholars were affiliated in one way or another with the school of Muḥammad 'Abduh (1949-1905), who is often seen as a leading proponent of Islamic religious utilitarianism.[18] However, it was his pupil, Muḥammad Rashīd Riḍā (1865-1935), who conducted

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[14] Masud, *Shāṭibī's Philosophy of Islamic Law*, p.151.

[15] *Ibid.*, p. 161.

[16] *Ibid.*, p. 162.

[17] Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge etc.: Cambridge University Press, 1997), p. 214.

[18] Hallaq, *A History of Islamic Legal Theories*; Masud, *Shāṭibī's Philosophy of Islamic Law*. In his speech on the reform of religious courts in 1899, 'Abduh advocated the adoption of *maṣlaḥa* as a guiding principle in law making, stressing that in contracts and transactions legal consideration should rest on the purposes and essences, not on the wordings of the revealed text. Al-Shatibi's *al-Muwāfaqāt* was a central reference for 'Abduh who used to recommend his colleagues and students to read book for the purpose of understanding the relevant philosophy of Islamic law making. Muḥammad 'Abduh, "Taqrīr Faḍīlat Muftī al-Diyār al-Miṣriyya fī Iṣlāḥ al-Maḥākim al-Shar'iyya," *Al-Manār*, 1899, 761; Muḥammad al- Khuḍarī Bik, *Uṣūl al-Fiqh*, 6th ed. (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1969), p. 13.

a formidable task in interpreting and formulating 'Abduh's idea into a sort of legal theory. Riḍā not only had modified *maṣlaḥa* "in such a way as to make it unqualifiedly palatable to the orthodox, but also to divest it of the fetters of the medieval theoretical discourse of which the concept was an integral part".[19] Riḍā formulates ten principles that he calls *muqaddimāt* (premises). First, God has perfected His religion. Second, Islam supports ease, for God does not intend difficulty in His religion. Third, the Qur'an is the backbone of religion. Forth, the Prophet's statements concerning religious matters are infallible. Fifth, God has entrusted Muslims, individually and collectively, to run their worldly affairs as long as in accord to the guidelines of religion. Sixth, matters of belief and worship will never change because God has perfected them. Seventh, the Prophet's reluctance to answer the detailed questions of his companions was intended to avoid strictness in religion, or probably because the answer might fit only the condition of people at a particular time. Eighth, the pious predecessors (*al-salaf al-ṣāliḥ*) reproached the use of reason to understand matters that the Prophet was reluctant to answer. Yet, those who did not witness revelation did use their reason to understand them, and this falls under God's permission (*illā annahū yadkhulu fī-mā 'afā Allāh 'anh*). Ninth, the greatness of Islam is featured when Muslims are able to engage their independent reasoning. And tenth, the truth of religion must be espoused by intellectuality in order for Muslims not go astray because of their blind fanaticism.[20]

D. The Original Habitat of *Sharī'a*

In pre-modern period, the centrality of *madhhab*s raised the demand for *taqlid* (unquestioning acceptance of the doctrines of established schools and authorities) and the growing tendency toward *tamadhhub* (affiliation to a particular school). This development left

[19] Hallaq, *A History of Islamic Legal Theories*, p. 214.

[20] Muḥammad Rashīd Riḍā, *Yusr Al-Islām Wa Uṣūl Al-Tashrī' Al-'Āmm* (Cairo: Maṭba'at al-Manār, 1928), p. 16–21; Hallaq, *A History of Islamic Legal Theories*, p. 215–16.

social problems particularly among lay Muslims who tended to practice the *sharī'a* in a more pragmatic fashion.

An Egyptian Sufi and jurist, 'Abd al-Wahhāb al-Sha'rānī (d. 973/1565), was complained by groups of poor worshipers (*al-fuqarā' al-muta'bbidūn*) and practitioners of small businesses (*aṣḥāb al-ḥiraf al-nāfi'a*) because jurists were forcing them to adhere to a single school of law. They were confused between the *sharī'a* of the Prophet Muhammad and that of the Muslim jurists. Al-Sha'rānī suggested that they learn legal reasoning from the jurists. They recognized to him that they were incapable of learning legal arguments and all other details. Comprehending their situation, al-Sha'rānī recommended that they just follow the opinion of any scholar, affirming that all the opinions of the jurists derived from the same source, the *sharī'a*. He made an analogy that the *sharī'a* is just like a great fountain, while the opinions of the *jurists* are various branch fountains which originally come from the great fountain.[21] Al-Sha'rānī's position can be understood as reviving the tradition of equal orthodoxy among the schools of law.

Al-Sha'rānī's notion of equal of orthodoxy can be rooted from his spiritual hermeneutics; he refrained from limiting the reading of the revealed texts to a single interpretation. The revealed texts are rich of meaning; this richness generates the "vastness" of the divine law. Only spiritual hermeneutics, therefore, is able to lead to knowledge of the divine law in its fullness.[22] Al-Sha'rānī's spiritual hermeneutics is very much influenced by that of Muḥy al-Dīn ibn 'Arabī (d.) who views the science of the *ḥaqīqa*, which corresponds to the non-normative aspect of revelation, is unlimited, whereas the *sharī'a* is limited because it correspond to its normative aspect. With the science of the *ḥaqīqa*, one is able to perceive the multiplicity of truth of the divine law in every manifestation of the visible world.[23]

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[21] 'Abd al-Wahhāb al- Sha'rāni, *Kashf Al-Ghumma 'an Jamī' Al-'Umma* (Cairo: Muṣṭafā al-Bābī al-Halabī, n.d.), p. 3–4.

[22] Samuela Pagani, "The Meaning of the Ikhtilāf Al-Madhāhib in 'Abd Al-Wahhāb Al-Sha'rānī's Al-Mīzān Al-Kubrā," *Islamic Law and Society* 11, no. 2 (2004): p. 180, 197–198.

[23] *Ibid.*, p. 200.

In his introduction of *Kitab al-Mīzān*, al-Sha'rani convinces that the *sharī'a* is manifested in two levels: lenience and hardship; so are Muslims divided between strong and weak Muslims. Strong Muslims are directed toward the hard and perfect opinion, while the weak are directed toward the lenient. Both perfectly represent the *sharī'a*.[24] Al-Sha'rānī holds the notion of equal orthodoxy between law schools in the true sense of meaning. He argues that the good for Muslims according to God lies in the divergences among Muslim jurists.[25] Moreover, referring to such authorities as ibn 'Abd al-Barr, al-Zanati, al-Rifā'ī, al-Nawawī and al-Suyūṭī, al-Sha'rānī is of the opinion to legitimate a Muslim to change his *madhhab* either wholly or partly, because according to him the *sharī'a* constitutes an umbrella for all existing *madhāhib*.[26]

In the modern period, *ikhtilāf* is not only acknowledged but also increasingly appreciated. Reformist scholars affiliated to the school of Muhammad 'Abduh are those important proponents to value *ikhtilāf*, considering it as a source of intellectual wealth that ought to be harnessed for the benefit of Muslim society.[27] This new scholasticism, to adopt M.B. Hooker's term in describing reformist movement under the umbrella of 'Abduh's school of thought,[28] considers all existing schools of law as equal in authority. Nevertheless, the scholars of this new school are not eager to restrict themselves to the doctrines of the old schools because they believe that their predecessors are humans whose opinions could be wrong or could fit only to the interest of the people in their time.[29] In many cases when asked for *fatāwā*, these scholars provide their audience with facilities by showing an inclination toward

[24] 'Abd al-Wahhāb al-Sha'rānī, *Kitāb al-Mīzān*, ed. 'Abd al-Raḥmān 'Umaira (Beirut: 'Ālam al-Kutub, 1989), p. 62–63.
[25] *Ibid.*, p. 73–74.
[26] *Ibid.*, p. 174.
[27] John L. Esposito, "Talfiq," *The Oxford Dictionary of Islam* (Oxford University Press, 2003), p. 312.
[28] M. B. Hooker, *Indonesian Islam* (Crows Nest NSW: Allen & Unwin etc., 2003).
[29] Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: Harper San Francisco, 2005), p. 75–76.

takhayyur,[30] choosing particular rulings from other *madhāhib*, and *talfīq*, mixing views from two or more *madhāhib*.[31] An emphasis on the validity of *takhayyur* implies a readiness towards eclectic expedient with regard to the variety of Islamic legal interpretations.

This school maintains the dynamic nature of Islam: "the Qur'an has given patterns, rulings, values and principles, but it is up to every age to apply them in the most practical, ethical, and correct manner".[32] In this regard, the role of *ijtihād* according to the school's terminology is to determine which Islamic scholarly and religious legacies are the most suitable to the demands of the age. In doing so, its scholars orient their *ijtihād* chiefly within the framework of *al-maṣlaḥa al-'āmma* (public good). These scholars share the concept rather nominally with their predecessors since they have modified it according to the spirit of their age.[33]

Our discussion above illustrates that society is the native universe of the *sharī'a*. All matters related to Muslim society are discussed and articulated within the social realm. Muslim scholars who work to articulate religion are no others but members of the Muslim society.

E. Islamic Law and the Challenge of Modernity

European colonialism had displayed the theatre of power through various ways in the Muslim world before the emergence of the modern

[30] Ahmed Fekry Ibrahim observes that the term *takhayyur* was not used to refer to the practice of selecting a certain legal opinion for its utility in the pre-modern period. It was adopted by modern Muslim reformers to indicate an act of choosing legal opinions either from one school or from other schools in which utility became an essential criterion. It is *talfīq* (patching together several opinions from different schools) and *tatabbu' al-rukhaṣ*(pursuing less stringent opinions) that have been consistently used in Islamic legal theory to describe school-boundary crossing for the purpose of pursuing legal utility. Ahmed Fekry Ibrahim, "School Boundaries and Social Utility in Islamic Law: The Theory and Practice of Talfiq and Tatabbu' Al-Rukhaṣ in Egypt" (Georgetown University, 2011), p. 30, 36..

[31] Jakob Skovgaard-Petersen, "Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār Al-Iftā'" (Leiden etc.: Brill, 1997), p. 74.

[32] *Ibid.*, p. 66.

[33] Much credit must be given to Rashīd Riḍā for his creative formulation of *maṣlaḥa*. Riḍā replaced what he excluded from the domain of traditional *qiyās* (analogy) with the concept of *maṣlaḥa*, as an underlying instrument to determine the effective cause (*'illa*) that is constitutive in the operation of *qiyās*. Hallaq, *A History of Islamic Legal Theories*, p. 214, 217.

nation-state. Colonial powers officialized procedures, licensing some activities as legitimate and considering some others as unlawful. They took control by defining spaces, making distinction between public and private spheres. The state replaced religious institutions as the authoritative registrar of social life and made public education machines to produce good citizens, to foster official beliefs, and to standardize procedures, languages and scripts. Nation-states emerged as the natural consequence of these social and historical developments.[34]

The adoption of the modern nation state in the Muslim world opened a new phase in the political and social history of Muslim society. The nation state necessitates establishing political sovereignty over a territory based on historical and cultural commonalities and constructing political unity through the creation of a unified legal system and a common economic strategy. This phenomenon was a response to what has been called as "hegemonic modernity" in the Muslim world, which forced Muslim elites to undertake a 'violent' break-up with the old social, political and legal systems in order to participate in the modernization processes.[35] These processes involved institution building and the creation of a centralized bureaucracy and a national law.

To maintain its sovereignty the state establishes legal apparatus, which works to enforce formal legal norms coercively —albeit coercion here does not necessarily mean that the state apparatus will exercise physical violence; rather this apparatus possesses the power to enforce the law in the name of the state. With such a coercive power, legal norms will be respected by the citizens. Sociologists of law have been interested in the historical development of law to see how law develops and lives within certain members of a society. A sacred law is derived and developed from sacred texts or what is called divine revelation,

[34] Bernard S. Cohn, *Colonialism and Its Forms of Knowledge* (Princeton: Princeton University Press, 1996), p. 3.

[35] Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge [et al.]: Cambridge University Press, 2009).

while customary law is developed based on communal consensus. Some sociologists, like Max Weber, presuppose that with the rise of the modern state, such sacred and customary laws would disappear due to the impact of the monopolization of law by the bureaucratic state.[36] This is the locus of our discussion on the fate of Islamic law in the Muslim modern world.

Before the emergence of the nation state, Muslim societies were subjects to the *sharī'a* law along with other customary laws. The emergence of the nation state pushed Islamic law into marginal importance. Its importance was challenged by the monopolization of the state-backed law which mainly derived from Western legal codes. The conflict between the modern state and Islamic law can be explained from the fact that both come from the same genus, albeit they work in their own different ways. Both are systems that claim ultimate legal sovereignty, and machines of ruling that are designed to organize society and to resolve disputes that may disrupt the social order.[37]

Some Muslim countries, including Indonesia, indeed incorporate Islamic law into state legal system, but the adoption is mostly limited in family and social issues. The enactment of *Kompilasi Hukum Islam* (Compilation of Islamic Law) in 1991 through Presidential Instruction is often seen as an attempt by the state to integrate Islamic law to the national legal system. The jurisdiction is, however, limited only to marriage, inheritance and religious endowment. The enactment of the *Kompilasi*, as Euis Nurlaelawati argues, was by no means driven by the state intention toward an actual Islamization. Rather, it was part of the government's negotiation strategy to deal with increasingly vocal demands of Indonesian Muslim citizens with whom the Suharto regime sought political support in the midst of fragmented support within the military that used to fully support the regime.[38]

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[36] Bryan S. Turner and Adam Possamai, "Introduction: Legal Pluralism and Shari'a," in *The Sociology of Sharia: Case Studies from around the World*, ed. Adam Possamai, James T. Richardson, and Bryan S. Turner (New York: Springer, 2015), p. 2.

[37] Hallaq, *Shari'a: Theory, Practice, Transformations*, p. 361–62.

[38] R. William Liddle, "The Islamic Turn in Indonesia : A Political Explanation," *The*

The regime's political interest is apparent from the enactment of the *Kompilasi* through a Presidential Instruction rather than a Statute or Governmental Regulation that has a higher legal status.[39] The state response to meet the demand of Muslim society to accommodate the Islamic "family" law into the national legal system seems inevitable. It can be understood from the point that the family law represents the very identity of Muslim society without which Muslims will feel in danger of moral collapse, and therefore, they will defend it with all their strength.

The fall of the authoritarian regime of Suharto in 1998 was celebrated with euphoria of democracy and political liberalization. One of its consequences is the emergence of Islamist groups that demanded formal implementation of the *sharī'a* law. Sociologically, Islamism is a modern movement and emerges from the modernized segment of Muslim society. In other words, Islamism is a product of modernization in Muslim society; and it never reacts against these modernization processes.[40] Islamism works along with a modern mind. It never aims to replace the existing system, the state, but to conquer it by proposing Islam as an underlying ideology for social and political orders. In terms of legal system, it does not deviate from the concept of legal centralism as embraced by the modern nation-state. Indonesian Islamist movements did not succeed in their attempts at the national level to 'Islamize' the state during constitutional reform from 1999 to 2002. They therefore turned their attention to push local governments to adopt *sharī'a* by-law following the institutional reform and the decentralization policy that delegates some areas of authority to local governments. Except in Aceh,[41] the adoption of the *sharī'a*

Journal of Asian Studies 55, no. 3 (1996): p. 615; Robert W. Hefner, *Civil Islam: Muslims and Democratization in Indonesia* (Princeton [et al.]: Princeton University Press, 2000), p. 125; Robert Hefner, "Public Islam and the Problem of Democratization," *Sociology of Religion* 62, no. 4 (2001): p. 506–507.

[39] Euis Nurlaelawati, *Modernization, Tradition and Identity* (Amsterdam: Amsterdam University Press, 2010), p. 89–94.

[40] Olivier Roy, *The Failure of Political Islam*, trans. Carol Volk (Cambridge, Massachussetts: Harvard University Press, 1994), p. 50.

[41] Aceh experiences a unique change in terms of *shari'a* implementation in the post-

mostly covers the issue of public morality.

Like in many other Muslim countries —except probably in a few countries like Saudi Arabia— the incorporation of the *sharī'a* does not include penal law. Most Muslim countries seem not to have serious problems with the adoption of Western penal code. The absence of such problems may go back to the powerful position of the state as a legal body, but more importantly to the position of court institution in the history of Islamic law, whose decision was binding to all Muslims. It differs from the institution of *iftā'*, which never attains the authority to force Muslims coercively regarding a certain legal opinion (*fatwā*). By this I want to emphasize that the authority of the court —whatever legal system it implements and whatever consideration that the judge may take— has its precedence in the history of Muslim legal system.

Not all elements of Indonesian Muslim society agree with the Islamist move due to conceptual difference between Islamic law and the modern nation-state. Islamic law as a legal system covers both public and private affairs, ritual and transactional and social issues. More importantly, "Islamic law is a grass-root system that takes form and operates within the social universe" with Muslim jurists as the main actors who "themselves emanate from the very society and societal culture that they serve." So, it contradicts the law of the nation-state, which is "superimposed from a central height in a downwards direction."[42] For the opponents of the Islamist move, the "formal *sharī'atization*" at the state level will bring unpleasant results not only for non-Muslims who share the status of equal citizenship as

Suharto era. The province is granted authority to establish its own *shari'a* courts, *shari'a* legislation and its own *shari'a* police. Scholars view that the particular institutionalization of the *shari'a* in Aceh cannot be disassociated from the central government's attempt to resolve the political crisis in Aceh. This religious approach was taken in order to uphold the central government's agenda to protect the unity of Indonesia against separatism initiated by the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM). Moch Nur Ichwan, "The Politics of Shariatization: Central Governmental and Regional Discourses of Shari'a Implementation in Aceh," in *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Boston: Islamic Legal Studies Program, Harvard University Press, 2007), p. 193–215; Arskal Salim, *Challenging the Secular State* (Honolulu: University of Hawai'i Press, 2008).

[42] Hallaq, *Shari'a: Theory, Practice, Transformations*, p. 364.

Muslims, but also for Muslims who disagree with the official religious interpretation taken by the state.

F. Making *Sharī'a* Democratic

The modern nation-state concerns with security and public order, and therefore enacts a body of law to serve this purpose. This development to some extent contributes to pushing modern Islamic legal debates to cover issues mostly on Muslim rituals and certain aspects of transaction. Those aspects mostly belong to private spheres, which are out of the modern state's interest. Modern Islamic legal discourses tend to narrow the importance of *ikhtilāf*, which is in fact a social reality of the *sharī'a*. Legal opinions (*fatāwā*) issued by Indonesian Islamic organizations often orient the publics toward adopting firm opinions. Some even adopt a form of governmental instruction or decision by using such formal phrases as "referring to", "considering", and "it is decided that" in order to impose a sense of authority.[43] Besides, the majority of Indonesian Muslims still belong to the authorities who orient their legal paradigm either strictly within the Shāfi'ī legal tradition or legal preference (*tarjīḥ*).

Our study will highlight a new trend that moves in the opposite direction from the dominant legal tendency. It is Muhammad Quraish Shihab (b. 1944), an Indonesian exegete and Azhari graduate of Hadrami descent, who authorizes the doctrine of *takhayyur* in order to provide Muslims with numbers of options of legal opinions. His position, as such, strongly reflects the legal doctrine of the new scholasticism. Shihab's argument of valuing *ikhtilāf* lies in his contention on the 'ambiguity' of the revealed texts, which is prone to various interpretations. He makes an analogy that legal differences are just like different "dishes" (*hidangan*) served by God; everyone may choose whatever he likes according to the quantity that suits his

[43] Moch Nur Ichwan, "Ulama, State and Politics: Majlis Ulama Indonesia after Suharto," *Islamic Law and Society* 12, no. 1 (2005): p. 52.

need; whatever the kind and quantity of dishes he takes, all come from God.[44] There are several opinions of Shihab that we may categorize as a strong tendency toward valuing *ikhtilāf* and hence democratization of the *sharī'a*. By democratization, I mean that everyone has his full freedom to choose whatever manifestation of the *sharī'a* that befits their contention and situation.

1. The Moon-sighting Controversy

It has been widely known that the beginning and the end of the Holy month Ramadan become an annual polemic among Indonesian Muslims. This happens because they have been long divided by various opinions given by different religious authorities that had established themselves before the emergence of the Indonesian state in 1945. To mention some, Muhammadiyah was founded in 1912, Persatuan Islam (PERSIS, the Unity of Islam) in 1923, and Nahdlatul Ulama (NU, the Awakening of the *'Ulamā'*) in 1926. Meanwhile, the Ministry of Religious Affairs and the Council of Indonesian *'Ulamā'* (Majelis Ulama Indonesia, MUI) were only founded in 1945 and 1975, respectively. The government attempts to play its role to unite different perspectives regarding the Muslim calendar and acts as a ruler to narrow the differences. However, the *hilāl* question in Indonesia seems to be much more complex than imagined for it involves not only different methods and standards, but also 'politics' among different Islamic groups In Indonesia.

In his response to a question addressed to him, Shihab mentions two solutions, and in his view if Muslims were willing to agree, the problem would be solved. The first suggests that Muslims submit the *hilāl* matter to the state authority, following a legal doctrine "the government's decision relieves the dispute" (*ḥukmu 'l-ḥākim yarfa'u 'l-khilāf*). The other solution is to adopt *wilāyat al-ḥukm* (territorial

[44] M. Quraish Shihab, *M. Quraish Shihab Menjawab 101 Soal Perempuan Yang Patut Anda Ketahui*, 4th ed. (Ciputat: Lentera Hati, 2011), p. xv–xvi; M. Quraish Shihab, *Seks, Mistik Dan Ibadah* (Jakarta: Republika, 2004), p. 110–111.

decision); if the moon has already been seen by a member of Muslim society in a particular region, Muslim from other regions may follow this finding. Shihab realizes that such offered solutions still cannot solve the polemic because each party stands firmly with its own opinion. In this situation, Shihab views the importance of preserving the greater public interest (*kemaslahatan yang lebih besar*), i.e., avoiding polemic and respecting difference.[45]

The legal postulate *ḥukmu 'l-ḥākim yarfa'u 'l-khilāf* has its root in Islamic legal tradition. Shihāb al-Dīn al-Qarāfī (d. 1285) proposes this postulate in the context of inter-personal relations in order to legitimize the opinion of the ruler and to call those involved in a conflict to adopt the ruler's opinion.[46] The reason is to resolve the conflict and to stop enmity and the spread of damage which contradicts the purpose behind the appointment of the ruler.[47] On the other hand, Ibn Taimiyya (d. 728/1328) views that the ruler's opinion does not apply universally; it is binding only for people who raised a certain issue to the ruler.[48] Shihab proposes the realization of public interest by introducing this legal postulate, but then realizes that its implementation in Indonesia does not meet this purpose. Then he turns to *ikhtilāf* as a legal foundation to realize a greater good for Indonesian Muslims.

In his response to the polemic of *'Id al-Fiṭr* (the Feast of breaking the Fast), Shihab again gives the freedom to Muslims either to break or to continue the fasting according to his own conviction. Adopting a Sufi perspective, he emphasizes that sincerity in practicing religion is much more important than polemicizing the difference, which touches only the level of perspective, not the purpose.[49]

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[45] See https://www.youtube.com/watch?v=Rvu_QDJ01X0 accessed on January 9, 2014.

[46] Al-Qarāfī says, "Know that the judgment of the ruler in the matters of *ijtihād* (legal opinions) repeals the disagreement and the opponent (has to) change his opinion in favor of the opinion of the ruler (*i'lam anna ḥukma 'l-ḥākim fī masā'ili 'l-ijtihād yarfa'u 'l-khilāf, wa yarji' al-makhālif 'an madhhabih li-madhhabi 'l-ḥākim*). Shihāb al-Dīn al- Qarāfī, *Al-Furūq* (Beirut: Dār al-Kutub al- Ilmiyya, 1998), II: p . 179.

[47] *Ibid., II*: p. 179–180.

[48] Taqī al-Dīn ibn Taimiyya, *Majmū'at Al-Fatāwā*, ed. 'Āmir al- Jazzār and Anwar al- Bāz, 3rd ed. (Mansoura: Dār al-Wafā', 2005), XXXV: p. 218.

[49] M. Quraish Shihab, *Lentera Hati*, 31st ed. (Bandung: Mizan, 2007), p. 428.

2. Bank Interest

Bank interest is among the most widely discussed topics in the modern Muslim world for it is frequently linked to the prohibition of usury (*ribā*) in Islam. Shihab's extensive discussion on *ribā* can be found in his *Membumikan al-Qur'an* which highly echoes the opinion introduced by scholars of the new scholasticism. He analyzes the Qur'anic verses related to the topic of *ribā* (Q. 2:278-281, 3:130, 4:161, 30:39)[50] according to their chronological order. Of those, in his view, only Q. 30:39 belongs to the Meccan chapter, while others Q. 3:130, 4:161 and 2:278-281, respectively belong the Medinan chapter. Of these, only Q. 3:130 and Q. 2:278-281 are related to *ribā* which is prohibited by religion.

Shihab focuses his discussions on three important issues: *aḍ'āf mudādafa* (multiplying by doubling), *mā baqiya min al-ribā* (remains of usury), and *falakum ru'ūsu 'amwālikum* (you may have your principal) – *lā taẓlimūna wa lā tuẓlamūna* (you do not suppress, nor are you suppressed).

Regarding the question of *multiplying by doubling*, Shihab analyzes a number of reports which inform common practices of *ribā* in the pre-Islamic period. The creditor used to come to the debtor in order to collect the debt that was already due. When the debtor was unable to pay, the creditor gave him a time extension, but with one condition to pay the debt with excess. The debtor had no choice but to accept

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[50] Q. 2:278-281, *O you who have believed, fear Allah and give up what remains of usury, if you should be believers ▫ And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do not suppress, nor are you suppressed ▫ And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew ▫ And fear a Day when you will be returned to Allah. Then every soul will be compensated for what it earned, and they will not be treated unjustly.*

Q. 3:130, *O you who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful.*

Q. 4:161, *And [for] their taking of usury while they had been forbidden from it, and their consuming of the people's wealth unjustly. And we have prepared for the disbelievers among them a painful punishment.*

Q. 30:39, *And whatever you give for interest to increase within the wealth of people will not increase with Allah. But what you give in zakah, desiring the countenance of Allah - those are the multipliers.*

the condition. Shihab highlights that the excess was never mentioned at the time of debt transaction, but imposed in return for the debt delay, commonly termed as *ribā al-nasī'a* (interest of deferment). According to him, the prohibition in text is still unclear, whether on the multiplying by doubling, or any kind of excess.[51]

Shihab observes Q. 2:278: "*…and give up what remains of the usury*," where *ribā* is expressed in the definitive form. It implies whether the command to leave the remain applies a particular type of *ribā*, which is doubled, or not. Shihab views that *ribā* in the verse seems to indicate that multiplied by doubling as reports on the common practices of usury in the pre-Islamic time. Because "multiplying by doubling" seems not to be the reason behind the interdiction of *ribā*, Shihab comes to examine the phrase *falakum ru'ūsu 'amwālikum*, which suggests that the creditor may take back his principal. Accordingly, any kind of excess in the deferment of debt, whether it is multiplied or not, is religiously not accepted.

However, Shihab does not see that any excess in debt payment is the main reason behind the prohibition of *ribā*. He observes how Q. 2:279 ends with the phrase *lā taẓlimūna wa lā tuẓlamūna*, which prohibits the element of suppression in debt transaction. The next verse Q. 2:280 restates more clearly; if the debtor is in hardship, it will be much better for the creditor to postpone the payment until a time of ease comes and to give the needy some amount of money as charity.[52] In line with this analysis, Shihab wants to emphasize that the prohibition does not simply lie in any excess of principal. In other words, excess only becomes illegal when accompanied by suppression (*ẓulm*).[53]

Nevertheless, Shihab does not clearly answer when the case is that the excess is conditioned at the beginning of debt transaction. He tends to view that excesses in debt transaction must not always be seen as unlawful,

[51] M. Quraish Shihab, *Membumikan Al-Qur'an: Fungsi Dan Peran Wahyu Dalam Kehidupan Masyarakat*, 2/new ed. (Bandung: Mizan, 2013), p. 409–412.
[52] *Ibid.*, p. 416–17.
[53] *Ibid.*, p. 417–18.

but does not explicitly suggest that interest is acceptable without any qualification. He renders the opinion of Muḥammad Rashīd Riḍā who views that usury does not include a case when a man gives another some amount of money to work with it by determining a certain rate of benefit during the contract because such a transaction is considered profitable for both. Interest is prohibited when it is unilaterally imposed on one party and brings benefit to the other without any effort but suppression and greed.[54] In this matter, Shihab seems to follow 'Abduh and Riḍā who tolerated interest if a scheme of *muḍāraba* can be devised to legitimate any excess beside the prinsipal.[55]

When asked about the ruling of working at a conventional bank whose transaction involves interest, Shihab devises his answer within the framework of valuing *ikhtilāf*. The questioner seemed confused with widely circulating opinions on the association of bank interest with *ribā*, which is religiously prohibited. In his response, Shihab affirms that bank interest is a matter of divergence among modern Muslim scholars. What is surely permissible, according to him, is bank transaction that does not involve interest. But again, Shihab leaves the matter to the conviction of each individual; if one believes that bank interest is not identical to *ribā*, then working at a conventional bank is permitted, but if one considers it closely identical to *ribā*, he may leave the job and find another. Yet, Shihab is convinced that not all transactions within conventional banks can be definitely categorized as *ribā*. So, in the case of a mixture, working at a bank can still be justifiable due to the existence of permissible transactions.[56]

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[54] Muḥammad Rashīd Riḍā, *Tafsīr Al-Manār*, 2nd ed. (Cairo: Dar al-Manar, 1947), III:116; Shihab, *Membumikan Al-Qur'an: Fungsi Dan Peran Wahyu Dalam Kehidupan Masyarakat*, p. 418.

[55] Chibli Mallat, "The Debate on Riba and Interest in Twentieth Century Jurisprudence," in *Islamic Law and Finance*, ed. Chibli Mallat (London: Graham & Trotman, 1988), p. 74. In Islamic legal discourse, *muḍāraba* is a business contract with pre-agreed proportional share of profit between two parties where the capital owner entrusts his money to the second party to do certain business. In *muḍāraba*, however, if there is any loss, it will be borne by the capital owner alone.

[56] M. Quraish Shihab, *M. Quraish Shihab Menjawab 1001 Soal Keislaman Yang Patut Anda Ketahui*, 14th ed. (Ciputat: Lentera Hati, 2014), p. 639–641.

In this way, Shihab features *ikhtilāf* as mercy both for Muslim society and individuals. For Muslim society, valuing *ikhtilāf* may become a constitutive element in upholding public good when legal agreement is inconceivable. For Muslim individuals, *ikhtilāf* can facilitate different convictions of religious practices. *Ikhtilāf* 'guarantees' that sincere worship will not go in vain before God who does not consider physical differences, but sees the spiritual quality of man.

G. Concluding Remarks

The adoption of the modern nation-state —which is a modern style of domination and sovereignty that seeks a unified political, legal and economic system— in the Muslim world is inevitable. It imposes structural transformation in Muslim society, not only introducing a distinction between public and private spheres but also putting the state as a legal body above all existing kinds of law, which had been long practiced and adopted in a given society. This development puts Muslim society in a big dilemma regarding the position of Islamic law, which is supposed to occupy a superior position due to its divine origin. A radical response to this new development comes from Islamist groups, which sought to 'Islamize' the state. In Indonesia they gained an important momentum in the post-authoritarian regime of Suharto.

However, Islamization of the state is often seen by its opponents to pave the way for Islamic legal authoritarianism since only certain interpretations of Islamic law will be integrated to the state legal system and then imposed to all Muslim citizens who may disagree with all of the state interpretations of religion. In the midst of contestation between state secularization and Islamization, there emerge an attempt to bring the *shari'a* back its initial habitat, the Muslim society with all its unique dynamics. In Indonesia, Muhammad Quraish Shihab is a strong proponent, who emphasizes the importance of valuing *ikhtilāf*, which constitutes the social reality of the *shari'a*. Valuing *ikhtilāf* not only offers facilities to Muslims, but also gives a sense of democratic

sharī'a against any religious authoritarianism. However, this trend is still not popular and only limited in private or individual spheres for the state will surely interfere public affairs for the sake of public order. *Wallāhu a'lam bi 'l-ṣawāb.*

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