Juristic Differences (*Ikhtilaf*) in Islamic Law: Its Meaning, Early Discussions, and Raesons (A Lesson for Contemporary Characteristics)

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الملخص

إن اختلاف الرأي والقضاء في الأحكام الإسلامية بين علماء الفقه هو أمر بدأ منذ العصور الأولى من تاريخ الإسلام بل وحتى في حياة الرسول حينما اختلف بعض الصحابة في فهم أوامره وفهم نصوص القرآن وفي بعض الحال قد يسكت الرسول في ذلك وهذا إن دل على شيء فإنما يدل على أن الاختلاف في استنباط الأحكام أمر مسموح منذ فجر الإسلام.

وقد نوقشت قضية اختلاف الفقهاء منذ عهد الصحابة وكتب عنها العلماء منذ العصور الأولى من تاريخ الإسلام وازدادت تلك الكتب التي تبحث عنها وتطورت. فقد قسم الباحث المؤلفات التي تتحدث عن ذلك الاختلاف إلى قسمين المنهج الجدلي والمنهج الوصفي. إن المنهج الأول يهدف إلى أضعاف الرأي أو المذهب الآخر وعندما عرض أحد الرأي الآخر أو مذهبه فإنما يقصد به بيان عناصر الضعف فيه وبالتالي ينقده ويضعفه ليقول بعد ذلك أن رأيه فقط هو الأقوى والأصح. أما المنهج الثاني فإن الكاتب عندما يعرض الآراء فإنه لا يهدف إلا لأجل وصف الاختلاف بين العلماء في الفقه الإسلامي وليس له هدف لأجل تغليب الرأي الآخر وترجيح رأيه.

فقد رأى الباحث أنه آن الأوان لإجراء الدراسات النقدية الجادة عن

اختلاف الفقهاء بل يكون من الأحسن أن يكون موضوع اختلاف الفقهاء عنوانا أو إحدى التخصصات التي تبحث بصفة جدية ودقيقة. إن دراسة اختلاف الفقهاء عند الباحث أكثر إلحاحاً وأهمية من دراسة الإجماع وليس كما يحدث الآن حيث أن العكس هو الواقع. وقد بحث كثير من الناس قضية الإجماع بصفة مستفيضة. أما قضية الاختلاف فلا يبحث عنها إلا قلة من الناس لا سيما إذا كانت الدراسة نقدية مع أن الإجماع عند الباحث ليس واقعيا وإذا حدث ذلك فإنه في حدود ضيقة في حين أن الاختلاف موضوع واقعي جدا وسيتكرر حدوثه إلى ما شاء الله.

والدراسة عن اختلاف الفقهاء في العصور القديمة يمكن أن نستفيد منها في حياتنا المعاصرة لتكون منهجا للمكفرين المسلمين المعاصرين في إبداء آرائهم القائمة على أساس التسامح في الحياة ذات الميزة التعددية. وفي نفس الوقت يمكن أن نستفيد منها في وضع منهج تفكيري لأننا عن طريق دراسة الاختلاف في العصور القديمة نستطيع أن نقيس بها على القضايا المعاصرة مثل القضايا السياسية ومشكلات حياة الأمة بصورة عامة. وعندما بحثنا عن أفكار العلماء القدماء نستطيع من خلالها الاستفادة في حل المشكلات التي تظهر في حياتنا المعاصرة فقد رأى الباحث أن هذه الاستفادة ليست متوقفة على ما يتعلق بالأحكام الإسلامية بمعناه الضيق ولكنها تتعدى إلى المشاكل الاجتماعية والإنسانية بصورة عامة مما هو داخل في التقاليد الإسلامية ضمن البحوث في الأحكام الإسلامية.

Abstrak

Perbedaan pendapat atau perbedaan keputusan dalam hukum Islam di antara ulama fiqh (*ikhtilaf al-fuqaha*) merupakan kebiasaan sejak masa awal. Bahkan, ketika Nabi Muhammad, saw masih hidup, perbedaan itu telah terjadi. Yaitu, ketika sahabat Nabi terjadi perbedaan dalam memahami perintah Nabi atau dalam memahamai teks al-Qur'an, Nabi dalam beberapa hal membiarkannya. Ini dipahami sebagai dibolehkannya terjadi perbedaan pendapat dalam menentukan hukum Islam sejak masa awal.

ikhtilaf al-fuqaha kemudian telah didiskusikan sejak masa sahabat dan juga ditulis sejak masa yang sangat awal. Buku tentang *ikhtilaf al-fuqaha* juga bertambah terus. Dalam perkembangannya itu, saya mengelompokkan tulisan, termasuk buku, mengenai *ikhtilaf al-fuqaha* itu pada dua kelompok: Pertama, saya sebut dengan *polemical* (model polemik) dan kedua *descriptive* (model deskriptif). Yang pertama (*polemical*) bertujuan untuk melemahkan pendapat pemikir atau ulama (*madhhab* yang lain). Dimuatnya pendapat orang atau *madhhab* lain dengan maksud untuk menjelaskan kelemahan-kelemahan yang ada untuk dikritik dan dilemahkan yang kemudian untuk mengatakan bahwa pendapatnya sendirilah yang lebih kuat dan hebat. Yang kedua, si penulis sekedar menguraikan apa adanya tentang apa yang terjadi mengenai perbedaan pendapat dalam penentuan hukum Islam itu. Si penulis tidak mempunyai target atau tujuan demi mengalahkan pendapat pemikir lain yang dikemukakan dan tidak pula demi menguatkan pendapatnya. Namun semata-mata menginformasikan kepada pembaca apa yang terjadi mengenai perbedaan pendapat dalam penentuan hukum Islam itu.

Menurut hemat saya, kini harus dilakukan studi kritis dan serius mengenai *ikhtilaf al-fuqaha* . Bahkan akan lebih baik jika *ikhtilaf al-fuqaha* itu menjadi sebuah topik atau bahkan semacam sub-disiplin keilmuan yang dibahas serius dan detail. Menurut hemat saya, kajian mengenai *ikhtilaf al-fuqaha* jauh lebih diperlukan dari pada kajian mengenai *ijma'*. Namun, kini yang terjadi sebaliknya. *ijma'* dibahas banyak orang dan secara panjang lebar; sedangkan *ikhtilaf* sedikit sekali dibahas orang, apa lagi yang bercirikan kajian kritis ini. Padahal, *ijma'* itu sudah tidak lagi realistik (kalau toh ada hanya sedikit dan dalam batasan yang sangat prinsip), sementara itu *ikhtilaf* sangat realistik dan akan selalu terjadi sampai dengan akhir nanti.

Kajian *ikhtilaf* pada masa klasik itu dapat kita jadikan pelajaran untuk masa kontemporer ini. Pelajaran ini meliputi sikap mental (*way of life*) para

ilmuwan muslim kontemporer, sehingga terjadi toleransi dalam kehidupan pluralistik dalam hal berpendapat. Dan dalam waktu bersamaan, juga dapat menjadi pelajaran dalam hal *way of thinking*, baik dalam hal metodologi maupun lainnya. Oleh karena itu, dengan menjadikan contoh-contoh kajian klasik kita membuat anologi untuk kasus-kasus kontemporer, seperti masalah-masalah politik, dan kehidupan umat secara keseluruhan. Kita dapat belajar dari para pemikir muslim klasik dalam membahas kasus-kasus yang bermunculan di masa kini. Menurut hemat saya, bukan hanya yang berkaitan dengan hukum dalam pengertian khusus seperti dalam ilmu hukum namun sekaligus meliputi masalah-masalah sosial dan humaniora secara keseluruhan yang dalam tradisi Islam dapat masuk ke dalam pembahasan hukum Islam.

Many people are confused in understanding Islamic law, because they think that Islamic law is identical with the shari'ah or even the *wahy* (revelation) of God. Here is the point, that, in fact, the term Islamic law has never lost its intellectual character, since it has almost always come out from the exercise of the jurists (*fuqaha'*). At the same time, it has never lost its religious label in all cases. Because of its intellectual character, Islamic law has never been free from differences. In other words, because it is the product of the Muslim jurists, it can never been avoided from differences of opinion among them. In addition, a single Muslim jurist may have more than one legal opinion on a single case. Indeed, this is when we see the essence of Islamic law, since a jurist may have different opinions on the same case, because of different places, times, and other circumstances which surround him. When it is possible for a single jurist to have several different judgments on a single case, it is more legitimate for several different jurists to have different judgments among them.

It is also true, that some of the essence of Islamic law comes directly from the texts, either the Qur'an or the sunna of the Prophet. However, there is still a room to have differences among the jurists when they interpret those texts. In other words, Muslim jurists may have differences of interpretation on a same single text. Finally, individual judgment of every jurist may have strong influence on making *ikhtilaf* in Islamic law.

This paper will discuss *ikhtilaf* in Islamic law, which comprises, at least,

its meaning, early discussion, and reasons. It is hoped that this discussion will be meaningful to be a lesson for contemporary characteristics. Indeed, it would teach us to take a lesson from the classical Muslim jurists whose lives were still very close to the time of the Prophet: a lesson which is very important to be a foundation for both theoretical and empirical characteristics.

Ikhtilaf: Meaning and Theoretical Framwork

The words *ikhtilaf* and *khilaf*, which have the same roots, *kh-l-f*, in etymological term have the same meaning. Each of them means "difference" or "diversity" (*mughayara*) in any thing (saying, opinion, characteristic, practice, etc.)[1]

In any dictionary, it also means dissimilarity, inconsistency, incompatibility, discordance, divergence, disagreement, contradiction, variation, and unlikeness. Al-Aṣfahānī gives an etymological definition, as follows:

> *Al-ikhtilaf* and *al-mukhalafa* denote that each thing is on path other than the path of its counterpart, in state or in statement. Another of its meanings is 'inequality'; thing which are not equal being certainly different and distinguished from one another...As for *khilaf*, it means 'conflict,' connoting the meaning of *ikhtilaf* and exceeding it.[2]

In terminological term, some Muslim scholars distinguish between ikhtilaf and *khilaf*, for *khilaf* usually has a negative connotation. Al-Shāṭibī is one of the scholars who curs *khilaf*, because, according to him, "the disputant does not pursue the will and pleasure of Allah."[3]

Considering *ikhtilaf* as a technical term, Joseph Schacht defines it as "the differences of opinion amongst the authorities of religious law, both between the several schools and within each of them."[4] The term *ikhtilaf* (difference, diversity) can be found in the alleged prophetic *ḥadīth* "*ikhtilafu ummatī raḥmatun*" (Difference of opinion in my community is [a sign of] the bounty of God), and hence views *ikhtilaf* positively.[5] However, in some verses

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[1] Ṭāhā Jābir al-'Alwānī, *Adab al-Ikhtilaf fī 'l-Islām* (Herndon: IIIT, 1987), 22.

[2] Ahmad Zaki Hammad, *Islamic Law: Understanding Juristic Differences* (Indianapolis: American Trust Publications, 1992), 15-16. Quoted from al-Rāghib al-Aṣfahānī, *al-Mufradāt* (Beirut: Dar al-Fikr, 1972), 156.

[3] Al-Shāibī, *al-Muwafaqāt fī Uṣul al-Shari'a*, ed. 'Abdallāh Darrāz (Beirut: Dār al-Ma'rifa, no date), IV: 222.

[4] Joseph Schacht, "Ikhtilāf," *Encyclopaedia of Islam* (new ed.), III: 1061b.

[5] In his introduction to al-Ṭabarī's *Ikhtilaf al-Fuqaha'*, F. Kern quotes this alleged *hadīth* without mentioning its chain of transmission. F. Kern, "Muqaddima," in al-Ṭabarī,

of the Qur'ān, such as 10: 93, 11: 118, and 19: 37,[6] as well as some *ḥadīths*, *ikhtilaf* is given a rather negative connotation. There are also some scholars who have condemned *ikhtilaf*, among the great Andalusian jurist Ibn Ḥazm.[7] Yet Ibn Ḥazm (d. 456/1065) himself produced his own opinions which differed from those of other jurists, thereby adding another *ikhtilaf* among Muslim religious scholars.

In *fiqh* (Islamic positive law), the term *ikhtilaf* is quite common. Although in early times the term *fiqh* covered several areas of religious knowledge other than law (e.g., *kalām*, *'ilm*, and perhaps also *zuhd* [asceticism]), it "never lost its intellectual character."[8] Concerning the development of the meaning of "*fiqh*," Fazlur Rahman explains that *fiqh* passed through at least three stages. In the first stage, it meant "understanding," which opposed and simultaneously supplemented *'ilm* (learning), the "authoritative given," the Qur'ān and the Prophetic *sunna*. Thus *fiqh* here was used in order to understand, and even to deduce, the "authoritative given"; it was the *ra'y*, the personal opinion of the jurists. Whereas "*'ilm*" referred to the process of learning and also to its objective, *fiqh* referred only the process or activity of understanding or deducing the "authoritative given." In the second stage, both *'ilm* and *fiqh* referred to knowledge; thus there was an *'ilm* of religion as well as a *fiqh* of religious matters. At this stage, when *fiqh* was used in the religious field, it still meant the entirety of religious thought, not only legal thought, and hence we could have a book by the title *al-Fiqh al-Akbar* (the Greater *Fiqh*), allegedly written by Abū Ḥanīfa, which was devoted to theological issues, not legal ones. In the third stage, *fiqh* meant "a structured discipline and its resultant body of knowledge." At this stage, *fiqh* came to mean

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Ikhtilaf al-Fuqaha' (Beirut: Dār al-Kutub al-'Ilmiyya, no date), 6. Many Muslim authorities believe that this alleged *ḥadīth* is not authentic. See, for example, Muḥammad Nāṣir al-Dīn al-Albānī, *Silsilat al-Ahadīth al-Da'ifa wa al-Mawdu'a* (Beirut: al-Maktab al-Islāmī, 1972), I: 76-78.

[6] Qur'ān 10: 93 reads: "And We verily did allot unto the Children of Israel a fixed abode, and did provide them with good things; and they differed not until knowledge came unto them. Lo! thy Lord will judge between them on the Day of Resurrection concerning that wherein they used to differ."

Qur'ān 11: 118 reads, "And if thy Lord had willed, He verily would have made mankind one nation, yet they cease not differing."

Qur'ān 19: 37 reads, "The sects among them differ: but woe unto the disbelievers from the meeting of an awful Day."

[7] Ibn Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo: Maība'a al-Imtiyāz, 1978), V: 844-45.

[8] Aḥmad Ḥasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1988), 5.

Islamic positive law, a discipline which is a product of the work of the *faqih* (jurist, pl. *fuqaha'*), who claims to have independent thinking in order to interpret the *shari'a*, the revelation.[9] In other words, the meaning of the term *fiqh* was gradually narrowed down to mean an exercise in legal issues. In discussing these issues, different opinions or rules were acceptable, since "[Islamic] law was neither inflexible nor so rigidly applied in the early days of Islam, as one finds it in the later days,"[10] and "different and even contradictory laws relating to many problems could be tolerated on the basis of argument."[11] Indeed, the great Mālikī jurist al-Shāṭibī (d. 790/1388) writes that knowing the place of *ikhtilaf* trains the jurists to reach the level of *ijtihad*.[12] And there is an Arabic maxim "*man la ya'rifu 'l-ikhtilafa lam yashumma ra'ihata 'l-fiqh*" (The person who does not understand divergence in doctrine, has not caught the true scent of *fiqh*).[13]

Examples of *ikhtilaf* among the first generations of the Muslims following the death of the Prophet can be seen through differences of the practice of the caliphs and later in the existence of a number of ancient schools of law and soon thereafter of a number of formal *madhahib* based on individual masters. In the ancient schools of law, *ikhtilaf* became typical of jurists. However, Schacht writes:

> The ancient schools of law, on the one hand, accepted geographical differences of doctrines as natural; on the other hand, they voiced strong objections to disagreement within each school, an opinion which was mitigated by their acceptance as legitimate of different opinions if based on *idjtihad*.[14]

Although Schacht elsewhere notes that "the opportunity for disagreement on questions of principle arose only from the time of Shāf'ī and his systematic innovation,"[15] it is clear that differences of opinion among jurists occurred not only in matters of positive law, *fiqh*, but also in those of *usul al-fiqh*, that is, in "the doctrine of the 'principles' of Muslim jurisprudence...."[16]

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[9] Fazlur Rahman, *Islam* (Chicago: The University of Chicago Press, 1979), 101-2.
[10] Aḥmad Ḥasan, *Early*, 13.
[11] *Ibid.*, 13.
[12] Al-Shāṭibī, *al-Muwafaqat*, IV: 160-62. Al-Shāibī quotes statements of other scholars about knowing the importance of *ikhtilaf* among Muslim jurists.
[13] Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 21.
[14] Joseph Schacht, "Ikhtilāf," 1061b.
[15] *Ibid.*, 1061b.
[16] Joseph Schacht, "Uṣūl," *E. I.* (first ed.), VIII: 1054b.

In actuality, although there were indeed schools based on regions, individual views still flowered and these often differed with each other in many cases (as is the case of Abū Ḥanīfa [d. 150/767] and Ibn Abī Laylā [d. 148/765]), and members of one school continued to have different opinions (as is the case of Abū Ḥanīfa, Abū Yūsuf [d. 182/795] and Muḥammad b. al-Ḥaṣan al-Shaybānī [d. 189/805], all generally considered the main architects of the Ḥanafī law).[17]

Since early Islamic times, *ikhtilāf* was not only practiced by jurists but was also the subject of their discussion. Books on the topic came soon to be written, beginning with Abū Yūsuf's *al-Radd 'alā Siyar al-Awzā'ī* and *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, al-Shaybānī's *Kitāb al-Ḥujja 'alā Ahl al-Madīna*, and al-Shāfi'ī's several books on this subject (all were in the late 2nd/8th-early 3rd/9th centuries). After the formation of the formal *madhāhib*, which were based on individual masters, many books were also composed, such as *Ikhtilāf al-'Ulamā'* of al-Marwazī (d. 294/909-10), *Ikhtilāf al-Fuqaha* 'of al-Ṭabarī (d. 310/923), and *Ikhtilāf al-Fuqahā'* of al-Ṭaḥāwī.[18] *Ikhtilāf* also flowered in *fiqh* books within single *madhhab*s. Some of these books describe the reasons for the differences of opinion among jurists, such as their interpretation of some verses of the Qur'ān or the *sunna*s, their recognition of some *sunna*s, while others do not. But the final judgment was that all juristic differences were amazingly valid and acceptable, and even considered Islamic and religious.

Al-Shāfi'ī is probably the first jurist who developed *ikhtilāf* theoretically.[19] He divides *'ilm* (legal knowledge) into two types.[20] The first type of

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[17] In his article on *fiqh*, Ignaz Goldziher writes that "the differences in law between these sects [Shī'ahs and Khārijīs] and the Sunnīs are scarcely more considerable than those of the different orthodox *madhāhib* within Sunnī Islam from one another." Goldziher, "Fiḳh," *E. I.* (first ed.), III: 105a.

[18] F. Kern mentions many books on *ikhtilāf* in his introduction to al-Ṭabarī's *Ikhtilāf al-Fuqaha* '; he is followed by other editors of books on *ikhtilāf* in mentioning *ikhtilāf* books.

[19] I dwell on al-Shāfi'ī's theory of *ikhtilāf* in this writing because al-Shāfi'ī discussed the theory of *ikhtilāf* at an early date; in addition, the essentials of the legal system which then became the classical theory of Islamic law were created by al-Shāfi'ī (Joseph Schacht, *The Origins of Muhammadan Jurisprudence* [Oxford: Clarendon Press, 1953], 1); the common culminating point of legal theory and technical legal thought was reached by al-Shāfi'ī (Schacht, *Origins*, 169). Schacht also states that "the consistent reference to traditions from the Prophet as the decisive criterion was introduced only by Shāfi'ī, following the activity of the traditionists" (Schacht, *Origins*, 213).

[20] Al-Shāfi'ī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Muṣṭafā 'l-Bābī 'l-Ḥalabī, 1940) (961-975). The figures which I mention inside parentheses in this section

legal knowledge is *'ilm al-'āmma* (the knowledge for the general public), of which no sober and mature person should be ignorant. Examples of this type are the obligation of the five daily prayers, fasting during the month of Ramaḍān, making the pilgrimage to the Sacred House, paying the *zakāt*, and so on. Other examples are the prohibition of usury, adultery, homicide, theft, drinking wine, and so forth. It is this type of knowledge which does not admit of error, interpretation or dispute (961-965). The second type of *'ilm* is *'ilm al-khaṣṣa* (knowledge of the specialists). This knowledge consists of the detailed duties and rules for which there exists neither a text of the Qur'ān nor a *sunna*. Whenever a *sunna* exists in this case, it is of the kind of *akhbār al-khuṣṣa* (the *sunna*s which are reported by a few authorities),[21] not *akhbār al-'āmma* (the *sunna*s which are accepted by the general public). This type of knowledge is subject to different interpretations and to understanding by analogy (966-7). In other words, whereas the knowledge of the general public does not permit of an error, interpretation or dispute, the knowledge of the specialists is subject to interpretation, *qiyās* (analogy), and even dispute, all of which can produce *ikhtilaf*. Although al-Shāfi'ī criticizes *ikhtilaf* and pursues legal uniformity through strictly analogical reasoning,[22] he apparently realizes that *ikhtilaf* cannot be avoided and that he can only minimize, not abolish it. He says:

> *Ikhtilaf* is of two kinds: First, if there exists an explicit decision of Allāh or a *sunna* of the Prophet or a consensus of the Muslims, no disagreement is allowed. Second, on points other than those of the first, scholars must exert an *ijtihād* (independent judgment) in search of a suspicion (*shubha*) in one of those three sources. He who is qualified for exercising is entitled to hold the opinion which he finds

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refer to paragraph numbers, not page numbers, of the *Risāla*. Here I have benefited from Majid Khadduri's *Islamic Jurisprudence (Shafi'i's Risala): Translated with an Introduction, Notes, and Appendices* (Baltimore: Johns Hopkins Press, 1961).

[21] Majid Khadduri translates *akhbār al-khaṣṣa* as "it is of the kind related by a few authorities"; and Norman Calder translates it as "of the reports of the specialists." Schacht explains that the term *khabar al-khaṣṣa* "is slightly wider than, although it largely coincides with, those commonly used for 'isolated' traditions (*khabar al-waḥid, khabar al-infirād*)" (*Origins*, 41, n. 3). I agree with Schacht's explanation; and I translate it as the *sunna*s which are reported by a few authorities, as opposed to the *sunna*s which are reported by unanimous authorities and are therefore accepted by general public (*khabar al-'āmma*). By resorting to this translation, the "isolated *ḥadīth*s" are included in the *khabar al-khaṣṣa*.

[22] Noel J. Coulson, *A History of Islamic Jurisprudence* (Edinburgh: Edinburgh University Press, 1978), 60. See also al-Shāfi'ī, *al-Umm*, VII: 475. Al-Shāfi'ī quotes some verses of the Qur'ān to disagree with differences when the arguments from the Qur'ān or the *sunna* are found. For this kind of difference, he quotes such verses as 3: 105.

implied in the Qur'ān, the *sunna*, or *ijtihād* consensus. If a problem possibly has two solutions, one who exercises *ijtihād* may decide differently from others who also do *ijtihād*, but this occurs only rarely.[23]

Thus, according to al-Shāfi'ī, there are two kinds of *ikhtilaf*, the first of which is rejected and the second is acceptable.[24] The first is the difference of opinion which occurs in spite of the availability of explicit texts of the Qur'ān or the *sunna*, or the presence of a consensus (*ijmā'*); the second is the difference of opinion which results from the practice of *ijtihād*. For this latter category, al-Shāfi'ī asserts that learned men must seek the truth by *ijtihād*,[25] which may possibly produce different solutions, i.e., *ikhtilaf*, among themselves. But, al-Shāfi'ī believes that this kind of *ikhtilaf* "occurs only rarely."[26] Although al-Shāfi'ī employs strict analogical reasoning, *qiyās*, he clearly realizes that different thinkers may conclude differently in applying *ijtihād* to the same case.

Al-Shāfi'ī further explains that the major structural features of the law of prayer, fasting, pilgrimage, *zakat*, and so forth, are known to the general public, yet their details are known only to the specialists. Interpretation is a characteristic of the specialists' knowledge, in which differences of opinion are legitimate;[27] it therefore cannot be practiced by the general public. The knowledge of the specialists may be employed by the general public, since it depends upon the specialists. Thus, as Calder states, "in every instance specialist knowledge affects and conditions general knowledge"; in other words, "the knowledge of the specialists qualifies, conditions and judges the general knowledge of the masses."[28]

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[23] Al-Shāfi'ī, *al-Umm*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Kutub al-'Ilmiyya, 1993), VII: 476.

[24] See also *Ibid.*; al-Shāfi'ī, *al-Risāla*, paragraph numbers 1672-5.

[25] Al-Shāfi'ī means by *ijtihād* the same as *qiyās*, "two names for one meaning." Al-Shāfi'ī, *al-Risāla*, paragraph numbers 1324 and 1326. However, he separates the chapter of *qiyās* from that of *ijtihād* in his *Risāla*.

[26] Al-Shāfi'ī, *al-Umm*, VII: 476; *al-Risāla*, paragraph numbers 1672, 1674-75. In fact, his claim that *ikhtilaf* occurs only rarely should be questioned, since *ikhtilaf* among the jurists has dominated legal theories and practices. Indeed, al-Shāfi'ī recognizes *ikhtilaf* on the ground that it occurred at the time of the Companions and was even supported by Prophetic *ḥadīth*. Al-Shāfi'ī, *al-Umm*, VII: 477. At the same time, al-Shāfi'ī also promotes the unity of Islamic law by using a theory of a common body of transmitted *ḥadīths* which go back to the Prophet.

[27] Al-Shāfi'ī, *al-Risāla*, paragraph numbers 961-975, 1401, 1405-07.

[28] Norman Calder, "*Ikhtilaf* and *Ijma'* in Shāfi'ī's *Risāla*," *Studia Islamica* 58 (1983): 69.

Since isolated *ḥadīth* belongs to the second, specialists' kind of knowledge, in which *ijtihād* is practiced, al-Shāfi'ī's discussion of both *ijtihād* and isolated *ḥadīth* paves the way for creating *ikhtilaf*. Al-Shāfi'ī gives, as an example of *ijtihād* that must be practiced, the case in which it is necessary for a judge to choose a just man as a witness, when the evaluation of the witness's uprightness is mixed. In such a case, al-Shāfi'ī says, "It is unavoidable that *mujtahids* should differ in their opinions (1405)," and thus "two judges may take a decision for a single case, in which one of them accepts [the testimony of the witness] while the other rejects it (1407)." According to al-Shāfi'ī, "this is [an example] of *ikhtilaf*, but each judge has fulfilled his duty" (1407). He then transmits a *ḥadīth*, "If a judge makes a right decision through *ijtihād*, he shall be doubly compensated; if he errs, he shall be compensated once" (1309).

For al-Shāfi'ī, it is clear that "all decisions based on *ijtihād* are equally valid, and there should be, as far as possible, no talk of error." Calder thus notes that al-Shāfi'ī "wishes to eliminate from the incidence of *ikhtilaf* all sense of error or sin"; while "a variety of views is permissible and acceptable, paradoxically all are right."[29] The fact remains, however, that the phrase "*kullu mujtahidin muṣībun*" (all *mujtahids* are correct) is not found in al-Shāfi'ī's writings. This is not surprising, however, for, according to Calder, it actually emerges in later generations, even though it is inspired by al-Shāfi'ī's thinking.[30] Calder also believes that the famous alleged tradition "*ikhtilafu ummatī raḥmatun*" was also first put into circulation by later generations.[31] Schacht further specifies the time frame for this circulation, saying that this alleged *ḥadīth* "had been formulated in the second century of the hijra, though it was put into the mouth of the Prophet only much later."[32]

Ikhtilaf, in fact, will exist not only in matters of the second type of knowledge, the *'ilm al-khaṣṣa*, (i.e. that which does not have any clear text in the Qur'ān or *akhbār 'āmma*), but also, to a certain extent, in the first type of knowledge, the *'ilm al-'āmma*, when understanding the plain text of the Qur'ān and *akhbār 'āmma* becomes varied due to a variety in their interpretations. In addition, and as described above, the details of *'ilm al-'āmma* belong to special-

[29]Norman Calder, "Ikhtilāf," 66.

[30]*Ibid.*, 67.

[31]Norman Calder, "Ikhtilāf," 67. About this alleged *ḥadīth*, Schacht writes that it originated from the *Fiqh al-Akbar* of Abū Ḥanīfa (Schacht, "Ikhtilāf," 1061b). However, I could not find such statement in the *Fiqh al-Akbar*. See Abū Ḥanīfa, *Kitab Fiqh al-Akbar* (Heyderabad: Dā'ira al-Ma'ārif al-'Uthmāniyya, 1953).

[32]Joseph Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1984), 67.

ists, so that *ikhtilaf* among them is acceptable. For example, the prohibition of theft belongs to the first type of knowledge, so no disagreement among jurists is permitted about it. The punishment for theft—the cutting off the thief's hand—is also agreed upon, according to the classical Muslim jurists, but they disagree as to the value of stolen goods for which the hand of the thief must be cut. According to Sufyān al-Thawrī (d. 161/777-78), the value of stolen goods must be equivalent, at least, to ten dirhams or one dīnār. According to al-Shāfi'ī, Mālik, al-Awzā'ī (d. 157/774), and Abū Thawr (d. 240/854), it must be equivalent to one-fourth of a dīnār or more. Aḥmad b. Ḥanbal (d. 241/855) says that it must be equivalent to three dirhams. And Ibn Shubruma (d. 144/761) and Ibn Abī Laylā believe that it must be equivalent to five dirhams or more.[33] For contemporary issue, the essence of punishment for theft, i. e. the cutting off the thief's hand, which was agreed upon by the classical Muslim jurists would possibly be argued by contemporary Muslim jurists. The reason is that only the prohibition of theft belongs to the first type of knowledge, while the essence of the punishment, which may range from the cutting off hand until other kinds of punishment, should belong to the second type of knowledge. Another example of *ikhtilaf* among jurists is the establishment of testimony which is a necessary institution, according to the first type of knowledge; its details, however, belong to the second type of knowledge, as in the instance of the witness for a spouse. According to al-Shāfi'ī, a husband or a wife can become a witness for each other, but children and parents cannot become witnesses for each other. Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Mālik, al-Awzā'ī, and al-Layth believe that a husband or a wife cannot become a witness for his or her spouse. According to al-Thawrī, a husband can become a witness for his wife, but a wife cannot become a witness for her husband.[34]

Political activity for Muslims can be an example for the first and the second types of knowledge. It might be agreed upon among the Muslim jurists that the endeavor or even struggle to promote Islamic values belongs to the first type of knowledge, while establishing a political party belongs to the second type of knowledge. This is why not all Muslim scholars believe in establishing a formal-Islamic political party. In fact, some of them do and

[33] Muḥammad al-Marwazī, *Ikhtilaf al-'Ulama'*, ed. Ṣubḥī al-Samarrā'ī (Beirut: 'Ālam al-Kutub, 1987), 221-22.

[34] Al-Ṭaḥāwī, *Ikhtilaf al-Fuqaha'*, ed. Muḥammad Saghīr Ḥasan Ma'ṣūmī (Islamabad: Islamic Research Institute, 1971), 194-95.

some others do not. The latter believe that in order to promote Islamic values, one can be active in formal-Islamic political party and others can be active in any political party, which is not necessarily formal-Islamic. This is why, even though the PAN (National Mandate Party) and the PKB (National Resurgence Party) are not officially using formal-Islamic bases, most contemporary Muslim scholars can accept them. Of course, some of them still blame those two political parties as being secular. They believe that because those political parties are not officially based on Islam, they cannot represent Islam nor can promote Islamic values.

Early Discussions of *Ikhtilaf*

When Muslim jurists discuss the beginning of *ikhtilāf*, they always refer to the practice of Muslims at the time of the Prophet. According to them, the Prophet himself in some cases legitimated *ikhtilaf* or provided opportunities for differences in judgment, since he gave instructions which could be interpreted in more than one way or he validated two different actions with regard to the same situation. Muslim jurists further believe that there was much evidence for *ikhtilaf* immediately following the death of the Prophet. *Ikhtilaf* in legal opinion occurred between one caliph and another, among the Companions (*ṣaḥāba*), and, especially, among the Successors (*tābi'ūn*) of the Companions. Furthermore, numerous differences—even contradictions—have been noted within the corpus of Prophetic *ḥadīth*s which were a major source of legislation. When faced by such differences, Muslim scholars usually try to harmonize the contradictory *ḥadīth*s, saying, for example, that all of them are acceptable but only one is recommended while the second is permissible and the third is obligatory, and so forth; they might also say that two different *ḥadīth*s come from different periods, and that the later one has abrogated the former. Examples of *ikhtilaf* among later generations can also be seen in the "ancient schools" of law which flourished in particular localities. The jurists within them produced the early corpus of Islamic law, but this corpus was far from homogenous. And in the generation of the Successors, there was an even greater *boon* for *ikhtilaf*—so much so that the masters of the formal, later schools refused to consider the opinions of the Successors as trustworthy sources of Islamic law.[35] Good examples of *ikhtilaf* within the

[35]We are told that when al-Shāfi'ī discussed the Successors, he said, "they were figures [thinkers] and we are [also] figures [thinkers] (*hum rijālun wa naḥnu rijālun*)." Fakhr al-Dīn al-Rāzī, *Manāqib al-Imām al-Shafi'ī*, ed. Aḥmad Ḥijāzī al-Saqqā (Beirut: Dār

same region are those between Abū Ḥanīfa and Ibn Abī Laylā, and between Abū Ḥanīfa and two of his own disciples: Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, as was mentioned above. In sum, the proliferation of schools of law in the first three centuries of Islam is itself the very evidence for the existence of *ikhtilaf*.

Ikhtilaf among Muslim jurists occurred orally as well as in writing. The former occurred directly in debate and indirectly through teaching; the later emerged in records of letters and books. At the same time, the circles of the grand scholars developed into centers for their thought and later became the centers of the schools which were attributed to their personal names: Abū Ḥanīfa in Baghdād, Sufyān al-Thawrī in Baṣra, Mālik b. Anas in Medina, al-Awzā'ī in Syria, and al-Layth b. Sa'd in Egypt.

Mālik b. Anas and al-Layth exchanged letters on the question of combining two prayers in one (*jam'*) at the time of rain. Mālik supported the combination; al-Layth rejected it. Mālik argued with al-Layth on the authority of a *ḥadīth* which, according to Mālik, was fully practiced by the Companions and later by the Medinans. Al-Layth rejected Mālik's view, arguing that the Companion Mu'ādh b. Jabal in Syria did not practice the combination because rain occurred more often in Syria than in Medina. "If the combination were very easy to do, the people of Syria would have almost always combined prayers, since rain was very frequent in that area," argued al-Layth.[36]

Since early times, Muslim jurists also wrote books on *ikhtilaf*, one type of which can be called polemical, whereas the other can be called descriptive. The former are those which were written to support the authors' respective opinions and the opinions of their schools and to argue against the opin-

al-Jīl, 1993), 456; Shāh Walī Allāh al-Dihlawī, *Ḥujjat Allāh al-Bāligha* (Cairo: Dār al-Turāth, 1936), I: 147. This statement was also attributed to Abū Ḥanīfa; see Ibn 'Abd al-Barr, *al-Intiqa' fī Faḍa'il al-Thalātha al-A'imma al-Fuqaha' Mālik wa al-Shāfi'ī wa Abū Ḥanīfa* (Cairo: Maktaba al-Qudsī, 1350 A. H.), 144. Further information about *ikhtilaf* at this time can be seen in al-Shāfi'ī, *al-Umm*, VII: 246, 250-62; al-Dihlawī, *Ḥujjat*, I: 144-52; Abū Zahra, *Ta'rīkh al-Madhāhib al-Islāmiyya* (Cairo: Dār al-Fikr al-'Arabī, no date), II: 73-77.

[36] Their letters are in Ibn al-Qayyim, *I'lām al-Muwaqqi'īn 'an Rabb al-'Alamīn*, ed. 'Abd al-Raḥman al-Wakīl (Cairo: Dār al-Kutub al-Ḥadītha, 1969), III: 107-14. Ibn al-Qayyim cites as the source of these letters Abū Yūsuf Ya'qūb b. Sufyān al-Fasawī in his *Kitāb al-Ta'rīkh*. However, scholars, like Aḥmad Ḥasan, do not take that into consideration, since "the letter is not traceable in any early sources," writes Ḥasan in *Early*, 19-20 (also n. 19).

ions of others. Examples of these are *al-Radd 'alā Siyar al-Awzā'ī*[37] of Abū Yūsuf, *Kitāb al-Ḥujja 'alā Ahl al-Madīna* of al-Shaybānī,[38] and *al-Radd 'alā Muḥammad b. al-Ḥasan* of al-Shāfi'ī.[39] On every topic of discussion in his *al-Radd 'alā Siyar al-Awzā'ī*, Abū Yūsuf first states Abū Ḥanīfa's opinion and then cites al-Awzā'ī's opinion and argument against it. Abū Yūsuf then rejects al-Awzā'ī's opinion with detailed counterarguments. Abū Yūsuf always uses a counter-*ḥadīth* to reject al-Awzā'ī's argument from *ḥadīth*.[40] Similarly, in his *Kitāb al-Ḥujja 'alā Ahl al-Madīna*, al-Shaybānī starts with the opinion of Abū Ḥanīfa on every topic of discussion. He then states the Medinese's opinion, which mostly contradicts Abū Ḥanīfa's. Finally al-Shaybānī rejects the argument of the Medinese, especially Mālik, in more detailed argumentation. For example, when al-Shaybānī discusses "who is more appropriate to give a little female orphan in marriage: her grandfather or her brother?" he starts with Abū Ḥanīfa's opinion that he is her grandfather. He adds that Abū Ḥanīfa is also reported to have said that there is no legal consequence to those who receive a recommendation about marriage, dead though they might be. Furthermore, Abū Ḥanīfa said that marriage basically belongs to guardians and the most appropriate persons to give a little female orphan in marriage are her father, then her grandfather, and finally her brother. In contrast, the Medinese believe that the orphan's brother is more appropriate than her grandfather to give her in marriage, and the one who receives a recommendation about marriage from her father is more appropriate than her brother to give her in marriage. After al-Shaybānī presents both opposing opinions, he gives a long argument in support of Abū Ḥanīfa and against the Medinese.[41] This is an example of his argument against the Medinese (*al-Ḥujja 'alā Ahl al-Madīna*). In his *al-Radd 'alā Muḥammad b. al-Ḥasan al-Shaybānī*, al-Shāfi'ī, as a defender of the Medinese, rejects Abū Ḥanīfa's opinion, which is supported by al-Shaybānī's argument.[42]

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[37] Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī*, ed. Abū 'l-Wafa' al-Afghānī (Heyderabad: Lajna Iḥyā' al-Ma'ārif al-Nu'māniyya, no date).

[38] Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Ḥujja 'alā Ahl al-Madīna* (Heyderabad: Maība'a al-Ma'ārif al-Sharqiyya, 1968).

[39] This treatise is in *al-Umm*, VII: 501-543.

[40] A serious study is needed to examine the authenticity of al-Awza'ī's and Abū Yūsuf's *ḥadīth*s.

[41] Al-Shaybānī, *al-Ḥujja*, III: 123-4.

[42] In fact, we also find a few cases in which al-Shāfi'ī's final judgment agrees with that of Abū Ḥanīfa, such as whether the blood money of women is half that of men, which is Abū Ḥanīfa's opinion, or whether it is worth up to two-thirds that of men,

Many *fiqh* books, which have in-depth discussions of legal issues, include the different opinions of the jurists of other schools, too. The authors usually want to strengthen their positions by weakening those other opinions. For example, in his *al-Hidāya*, al-Marghīnānī cites al-Shāfi'ī's opinion on accepting the testimony of those who suffered *ḥadd* punishments because of *qadhf* (accusation of fornication) after their repentance; he then rejects al-Shāfi'ī's opinion with an argument. Al-Shāfi'ī accepts that testimony based on the general meaning of the Qur'ānic verse 24: 5 *illā 'l-ladhīna tābū* (save those who afterward repent). According to him, the verse means that the testimony of those who have already repented is accepted only as an exception to the general rule of rejecting the testimony of those who accuse honorable women of fornication. However, al-Marghīnānī writes that the verse that al-Shāfi'ī uses in his argument must refer only to the previous verse, *wa ulā'ika hum al-fāsiqūn* (they indeed are evildoers). The meaning of the two verses (24: 4-5) is:

> And those who accuse honorable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evildoers. Save those who afterward repent and make amends. (For such) lo! Allāh is Forgiving, Merciful.

In other words, only the testimony of repentants of *fisq*, not of *ḥadd* punishment, is accepted.[43]

Presenting the opinions of other jurists, especially those of other schools, occurs commonly in *fiqh* books of all schools. But it also occurs within single schools, and not only within the Ḥanafi school, which almost always has the three different opinions of Abū Ḥanīfa, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī. For example, although Mālik accepts the testimony of children about injury only under some conditions (that they have not been separated from the scene of the incident, that they must be boys, and no adult men are among them), some Malīkī jurists allow the testimony of girls, and some other Mālikī jurists accept the testimony of children about murder.[44] Furthermore, in his *al-Majmū' fī Sharḥ al-Muhadhdhab*, al-Nawawī (d.

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which is the opinion of the Medinese, who defended their opinion as a *sunna*. However, al-Shāfi'ī questions the existence of that alleged *sunna* because he does not find it truly authentic. Al-Shāfi'ī, *al-Umm*, VII: 510-11.

[43] Al-Marghīnānī, *al-Hidāya Sharḥ Bidāya al-Mubtadi'* (Cairō Muṣṭafā 'l-Bābī 'l-Ḥalabī, no date), III: 122.

[44] Saḥnūn, *Min al-Mudawwana al-Kubrā* (Cairo: al-Maība'a al-Khayriyya, 1906), IV: 84.

676/1277) cites several differences among the Shāfi'ī jurists on a single case; and in many cases, their differences went in opposite directions. However, I do not consider these books polemical, since their main focus is neither to debate nor to write theoretically about *ikhtilāf*.

The descriptive books of *ikhtilāf* are those which merely state differences of opinion among the jurists and only occasionally betray the opinions of their respective authors, like the *Bidāya al-Mujtahid*[45] of Ibn Rushd (d. 595/1198). The authors of this type of *ikhtilāf* books do not focus on rejecting the opinion or argument of other jurists, but rather present *ikhtilāf*s among the jurists descriptively. The main focus there is to inform the readers about differences of juridical opinion on the various topics that they discuss. This type of books is also attested within a single school, when the authors describe differences of opinion among the jurists of their school. Al-Ṭaḥāwi's *Ikhtilāf al-Fuqahā'* is basically descriptive; yet al-Ṭaḥāwī often polemically defends his opinion or the opinion of his authorities.

The *ikhtilāf* books of al-Marwazī, of al-Ṭabarī,[46] as well as that of al-Ṭaḥāwī, utilize similar methods. Although the contents of these three books are different, within each chapter and sub-chapter the varying opinions of the jurists are cited. What makes these three books similar is that their respective authors include their own opinions (albeit with differences in emphasis), but not always on every topic under discussion. In his *Ta'sīs al-Naẓar*,[47] al-Dabbūsī (d. 430/1038) uses a different method. He offers general legal rules or maxims which he calls *aṣl*s; he formulates basic differences in the *aṣl*s (root, basic rule), and then cites some examples for each of them. Al-Dabbūsī formulates the *aṣl* of differences among Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī, and between the Ḥanafis and the jurists outside of the Ḥanafi schools. For example, in this book, al-Dabbūsī dedicates a chapter to discuss the *aṣl* of differences between the Ḥanafis and Mālik, saying that the Ḥanafis base their legal decisions on *ḥadīth*, whereas Mālik bases his legal decision

[45] Ibn Rushd, *Bidāya al-Mujtahid wa Nihāya al-Muqtaṣid*, 2 vols. (Cairo: al-Kulliyyāt al-Azhariyya, 1966). Books on *ikhtilāf* are cited in the editor's "Introduction" to al-Ṭaḥāwī's *Ikhtilāf al-Fuqahā'* and in Kern's "Introduction" to al-Ṭabarī's *Ikhtilāf al-Fuqahā'* as well (see next note).

[46] Al-Ṭabarī, *Ikhtilāf al-Fuqahā'*, ed. Frederick Kern; and another volume edited by Joseph Schacht.

[47] 'Ubaydallāh b. 'Umar al-Dabbūsī, *Ta'sīs al-Naẓar* (Cairo: Maība'a al-Imām, no date).

on *qiyās*.[48] This is very interesting, since, according to most scholars, the Ḥanafi school is usually judged as to belong to the *ahl al-ra'y*; whereas the Mālikī school belongs to the *ahl al-ḥadīth*. Thus al-Dabbūsī's explanation seems to contradict with the opinion of the majority of the fuqahā'; however, he gives an argument and examples.

Books on *ikhtilaf* continued to be written by Muslim scholars until recently. Whereas many of them have described the differences of opinion among the various schools of law, none of them has analyzed an individual authority on *ikhtilaf*. As I mentioned above, *ikhtilaf*, in fact, should be a topic of independent study which may use many different approaches, such as phenomenological or hermeneutic. The categorization of polemical and descriptive in analyzing *ikhtilaf* has not been developed as a field of study either. This is a challenge for further academic exercise.

When *ikhtilaf* is compared to *ijma'*, in fact, the reality of *ikhtilaf* is more often than that of *ijma'*. Unfortunately, writings on *ikhtilaf* is much less than those of *ijma'*. This also reminds us to think more about studying *ikhtilaf* as a field of scholarly study.

The Reasons for *Ikhtilaf*

Muslim scholars believe that when the Prophet was still alive, any disagreement among the Companions always went back to him. He was the ultimate authority whose decisions were always accepted by Muslim society at that time, although some of the decisions recognized all differences of opinion (*ikhtilaf*) among the Companions. This situation was not found after the death of the Prophet, so that there occurred *ikhtilaf* in which the Companions kept their own varying opinions. The Companions had some *ikhtilaf*s among themselves not only because no ultimate decision could be made by the Prophet, but also because many situations arose (such as the emergence of new legal problems), which had not obtained at the time of the Prophet. The Companions also spread into many regions in which they faced new legal problems resulting from the impact of local customs or from the development of society, and they had to find Islamic solutions for them. Of course, they could not always find the answers to those problems in the Qur'ān and in the *sunna* of the Prophet. Exercising *ijtihād*, thus, was wide open to the

[48] Al-Dabbūsī writes, for example, *al-aṣlu 'inda 'ulamā'inā 'l-thalāthati anna 'l-khabara 'l-marwiyya 'an al-nabiyyi min ṭarīqi 'l-aḥādi muqaddamun 'alā 'l-qiyāsi 'l-ṣaḥīḥi wa 'inda Mālikin al-qiyāsu 'l-ṣaḥīḥu muqaddamun 'alā khabari 'l-aḥādi*. Al-Dabbūsī, *Ta'sīs*, 65-67.

Companions and to the next generation as well.

The new legal problems and new customs that the Companions faced became more complex at the time of the Successors and even more so at the time of the late Successors (*tabi'u tabi'in*). The more distant in time from the death of the Prophet, the more complex were the legal problems which confronted the scholars. According to Muslim scholars, since the text of the Qur'an at their time was exactly the same as it was at the time of the Prophet, interpretations of it had to be developed; and likewise for the *sunna* of the Prophet. Therefore, the way to understand and interpret the Qur'an and the *sunna* was discussed and eventually founded. New sources were discussed and even debated, and other influences for making legal decisions were also argued. Therefore, *ikhtilaf*s among the jurists occurred, not only among those who lived in different regions and localities, but also among those who lived in the same locality. *Ikhtilaf* among the jurists, in a further development, also happened among different schools (*madhhab*s) and also within single schools. When the jurists exercised *ijtihad*, most of their results would be products reflective of *ikhtilaf* among themselves.[49]

I will discuss three reasons for *ikhtilaf* among Muslim jurists:[50]

The first is the text (*nass*). Some *ikhtilaf* among the jurists happens because of the text of either the Qur'an or the *sunna* of the Prophet.

(1) The Qur'an. While all Muslim jurists agree on the exact text of the Qur'an, they sometimes disagree about understanding it. In other words, the same verses of the Qur'an sometimes have different meanings according to different jurists. We find many examples of *ikhtilaf* among the jurists because of the way each of them interpreted the texts of the Qur'an. An example is Qur'an 5: 106: *aw akharani min ghayrikum* (or [two] others from other

[49] Fazlur Rahman, *Islam*, 77; al-Shafi'i, *al-Umm*, VII: 475-76. We are told, as Yusuf Musa quotes from al-Shahrastani's *al-Milal wa al-Nihal*, that Abu Hanifa, when he found the opinions of others, said "For him what he thought and for us what we are thinking." Yusuf Musa, *al-Madkhal li-Dirasa al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-'Arabi, 1953), 142. This consequence of exercising *ijtihad* differs from the view of Muhammad al-Hajwi, who tries to convince us that facilitating the qualifications for exercising *ijtihad* would make less *ikhtilaf*. Muhammad al-Hajwi, *al-Fikr al-Sami fi Ta'rikh al-Fiqh al-Islami* (Medina: al-Maktaba al-'Ilmiyya, 1977), IV: 441.

[50] Al-Shatibi mentions eight reasons for *ikhtilaf* among Muslim jurists, which, except for the sixth, all go back to the texts of the Qur'an and the *sunna* of the Prophet. Moreover, the sixth is about the concept of *ijtihad* and *qiyas*. Al-Shatibi, *al-Muwafaqat*, IV: 211-14.

than you), which al-Ṭaḥāwī discusses in his *Ikhtilaf al-Fuqaha'*.[51] All Muslim jurists accept the exact text of this verse, but they have different opinions on how it should be understood, and that affects the legal judgment to be derived from it. Ibn Sīrīn and Sa'īd b. Jubayr think that "*ghayrikum*—other than you" in this verse means those who are from the same religion, i.e., other Muslim brothers. Al-Ḥasan thinks that the verse means other people in general. According to Ibrāhīm, it means those from other religions. These differences result in two opposite legal opinions on the testimony of a *dhimmī* about the testament of a journeying Muslim: (a) the testimony is unlawful or rejected in the opinion of the Ḥanafi authorities, al-Shāfi'ī and Mālik, and (b) the testimony is lawful or accepted in the opinion of Ibn Abī Laylā, al-Awzā'ī, and probably al-Ṭaḥāwī. We can find many examples for this reason, even from the very small thing until the very serious one in Islamic law: from the case of ablution until the case of war and political activities. And also this is why many different madhhabs had been established, even though the imam or the founder of the madhhab originally did not mean to do it.

The jurists often have *ikhtilaf* among themselves because of their divergent understanding of the same texts of the Qur'ān. Sometimes their differences were an extension of the differences among the Companions.[52] Not only does their *ikhtilaf* in understanding the Qur'ān influence their methods for interpreting the Qur'ān, but those different methods simultaneously cause further *ikhtilaf*. For this purpose, the jurists developed specific terms for understanding the literal meaning of the Qur'ān, such as *'āmm* (general), *khaṣṣ* (special), *muṭlaq* (unrestricted), *muqayyad* (restricted), *ḥaqīqa* (real), *majāz* (metaphorical), and so on.[53] When Muslim jurists theorize about these terms differently, they always produce *ikhtilaf* in their opinions. A very important thing we should note here is the *ikhtilaf* which is originally based on the opinions of the Companions. In other words, some Companions had already differed in understanding some texts of the Qur'ān, then the jurists in the next generation and in the succeeding generations followed suit. For example, we are told about Abū Ḥanīfa's own statement that he based his *ijtihād* on the Qur'ān and the *sunna* of the Prophet; if he could not find any argument from both of them, "he picked the opinion of any Companion which he wanted

[51] Al-Ṭaḥāwī, *Ikhtilaf*, 191-92.

[52] See Aḥmad Ḥasan, *Early*, 17.

[53] For a discussion of these terms, see 'Abdallāh 'Abd al-Muḥsin al-Turkī, *Asbab Ikhtilaf al-Fuqaha'* (Cairo: Maiba'a al-Sa'āda, 1974). I will not discuss these terms here.

and ignored the opinions which he did not want."[54] The question is why some jurists picked the opinions of certain Companions and other jurists picked the opinions of others. Here, I think, might be an area for phenomenological judgments,[55] which have not been developed so far by classical as well as modern Muslim jurists properly.

The jurists' varying interpretations of Qur'ānic texts led them to interpret them differently, thereby giving rise to the problem of their detailed meanings. This problem can be formulated as "the validity of the texts of the Qur'ān are all agreed upon among Muslim jurists; however, their detailed meanings are possibly in disagreement among them." Of course, this formula will differ from that of the *sunna*.

(2) The *sunna* or the *ḥadīth* of the Prophet. Al-Shāfi'ī, as I noted earlier, categorizes *sunna* into two kinds, *akhbār al-'āmma* (the *sunna*s which are accepted by the general public) and *akhbār al-khaṣṣa* (the *sunna*s which are reported by a few authorities). The first is believed to be accepted by all Muslim jurists; but, as in the case of the Qur'ān, problems may arise with regard to detailed meaning, leading to the jurists having *ikhtilaf*. The second may have been one cause of the development of many differences among jurists. Some jurists accept the existence of a certain *sunna* because it fulfills their requirements for an acceptable *sunna*, while others reject it because it is, according to them, weak. An example is couched in a story in which Abū Ḥanīfa, Ibn Abī Laylā, and Ibn Shubruma give three different opinions in answer to a single question which was asked by the same person, and each of them produces a *ḥadīth* with full a chain of transmission which go back all the way to the Prophet. According to a report narrated by 'Abd al-Ṣamad b. 'Abd al-Wārith[56] on his grandfather's authority, "When I (i.e., 'Abd al-Ṣamad's grand-

[54] Ibn 'Abd al-Barr, *al-Intiqa'*, 143; Ibn al-Qayyim, *I'lām*, IV: 158; Yūsuf Mūsā, *Madkhal*, 143.

[55] I quote the comment of Goldziher about the methods of the Muslim jurists: "Let it suffice for us as historians of Islam, to observe that the great majority of the schools of law have in many cases availed themselves of the free exercise of such hermeneutics, to the end that life in the spirit of the law might be brought into line with actual ways of society, and that the narrow law of Mecca and Medina might be adapted to larger circumstances; for as foreign lands were conquered and radically different ways of life encountered, requirements arose that the letter of the law could not easily accommodate." Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. Andras and Ruth Hamori (Princeton: Princeton University Press, 1981), 62.

[56] 'Abd al-Ṣamad b. 'Abd al-Wārith b. Sa'īd b. Dhakwān al-Tamīmī al-'Anbarī transmitted *ḥadīth*s from several authorities. He was judged as a trustworthy person. He died

father) went to Mecca, I met Abū Ḥanīfa, Ibn Abī Laylā, and Ibn Shubruma. When I met Abū Ḥanīfa, I asked him, 'What is your opinion about a man who sells something for which he makes a condition?' Abū Ḥanīfa answered, 'Both the sale and the condition are null and void.' When I met Ibn Abī Laylā, I asked him the same question that I asked Abū Ḥanīfa, and he answered, 'The sale is permissible, but the condition is null and void.' When I met Ibn Shubruma, I also asked him the same question that I asked Abū Ḥanīfa, and he answered, 'Both the sale and the condition are permissible.' Then I said, 'May God be praised (*subḥān Allāh*)! Three jurists of Kūfa differ among themselves on a single case!' I then came to Abū Ḥanīfa and told him about the opinions of Ibn Abī Laylā and Ibn Shubruma. Abū Ḥanīfa said, 'I do not know what they said. 'Amr b. Shu'ayb transmitted to me on the authority of his father on the authority of his grandfather that the Messenger of God forbade a sale with a condition.' I then came to Ibn Abī Laylā and told him about the opinions of Abū Ḥanīfa and Ibn Shubruma. Ibn Abī Laylā said, 'I do not know what they said. Hishām b. 'Urwa transmitted to me on the authority of his father on the authority of 'Ā'isha that the Prophet said [to 'Ā'isha], "Buy [the slave girl] Barīra and make a condition that clientage belongs to the sellers; indeed, clientage belongs only to those who liberate." Thus, the Prophet permitted the sale and nullified the condition.' I then came to Ibn Shubruma and told him about the opinions of Abū Ḥanīfa and Ibn Abī Laylā. Ibn Shubruma said, 'I do not know what they said. Mas'ūd b. Ḥakīm transmitted to me on the authority of Maḥārib b. Dithār on the authority of Jābir b. 'Abdallāh who said, "The Messenger of God bought a pregnant she-camel from me and I made a condition that its baby would be mine. He allowed both the sale and the condition."[57] Therefore, the position of this kind of *sunna* (most of it) is as al-Shāfi'ī explained about *'ilm al-khaṣṣa*, in which *ikhtilaf* is legitimate: both its existence and interpretation make it a subject of disagreement among jurists. The *sunna* which is belongs to *'ilm al-khaṣṣa* has the same status as what we call ḥadīth *aḥād*, which according to the scholars of ḥadīth is considered as *ẓannī* (hypothetical). The notion of *ẓannī* theory can make some problems, because the hypothetical one produces the exact one. It is, actually, hard to understand for common cases, other than ḥadīth *aḥād*. The *sunna* or ḥadīth as the cause or reason for devel-

in 206-7/821-2. Ibn Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb* (Beirut: Dār Ṣādir, 1325 A. H.), VI: 327-8.

[57] Al-Shāiibī, *al-Muwafaqat*, IV: 230-31.

oping differences of opinion can be seen on many different examples of any activity. Whether a woman can be a president is a crucial case which originally comes from the ḥadīth *āhād*, even though the Qur'an already gave an example of queen Bilqis who had a great power at her time.

The second reason for *ikhtilaf* is the sources of law other than the Qur'ān and the *sunna*. The Qur'ān and the *sunna* are very limited, but the cases which the law must have an answer for have continually grown.[58] *Ikhtilaf*, then, appears not only on how to apply the texts of the Qur'ān and the *sunna* of the Prophet, but also on how to find sources (*adilla*) other than the Qur'ān and the *sunna* of the Prophet. The jurists thus identify and discuss such new sources as *istiḥsān* (preference), *maṣlaḥa* (public interest), *istiṣḥab* ("the presumption that a state of affairs known to exist in the past continues to exist until the contrary is established"[59]), and custom. When they differ in determining sources, there is more chance that their conclusions also differ. The jurists also differ in determining and using the valid methods to understand the texts and the other sources. Here again, the methodological differences occur not only between one school and another, but also within a single school; conversely, eclecticism among jurists from different schools may also occur. The development of various methodologies in Islamic law has, in fact, been open to almost every jurist to discuss, reject, and adopt.[60]

The third reason for *ikhtilaf*, especially for the ancient schools of law, is that jurists lived in different localities, so that jurists from the same school may differ because they reside in different cities. The main point here is that the customs of new places may influence jurists and cause them make legal decisions which are different from their earlier decisions. In addition, those who live in the same locality may very well also have *ikhtilaf*s among themselves. Furthermore, not only may different jurists decide legal problems differently, but also a single jurist may change his former opinion because he

[58]Books on *uṣūl al-fiqh* almost always talk about the limitations of the revelation and the continuously growing new cases. See, for example, Ibn al-Qayyim, *I'lām*, I: 289-92.

[59]Coulson, *A History*, 92.

[60]Schacht, "Taḳlīd," *E. I.* (first ed.), VIII: 630b; Coulson, *A History*, 90. Quoted from al-Shaybānī's *Muwaṭṭa* and al-Shāfi'ī's *Kitab Ikhtilaf Malik wa al-Shafi'i*, Schacht writes that "Shaibānī takes over a tradition from Mālik and puts his own systematic reasoning beside it. Shāfi'ī adopts Shaibani's reasoning and finds a justification for it in the very wording of Mālik's tradition; this was originally meant to express the Medinese doctrine, but Shāfi'ī succeeds in turning it into an argument in favour of his own." Schacht, *Origins*, 306.

has moved to a different place.[61]

There are other factors which support those reasons:

First, after the death of the Prophet, the Companions spread out to new locations. This spread continued in the next generations. The scholars established centers of learning in every location. They developed their own opinions to solve the problems they faced with according to Islamic law, and those opinions often differed from those of the jurists in other centers. Therefore, Islamic law developed differently in different centers. By this process, *ikhtilaf* among the jurists became diffused throughout the centers of different regions.[62] Of course, the main reasons for the difference noted here are those which I discussed above.

Secondly, it was very common for scholars to debate with each other;[63] sometimes public debates were also organized and sponsored by the government. When the jurists encountered their opponents, they would not only defend their opinions but also disprove those of their opponents. Debate was a dangerous game because the losers would lose their reputation before

[61] Ibn al-Qayyim, who is considered a strict follower of the Ḥanbalī school, i.e., the people of *ḥadīth*, accepts the notion of different opinions caused by different places and times. In his monumental book, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, he allocates an entire chapter to "Changing and Differing on a Fatwa Because of Changing Times, Places, Conditions, Intention, and Customs." Ibn al-Qayyim, *I'lām*, III: 5 ff. We are also told about two different sets of opinion of al-Shāfi'ī himself, i.e., the *qawl qadīm* (his opinions when he lived in the Ḥijāz and 'Irāq) and *qawl jadīd* (his opinions after he lived in Egypt). Almost all of his opinions of *qawl jadīd* differ from those of *qawl qadīm*, except for twenty cases, as al-Juwaynī has noted; see Al-Nawawī, *al-Majmū' fi Sharḥ al-Muhadhdhab* (Cairo: Maība'a al-'Āṣima, 1966), I: 108. In al-Ṭaḥāwī's *Ikhtilāf al-Fuqahā'*, different places do not appear as a cause of *ikhtilāf* among Muslim jurists; thus, we see *ikhtilāf*s among the 'Irāqī jurists themselves: Abū Ḥanīfa, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, Ibn Abī Laylā, Ibn Shubruma, Zufar, Abū Thawr, Sufyān al-Thawrī, 'Uthmān al-Battī, and others.

[62] Most Muslim scholars and writers, such as Muḥammad Yūsuf Mūsā, believe that *ikhtilāf* among Muslim jurists was caused by three factors: (1) the spread of the *'ulamā'* into many different cities or regions; (2) different stands between the *ahl al-ḥadīth* (the supporters of the *ḥadīth*) and *ahl al-ra'y* (the supporters of free thinking); (3) differences in receiving the *sunna* of the Prophet among the *'ulamā'*. Muḥammad Yūsuf Mūsā, *Muḥāḍarāt fi Ta'rīkh al-Fiqh al-Islāmī* (Cairo: Dār al-Kitāb al-'Arabī, 1955), II: 10-12. Shāh Walī Allāh al-Dihlawī explains several consequences based on the differences on receiving and understanding the *sunna* of the Prophet. From his explanation, it seems that most of *ikhtilāf*s have gone back to the sunna of the Prophet: because of differences on judging some *sunna*s, on receiving them, on interpreting them, and so on. Al-Dihlawī, *Ḥujjat*, I: 144-47.

[63] Al-Dihlawī, *Ḥujjat*, I: 153.

the public, whereas that of the winners would immediately go up. In this game, people would always defend their own opinions regardless of whether or not their opinions were really correct or accurate. As a result, *ikhtilaf* became diffused in society.

Thirdly, every great jurist had many students who followed his opinion.[64] These students usually compiled or abridged the sayings and teachings of their masters and spread them to other people in many areas. It is true that some of those students also developed their masters' teachings and even sometimes departed from them, but they still considered themselves the followers of their masters. Many students were fanatics for their masters' opinions and upheld them against the opinions of other jurists. Furthermore, the *madhhab* continued to survive and was diffused to different places.[65] Consequently, the *ikhtilaf* automatically became widespread, too.

To recapitulate, the subject-matter of Islamic law mostly belongs to the area of reliable differences, since very few matters of Islamic law are considered so essential in Islamic doctrines that all jurists agree upon them: These doctrines, according to al-Shāfi'ī, belong to the category of first knowledge, *'ilm al-'āmma*. Most of the subject-matter of Islamic law belongs to the second type of knowledge, *'ilm al-khāṣṣa*, about which scholars have a right to differ among themselves; *ikhtilaf*, thus, among the jurists is legitimate and acceptable. Consider, for example, the doctrine of testimony (*shahāda*). In the minds of Muslim jurists, the idea of testimony itself belongs to the first type of knowledge, *'ilm al-'āmma*, and all jurists agree upon its existence. However,

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[64] It is possible that many great jurists themselves forbade their students and other people to follow their opinion, as al-Shāfi'ī did when he was Alive, but their students still followed them, developed their doctrines, and bound themselves to them. In his *Mukhtaṣar*, al-Muzanī starts with a statement as follows: "I compose this book as an extract from al-Shāfi'ī's doctrine and from the implications of his opinion, for the benefit of those who may desire it, in spite of his prohibition to anybody to follow him or anybody else." Al-Muzanī, *Mukhtaṣar*, in *al-Umm*, IX: 3. All of the biographical dictionaries, which include al-Shāfi'ī's biography, mention that al-Shāfi'ī declared that his doctrine (*'ilm*) and his writings should not be attributed to him. See, for example, al-Bayhaqī, *Manāqib al-Shāfi'ī* (Cairō Dār al-Turāth, 1971), I 173-4 al-Nawawī, *al-Majmū'*, I 104-05 al-Ṣafadī, *al-Wāfi bi 'l-Wafayāt*, ed. Sven Dedering (Istanbul Maïba'a Wizāra al-Ma'ārif, 1949), II: 175.

[65] These students and followers who abridged, codified, and spread the doctrines of their great masters, played very important roles in the development of the *madhhab*. Because of the lack of these kinds of students, too, some *madhhab*s did not survive. Only four *madhhab*s were then agreed upon to be the equally correct and acceptable among Sunnī Muslims.

the operational details of the practice of testimony belong to the second type of knowledge, *'ilm al-khaṣṣa*, and there the jurists are entitled to their own opinions and end up producing *ikhtilaf* as al-Ṭaḥāwī discusses in his book, *Ikhtilaf al-Fuqaha'*. The reasons for this *ikhtilaf* are largely those which I have discussed above: the texts, the sources other than the Qur'ān and the *sunna*, and methodology. But the very main reason, I think, is the individual decisions of each jurist. We will not find a full agreement among the jurists, even within a single *madhhab*, about the detailed practices of the doctrine of testimony. It is clear, as al-Ṭaḥāwī shows us in his *Ikhtilaf al-Fuqaha'*, that within a single *madhhab* we find differences among the jurists almost in every section of the discussion of testimony. We also find that a jurist may very well have opinions similar to those of jurists who belong to different *madhhab*s.

Conclusion:
(From Individual Judgment to be A Lesson for Contemporary Characteristics)

Ikhtilaf among Muslim jurists which is discussed in many books, such as those of al-Ṭaḥāwī, of al-Marwazī, and of al-Ṭabarī, is a consequence of their individual free thinking. There is no evidence that the early Muslim jurists were bound by any rule of the so-called *madhhab* which forbids them from exercising independent *ijtihad*. In fact, the boundary of the concept of a *madhhab* is questionable.[66] Rather, there is evidence that a jurist easily disagreed with his master even though he was committed to his master's school. In fact, the masters, like al-Shāfi'ī, forbade other people from following them or anybody else blindly. At the same time, the jurists had no difficulty in agreeing with the masters of other schools. For example, al-Ṭaḥāwī in his *Ikhtilaf al-Fuqaha'*, not only shows that the three masters of the Ḥanafi school, Abū Ḥanīfa, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī, differed among themselves, but he also puts himself in a position of sufficient authority to differ from all of them. Furthermore, in his *Mukhtaṣar of al-Ṭaḥāwī*, he shows different opinions among those three masters of the Ḥanafi school in more detailed explanations. As a result, much of Islamic law, which is originally the activity of giving a *fatwa*, derives from the very differences in opinion among individual jurists. Indeed, we can also see differences of opin-

[66] A. Qodri Azizy, "The Concept of *Madhhab* and the Question of Its Boundary," in *Al-Jami'ah*, 59 (1996), pp. 82-92.

ion among the jurists within a single madhhab as in the tradition of the Shāfi'ī school.[67] This should lead us to re-examine the idea that Islamic law is simply the command of God, on the one hand, and that it derives from the homogenous authority of the jurists within schools or localities, on the other. Al-Ṭaḥāwī, al-Marwazī, and al-Ṭabarī also show us that the early Muslim jurists—including themselves—practiced independent thinking without being strictly bound by the systems of their schools. This means that the boundary of the *madhhab*, which is based on both regional allegiance—ancient schools of law—and the individual allegiance with which we are familiar, does not really exist in any strict form, unless there are some opinions of the masters which were developed voluntarily by their students or followers. The methods (*minhājs*) that some scholars allege as being the boundary of the *madhhab*, since they can distinguish one school from another, are not only eclectic among the jurists from different schools, but also differ even among the jurists within single schools. Eclecticism in Islamic law had also taken place among the Ḥanafīs and the Mālikīs "in the course of ninth century, by modifying and supplementing ash-Shāfi'ī's theory in a variety of respects," writes Coulson.[68]

There is no official standard content of the books which deal with *uṣūl al-fiqh*, and the books of *uṣūl al-fiqh* which were written by different jurists from the same school might differ widely in content. This means that liberal individual thinking of the jurists is a key which has played a very important role in producing and developing Islamic law, both its method, *uṣūl al-fiqh*, and positive law, *fiqh*. Islamic law is, then, a product of Muslim jurists who exercise independent thinking to interpret the texts of the Qur'ān and the *sunna* of the Prophet deductively, and also to answer legal problems inductively while going back to those texts; it is thus also an area that is capable of permitting *ikhtilaf* among those jurists. Indeed, this activity leads us to believe that the phenomenological approach of the jurists is a very important factor in the development of Islamic law. This should advise us that the philosophical approach to studying the phenomenology of the jurists is at least as important as the literal approach to studying the texts of the Qur'ān and the *sunna* of the Prophet through *'ilm uṣūl al-fiqh* and *'ilm Tafsīr*, as has been usually done.

[67] A. Qodri Azizy, "*Ikhtilāf* in Islamic Law with Special Reference to the Shāfi'ī School," in *Islamic Studies*, 34: 4 (1995), pp. 367-384.

[68] Noel Coulson, *A History*, 90.

In his *Ikhtilaf al-Fuqaha'*, al-Ṭaḥāwī shows himself to be a *mujtahid*, at least a *mujtahid muntasib*, since he presents his own opinions not only as differing from those of his masters, but sometimes as even surpassing them in authority. He almost always writes his own opinion on every topic that he discusses. Al-Ṭabarī in his *Ikhtilaf al-Fuqaha'*, has done more than that of al-Ṭaḥāwī.

The typical *ikhtilaf* among the Muslim jurists has also occurred in the tradition of every school of Islamic law. In the Shāfi'ī school, the *ikhtilaf* has occurred not only between al-Shāfi'i, the master, and the masters of other schools, but indeed also occurred between al-Shāfi'ī and his followers and especially among his followers.

A critical study of *ikhtilaf* among the jurists is very important. I hope that my study, unlike some other works, will not polemically or descriptively support or reject the opinion of the jurists, but will analyze differences critically. I characterize the writings of *ikhtilaf* among the jurists as either polemical or descriptive, but the study that I propose is neither. Rather, my goal is to study the discipline of *ikhtilaf* among the jurists and later to have a philosophical study of the phenomenology of the jurists' thought and methods.

Finally, the corpus of Islamic law, as the product of *ijtihad*, of course recognizes differences of opinion, even in its sources. The jurists do not differ on the existence of the Qur'ān, but they may differ in understanding its details, so that, in many cases, they practice Qur'ānic teachings differently. They disagree more often in determining, understanding, or applying other sources: the *sunna*, *ijma'* and *qiyas*. The conclusion that *ikhtilaf* is in fact the consequence of *ijtihad* cannot be avoided; thus the jurists must pay more attention to the theoretical development of *ikhtilaf*. The discussion of *ikhtilaf* in *uṣul al-fiqh* is more important than that of *ijma'*, since *ikhtilaf* is more practicable and has always occurred in all the stages that witnessed the development of Islamic law.

The discussion of *ikhtilaf*, furthermore, should go into two ways: to recognize *ikhtilaf* and, at the same time, to minimize it. By recognizing *ikhtilaf*, the view that Islamic law is absolutely immutable is refutable, and the idea that all Muslims must practice Islamic doctrines only by a single manner is inappropriate even impossible. By minimizing *ikhtilaf*, the view which is based on emotional desire can be avoided; it must be in accordance with the social benefits. Therefore, two suggestions below should be taken into consideration.

First, the source, such as the argument of the isolated *ḥadīth*, which

creates *ikhtilaf* should be avoided, at least minimized. Al-Shāfi'ī recognizes that the isolated *ḥadīth* belongs to the second type of knowledge, which legitimately creates *ikhtilaf*. The sources of Islamic law must be definite (*qaṭ'ī*, at least quasi *qaṭ'ī*), that is, the Qur'ān and the *sunna* which has definite proofs to go back to the Prophet. *Ḥadīth*s or *sunna*s which are contradictory to each other are better to be avoided, instead of being harmonized. Consequently, not too many *ḥadīth*s or *sunna*s are accepted. Therefore, *ikhtilaf* among Muslim jurists will occur only because they interpret the sources differently, not because they differ to determine the validity of the sources of Islamic law.

Second, two different concepts of *ijma'*, that of al-Shāfi'ī and that of the ancient schools of law should be combined. The *ijma'* of al-Shāfi'ī should be placed to what he categorizes *'ilm 'āmma*, and that of the ancient schools of law should be placed to what al-Shāfi'ī categorizes *'ilm khāṣṣa*. This means that the second kind of *ijmā'* is to maintain, or even to compromise and harmonize, differences of opinion among the jurists. Consequently, *ijma'* might be practiced on the ground of a region or nation. The *ijma'* which is held in a certain region or nation possibly differs from that of other regions or nations. It should be noted here that the very important notion concerning *ijma'*, especially that of a region or nation, is that *ijmā'* can further be abrogated by later *ijma'* when its considerations have changed. Examples of the regional *ijma'* are the minimum amount of property liable to payment of the *zakāt*, the type of dress, the type of contracts, the minimum age of children to be considered as adults, the form of government, and so on.

From the study of *ikhtilaf* in classical Muslim jurists, we should take a lesson for a contemporary characteristics, both of the attitudes of Muslim jurists and of ways of thinking among the contemporary Muslim jurists. This is very useful, especially for cases which is usually very sensitive, such as the current issues of political practices in Indonesia.

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