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A Legal and Political Analysis of Hizb ut-Tahrir's "Caliphal State": From the Perspectives of Legal Centralism, Legal Pluralism, and the Separation of Powers

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Abstract

This paper analyzes Hizb ut-Tahrir's "draft constitution" of the "Caliphal state" from legal and political perspectives. Since the conception of the state can be evaluated as a kind of "ideal type" or "thought experiment" for a modern Islamic state, understanding it with perspectives that are generally applicable to modern states as clues leads to clarifying the relationship between the characteristics of the Islamic state and the modern state. However, previous research has rarely analyzed it from such perspectives.

Concretely, this paper uses (1) legal centralism and legal pluralism, and (2) the separation of powers. On the other hand, the "draft constitution" of the "Caliphal state," consisting of 191 articles in total, is a very detailed and concrete design of the state.

This analysis reveals as follows; first, on the one hand, the conception of the "Caliphal state" is strongly influenced by the modern states. For example, the "draft constitution" stipulates legal centralism and the separation of powers within government entities themselves. Second, in contrast to the first finding, the position of Islamic law in the "Caliphal state" indicates characteristics proper to Islam. This is institutionalized by requiring non-contradiction with the state law. Such institutionalization can be evaluated as a distinctive feature in an "ideal type" of Islamic state in the modern age. Third, it is construed as characteristic of Hizb ut-Tahrir's "Caliphal state" that the Caliph has both executive and legislative powers.

I. Introduction

What would a "pure" Islamic state look like today? What kind of state would it be if the Caliphate (*khilāfa*) were revived in the modern age? It is these questions that are the starting point for this paper.

While there are many Muslim-majority countries today (all of which are equally nation-states), there is a constant stream of Muslims who dream of reviving the Caliphate that collapsed in 1924. In this context, this paper focuses on Hizb ut-Tahrir (*Ḥizb al-Taḥrīr*: HT),

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an Islamist organization that has called for the revival of the Caliphate and presents its detailed conception of the "Caliphal state" as a "draft constitution." As discussed below, the concept can be regarded as a kind of "ideal type" or "thought experiment" for a modern Islamic state. This paper analyzes the "draft constitution" of the state from legal and political perspectives that *can apply to modern states generally*. It leads to clarifying the relationship between the characteristics of the Islamic state and the modern state. Concretely, this paper uses (1) legal centralism and legal pluralism, and (2) the separation of powers. Through the analyses, we attempt to clarify how the conception of the "Caliphal state" can be understood from general perspectives.

The structure of this paper is as follows. In Section II, first, we point out that the previous research that has discussed the conception of the "Caliphal state" of HT has mainly focused on the thought in itself and lacked an analysis from general perspectives. Then, we propose an analytical framework that differs from the previous research. Section III provides an overview of HT and its conception of the "Caliphal state," paying attention to its denial of the nation-state. Section IV analyzes the "draft constitution" from a legal perspective, especially legal centralism and legal pluralism. In Section V, we analyze it from a political perspective, in terms of the separation of powers. In Section VI, in conclusion, it is evident that the conception of the "Caliphal state," which *ought to be* a "pure" concept in theory, is in reality strongly influenced by the modern states, but also shows peculiar characteristics regarding the position of Islamic law and the powers of the Caliph (*khalīfa*).

II. Previous Research and Analytical Framework

(1) Previous Research

Previous studies discussing the conception of the "Caliphal state" of HT have mainly focused on the concept itself. On the other hand, they have rarely analyzed it from general perspectives.

The most major previous research on HT, Taji-Farouki [1996], discusses the conception of the "Caliphal state" minutely [Taji-Farouki 1996: 63–71]. It is also argued that its conception is implicitly influenced by the modern nation-state. This point is partly in common with our analysis of the relationship between the Islamic state and modern states. However, in the book, she *only discovers* contemporary concepts (concretely, elections and political parties) in the "draft constitution" [Taji-Farouki 1996: 67–69] and does not *analyze* the content through the general perspectives of the modern states. In addition, the concrete points at issue addressed are also different.[1]

Al-Rifāʻī [2017: 295–340] is perhaps the most detailed study of HT's conception of the state. The subjects discussed range from the authorities of Shariʻa (*sharīʻa*) for the Caliphate,

1 Taji-Farouki [1996: 66] also discusses the separation of powers, but the content and positioning are very different from this paper. This is because she argues it in the context of deviation from classical Islamic theory.

to the provisions for specific elements of the state, such as the Caliph, the parliament, and the rights of non-Muslims, as well as the ambiguities, problems, and contradictions of each of them. However, the book mainly analyzes the conception of the state independently or in the Islamic context, and beyond that, it is not discussed from general perspectives.

Yamaoka [2023] discusses the basic principles of the "Caliphal state" and the provisions of the "draft constitution" regarding general rules and the Caliph, placing them also in the context of Islamic political thought. While the paper shares some points of view with our paper, it still does not attempt to analyze the conception of the "Caliphal state" through the perspectives of the modern states.

A report on the revival of the Caliphate, analyzing its history and the dynamics of modern Islamist movements [McQuaid 2007], makes a point regarding HT in common with this paper; "Even modern-day groups that advocate a caliphate model—most notably Hizb ut-Tahrir—tend not to examine the assumptions implicit in their vision. Some of these assumptions include aspects of the modern, state-centric system that currently exists" [McQuaid 2007: 3]. There is also a brief overview of the conception of the "Caliphal state" [McQuaid 2007: 19–21]. However, the aspects of the "state-centric system" pointed out are not adequately researched in the report.

In addition, Commins [1991: 207–210], Mohamed Osman [2012: 96–97], and Pankhurst [2016: 59–60] discuss the conception of the "Caliphal state," but all of them only give partial introductions or overviews of the whole. No attempt is made to analyze it from general perspectives.

However, as discussed below, analyzing the conception of the "Caliphal state" from such perspectives is significant in that it contributes to clarifying the characteristics of the "ideal type" of a modern Islamic state. Therefore, this paper seeks to contribute to understanding the nature of the modern Islamic state in a broader context through an analysis of the conception of the "Caliphal state" from the general perspectives, which has been lacking in previous studies.

(2) Analytical Framework

What this article analyzes is a document of the "draft constitution." It can be regarded as equivalent to a state law (for example, its adoption through the establishment of the "Caliphal state" envisioned by HT means that the document would function as a constitutional *law*). In this sense, this paper is an analysis of the state law, just as a study analyzing the French constitution would be. On the other hand, in Islam, as is well known, there is Islamic law deduced from the Qur'an (*al-Qur'ān*) and Sunnah (*sunna*, the traditions of the prophet) which has normative force over Muslims. Thus, in this study, which analyzes the "draft constitution" of the "Caliphal state" premised on Islamic law, the main components are *two laws* and one

state. These characteristics (in particular, the plurality of laws) could give rise to a state that is unique to Islam.

What, then, is the relationship between law and state(s) in the Islamic context? According to Islamic theory, Islamic law as the embodiment of God's will is superior to the states themselves, while states are merely a means to enforce the law [Kosugi 1994: 20–21]. In other words, the law is an end in itself, while states have only a subsidiary meaning.[2] Therefore, states (governments) are bound by the law, and historically, it is pointed out that even the Caliph, the head of state, should consult with ulama (*'ulamā'*, scholars), "the inheritors of the Sharī'ah," before enforcing any laws [Abou El Fadl 2012: 38–39].[3]

On the other hand, the perspectives used in this paper (i.e., (1) legal centralism and legal pluralism, and (2) the separation of powers) are for construing laws, including constitutional laws. These perspectives are not exclusively used for the Islamic state, but rather for understanding modern states generally. Therefore, in this paper, the image of the state of HT in the Islamic context and the perspectives of modern states intersect.

Why does this paper adopt such an approach? To answer this, we have to indicate two things: first, the characteristics of the "draft constitution" itself, and second, the methodological significance of adopting this approach. Regarding the former, the "draft constitution" is considered to be indicative of *what an Islamic state would be like in the modern age*. As discussed below, the conception of the "Caliphal state" of HT can be regarded as a kind of "ideal type" of a modern Islamic state because it is a "design" that has not yet been realized; a "thought experiment," so to speak. *Theoretically*, it can be evaluated as free from external influence.[4]

On the other hand, with regard to the latter, we point out the following. Generally, most studies on Islamic political thought have conventionally dealt with the characteristics of each thought itself (sometimes by placing it in the context of modernity). Actually, as indicated above, most of the previous research on HT's conception of the state basically understands the thought in itself.

In contrast, this paper analyzes HT's conception through the perspectives that are applicable to modern states generally. The background is the issue of the particularity and universality of Islam (especially Islamic political thought in the modern age). This, however, does not seek the conclusion that "Islam is particular/universal" lightly.

In general, conceptions of the Islamic state, especially in the context of the modern age, are regarded as having both aspects that are peculiar to Islam and universal as a modern state. On the other hand, HT's conception can be considered free from external influence *in theory*.

2 Because the Ummah (*umma*, Islamic community) is a community composed of people who have accepted Islamic law, the significance of its existence depends on the law [Kosugi 1994: 21].

3 However, as Abou El Fadl [2012: 40] points out, this does not mean that governments have not implemented Islamic law arbitrarily.

4 For details on this point, *see* Section III.

Therefore, this paper uses a different approach from previous research in order to construe the *actual* relationship between the characteristics of the Islamic state and the modern state (in other words, both aspects of particularity and universality of Islam for the modern states). For this purpose, it is necessary to analyze Islamic political thought (HT's conception of the "Caliphal state") with the perspective of the modern states as clues.

In this context, the relationship between this paper and the humanities/social sciences should also be discussed. Brown [2016: 10] and Suechika [2022: 213–217] point out that there has been a methodological polarization in the study of Islamism; the humanities and the social sciences. As discussed above, research in the humanities, for example, includes studies that identify the characteristics of the thought itself; this is research that elucidates ideology and thought (i.e., answering the "what" question) through the reading of original sources. Research in the social sciences, on the other hand, regards Islamist movements as a general political phenomenon (e.g., democratization or revolution) and deduces causal relationships related to it (i.e., answering the "why" question) from theory. In terms of particularity and universality, it can be considered that the humanities focus on particularity (the internal logic), while the social sciences pay attention to universality [Suechika 2022: 214].

Placing this paper on the above premises, we can state the following; first, this study is humanistic in the sense that its main purpose is to understand the political thought of the "Caliphal state" based on analysis of original sources. Second, on the other hand, this paper is closer to the social sciences in the point that it uses the general perspectives that can apply to the modern states, rather than elucidating the ideology in itself. However, this paper is not about deducing the causes of the occurrence (or non-occurrence) of certain events (i.e., theoretically answering the "why" question), but only about finding "what" characteristics the conception has. Therefore, this paper's approach is neither purely humanistic research nor social sciences; rather, it has both aspects of research of the internal logic and analysis from the perspective of its generalization (in terms of both particularity and universality). By adopting such an approach, we attempt to discover both the natures of the modern Islamic state.

Based on the above premises, this paper attempts to analyze the "draft constitution" of the state *by using a "yardstick" that applies to the modern states generally.* In other words, the purpose of this paper is to clarify how the concept of the Islamic state in the modern age (i.e., "ideal type" or "thought experiment") can be understood and dissected by using the general perspectives of modern states. Therefore, we aim to make a contribution beyond merely analyzing HT's conception as a case study; this paper has significance in that it analyzes one "ideal type" of the modern Islamic states from the general (and comparable) perspectives.[5]

5 Considering the conception as one of the "ideal types" of the modern Islamic state, a comparative analysis of the existing political systems of Muslim-majority countries (as realpolitik) and HT's state conception (as a reference point) would also clarify the characteristics of the existing states. This point will be discussed in a separate paper.

III. Hizb ut-Tahrir and the "Caliphal State"

(1) Hizb ut-Tahrir and the Denial of the Nation-State

HT (meaning "Liberation Party" in Arabic) is an Islamist organization established by Taqī al-Dīn al-Nabhānī around 1950.[6] It was organized with the aims of establishing an Islamic state (the "Caliphal state") and liberating Palestine [Commins 1991: 194]. It has consistently called for the revival of the Caliphate to this day.[7]

One of the characteristics of the organization is that it has branches (called "*wilāya*") all over the world. The group was established in the West Bank under Jordanian rule [Cohen 1982: 209–210; Commins 1991: 194], but under the leadership of al-Nabhānī, it expanded its activities to other Middle Eastern countries. Furthermore, after he died in 1977, during the 1980s and 1990s, their activities expanded globally, including Western countries such as the US and the UK, Uzbekistan, Ukraine, Indonesia, Turkey, and Pakistan [Mohamed Osman 2012: 90–91; Pankhurst 2016: 206–208, 211–213]. To date, the website of HT's Central Media Office contains links to 32 branches [Ḥizb al-Taḥrīr al-Maktab al-I'lāmī al-Markazī n.d.], and by 2009, it is pointed out that the group claimed to be active in more than 40 "Muslim countries" [Pankhurst 2016: 240].

By the way, HT does not recognize and strongly criticizes the nation-state, nationalism, and the borders within the Muslim world. It is indicated that the members of the organization believe that nationalism was spread to weaken Muslims and that the creation of Arab nationalism led to the collapse of the Caliphate [Mohamed Osman 2012: 95].

The criticism of the nation-state is clearly expressed in an article posted on the Central Media Office's website [Ḥizb al-Taḥrīr Wilāya al-Sūdān 2017]. According to it, the enemy, the infidel West, destroyed the Caliphate and built "skinny and petty nation-states (*duwaylāt waṭanīya hazīla*)" on its rubble utilizing the Sykes-Picot Agreement. It then goes on to state:

> The truth that must be understood is that the Caliphal state universal to the Muslims is the legacy of the prophethood, while the nation-state [*al-dawla al-waṭanīya*] separated from the rest of Muslim countries is the legacy of the infidel [*kāfir*] of colonialism, the enemy of the Muslims [Ḥizb al-Taḥrīr Wilāya al-Sūdān 2017].

It is clear from the above that HT criticizes the nation-state and calls for the establishment of the "Caliphal state," contraposing the two. It is also indicated that this critical perspective on the nation-state is concretely reflected in the provisions of the "draft constitution"; it

6 For a discussion about the group's year of establishment, *see* Pankhurst [2016: 54].

7 On the other hand, the purpose of liberating Palestine has become secondary because of the geographic expansion of the organization discussed below.

stipulates that if the "Caliphal state" is founded, it will be forbidden to establish diplomatic relations with any other state in the Muslim world [Taji-Farouki 1996: 70–71]. Based on the above assumption, the "Caliphal state" is presented.

(2) The "Caliphal State" and the "Draft Constitution"

What is the "Caliphal state?" According to HT, attempting to establish the Islamic state (*al-dawla al-Islāmīya*) is the most important duty of Muslims, and the ruling system in Islam is the Caliphate (*niẓām al-khilāfa*) in which the Caliph is appointed by bay'ah (*bay'a*, pledge of allegiance) [al-Rifā'ī 2017: 298]. The most important element in its conception is the Caliph [al-Rifā'ī 2017: 312], and as a detailed vision of the state with him at its apex, HT presents the "draft constitution of the Caliphal state (*mashrū' dustūr dawla al-khilāfa*)" [al-Nabhānī 2001: 91].

The "draft constitution" consists of 191 articles in total. It is a very detailed and concrete design of the state. In fact, its contents include general provisions (e.g., the status of Islam, the scope of the law's application, and the official language), the system of governance (e.g., Caliph, assistant (*mu'āwin*), and governor (*wālin*)), and the judiciary, as well as contemporary provisions such as parliament (*majlis al-umma*) and educational policies [Yamaoka 2023: 313–316].

The meaning of states and the relationship between law and states in Islamic theory discussed above is also shared by HT [Yamaoka 2023: 296–298]. In a publication of the organization, *Niẓām al-Ḥukm fī al-Islām*,[8] Taqī al-Dīn al-Nabhānī states:

> Islam made the state and the ruling part of it, considering that it is a principle for the state, the society, and the life [*ḥayāt*]. Islam commanded Muslims to establish the state and its rule, and to govern by Islamic rules [*aḥkām al-Islām*]. [al-Nabhānī 2002: 14]

> Islam is a system [*niẓām*] for the ruling and the state, for the society and the life, for the Ummah and individuals. … Islam has no existence unless it is alive in a state that implements its rules. Islam is a religion [*dīn*] and a principle [*mabda'*] and the ruling and the state are part of it. The state is the only lawful method made by Islam to implement and execute its rules in public life [*al-ḥayāt al-'āmma*]. [al-Nabhānī 2002: 15–16]

8 The referenced *Niẓām al-Ḥukm fī al-Islām* [al-Nabhānī 2002] was originally written by Taqī al-Dīn al-Nabhānī and expanded and revised by the second leader, 'Abd al-Qadīm Zallūm. There is an English version of this book [Hizb ut-Tahrir n.d.], but since it is not a translation of the latest Arabic edition (sixth edition), this paper is basically a direct translation from the Arabic version, with reference to the English version.

> The Islamic state is a Caliph that implements the divine law [*al-shar'*], and it is the political and executive entity for implementing and executing Islamic rules and for conveying the [Islamic] message to the world by da'wah [*da'wa*, invitation to Islam] and jihad [*jihād*, struggle]. [al-Nabhānī 2002: 17]

As the above makes clear, even in HT, which considers the establishment of the Islamic state as the most important duty of Muslims [al-Rifā'ī 2017: 298], its ultimate purpose is to implement Islamic law and the state is considered secondary.

What characteristics, then, can be pointed out in the "draft constitution"? First, it has a modernity. The "draft constitution" was first presented in 1953 in the second edition of *Niẓām al-Islām*, a publication of HT [Taji-Farouki 1996: 64; Pankhurst 2016: 59].[9] Already by that time, the Muslim societies had changed significantly from those of the pre-modern period. In the Middle East, for example, many states had achieved independence after the invasion of European countries, the collapse of the Ottoman Empire, the abolition of the Caliphate, and the practice of colonial policy [Owen 2004: 5–22]. Therefore, the "draft constitution," the conception of the state that emerged in a modern context, is distinct from pre-modern Islamic states.

Second, HT's conception of the "Caliphal state" *theoretically* has the nature of being a "pure" (i.e., free from external influence) Islamic state in the modern age because it is a "design" that *has not yet been realized*. This is confirmed by Taqī al-Dīn al-Nabhānī himself, who, as the author of the "draft constitution," stated that he drafted it "without paying any attention whatsoever to the sorry circumstances of Muslim societies, the conditions of other *umma*s or non-Islamic systems," and he emphasized that "all laws pertaining directly to the Islamic doctrine or system comprise legal rules" [Taji-Farouki 1996: 64]. In other words, the conception of the "Caliphal state" is a kind of "thought experiment."

This point is also of importance as a premise for the following comparison, for example; the Islamic Republic of Iran, founded in 1979, is recognized (by itself and others) as being basically in the nature of Islam, with the adoption of the guardianship of the jurisconsult (*velāyat-e faqīh*) at the core of its constitution [Owen 2004: 160–162]. Nonetheless, Iran has also been influenced by its surrounding environment in many respects. First, at the establishment of the "new" state, Rūḥ Allāh Mūsavī Khomeynī "aimed at seizing, and then utilizing, the institutions of the Iranian state as they existed in the 1970s" [Owen 2004: 83]. Second, due to the situation after the founding and at the time of the establishment of the new

9 This edition consisted of 89 articles [Pankhurst 2016: 59]. In this connection, the most recent edition currently available on the website is the sixth edition (consisting of 191 articles), published in 2001 [an-Nabahani 2001: 86–124; al-Nabhānī 2001:91–136].

constitution, "[a]t one level it contained features typical of a nineteenth-century European liberal constitution" [Owen 2004: 83]. Third, even after it was enacted, "the clerical leadership had not only to coexist with the institutions of a modern state but also to devise policies to deal with the quotidian problems of the economy, rapid urbanization and the management of a host of large state enterprises" [Owen 2004: 163]. Thus, even Iran, generally regarded as an Islamic state, has been significantly influenced by the previous regime and by domestic and international politics. Therefore, by contrast, it is possible to indicate the significance of the "Caliphal state" as a conception of a "pure" Islamic state in the modern age, as discussed above. Iran, being a real state, has been affected by realpolitik, but HT's "draft constitution" *theoretically* ought to be able to circumvent it.

In addition to the above overview of the "draft constitution," *analyzing* HT's conception of the state through the scrutiny of the "document" has the following characteristics. That is to say, because its conception is presented as a "draft constitution," it can be objectively analyzed in the same way as any existing state. Therefore, this study is *not a theological one* to judge how Islamic (or not) the political system of the "Caliphal state" is. Rather, *we can analyze it juridically and politically as a modern state*, with "falsifiability."[10]

In this paper, the text of the "draft constitution" is from the Arabic version of *Niẓām al-Islām* (sixth edition) [al-Nabhānī 2001:91–136]. This edition is the most recent version currently available on HT's website. An English version of the same edition also exists for this document [an-Nabahani 2001: 86–124], but this paper is basically a direct translation from the Arabic version while referring to the English version. Although both versions are the same edition, there are some differences in the text of the articles. These will be mentioned in each case.

IV. An Analysis of the "Draft Constitution": The Perspective of Legal Centralism and Legal Pluralism

(1) Theoretical Premise

This section analyzes the document in terms of legal centralism and legal pluralism. "Legal centralism" (or "legal monism") is defined as the notion that "all law is and should be state-sponsored law, which is *uniform* and *equally applied* to all citizens across the board, being emphatically *superior* to, if not exclusive of, all other reglementary regimes" [Jackson 2013:

10 On the other hand, the following remark by Abou El Fadl is a limitation of this paper. He states; "The existence of a written constitution is not what creates a constitutional system. A political system could generate a written constitution, but not base or bind itself by such a document. In other words, the document could fail to appropriate or reflect the sociopolitical culture of a system and, therefore, such a document could be violated regularly, altered, or suspended on a regular basis" [Abou El Fadl 2012: 37]. This point is a trade-off with the nature of the "Caliphal state" as a "pure" conception of the state, which, as noted above, is considered not influenced by the outside in theory. Hence, the analysis of this paper will remain an ideological one (unless the "Caliphal state" is established).

43]. Fundamentally, legal centralism is related to the separation of church and state in the context of early modern European history, especially the "Wars of Religion" [Jackson 2013: 43–44]. The "separation of church and state" here is thought to mean the abandonment of pluralistic religious laws.

On the other hand, "legal pluralism" is defined as the idea that "in any one geographical space defined by the conventional boundaries of a nation state, there is more than one 'law' or legal system" [Davies 2010: 805].[11] The word "pluralism" here means that "there is more than one classification, system, type, mode or form of law within a particular space" [Davies 2010: 817–818].

Premodern Muslim politics presupposes legal pluralism, and it is pointed out that the area of state-sponsored homogenization was limited [Jackson 2013: 44–45]. First, pluralism of laws was granted to non-Muslims such as Jews and Christians. This phenomenon was observed not only in areas where pluralism was easily recognized such as family law but even in the domain of criminal law [Jackson 2013: 45]. Second, because Islamic law had been generated by independent ulama and not by states (this function is called ijtihad (*ijtihād*)) [Kosugi 1994: 76–78], the politics was the opposite of legal centralism, the monopoly over law by states [Jackson 2006: 166–167], and the results of ijtihad had been diverse [Kosugi 1994: 95; Quraishi 2012: 64]. Thus, legal pluralism is considered to have existed in premodern Muslim society.

With the independence of many Muslim-majority countries in the 20th century, the nation-state came to function as an implicit premise. Jackson [2013: 42] expresses that "the basic *structure* of the nation-state" has become "a veritable grundnorm of modern Muslim politics." This is no exception in the perception of Islamist organizations. For example, it is shown that the Muslim Brotherhood in Egypt and Jamaat-e-Islami have worked within the framework of nation-state politics [Voll 2013: 57].[12] Even Muslim thinkers and activists shifted their main concern to the question of "whether and how the nation-state can or should be made Islamic" [Jackson 2013: 42].

In terms of law, the nation-state system is generally considered to have brought about legal centralism. In other words, it "emerged as a corollary to the rise of the modern Nation-State and its newly asserted monopoly over law and the distribution of rights" [Jackson 2006: 162].

In this respect, legal pluralism in Islam and legal centralism of the nation-state may theoretically conflict. The result to date has been the supremacy of the latter (nation-state) over

11 For details on the debate over "legal pluralism," *see* Davies [2010].

12 Of course, some groups reject the nation-state system itself; ISIS, which declared its "establishment" across the border between Iraq and Syria, is a prime example. HT also criticizes the nation-state system, as discussed above. In this paper, we consider that HT presents an ideologically rather more specific alternative to the system than ISIS because the former proposes an elaborate conception of the "Caliphal state" as the "draft constitution" concretely. This is the ideological importance of the organization.

the former (Islamic law); the nation-state tends to either co-opt or suppress Islamic law, with the result that both the state and its competitor (e.g., Islamist organization) incline to assume "'juristic monism,' i.e., the view that there can be only one law of the land uniformly applied across the board" and to apply its own law *exclusively* [Jackson 2006: 172–173]. At the same time, however, this contradicts the aforementioned character of the superiority of Islamic law to the state. The political theory underlying the modern nation-states in the Muslim world does not embody the features of Islamic law [Jackson 2006: 172], but rather, *being the law of the state* is of primary importance.[13] It is clear from the above that there is little room for the legal pluralism of Islam in the nation-states, even in the Muslim world today.

(2) An Analysis from the Perspective of Legal Centralism and Legal Pluralism

So, how can the "draft constitution" of HT be understood in terms of legal centralism and legal pluralism? In what follows, we analyze it with attention to specific articles.

When analyzing the document from these perspectives, it is necessary to note the fact that the organization *adopts* the form of a (draft) "constitution." In the chapter "The Constitution and the Law (*Al-Dustūr wa al-Qānūn*)" of *Niẓām al-Islām*,[14] the following argument is presented.

HT affirms the unification of law, which is friendly to legal centralism. This is evident from the introduction of a single legal system consisting of a constitution and laws. The logic justifying it is as follows [al-Nabhānī 2001: 87–88]. According to HT, the existence of a comprehensive constitution (*dustūr shāmil*) and general laws (*qawānīn 'āmma*) essentially does not contribute to innovation (*ibdā'*) and ijtihad. In Islam, historically, the adoption of rules had been limited to specific ones (*aḥkām mu'ayyana*) necessary to maintain uniformity. It is preferable that governors and judges carry out ijtihad and deduction. However, when most people have become muqallid (*muqallid*, those who follow ulama's view (especially one of the four schools of jurisprudence (*madhhab*)) without carrying out ijtihad themselves), it is difficult to govern by what has Allah revealed. Therefore, the Islamic state needs to generally adopt certain rules about transactions (*mu'āmalāt*) and punishments (*'uqūbāt*). From the above, it is evident that HT, while considering the unification of law to be inherently undesirable, can be interpreted as relying on legal centralism by taking account of the circumstances at present.

From the perspective of legal centralism, it is also noteworthy that HT places its

13 Even from the standpoint of legal centralism, which insists that the law enacted by the nation-state is the only law, the supremacy of Islamic law over the state is still guaranteed in the sense that the state (that generates the state law) itself can be changed by revolution. In fact, the Iranian Revolution in 1979 is noteworthy in that it is a case in which the foundation for the existence of the former state was destroyed because Islamic law denied its legitimacy [Kosugi 1994: 21].

14 The English version of this book basically uses the expression "constitution and canon" [an-Nabahani 2001: 81–85]. In this paper, however, "canon" in the English version (i.e., "*qānūn*" in Arabic) is translated as "law" because the "draft constitution" adopts a common legal system in which the constitution is at the top.

"constitution" on the same level as those of the nation-states, including even Western countries. Specifically, the various patterns of sources (*mansha'* or *manba'*) of constitutional laws are discussed, with specific examples from the UK, the US, France, Turkey, Egypt, Iraq, and Syria [al-Nabhānī 2001: 85]. This can be interpreted as an indication that HT dares to present the basic principles of the "Caliphal state" as a "constitution" and positively seeks to place it within the main legal framework of the modern nation-state.

A similar intent is found in the debate over whether the terms "constitution and law (*al-dustūr wa al-qānūn*)" can be used. According to HT, the criterion for judging whether a term is permissible to use depends on whether it corresponds to the terminology of Muslims. This is explained along with the specific examples of "social justice (*'adāla ijtimā'īya*)" and "tax (*ḍarība*)" by HT as follows [al-Nabhānī 2001: 86].

For example, is it permissible to use the term "social justice"? According to the organization, the answer is no. This is because there is a difference between the general and Islamic meanings of the term. Specifically, the word "justice (*'adl*)" in the general context means, for example, the guarantee of education *for the poor* and of the rights *of workers*, while the word "justice" in the Islamic context means for example the guarantee of education and the rights *for all*. So, is the term "tax" allowable? The answer is yes. This is because the term, in both contexts, means the money collected from the people for the administration of the state. The former is an example that the use of the term "justice" is not permissible because there is a difference between the scopes of the concept in both meanings, while in the latter example, the use of the term is allowed because the meaning of the two is almost identical.

Then, is the term "constitution and law" allowable? The answer is yes. This is because the term in both contexts means that the state adopts specific rules, promulgates them to the people, obligates the people to act, and governs them according to the rules, thus, there is no difference between the two.

However, unlike the aforementioned "tax" example, al-Nabhānī states that the Islamic constitution and laws (*al-dustūr al-Islāmī wa al-qawānīn al-Islāmīya*) differ from others [al-Nabhānī 2001: 86–87]; for the latter (i.e., constitution and laws except for Islamic), their sources are the customs, the rulings of courts, etc., and their origins are a constituent assembly and a parliament elected from people. On the other hand, the former (i.e., Islamic constitution and laws) are based on the Qur'an and Sunnah only, and their origins are ijtihad. Thus, even under the same terms "constitution and law," those of Islam and others are composed of distinctly different elements from each other.

Given this difference between the general and Islamic meanings of the term, the question arises as to whether HT need not *bother to use* the term "constitution and law." In fact, as noted above, the organization does not permit the use of the term "social justice" because of the difference in the scope of the concept. Furthermore, the above discussion is about whether

it is *permissible to use a term*, while *the necessity of daring to use it* is not discussed.

Nevertheless, HT adopted the term "constitution and law" and presented the "draft constitution." This suggests that even in the modern conception of a "pure" Islamic state, which could be called a kind of "thought experiment," a single legal system consisting of a constitution and laws is still judged *to be valid*. Needless to say, such a centralized legal system is compatible with legal centralism, which considers that "all law is and should be state-sponsored law." In this respect, we can interpret that there is a disconnect with the legal pluralism found in premodern Muslim politics.

Actually, the provisions of the "draft constitution" also essentially rely on legal centralism. A typical article is as follows:

> The Caliph adopts specific divine rules [*aḥkām shar'īya mu'ayyana*] and enacts them as a constitution and laws. Once a divine rule is adopted, the rule becomes the only divine rule that must be implemented, and it becomes a valid law that all citizens are obligated to follow, both publicly and privately. (Article 3)

In this article, the sentence "the rule becomes the only divine rule that must be implemented," is interpreted as embodying legal centralism in that what is adopted as state law becomes *the only law* that must be enforced.[15]

On the other hand, some provisions can be evaluated as relying on legal pluralism. The first is the following article regarding non-Muslims:

> The state implements the Islamic divine law [*al-shar' al-Islāmī*] on all those who have citizenship of the Islamic [state], whether Muslims or non-Muslims, as follows:
> (a)[16] All Islamic rules are implemented on Muslims without any exception.
> (b) Non-Muslims are allowed [to follow their] beliefs and worship within the general system [*al-niẓām al-'āmm*].
> (c) The rule of the apostate [*ḥukm al-murtadd*] is applied to the apostates from Islam if they are [truly] apostates. If they are sons of apostates and are born as non-Muslims, they are treated as non-Muslims, according to their status as polytheists [*mushrikūn*] or People of the Book [*ahl al-kitāb*].

15 Al-Rifā'ī [2017: 313] points out, from this provision, that the Caliph gives legitimacy to the laws in an Islamic (rather than constitutional and legal) sense. This perspective implies the possibility of legal centralism of the "Caliphal state" to Islam as a whole. This point differs from this paper, which focuses on the "framework" of the (Caliphal) "state."

16 In the Arabic version of the "draft constitution," each section is indicated by the so-called "*abjad*," which in this paper is replaced by the Roman alphabetical order.

> (d) Non-Muslims are treated according to their religions [*adyān*] about the food and the clothes within the limits permitted by the divine rules [*al-aḥkām al-shar'īya*].
> (e) Marriage and divorce between non-Muslims are judged according to their religions. [Marriage and divorce] between them and Muslims are judged according to the rules of Islam.
> (f) The state implements the rest of the divine rules and of the matter of Islamic Shari'a, such as transactions, punishments, evidence [in trials], systems of ruling and economy, etc., to all. It applies to both Muslims and non-Muslims. Likewise, it applies to the people of treaties, to the insured persons [*musta'minūn*], and to all those who are under Islamic authority [*sulṭān al-Islām*], in the same way as it applies to citizens. However, ambassadors, envoys, and equivalent persons are excluded if they have diplomatic immunity. (Article 7)

These provisions are legally pluralistic in the sense that *the state applies* different provisions to non-Muslims. Attempting an explanation from the dichotomy of legal pluralism (i.e., "strong" and "weak" sense) by Griffiths [1986],[17] this provision can be interpreted as legal pluralism in the "weak" sense precisely because *the state commands* to apply the rules.

The second is the power of the court to investigate the rules' violations of divine law:

> The mazalim [*maẓālim*] court [the court of unjust acts] has the power to investigate any injustice, whether it is related to individuals of the state apparatus, to violation of the divine rules by the Caliph (the head of state), to the meaning of the legislated article [*naṣṣ*] in the constitution, law, and other divine rules adopted by the head of state, to tax obligation, or to otherwise. (Article 91)

This provision stipulates that the mazalim court has the power to investigate all matters concerning state injustice, including violation of the divine rules by the Caliph, interpretation of the constitution and laws, etc.[18] In other words, even the content of the Caliph's adoption

17 Griffiths [1986], one of the most important studies of legal pluralism, divides the situation of legal pluralism between the "strong" sense and the "weak"; legal pluralism in the "strong" sense is defined as "a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform," and in the "weak" sense is defined as "a legal system is 'pluralistic' when the sovereign (implicitly) commands … different bodies of law for different groups in the population" [Griffiths 1986: 5].

18 As mentioned above, the Caliph is stipulated to adopt specific divine rules and enact them as a constitution and laws (Article 3).

is to be examined for contradiction with Islamic law. This is interpreted as *the supremacy of Islamic law over state law*, and we can indeed construe this as legal pluralism in that there are multiple laws (state law and Islamic law). However, in that Islamic law exists *above the state law*, it is completely different from the application of other rules *by the state* to non-Muslims (i.e., legal pluralism in the "weak" sense) discussed previously.

It is clear from the above that even the concept of the "Caliphal state," which can be evaluated as "pure" and a kind of "thought experiment" in the modern age, is basically strongly influenced by the legal centralism brought by the nation-state. This is suggestive in that even though HT criticizes the nation-state, and legal centralism was originally affected by early modern European history, the "Caliphal state" adopts (or is forced to adopt) legal centralism. In this respect, we can point out the strong influence of the nation-state system even over its critics, the universality of legal centralism in modern times, and the transformation from premodern Muslim politics.

On the other hand, the "draft constitution" also shows aspects of legal pluralism. This means, first, that *the state applies* different rules to non-Muslims and, second, that *Islamic law is superior to state law*. This would be one feature of the modern conception of the Islamic state. In particular, it is noteworthy that the "draft constitution" institutionalizes the supremacy of Islamic law over state law, which is closely related to the raison d'etre of states, as discussed in Section II.

V. An Analysis of the "Draft Constitution": The Perspective of the Separation of Powers

(1) Theoretical Premise

The power of the mazalim court to investigate injustices including those committed by the Caliph (Article 91) also seems to illustrate the separation of powers as well as legal pluralism. Generally, in modern states, how the separation of powers is regulated is a noteworthy factor that affects the various outcomes of politics [Samuels 2007]. Therefore, in this section, we attempt to analyze the "draft constitution" from the perspective of the separation of powers, which is useful for understanding the characteristics of modern states.

On the one hand, the modern concept of the separation of powers, developed as a theory by Montesquieu and adopted by the US government, consists of the executive, the legislature, and the judiciary [McLean and McMillan 2009]. In particular, the analysis of the relationship between the executive and the legislature is significant because it can have a great impact on outcomes of politics [Samuels 2007]; in a perspective relevant to this paper, several studies show that the more the executive and the legislature are fused (in other words, parliamentarism as compared to presidentialism), the more likely it is for policy changes to occur [Samuels 2007: 706–708].

On the other hand, it is pointed out that the peculiar separation of powers had also been

present in classical Muslim societies [Quraishi 2012; Kamali 2014]. The basic composition of it is as follows; the framework is composed of two entities, rulers and scholars (ulama). They differ from each other in the lawmaking authority they possess, with the rulers making siyasa and the scholars creating fiqh.[19]

"Siyasa (*siyāsa*)" is an Arabic word that literally means "administration" or "management." It is *established by rulers* to maintain public order, security, and justice in society. In other words, siyasa was introduced not from interpretations of the scriptures, but from "according to the will of the ruler" [Quraishi 2012: 66]. On the other hand, "fiqh (*fiqh*)" is an Arabic word that literally means "understanding," and is a product of scholars based on jurisprudential interpretation (ijtihad) of the Qur'an and Sunnah [Quraishi 2012: 64–66].

The logic of the separation of powers is as follows; on the one hand, rulers depend on the support of scholars and are obliged to conduct the state's affairs based on consultation and consensus with the community [Kamali 2014: 476]. On the other hand, scholars could be "checked" by rulers in the form of rulers ignoring scholars' fiqh. This is because scholars do not have any power to enforce such as an army [Quraishi 2012: 67].

Two important points arise from this perspective; first, *where* the separation occurs. In classical Muslim societies, it is shown that the separation of powers was *between governmental (rulers) and nongovernmental (scholars)*, not within government entities [Quraishi 2012: 63–67, 72]. In addition, this separation was not due to institutionalization by the constitution, but "as a result of the practical realities of the rulers' police power on the one hand and the social influence of the scholars on the other" [Quraishi 2012: 66].[20] However, the separation in the modern age, whether in Muslim or non-Muslim countries, means *split governmental power within itself*. This seems different from the external check on government found in classical Muslim societies.

Second, when this separation is applied to the division of *the three powers* (of the executive, the legislature, and the judiciary), it can be summarized that while the judiciary is partially dependent on the executive, the executive and the legislature are completely separate [Kosugi 1994: 44]. The former is because judges are appointed and dismissed by rulers. On the other hand, the latter is because the legislature is the domain of the ulama (especially mujtahid (*mujtahid*, a person who is qualified to exercise ijtihad)). If rulers "legislate" by ijtihad, it is by virtue of their authority as *mujtahidūn*.

(2) An Analysis from the Perspective of the Separation of Powers

Then, using the above perspective, how can we understand the "draft constitution" of HT?

19 The term "siyasa" used by Quraishi and Kamali here could be considered equivalent to "qanun (*qānūn*)" in that it is established by rulers. *See* Kamali [2014: 478].

20 This is very different from the situation the separation of powers is guaranteed by institutionalization, as is the case today.

Although the document is only a "design" that has not yet been realized, we attempt to clarify its actual function and meaning by also examining the purpose of the state itself.

The aforementioned Article 91 of the "draft constitution" clearly indicates that it is the provision of the separation of powers in that the mazalim court (the judiciary) has the authority to investigate the executive and the legislature. In the first place, the judges of the mazalim court are "appointed to eliminate all injustices caused by the state against any person living under the authority of the state whether citizens or not, regardless of whether the injustices are brought about by the Caliph, other rulers (*ḥukkām*), or officials (*muwaẓẓafūn*)" (Article 87). To achieve this purpose, the court has the authority to remove rulers. The "draft constitution" stipulates as follows:

> The mazalim court has the right to dismiss any ruler or official in the state as well as the right to remove the Caliph when the dismissal is necessary to eliminate the injustice. (Article 90)

Furthermore, the "draft constitution" also provides for the independence of the judiciary (the mazalim court). That is, whereas the judges of the court are normally appointed, inquired of, disciplined, and dismissed by the Caliph or the chief judge (*qāḍī al-quḍāt*), "no removal [of the judge by them] is allowed during the investigation into an injustice of the Caliph, the delegated assistant, or the mentioned chief judge, rather the authority for the dismissal is vested in the mazalim court in this situation" (Article 88).

From the above, it is clear that the "draft constitution" stipulates the separation of powers between the executive and the legislature, and the judiciary, *at least formally*. On the other hand, since it is only a "draft" and the establishment of the state has not been realized, it is difficult to clarify whether the separation is guaranteed *in reality*.[21]

However, a deductive analysis of it from the raison d'etre of the state may reveal some of the feasibility of the separation of powers and the prospect of its being guaranteed. As discussed in Section II, in Islamic (also HT's) perception, states are merely a means to implement Islamic law. Therefore, the ultimate goal is to rule by Islamic law. In addition, as mentioned in the previous section, "the Caliph adopts specific divine rules and enacts them as a constitution and laws," those alone become valid laws (Article 3). Thus, we can conclude that in the design of the "Caliphal state," the implementation of Islamic law depends on the "legislative" acts of the Caliph.[22]

21 On this point, *see* n. 10.

22 In the Islamic context, the "legislative power" in the ideological dimension belongs to Allah. For example, Rūḥ Allāh Mūsavī Khomeynī states; "The fundamental difference between Islamic government, on the one hand, and constitutional monarchies and republics, on the other, is this: whereas the representatives of the people or the monarch in such regimes engage in legislation, in Islam the legislative power and

Nevertheless, the provisions of the "draft constitution" do not require Islamic scholarship as a condition for the Caliph. The conditions imposed are stipulated as follows:

> For the Caliphate to be concluded, seven conditions are imposed. They are to be a male, Muslim, free, mature, sane, fair, and capable. (Article 31)

According to HT, being mujtahid is only a preferable condition (*sharṭ afḍalīya*) as well as being from the Quraysh or skillful in using a weapon. A condition of this type is clearly distinguished from a concluding condition (*sharṭ in'iqād*) as an obligation [Ḥizb al-Taḥrīr 2005: 25; Hizb ut-Tahrir 2005: 26–27].[23] Actually, it is indicated that HT even lobbied Libya's Mu'ammar al-Qadhdhāfī and Iraq's Ṣaddām Ḥusayn Majīd to assume the Caliphate in the past [McQuaid 2007: 20–21]. Therefore, we can conclude that the "draft constitution" supposes a person without Islamic scholarship would be a Caliph, who has the power to execute "legislative" acts.

By the way, the "draft constitution" provides for the existence of the "Ummah Assembly (*majlis al-umma*)," as a concept similar to a parliament. Nevertheless, it does not have legislative power [al-Rifā'ī 2017: 327]. The only provision of it regarding laws is as follows:

> The Caliph may refer the rules and laws that he intends to adopt to the Assembly. The Muslim members have the right to debate them and to explain the correct and wrong aspects regarding them, but their opinion is not binding. If they disagree with the Caliph about the method of adoption in the divine jurisprudence [*al-uṣūl al-shar'īya*] adopted in the state, the decision returns to the mazalim court. The judgment of the court about it is binding. (Article 111, Paragraph (2))[24]

How, then, is the (proper) implementation of Islamic law, which is the goal of the "Caliphal state," to be guaranteed? In this paper, we conclude that it is the judges of the

competence to establish laws belongs exclusively to God Almighty. The Sacred Legislator of Islam is the sole legislative power" [Algar 1985: 55].

In contrast, HT provides for "legislation" in the dimension of reality. This is evident from the clear appearance of the word "legislation" in Article 12 of the English version, in addition to Article 3 mentioned above; "legislation cannot be taken from any source other than these evidences [the Qur'an, Sunnah, ijma' (*ijmā'*, consensus) and qiyas (*qiyās*, analogy)]" (Article 12). However, this sentence does not exist in the Arabic version.

23 On the other hand, *al-Aḥkām al-Sulṭānīya* by 'Alī ibn Muḥammad al-Māwardī for example, requires as one of the conditions for the Caliph "the knowledge leading to ijtihad in occurrences and judgments" [al-Māwardī 1960: 6].

24 The passage "but their opinion is not binding" is present only in the English version. In contrast, the last two sentences exist only in the Arabic version. In addition, this clause corresponds to Paragraph (4) in the English one.

mazalim court who play this role. In the "draft constitution," only judges of the court are required to be mujtahid.

> All judges are appointed on the conditions that they are Muslim, free, mature, sane, fair, jurist [*faqīh*], and aware of how to apply the rules in the real world. In addition to these conditions, all judges of the mazalim [court] must be male and mujtahid. (Article 78)[25]

It is clear from the above that while the Caliph who has the power of the "legislative" acts is not required to be a mujtahid, the judges (regarding the mazalim court) who belong to the "judiciary" must comply with this condition. Then, as discussed above, the judges have the authority to "check" the Caliph. Therefore, it can be said that the provisions of the separation of powers are the only guarantee for the "Caliphal state" to implement Islamic law correctly; in other words, the enforcement of Islamic law by the state *depends on the ex post facto review by the mazalim court*. From the above, it can be concluded that the separation of powers in the "draft constitution" is guaranteed at least to some extent.

Furthermore, when comparing the above with the aforementioned classical Muslim societies, we can evaluate the following; first, this separation of powers is defined by the constitution *within government entities themselves*, not between governmental and nongovernmental based on the practical realities as in the past societies. Second, in terms of the division of *the three powers*, it is quite different from the separation between the executive and the legislature in classical societies. Rather, the structure is that the Caliph (not necessarily mujtahid) assumes the executive and legislative powers (at least constitutionally) on the one hand, while the judiciary (mujtahid) checks both on the other hand. Thus, although the "draft constitution" of the organization guarantees the separation of powers, its contents deviate greatly from classical Muslim societies. Third, from a modern analytical perspective, the function of the Caliph as both the executive and the legislature is closer to parliamentarism than presidentialism (in that the two branches are fused rather than confrontational). Therefore, policies may be pursued strongly by the Caliph. However, unlike many modern states, the parliament of the "Caliphal state" (Ummah Assembly) does not have the legislative power, as discussed above. Thus, the theory of the separation of powers (especially the relationship between the executive and the legislature) would not be strictly applicable. Rather, we consider such a point may be one feature of the conception of HT's "Caliphal state."

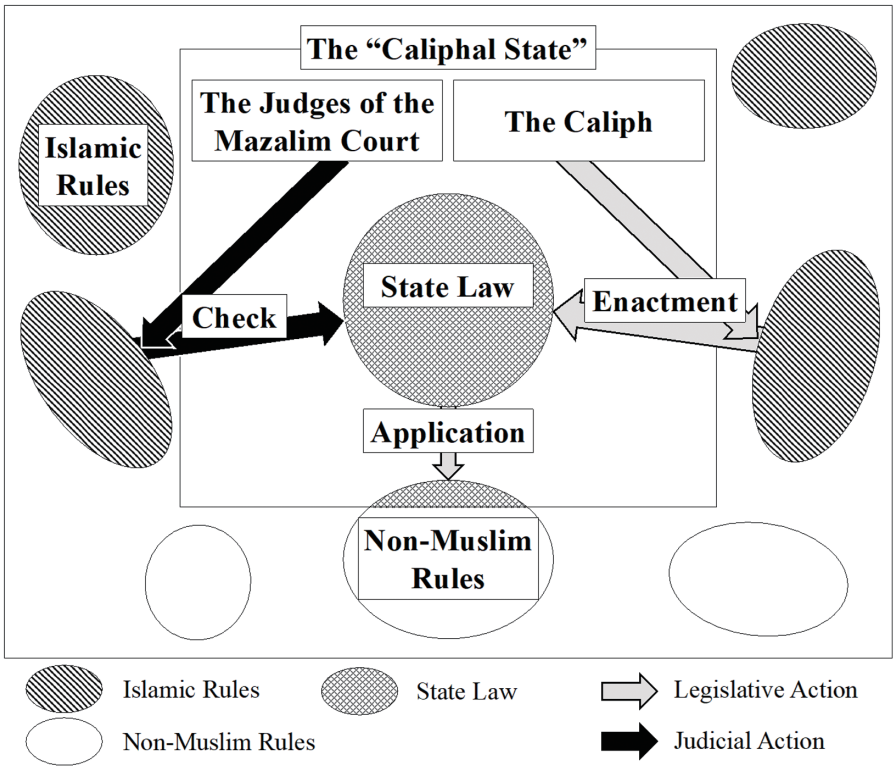
VI. Conclusion

In conclusion, we try to construe the results from the two perspectives analyzed above as a

25 In addition to this article, it is stipulated that if the chief judge has the power such as appointment and dismissal over the judges of the mazalim court, he must be a mujtahid (Article 76).

single state with interrelatedness. **Figure 1** illustrates this. Needless to say, since the above analysis is based on the division of the single "draft constitution" into different perspectives (by the author), the results of each can be considered relevant. In this section, we attempt to construe the above findings in the context of the "Caliphal state" as a whole.

Figure 1: The Relationship Between the State, the Laws, and the Actors



Source: Author.

First, the results show the legal centralism in that the state law is *the only law* in the "Caliphal state" and the separation of powers *within government entities themselves* can be evaluated as a consequence of the great power the state has. Similarly, the aspect of legal pluralism in the sense that the state applies different provisions to non-Muslims is also not inconsistent with the strong power of the state, in that the state law functions as the only criterion. This argument is only a question of the extent to which *the state allows* the legal system of the minorities to be applied.

Second, in connection with the above point, the "draft constitution" envisages a centralized and unidirectional state system. That is, in order to implement a single legal system, the Caliph would first adopt specific divine rules and enact them as a constitution and laws, which would then be reviewed ex post facto by the mazalim court (if necessary). There

is no concurrent process *from outside the state.* This is also an indication that the state seeks to complete the administration (at least with regard to governance) solely within itself.

The above shows that even in the design of the "Caliphal state," which *theoretically ought to be* a "pure" conception of the modern Islamic state, there is a strong influence from the general modern states. In addition, the structure of such a separation of powers itself is also considered to show influence from the modern states.

However, the position of Islamic law indicates characteristics proper to Islam. That is, as pointed out as the second legal pluralism, Islamic law is superior to the "Caliphal state," and this is institutionalized (with the separation of powers) by requiring non-contradiction with the state law. Such institutionalization can be evaluated as a distinctive feature of Islam in an "ideal type" of Islamic state in the modern age.[26]

Furthermore, from the perspective of the division of the three powers, it is also noteworthy that the parliament (Ummah Assembly) does not have legislative power, and the Caliph has both executive and legislative powers. This point may be construed as characteristic of the conception of the state presented by HT, which emphasizes the existence of the Caliph himself.

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26 This does not mean that there is no room for explanation and thus universalization from the framework adopted by the modern states; Islamic law can be interpreted as fulfilling the function of the natural law or a higher legal norm in the states. In this respect, the "Caliphal state" can be compared with the non-Muslim modern states.

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