

DEBATING *SHARĪʿA* IN EGYPT'S NATIONAL COURTS¹

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Abstract

This article explores debates about the role of Islamic law (sharīʿa) in the early development of the native courts in Egypt, established in 1883. Current literature focuses on the impact of European influence, arguing that the native courts and the codes they implemented broke away from a past dominated by Islamic law, sidelined pre-modern juristic (fiqh) understandings, and reflected an importation of European norms in service of a growing modern state. Using periodicals published within the first ten years following the establishment of the native courts, this article argues that, for both supporters and detractors, the question was not whether the sharīʿa was being implemented but how it should be understood and utilized. Ideas informed by external influences, such as the rule of law and the creation of an independent judiciary, were significant and helped to shape the development and operation of the native courts. However, these ideas were viewed by observers through a broader conceptualization of the sharīʿa that included the work of the political authority to achieve a central goal: to nationalize the sharīʿa and establish justice in a rapidly changing social and legal environment.

Keywords: Egyptian law; judiciary; native courts; nineteenth century; *sharīʿa*

¹ Funding for the research that led to this article was provided by a post-doctoral fellowship from the United States Department of State's Bureau of Educational and Cultural Affairs (ECA) at the American Research Center in Egypt (ARCE) in July–December 2022. I want to thank ARCE for their continued support.

INTRODUCTION

In December of 1883, Khedive Tawfiq of Egypt proclaimed the formation of a new court system in Cairo, Alexandria, and select cities in the Nile Delta. Dubbed the native courts (*al-mahākim al-ahliyya*), these venues applied to all subjects of the local government. They adjudicated most matters related to civil, criminal, and trade law.² Accompanying the new courts was a collection of codes, including a Penal Code (1883), a Code of Criminal Procedure (1883), Civil Code (1883), and Commercial Code (1883), created by a committee led by the then Minister of Justice, Ḥusayn Fahkrī Bāshā (1843–1910).

For its supporters, the introduction of the native courts marked the beginning of a new era. At a meeting with the Khedive celebrating the appointment of the native courts' first cadre of judges, Fahkrī Bāshā stated,

From the day you [Tawfiq] sat upon the throne of your forefathers, you have given great care to reform Egyptian courts. Your government has organized laws that apply, as much as possible, to the conditions and traditions of the country . . . I am happy to present to you [here] the men you have entrusted to fulfill this truth in your courts.³

Khedive Tawfiq then addressed the gathering, stating,

It is known that the foundation of civilization and the increased wealth of its citizens and residents is to follow the path of justice and truth according to the rule of legal texts. Through this, justice reaches its peak; rights are given to those who deserve them, aggressors are halted, and other potential aggressors are deterred.⁴

² Unnumbered order of June 14, 1883 (*Lā' iḥa tartīb al-mahākim al-ahliyya* [Order to Establish Native Courts]), art. 15 (Egypt).

³ Quoted in 'ABD AL-RAḤMĀN AL-RĀFI'Ī, *Miṣr wa'l-Sudān fī Awā'il 'Ahd al-Iḥtilāl* 66 (1983).

⁴ *Id.*

The Egyptian government considered the native courts the culmination of a reform process that would end the corruption and disorganization that had plagued the country's legal system throughout the nineteenth century. By providing the collection of codes applicable to all Egyptians regardless of status, the courts guaranteed justice and put the country firmly on the path of progress.

However, others were concerned that the native courts were disconnected from Egypt's legal past, particularly Islamic Law (*sharī'a*). In April of 1883, while the legal committee was finalizing the codes, press reports from Istanbul reached the offices of the popular daily *al-Ahrām*, worried that the government's recent removal of the Mālikī *muftī* position and the preparation of the codes were a sign of "disrupting Islam."⁵ *Al-Ahrām* dismissed these concerns and responded, "Egypt regularly follows the rulings of the Caliphate and all areas ruled by the Ottoman Sultan, i.e., the Ḥanafī School . . . The most important thing to the Khedive is the protection of the principles of the Holy Sharī'a. Nothing will be accepted which touches it, no matter what the source."⁶

Despite *al-Ahrām*'s reassurances, the codes for the native courts did rely heavily on French influence in their organization and content, a point that has led several later historians to suggest that Islamic law had been left in the past. In criminal law, Rudolph Peters states, "In 1883/1889, Islamic criminal law was abolished in Egypt."⁷ Peters' view is part of a broader argument in Islamic legal historiography that the influence of the *sharī'a* ended with the creation of modern legal systems in the Muslim world. At the core of the standard view is the conceptualization of pre-modern *sharī'a* as a transnational "jurists' law," described by Wael Hallaq as mediated by a class of traditionally educated jurists (*fuqahā'*, sg. *faqīh*).⁸ The political authority and the laws they created were external to the *sharī'a* as, according to Aharon Layish, jurists "were not integrated as a professional class in

5 AL-AHRĀM, April 24, 1883.

6 *Id.*

7 RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 141 (2009).

8 See, for example, WAEL HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 443 (2009).

the [political] establishment.” Likewise, the methodology of the *sharī‘a* “did not leave the political ruler any leeway, except by means of administrative decrees, to control the formulation of the legal norm.”⁹

Following the work of Layish and Hallaq, Baudouin Dupret argues that the nineteenth century was a breaking point for Egypt and other jurisdictions in the Muslim world. Through a process he calls the “positivization of the law,” the modern state in this period used codes to “completely and systematically organize the world, societies, and men.”¹⁰ The introduction of positive law marked an epistemic shift in the *sharī‘a* where the jurists’ role in forming the law was systematically removed. National codes were implemented whose ideological roots and content were alien to the legal and social fabric of the Muslim world. For Talal Asad, positive law signified the rise of secularism, creating a division between secular public law and religious morality limited to the private sphere.¹¹ As a result, the *sharī‘a*, as it operated in the pre-modern period, succumbed to the expanding modern state.¹²

Other research has modified the jurist-centered approach to the *sharī‘a*. While accepting that the modern state is critical to understanding the nineteenth century’s legal developments, revisionist scholars argue that the state’s increased role in shaping the law has not interrupted the functioning of the *sharī‘a*. For example, Khaled Fahmy suggests that focusing on jurists leaves out the vital place law created by the political authority (*siyāsa*) occupied in the pre-modern Islamic system.¹³ The state assuming a more dominant position by introducing codes in the second half of the nineteenth century indicated change but not a divergence from the past.

9 Aharon Layish, *The Transformation of the Shari‘a from Jurists’ Law to Statutory Law in the Contemporary Muslim World*, 44 *DIE WELT DES ISLAMIS* 86 (2004).

10 BAUDOUIN DUPRET, *POSITIVE LAW FROM THE MUSLIM WORLD: JURISPRUDENCE, HISTORY, PRACTICES* 54 (2021).

11 TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 205–6 (2003).

12 Wael Hallaq, *Can the Shari‘a Be Restored?*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* 24 (Yvonne Haddad and Barbara Stowasser, eds., 2004).

13 KHALED FAHMY, *IN QUEST OF JUSTICE: ISLAMIC LAW AND FORENSIC MEDICINE IN MODERN EGYPT* 279 (2018).

Applying Fahmy's view, Mina Khalil, in his work on criminal defendants and the Egyptian public prosecutor's office, has argued that case law does not support the argument that the codes developed for the native courts opposed the *sharī'a*.¹⁴ In civil law, Samy Ayoub shows how the *Mecelle-i Ahkâm-i Adliyye*, the Ottoman Civil Code of 1877, represented new social and legal norms of the late Ottoman Empire but was also "a faithful synthesis of late Hanafi jurisprudential norms."¹⁵ Iza Hussin suggests that the codes developed in the Muslim world during the nineteenth century resulted from an interaction between local and colonial elites and continue to represent Islam within the state accurately.¹⁶

Building on these emerging approaches, this article explores Egyptian debates regarding the role of the *sharī'a* in the native courts. Using periodicals from the first ten years following the courts' establishment, the article examines the place of the *sharī'a* in Egypt's modernizing legal system, the purposes of the law in punishing homicide, and whether Christians could adjudicate matters previously subject to courts staffed by classically trained Muslim jurists. The article supports the theory of continuity and argues that the question of the native courts' connection to the *sharī'a* was not one of *whether* the *sharī'a* was being applied in Egypt. Rather, the more pertinent concern for local reformers was *how* the *sharī'a* should be utilized to realize a broader goal: the creation of an independent judiciary that would dispense justice equally amongst all Egyptians. The centrality of the modern state and the use of positive law were critical to achieving this goal. Yet, reformers of the time adopted a comprehensive view of the *sharī'a* as a legal system that included the participation of the political authority. The rules created by pre-modern jurists did not limit them. Both the rules

14 Mina Elias Khalil, *A Society's Crucible: Forging law and the criminal defendant in modern Egypt, 1820–1920*, 18 (2021) (Ph.D. dissertation, University of Pennsylvania).

15 Samy Ayoub, *The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning Islamic Law in the Nineteenth and Twentieth Centuries*, 2 JOURNAL OF THE OTTOMAN AND TURKISH STUDIES ASSOCIATION 123 (2015).

16 IZA HUSSIN, *THE POLITICS OF ISLAMIC LAW: LOCAL ELITES, COLONIAL AUTHORITY, AND THE MAKING OF THE MUSLIM STATE* 19 (2016).

constructed in *fiqh* and the codes developed by the political authority for the greater good fell within the scope of the *sharī'a*. They could be used in the development of modern Egyptian law.

Additionally, for both supporters and detractors of the native courts, ideas informed by European norms such as the rule of law were important influences that shaped the nature of reform. However, reformers understood these ideas through the lens of the *sharī'a* and employed them to meet the needs of a rapidly changing nation. By synthesizing foreign ideas with pre-modern interpretations that best fit local circumstances, reformers infused the *sharī'a* into the modern Egyptian context.

The nationalization of the *sharī'a* and the codes made by the political authority were not universally accepted. By the middle of the twentieth century, revivalists began to view what they perceived as the importation of European law as “an affront to Egypt’s religious, cultural, national, and transnational Muslim identity.”¹⁷ As a result, they envisioned a reapplication of the *sharī'a* as a body of positive law that would stand superior to “man-made” law.¹⁸ Wood’s observations accurately represent the Egyptian legal environment in the 1920s and 30s. However, for writers in the first decade after the introduction of the native courts, these concerns were largely absent; the pre-modern *sharī'a* remained intact and formed a critical part of the ideological foundations of a new national justice system.

Before discussing the content of the codes and their application in native courts, it is necessary to understand what concerns Egyptian reformers perceived in their legal system and what types of influences they used to address them. Were the native courts the result of a native desire to reduce corruption or the direct implementation of foreign norms? To answer this question, the following section briefly describes the Egyptian legal system before the introduction of the native courts.

17 LEONARD WOOD, ISLAMIC LEGAL REVIVAL: RECEPTION OF EUROPEAN LAW AND TRANSFORMATIONS IN ISLAMIC LEGAL THOUGHT IN EGYPT 1875–1952, 4 (2016).

18 *Id.* at 5.

BUILDING THE NATIVE COURTS

Before the issuance of the country's first Penal Codes (1830) by Muḥammad 'Alī (r. 1805–48),¹⁹ the Egyptian legal system consisted of four institutions. First were the *sharī'a* courts staffed by judges (*quḍā*, sg. *qāḍī*) trained in Islamic jurisprudence (*fiqh*) who adjudicated the affairs of Muslims and non-Muslims who agreed to have their cases heard there. Second, non-Muslim councils (*majālis*, sg. *majlis*) handled cases between Christians and Jews. The non-Muslim councils could be headed by a judge trained in the *sharī'a* courts or a mediator appointed by the ruler. Third was consular courts held in foreign embassies and ruled in matters where at least one party was a foreign national. Finally, there was the court of the governor (*wālī*), which addressed appeals from Muslim or non-Muslim courts, handling cases brought directly to them and intervening in issues where there was a prevailing state interest, such as homicide.²⁰ Following the 1854 Ottoman orders establishing state judiciaries outside the existing religious venues, the *wālī* tribunals evolved into a collection of local courts (*nizāmiyya* or *siyāsiyya*) staffed by government officials.²¹

The development of the local courts in Egypt closely mirrored reforms undertaken in the wider Ottoman Empire where, following the Gülhane Rescript of 1839, Sultan Abdülmecid I (r. 1839–61) announced his intention to embark on a series of legal and social changes called the Tanzimat. In law, the Tanzimat culminated in the middle of the nineteenth century with the creation of a system of state courts called the Nizamiye.²² Although the Nizamiye courts and the laws they applied are often described as a step towards the secularization and westernization of the law, Avi Rubin suggests that individuals working in the courts did not believe they were working in a legal system

19 LAṬĪFA MUḤAMMAD SĀLIM, *AL-NIZĀM AL-QAḌĀ'Ī AL-MISRĪ AL-HADĪTH* 26–28 (2010).

20 JAMES BALDWIN, *ISLAMIC LAW AND EMPIRE IN OTTOMAN CAIRO* (2017).

21 SĀLIM, NIZĀM, *supra* note 19 at 28–52.

22 See Roderic Davison, *Tanzīmāt*, in *ENCYCLOPEDIA OF ISLAM*, SECOND EDITION (P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, and W. P. Heinrichs, eds., 2012), available at http://dx.doi.org/10.1163/1573-3912_islam_COM_1174; AVI RUBIN, *OTTOMAN NIZAMIYE COURTS: LAW AND MODERNITY* 23 (2011).

divided between secular and religious influences.²³ Instead, the plurality of legal venues in both the Ottoman Empire and Egypt functioned, according to Khaled Fahmy, to uphold and complement the *sharīʿa*.²⁴

As the nineteenth century progressed, elite circles began to believe that Egypt’s pluralistic system needed consolidation. There was a growing perception that, for many everyday Egyptians, the *sharīʿa* courts and local councils were despotic, inefficient, and easily corrupted.²⁵ Writing in the legal journal *al-Aḥkām* in 1889, the attorney Iskandar Tūmā described how a typical civil or criminal case was handled in the first half of the nineteenth century:

Disputing parties usually raised their matters in the *sharīʿa* courts. However, a strong complainant could approach the local director or governor to avoid the lengthy trial process and associated costs. If we were to conduct a simple study of the *sharīʿa* court records, we would find that they have only a minor impact. [In reality], the director or governor would adjudicate matters administratively, following what they would call “political authority.” The judgment would trickle down to lower-level government officials until it reached the village elders [*mashāyikh al-bilād*] and their supporters, with every level acting as a judge. These individuals could [exercise such power] due to the country’s state at that time. Even the state appellate court [*majlis al-aḥkām*] could only review the activities of directors and governors, and only if an issue was brought before them or the ruler requested a review.²⁶

23 RUBIN, OTTOMAN, *supra* note 22 at 81.

24 FAHMY, QUEST, *supra* note 13 at 126.

25 The reality of whether the Egyptian legal system before 1883 was inefficient in practice has been subject to criticism. See Rudolph Peters, *Murder on the Nile: Homicide Trials in 19th Century Egyptian Shari’a Courts*, 30 DIE WELT DES ISLAMIS 98 (1990).

26 Iskandar Tūmā, *Majālis al-wajh al-qiblī, aw ṭarīqa al-muḥākamāt al-sālifa fī’l-qaṭr al-miṣrī*, AL-AḤKĀM, January 1, 1889.

From Tūmā's analysis, the problem with the Egyptian legal system was apparent: government administrators have too much authority to manipulate the law. While the existence of a pluralistic court system might seem attractive, the lack of organization inherent in such a system left the door open for corruption. As a result, judgments issued by the courts were unpredictable. What oversight existed was ineffective as appellate courts could only be called upon by a litigant with the resources and societal connections to request a review.

The lack of organization and resulting corruption in the local courts remained even after they were reformed in 1876, with Tūmā continuing:

The [post-reform] councils were ineffective due to the corruption of their foundations for several reasons, the most important of which are: (1) they were not organized by a legal order like that of the [later] native courts . . . (2) the rules created for the councils did not set a deadline for the issuance of judgments . . . (3) judgments were to be announced to the parties through governors and directors without specifying a timeline . . . (4) the implementation of judgments was left to governors and directors . . . and (5) councils issued inconsistent judgments because there were no comprehensive laws. Whoever wanted a judgment in their favor could agree with the court employees to introduce an administrative order that matched the ruling they wanted or state that an order had been annulled.²⁷

Again, Tūmā stressed the local courts' lack of organization and unpredictability. If the councils remained without a guiding set of rules and regulations, they were susceptible to the interference of government officials.

In the eyes of Tūmā and other reformers, the best way to cut out corruption, organize the Egyptian legal system, and guarantee predictable outcomes was to create a uniform set of laws and courts operating at arm's length from the executive

²⁷ *Id.*

authority.²⁸ Although some progress towards uniformity began with the establishment of the mixed courts (*al-mahākīm al-mukhtalaṭa*) in 1875, only with the native courts did the ideal of a single independent judiciary for Egyptians come to fruition. For example, the author of the first draft of the Khedival Order organizing the native courts in 1881, the legal translator and Minister of Justice from 1879 to 1881, Muḥammad Qadrī Bāshā, took great pains to emphasize the separation of judicial and executive powers. Rulings of the courts, although issued in the name of the Khedive, must be justified by referencing specific articles from the codes. Judges could also not be removed from office arbitrarily but could be replaced by someone more qualified within the first three years of their service. Finally, if the government wished to transfer a judge to another jurisdiction, it could only do so with their approval, according to a Khedival Order requested by the Minister of Justice and approved by the Appellate Court.²⁹

Reforming the courts by providing uniformity was driven by an increased interest in ideas such as the rule of law. An Islamic concept of the rule of law, or that no individual is above God's decrees, has existed since the beginning of the religion's history. At the level of implementation, Muslim thinkers focused on the virtuous character of the individual who held a position of power rather than the nature of the institution itself.³⁰ For example, a ruler or judge may be deemed "good" because they regularly pray, issue just rulings, and are morally sound. For reformists in nineteenth-century Egypt, Islamic conceptions of the rule of law evolved as the result of encounters with European liberalist thinkers such as John Locke (1632–1704) and Montesquieu (1689–1755), as well as the *Federalist Papers* from the United States (published 1787–88). For these writers, the focus was on the place of institutions. When it came to the courts,

28 BYRON CANNON, *POLITICS OF LAW AND THE COURTS IN NINETEENTH-CENTURY EGYPT* 126–28 (1988).

29 RĀFĪ'Ī, *Miṣr*, *supra* note 3 at 61–62.

30 Lawrence Rosen, *Islamic Conceptions of the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 88 (Jens Meierhenrich and Martin Loughlin, eds., 2021).

creating an independent judiciary was a central concern as it acted as “the best barrier against lawless governmental actions.”³¹

Many essential works on modern evolutions in the rule of law were not published in Arabic until later in the nineteenth century. For example, Montesquieu's main work on legal theory, *De l'esprit des lois*, was only translated in 1891 by the Lebanese attorney Yūsuf Āṣāf.³² However, many Egyptian officials encountered liberal European ideas when studying abroad. For example, several members of the native courts committee, including its head, Fakhrī Bāshā, completed their undergraduate education in France. Fakhrī had also worked in the Paris Public Prosecutor's office from 1867 to 1874, before returning to Egypt.³³

Considering the influence of European thought, the question arises as to whether the Egyptians working on and in the native courts acknowledged that foreign influence had fundamentally altered their legal system. Did observers of the time believe that the norms presented by the *sharī'a*, which had formed the basis of Egypt's legal system for centuries, were secondary to imported legal norms and the will of the modern state?

IS EGYPTIAN LAW ISLAMIC?

Although several Egyptian newspapers and journals discussed the evolution of the Egyptian legal system, the first periodical established with the exclusive purpose of observing and commenting on the native courts was *al-Ḥuqūq*. *Al-Ḥuqūq* was founded in Cairo in March 1886 and headed by the Lebanese Christian businessman and attorney Amīn Shmayil (1828–97). Shmayil hailed from the village of Kafr Shīmā, now a southern suburb of Beirut. During his childhood, he received his primary education in English at the American Missionary School in Beirut. He also

31 BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 52 (2004).

32 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, UṢŪL AL-NAWĀMIS WA'L-SHARĀ'Ī' (Yūsuf Āṣāf, trans., 1891).

33 YŪSUF ĀṢĀF, DALĪL MIṢR 223 (1890).

frequented the traditional *fiqh* circles of Muḥī al-Dīn al-Bakrī al-Yāfī, a prominent Ḥanafī scholar.³⁴

From an early age, Shmayil was recognized for his problem-solving skills. When he was only twenty-one, he was asked to mediate a dispute between Christian sects in Syria, necessitating years of travel between Rome, Istanbul, and Lebanon. During this time, he developed strong friendships within Ottoman diplomatic circles. In 1854, Shmayil left Lebanon to travel to London and Liverpool, where he would spend the next twenty years building a successful trading company with the support of the Ottoman ambassador in England, ‘Abd Allāh Adablī. In 1875, he decided to liquefy his assets and move to Egypt, hoping his commercial success in England would be repeated in Alexandria. He was ultimately unsuccessful and decided to return his attention to the law, working as an attorney in Cairo and founding *al-Ḥuqūq*. He remained the editor-in-chief of *al-Ḥuqūq* for the next twenty years until he retired following the sudden death of his daughter in 1896, staying at home until his own death a few months later.³⁵

For Shmayil, Egypt’s post-1883 legal system resembled the Tanzimat system adopted in the Ottoman Empire, of which Egypt was a part. The Tanzimat was a “dual system” of law in which *sharī‘a* and state (*niḏāmiyya*) operated simultaneously.³⁶ Shmayil outlined this division in an article from March 1888, writing:

Our country is composed of several religious groups, and for each is their statement [of law]. For example, the religion of the Kingdom [of Egypt] is Islam. Islam’s civil, commercial, and criminal laws are based on organized rules and principles that are entirely just if followed correctly. The center of adjudication, according to Islam, is the *sharī‘a* court. The Kingdom also has state laws [*sharā‘i‘ niḏāmiyya*], derived from general principles and rules appropriate for the time and introduced

34 JURJī ZAYDĀN, TARĀJIM MASHĀHĪR AL-SHARQ FĪ’L-QARN AL-TĀSĪ‘ ‘ASHR 2:245 (1903).

35 *Id.* at 2:245–48.

36 See RUBIN, OTTOMAN, *supra* note 22.

by the great Sultans and governors. The venues for state law are the native courts in some areas and local councils in others.³⁷

Shmayil acknowledged the impact of European influence on the Egyptian legal system, stating in an article from 1887 that the country had taken its cues from “the most appropriate constitutions of civilized nations.”³⁸ Later, in 1889, Shmayil would further state that Egypt had composed its new codes by “translating the laws of the West and their constitutions, choosing from them the best and most agreeable with the Holy Sharī'a. However, the greatest reliance was on French law, even though others were more appropriate for modern times, such as Italian, Belgian, German law, etc.”³⁹ Shmayil accepted that foreign influence was critical to developing modern Egyptian law. He also held reservations that Egypt had primarily relied on the French system. More consideration should have been given to other sources of inspiration to provide more useful practical solutions. However, when selecting the content for the codes, Shmayil emphasized that the law committees only chose rules compatible with the *sharī'a* and Egyptian circumstances.

Shmayil also acknowledged differences in how the *sharī'a* and state courts functioned and believed that state law complemented the rules of earlier Muslim jurists. An example of the complementary functioning of state and Islamic norms can be seen in a case from Cairo in 1887. In this instance, a woman lost an appeal to annul a land sale conducted by her deceased husband's estate manager. Her attorneys argued that the contract was incorrectly recorded in the mixed courts and should have been recorded with the *sharī'a* court. The native court judges sided with her husband's agent, stating that although there was a requirement to register the contract with the *sharī'a* courts, the fact that it was handled in the mixed courts did not immediately render it invalid.⁴⁰

37 *Al-Qism al-ḥuqūqī: fī ta'addud al-mahākīm wa ikhtilāf anwā' al-qadā'*, AL-HUQŪQ, March 17, 1888.

38 *Al-Muhāmūn wa'l-mahākīm al-ahliyya*, AL-HUQŪQ, June 18, 1887.

39 *Al-Qism al-ḥuqūqī: al-ḥaqq al-jinā'ī*, AL-HUQŪQ, April 27, 1889.

40 *Al-Qism al-qadā'ī*, AL-HUQŪQ, August 7, 1887.

When explaining the legal importance of the case, Shmayil stated that according to Islamic law (*al-sharʿ*), contracts occur when parties make an offer and acceptance with proper legal capacity. However, the existence of administrative orders, such as those requiring that a contract be registered, must be followed to prevent the contract from being annulled.⁴¹ Even if all the *fiqh* requirements for the contract's validity had been met, an agreement would be invalid and could not be enforced as it did not comply with state law. Shmayil's view here echoes Khaled Fahmy's observations about the "coupling" of jurist-made law with *siyāsa*.⁴² Through his analysis of the case, Shmayil showed he was not concerned about the implications of applying positive law from the state in concert with the *fiqh* on the functioning of the *sharīʿa*.

Shmayil's writings also exemplified the evolution of the judiciary's role. When writing about judges in the native courts, he provided that they should follow principles entirely extracted from classical Islamic works of *fiqh* and judicial etiquette (*adab al-qādī*). Shmayil reflected the importance of individual judges holding to a solid moral character by citing these principles.⁴³ However, he accepted that the judiciary's role had changed to being "agents of political authority and servants of justice," who held an additional responsibility of assisting in the efficacy of broader systemic reform by "revising corrupt laws and [correcting] injustices in their application."⁴⁴ Interestingly, Shmayil's insistence that judges actively participate in the reform process contradicts the positivist view of the law. Instead of merely applying state codes, a common element of the French system, Shmayil acknowledged that Egyptian judges played a vital role in their rulings. When a case is brought before the native courts, judges should seek the outcome that most closely serves the needs of justice.

Regarding the law's content, Shmayil emphasized the connection between the codes and pre-modern *fiqh* rulings. For

41 *Al-Qism al-huqūqī: fī al-bayʿ*, AL-ḤUQŪQ, August 7, 1887.

42 FAHMY, QUEST, *supra* note 13 at 124.

43 *Al-Qism al-huqūqī: fī al-sulṭa al-qadāʾiyya wa ādāb al-qādī*, AL-ḤUQŪQ, March 16, 1889.

44 *Id.*

example, *al-Huqūq* regularly received questions from readers on unclear points of law. In the first set of questions received in May of 1886, a reader asked what the consequences were if an individual were to discover that a product they purchased was defective.⁴⁵ Shmayil's response referenced the right to return a product found in the Egyptian Penal Code and the relevant articles from the French Civil Code.⁴⁶ After these quick citations, he wrote, "The *sharī'a* agrees with the civil code in this area." As proof, he directed his readers to the section on sales from the seventeenth-century Ḥanafī work *Majma' al-Anhur*, written by 'Abd al-Rahmān b. Muḥammad al-Kalībūlī (d. 1078/1667).⁴⁷

Shmayil's view that the *fiqh* and modern codes were compatible can also be seen in his commentaries on case law. In one instance from 1860, a man named Ḥusayn Dassūqī lent twenty-three thousand silver piastres (*qirsh*) to several members of the al-Malījī family and registered the transaction with the *sharī'a* court. The family never paid him back, and on December 20, 1884, Ḥusayn filed a lawsuit in the native courts demanding that the debt be repaid. The lower court rejected the claim in May 1885, stating that too much time had passed since the initial agreement. Ḥusayn then appealed the case, and the Cairo Appellate Court issued its final judgment in February 1886. The court agreed with the defendants, stating that a claim for a debt that was now twenty-five years old was too late to be heard.

When justifying their ruling, the court stated that before the introduction of the Civil Code in 1883, there was no code or royal order governing commercial promises. The law in place was "the texts and rules of the Holy Sharī'a" (*nuṣūṣ wa aḥkām al-sharī'a al-gharrā*). According to those rules and practice confirmed by the Khedives and the mixed courts, no civil claims (outside of matters of inheritance and endowments) that were more than fifteen years old should be heard unless the claimant could prove that there was a valid legal reason for the delay. Shmayil praised the ruling and stated that Article 208 of the 1883 Egyptian Civil Code, which set the statute of limitation for

45 AL-ḤUQŪQ, May 1, 1886.

46 *Al-Qism al-adabī*, AL-ḤUQŪQ, June 5, 1886.

47 *Id.*

civil cases at fifteen years, was “nothing more than confirming that which had come before [i.e., the *sharī‘a*].”⁴⁸

From his analysis of the sources, content, and operation of the native courts, Shmayil saw that introducing new norms into the Egyptian legal system posed few epistemological challenges and believed that the *sharī‘a* continued to form the basis for the new system. Although heavily reliant upon the form of the French system, the courts and their codes were either directly compatible with the pre-1883 legal environment or represented a necessary, even inevitable, development that would allow Egypt to modernize.

Shmayil and *al-Huqūq*’s view of the law were not without their detractors, and there were significant questions about how the *sharī‘a* should operate in the native courts. The most important of these early debates surrounded the issue of homicide. As will be seen in the following section, controversial conditions in the Egyptian Penal Code were debated regarding their impact on realizing justice. Both sides used arguments grounded in the *sharī‘a* to justify their positions.

DEFINING THE PURPOSE OF *QIṢĀṢ*

According to the Egyptian Penal Code of 1883, courts could only issue an order for execution in homicide cases if two sets of conditions were met: (1) that the defendant developed a specific intent to murder and waited for the opportune moment to commit the crime (*sabq iṣrār wa tarassud*)⁴⁹ and (2) that there were two eyewitnesses to the act or the accused confessed to committing the murder.⁵⁰ If these conditions were not fulfilled, the punishment would be a prison sentence with hard labor (*al-ashghāl al-shāqqa*) for fifteen years, which could be altered at the court’s discretion.⁵¹ The first condition was an importation from the French Penal Code of 1810, while the second was adapted from pre-modern *fiqh* rules of evidence.⁵²

48 AL-HUQUQ, November 19, 1887.

49 Penal Code 1883, art. 208 (Egypt).

50 *Id.*, art. 32.

51 *Id.*, art. 213.

52 HALLAQ, SHARĪ‘A, *supra* note 8 at 348.

From the moment the Egyptian Penal Code of 1883 was implemented, the condition of eyewitnesses or confession was the subject of debate. For some, this requirement ensured that execution was only carried out in rare circumstances when full culpability was guaranteed. Muḥammad Yāsīn, one of the earliest commentators on the Penal Code, wrote that eyewitnesses or confessions were necessary because “execution is a great matter and cannot be ordered simply with the presence of logical or circumstantial evidence.”⁵³ For others, requiring eyewitnesses or a confession was an unnecessary barrier to punishment. Amīn Afrām al-Bustānī, a Lebanese lawyer who penned another commentary on the Penal Code, remarked, “this strange restriction in the law resulted in few judgments for execution against the violent murderers who deserve it, allowing evil and threats to security to spread.”⁵⁴ Al-Bustānī, along with many elites in Egypt in the late nineteenth century, believed that an increase in violent crime plagued Egypt. Murderers who would typically be executed if they were proven to have committed their crime intentionally could utilize the conditions in the code to escape the harshest penalties of the law. The requirement of eyewitnesses or a confession was a loophole in the system that needed to be corrected.

In 1887, the Interior Ministry (Nizāra al-Dākhiliyya) took the first concrete step to address concerns that the Penal Code placed too many restrictions on the courts and sent a formal report to the Justice Ministry suggesting that these conditions be removed. In their view, any individual proven to have committed a crime intentionally (*al-qatl 'amdan*) should be executed. The daily *al-Qāhira al-ḥurra*, headed by Muḥammad 'Ārif, welcomed the report as it would “remove the germ of these incidents [homicide and grave bodily injury], which do nothing except upset the peace and shake the foundations of security in the country.”⁵⁵ By allowing the courts to sentence murderers to death more easily, 'Ārif believed that they could more effectively perform their role in deterring potential offenders.

53 MUHAMMAD YĀSĪN, SHARH QĀNŪN AL-'UQŪBĀT 29 (1886).

54 AMĪN AFRĀM AL-BUSTĀNĪ, MUKHTĀRĀT AMĪN AL-BUSTĀNĪ AL-MUHĀMĪ 143 (1919).

55 'Iqāb al-mujrimīn, AL-QĀHIRA AL-ḤURRA, February 27, 1888.

A reduction in murders would reflect positively on the stability of Egyptian society.

Writing in *al-Huqūq*, Amīn Shmayil rebutted the ministry's recommendation and *al-Qāhira al-ḥurra's* praise. He framed his argument historically, opening with the phrase, "Laws should adapt to the time and place [they are applied to]." Shmayil argued that the rules of retaliation (*qiṣās*) were necessary in the past to prevent individuals from taking the law into their own hands and perpetuating blood feuds. Today, such methods are no longer required, and advanced societies worldwide have seen the importance of valuing individual life. The legal principle of "choosing the lesser evil" (*yukhtār ahwan al-sharrayn*), mentioned by scholars of *fiqh* and outlined in the opening section of the Ottoman Civil Code of 1877, the *Mecelle*, dictated that prison with hard labor was a more logical and appropriate course of action than execution. After all, murderers were still faced with eternal damnation should they fail to repent.⁵⁶ "Which is more acceptable to reason and more [effective] in preventing evil," Shmayil questioned, "executing a murderer and taking his valuable life, or keeping him alive and tortured through hard labor, the end of which is also death? We, of course, choose hard labor."⁵⁷ Like 'Arif, Shmayil agreed that serious steps needed to be taken to ensure that courts dealt harshly with offenders. However, he felt that the status quo of the Penal Code fulfilled this need. Egypt had moved beyond its more violent and uncivilized past, and new circumstances meant that older norms had to change. Removing the conditions in the Penal Code, specifically the requirement of eyewitnesses or a confession, would reverse Egypt's progress.

For Shmayil, the purpose of punishment is to reform the individual (*iṣlāḥ*). By subjecting perpetrators to hard labor, society can access a greater benefit and avoid the harm of losing a member. A murderer could potentially "compensate society through his [continued] presence," turning a "wild branch" into one that "produces fruit," he writes. Although this is only a "minor benefit" (*manfa'a ṭafīfa*), it is better than "no benefit at all"

⁵⁶ *Iqāb al-mujrimīn*, AL-HUQŪQ, March 17, 1888.

⁵⁷ *Id.*

(*al-lāmanfa 'iyya kuliyyan*).⁵⁸ This element of Shmayil's argument shows his focus on the societal impact of homicide over its effect on the individual. Even if a person commits the most serious crimes, their lives should not be thrown away unless it is guaranteed that there is no possibility for them to be reformed. Avoiding punishment except in the most extreme circumstances was a prominent principle within *fiqh* discussions on criminal law. For pre-modern jurists, avoiding punishment was necessary because of an assumed failure of evidence to determine an individual's criminal intent.⁵⁹ Shmayil took the principle of avoiding punishment further by adapting it to modern Egyptian circumstances. Instead of a way to prevent executing potentially innocent defendants, avoiding punishment now provided a benefit to a society that prioritized reforming rather than punishing wayward members.

Finally, Shmayil pushed back against textualism, stating that religious texts have always been subject to abrogation (*naskh*) and reinterpretation based on circumstances. "Is it not the case," he argued, "that there are abrogating and abrogated verses in a single religious text?" Even if a divine commandment is not entirely abrogated, Shmayil emphasized that humanity's job is to find the most appropriate methods to reach its intended goal. For example, the execution of murderers is a religious obligation (*amr wājib*). However, the methods used to fulfill that obligation in one time and place may no longer be effective and should change so long as both achieve the same purpose.⁶⁰

Responding to Shmayil's position was Shaykh 'Alī Yūsuf (1863–1913). Although he later would gain fame for his anti-colonial newspaper *al-Mu'ayyad*, Yūsuf's first foray into journalism was with the weekly literature journal *al-Ādāb*. Yūsuf published two pieces rejecting Shmayil's arguments, taking its title from the Qur'ānic verse, "There is life for you in the law of retaliation" (*wa-lakum fī'l-qīṣāṣ ḥayā*).⁶¹ Yūsuf suggested

58 *Iqāb al-mujrimīn*, AL-HUQŪQ, March 3, 1888.

59 For more on the avoidance of punishment in Islamic criminal law, see INTISAR RABB, *DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW* (2015).

60 *Iqāb*, *supra* note 56.

61 QUR'ĀN, 2:179.

that Shmayil's argument of historical change was invalid, as the Qur'ānic commandment of retaliation "has existed for centuries in a place of respect." In contrast to Shmayil's argument of civilization leading humanity from its more violent past, Yūsuf argued that every society, state, and legal system throughout history has expressly confirmed the rules of *qiṣāṣ*, despite the many changes that they have undergone. This "guides us to the necessity that these rules [*qiṣāṣ*] should remain in place."⁶² In Yūsuf's view, the rules of *qiṣāṣ* carried a normative value because they were mentioned explicitly within the Qur'ān. The value of the Qur'ān was not subject to historical circumstances. No difference in practical reality could justify a total deviation from its norms.

For Yūsuf, Shmayil's reliance on principles was misplaced, even though the principles he cited were valid. According to the fundamentals of jurisprudence (*uṣūl al-fiqh*), the principle of choosing the lesser evil utilized by Shmayil was too general. Some pre-modern scholars frowned upon applying general principles to cases, citing the maxim "there is no general statement that has not been specified" (*mā min 'ām illa wa kuṣṣis*).⁶³ Yūsuf employed this maxim to argue that nothing is more specific than a clear verse of the Qur'ān, and no other form of evidence can override a Qur'ānic commandment. When Shmayil posited that texts may be abrogated or their application modified using principles, Yūsuf claimed that he had failed to realize that, despite all the instances where principles have been used to abrogate or modify a text, "every religious law and holy text has confirmed the continuity of the law of *qiṣāṣ*."⁶⁴ Yūsuf's argument here reflects his dedication to textualism in interpreting Islamic law. The Egyptian government had gone too far in the Penal Code by taking evidentiary conditions from *fiqh* out of their proper context. The conditions in the code should be removed, and the

62 *Wa-lakum fi'l-qiṣāṣ ḥayā*, AL-ĀDĀB, March 22, 1888.

63 This maxim was controversial for pre-modern scholars, with the fourteenth-century jurist Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyya criticizing it as invalid. See MAJMU' AL-FATĀWĀ 6:444-45 (Medina: Mujamma' al-Malik Fahad li-Tiba'a al-Muṣḥaf al-Sharīf, 2004).

64 *Wa-lakum*, *supra* note 62.

original Qur'ānic rules maintained to allow judges to apply the harshest punishments more easily.

Finally, Yūsuf believed that the purpose of the law was not to reform individuals but to deter potential offenders (*rad'*). He argued that there is no rational or scientific proof that Shmayil's "wild branches" can be reformed, and his call to apply the "lesser evil" to society confirms the necessity of executing the most violent criminals rather than having to deal more harshly with them if (and when) they choose to strike again. With *qiṣāṣ* present, Yūsuf wrote, "murderous criminals find themselves faced with an absolute, unquestionable limit" that they must not cross, receiving an "appropriate punishment" if they do.⁶⁵ Yūsuf believed that the role of the government was to protect against the spilling of innocent blood. The Interior Ministry's suggestions did precisely that. They reflected the government's desire to secure the interests of the Egyptian people, ridding them of terrible crimes.

There are apparent ideological differences between the positions of Amīn Shmayil and 'Alī Yūsuf regarding the purpose and necessity of *qiṣāṣ*. Shmayil relied on history, legal principles, and rational argument to justify the preference for hard labor and maintain the status quo of the Egyptian Penal Code. In contrast, Yūsuf focused on the authoritative power of the Qur'ān to reject the condition introduced by the Penal Code and encourage broader use of the death penalty as a deterrent.

What is interesting in the exchange between Shmayil and Yūsuf is that both writers were able to ground their arguments within the realm of the *sharī'a*, and neither suggested that their opponent was using imported or non-*sharī'a* ideas. Whether it was Shmayil's principles of *fiqh* that the Ottomans had codified in the *Mecelle* or Yūsuf's reliance on *uṣūl* and the texts of the Qur'ān, both found support in positions that had existed long before the introduction of the 1883 code and the establishment of the native courts. Likewise, viewing the purpose of *qiṣāṣ* to either reform or deter offenders also finds roots in pre-modern juristic discourses. However, reform is more commonly associated with later thinkers and European Enlightenment.

⁶⁵ *Wa-lakum fī'l-qiṣāṣ ḥayā*, AL-ĀDĀB, March 8, 1888.

At the same time, both writers also acknowledged that Egypt's legal and political circumstances had fundamentally changed. For example, they called for the modern state to create and apply laws to improve society. Departing from pre-modern *fiqh* discussions of *qiṣāṣ* that located the right to punish solely with the victim's family (*awliyā' al-damm*), both believed that it was the state and the native court judges who were to fulfill the objectives of the *sharī'a* through their judgments.⁶⁶ Allowing the state to punish offenders also finds its home in pre-modern juristic discourse, albeit amongst a minority of scholars. For example, the Shāfi'ī 'Alī b. Muḥammad al-Māwardī (d. 450/1058) and the Mālikī Shihāb al-Dīn al-Qarāfi (d. 684/1285) argued that the political authority retained the right to punish offenders outside of the will of the victim's family because homicide included "rights of the public good" (*ḥuqūq al-maṣlaḥa al-'amma*).⁶⁷ Shmayil and Yūsuf adopted the pre-modern approach most appropriate for Egypt's circumstances by placing the right to punish with the state. They were interested in how the courts could best resolve the problem of an increase in criminal activity.

A case presented to the court of Banha in February of 1889, approximately one year after the exchange between Amīn Shmayil and Shaykh 'Alī Yūsuf, brought to center stage the question of which *sharī'a* norms should matter in the native courts. A Bedouin named Khalīl Ḥusayn, who was most likely in his late teens, was arrested and accused of committing the premeditated murder of another Bedouin named Nadhīr al-Mayār. Upon his arrest and during the initial investigation, Khalīl openly confessed to having committed the murder, stating that he was carrying out his duty to take revenge (*tha'r*) against Nadhīr for killing his father when Khalīl was only four months old.⁶⁸

The trial court judges found themselves torn between the two approaches to punishment expressed by Shmayil and

66 HALLAQ, *SHARĪ'A*, *supra* note 8 at 320.

67 'ALĪ MUḤAMMAD AL-MĀWARDĪ, *AL-AḤKĀM AL-SULTĀNIYYA* 346 (Cairo: Dār al-Ḥadīth, 2006); SHIHĀB AL-DĪN AL-QARĀFI, *AL-FURŪQ* 1:257 (Beirut: Dār al-Kutub al-'Ilmiyya, 1998).

68 AL-ḤUQŪQ, March 30, 1889.

Yūsuf. On the one hand, there was the option of execution provided by the 1883 Penal Code. Khalīl fulfilled all the conditions required by the law: he committed homicide, developed specific intent, and waited until the opportune moment to murder his victim. He had also confessed and, even when questioned by the judges in the court, repeated and confirmed his confession. Following the approach of Yūsuf, Khalīl was a product of the lawlessness that plagued Egypt. The state should execute Khalīl, using its power to enact the strictest punishments to deter others. On the other hand, Khalīl firmly believed that his acts were justified, as his Bedouin culture of preserving family honor dictated that he must take revenge for his father's murder. He was, as Shmayil had argued, a "wild branch" that should be educated, reformed, and encouraged to become a more productive member of society.

In its final judgment on March 9, 1889, the court followed the view that Shmayil would embrace. While acknowledging that there is no legitimate excuse for murder and that revenge killing should never be accepted, the court also stated that "the conditions of this case, the evidence presented, the age of the defendant, his strongly held belief based on ignorance and the environment in which he was raised, and the strong moral leanings of the Bedouin community towards revenge necessitate that the court exercise compassion and mercy." Khalīl was sentenced to only seven years of prison with hard labor, the shortest period possible for homicide in the Penal Code.⁶⁹ The judges of the native courts adopted the *sharī'a* norm of acting in the interests of the public good by utilizing the state's power. Executing Khalīl would have provided no deterrent to future offenders, as Bedouin culture firmly held to the right of victims to take revenge. The best option for Khalīl was to be punished for his actions but allow him the opportunity to continue his life and, possibly, learn from his actions and be reformed.

The debate about *qiṣāṣ* and the conditions controlling the application of the death penalty in Egypt continued. The recommendations from the Interior Ministry that sparked this debate in the press were not immediately adopted. It was only in

69 *Id.*

December 1897, after the murder of a British official, that the situation changed. In a Khedival Order, the article outlining the condition of eyewitnesses or confession was annulled, allowing judges to order the execution of murderers more easily.⁷⁰

Interestingly, it was *al-Mu'ayyad*, run by Shaykh 'Alī Yūsuf, that published opinion pieces defending the article and demanding that it be retained as a “defense of the *sharī'a*, which would rather have evildoers and thieves declared innocent rather than execute an innocent defendant.”⁷¹ Standing against *al-Mu'ayyad* was Amīn al-Bustānī, writing in the periodical *al-Muqattam*, who had long argued that the article requiring eyewitnesses or confessions was a barrier to punishment. For al-Bustānī, the article's removal was a victory for the “hand of truth” and that “justice, the *sharī'a*, and the wisdom of the judiciary are now at a consensus [that the article is abhorrent].”⁷² Even though the tables had now turned, both supporters and detractors of the conditions of *qiṣāṣ* still located their positions within the *sharī'a*.

Beyond debates regarding the content of the law, the implementation of the native courts, a singular court system for all Egyptians, opened questions about who would apply the law. Could Coptic Christians, the largest non-Muslim minority in Egypt, adjudicate in matters of the *sharī'a*? The following section discusses a similar debate that evolved regarding Christian judges in the native courts.

CAN CHRISTIANS JUDGE ACCORDING TO ISLAMIC LAW?

One of the core characteristics of the *sharī'a* courts, both before and during the nineteenth century, was that the judges and support staff were Muslims trained in *fiqh*. When a royal order set up the appointment of judges in the *sharī'a* courts in 1880, the Shaykh of Egypt's Islamic University, al-Azhar, and the grand

70 AL-BUSTĀNĪ, MUKHTĀRĀT, *supra* note 54 at 144.

71 Eugene Clavel, *Mashrū' al-tawassu' fi'l-i'dām: al-mādda 32 min Qānūn al-'uqūbāt al-miṣrī*, AL-MU'AYYAD, December 8, 1897.

72 Amīn Afrām al-Bustānī, *Khitām al-kalām 'ala al-mādda 32*, AL-MUQATTAM, December 18, 1898.

mufī had to approve the candidacy of any judge before they were referred to the Ministry of Justice and the Khedive.⁷³

In the native courts, the situation was quite different. Judges were to be selected based on the recommendation of the Minister of Justice and approved by the Cabinet, with no involvement of the religious authorities.⁷⁴ Judges were expected to have “sufficient knowledge of the law” (*dhā dirāya kāfiya bi'l-qawānīn*) and could serve so long as they were more than twenty-five years old (for lower courts) and promised to hold no other official position while acting as judge.⁷⁵ Native court judges could come from almost any intellectual background. They did not need to know the rules of *fiqh* or be well-versed in the pre-modern Islamic tradition.

Following these regulations, the judges of the native courts were drawn from a pool of existing government officials. Their selection was essentially a political decision. For example, one of the judges of the Cairo Appellate Court, 'Umar Bek Rushdī, was a military expert with no legal experience until his appointment to the Alexandria Appellate Court in 1884. His biography mentions Rushdī's support of Khedive Tawfīq during the Urabi Revolution of 1879–82 that had sought to depose the Khedive due to perceived British and French influence. According to the entry, Rushdī “was never responsive to the calls to rebel” and “advocated for the support of the Khedive for better or worse.”⁷⁶ However, appointments based on political loyalties should not indicate that the government ignored previous legal expertise when choosing judges for the native courts. The head of the Cairo Appellate Court in the 1890s, 'Abd al-Ḥamīd Ṣādiq, had an extensive legal education and had served as a judge in the state councils since 1862.⁷⁷

Nevertheless, the shadow of political favoritism persisted. In October of 1887, Muḥammad 'Ārif penned an article in

73 Order 12 of 1880 (Lā'ihā al-mahākīm al-shar'īyya [Sharī'a Courts Order]), art. 5.

74 Unnumbered order of June 14, 1883 (Lā'ihā tartīb al-mahākīm al-ahliyya [Order to Establish Native Courts]), art. 32.

75 *Id.*, art. 36.

76 ĀṢĀF, DALĪL, *supra* note 33 at 289.

77 *Id.* at 277.

al-Qāhira al-ḥurra questioning the judicial appointments made by the Minister of Justice, the Coptic Christian Buṭrus Ghālī. Ghālī was no stranger to controversy nor was he short on political enemies, as he had sided with Aḥmad ‘Urābī during the 1879 Revolution and published a manifesto with the Coptic Pope Cyril V opposing Khedive Tawfiq’s rule and British support.⁷⁸ According to ‘Ārif, Ghālī had used his position to appoint Christians “in the appellate courts who know nothing about the *sharī‘a*, with one being a station assistant in the railways and another who was in the military marching band.” The same situation had occurred in the office of the Public Prosecutor, with Ghālī “appointing his friends who are not qualified,” a matter that was rumored to have led to Shafiq Maṣṣūr, the Prosecutor’s secretary, to resign in protest.⁷⁹

Responding to ‘Ārif’s attack was another Cairo daily, *al-Waṭan*, managed by a Christian named Mikhā’īl ‘Abd al-Sayyid. He took issue with ‘Ārif’s characterization of Copts as unable to participate in the country’s legal system. “He [‘Ārif] writes that Coptic judges are unqualified . . . [However,] we have heard from their trustworthy Muslim brothers that they perform their duties with integrity, humility, transparency, and skill.”⁸⁰ According to ‘Abd al-Sayyid, ‘Ārif’s statements were merely due to his ignorance of Egyptians, who had stood shoulder to shoulder in military conflicts and participated equally in society, regardless of their faith. ‘Abd al-Sayyid also accused ‘Ārif of threatening the stability of Egypt’s national harmony. “[This kind of criticism] creates hysteria and concern between Muslims and Copts,” he wrote, “causing one to look at the other with jealousy as if the Copts hold the proverbial Keys to the Kingdom.”⁸¹ ‘Abd al-Sayyid was wary that ‘Ārif’s statements could ignite communal conflict and disrupt Egypt’s nascent nationalism. The concern of sectarian strife was fresh on ‘Abd al-Sayyid’s mind in the aftermath of the Urabi Revolution.

78 Samir Seikaly, *Prime Minister and Assassin: Butrus Ghali and Wardani*, 13 MIDDLE EASTERN STUDIES 112 (1977).

79 *Sa‘ādat Buṭrus Bāshā Ghālī*, AL-QĀHIRA AL-ḤURRA, October 27, 1887.

80 AL-WAṬAN, October 29, 1887.

81 *Id.*

A few days later, *al-Qāhira al-ḥurra* published 'Ārif's response. "Our [publication's] investigation into the functioning of the native courts is only a desire to see their organization perfected and to protect them from those who spread disinformation. We have never discussed forbidden matters that threaten the foundations of society. Rather, we seek to break the backs of the enemies of truth."⁸² 'Ārif was also furious about the accusations against his patriotism, writing, "The native courts belong to Muslims, Christians, Jews, and every Ottoman born under the crescent flag [of Egypt] without any discrimination."⁸³ According to 'Ārif, Egypt's national integrity was not up for debate. All members of society, regardless of faith, were equal participants in the country's progress. What was at stake for 'Ārif was the truth.

It was in the next section where 'Ārif elaborated on this vital point: "It is shocking to hear that this snitch suggests that our investigation seeks to promote the Islamic element [*al-ʿunṣur al-islāmī*] to cause strife between our Coptic brothers and us," he wrote. "Our paper only seeks the triumph of the truth [*al-ḥaqq*]. If we are to support the country, what is our country other than an Islamic one that embraces the Copt? Should our paper be labeled Islamic if it seeks the clear truth [*al-ḥaqq al-ẓāhir*]?"⁸⁴ As will be seen in more detail below, 'Ārif's response used the truth as a universal value connected to the goal of achieving justice inherent within Islam. 'Ārif meant to turn the tables against his opponent. When hinting that 'Ārif was promoting the "Islamic element," it was 'Abd al-Sayyid who engaged in sectarianism by suggesting that 'Ārif believed Islam held a monopoly over the truth. In reality, 'Ārif argued that the native courts applied a universal truth for Muslims and Christians.

Feeling that the argument had reached a boiling point, Amīn Shmayil intervened to calm the debate by responding to both 'Abd al-Sayyid and 'Ārif. "We sympathize with the editor of *al-Waṭan* from what he has seen in the attacks of *al-Qāhira al-ḥurra* against his co-religionists," he wrote. However, "conflict

82 *Radd wajīz*, AL-QĀHIRA AL-ḤURRA, November 1, 1887.

83 *Id.*

84 *Id.*

within the Arabic press should not be to humiliate the people of this country. Rather, it should be to support their rights and prevent the causes of sectarian strife.” He then described several historical contributions of Coptic Christians to Egyptian military victories and listed prominent Coptic figures in the native courts, the Public Prosecutor’s Office, and other ministries.⁸⁵

Shmayil also agreed that those who had received government appointments based on favoritism should be removed. Positions in the courts should be given “without discrimination based on their religion, but rather based on their qualifications to serve the nation.” The vital point for Egypt’s development was the growth of its institutions. Egypt had preceded the world’s developed countries for centuries but was now in a race to compete. “If we only focus on [criticizing each other],” wrote Shmayil, “we will find ourselves isolated and unable to catch up with them [Europe].”⁸⁶ Shmayil’s reference to “catching up” reveals much about his approach to reform. As mentioned earlier, Shmayil acknowledged that France heavily influenced the native courts’ form and content. He felt that Egypt was “behind” Europe in its legal development. However, Shmayil’s focus on France should not be understood to mean that Shmayil advocated for a wholesale importation of European norms. Instead, he felt that France and other European jurisdictions had made significant progress in achieving the universal goal of justice that must be applied considering each nation’s practical reality. In Egypt, justice could only be served by drawing inspiration from its native legal tradition, the *sharī‘a*.

The argument launched by Muḥammad ‘Ārif in *al-Qāhira al-ḥurra* can be placed against the backdrop of sectarian fears that appeared during the Urabi Revolution. The debate also reflects political differences between the authors and questions of national independence. Indeed, ‘Abd al-Sayyid suggested that ‘Ārif’s criticisms of the native courts were made partly to “give cause to prevent the British from leaving the Nile Valley.”⁸⁷ The British occupation, although limited in its interference in the

85 *Al-Qāhira wa’l-waṭan*, AL-HUQŪQ, November 5, 1887.

86 *Id.*

87 AL-WAṬAN, October 29, 1887.

daily affairs of the Egyptian government, was always present in the background of reformist thought. More overt calls for independence, like those hinted at by 'Abd al-Sayyid in his criticism of 'Ārif, would become important as Egypt's political environment flourished in the twentieth century. For the exchange discussed here, local concerns about the nature and necessity of reform in areas of Egyptian society like the legal system were more pressing.

'Ārif's response to *al-Waṭan* also reflects an essential point in the conceptualization of the *sharī'a*. With the development of the native courts and the new codes, the *sharī'a* was being drawn into the Egyptian context, adjudicating matters between individuals based on national and not religious affiliation. As a result, the courts' activities would naturally include Muslims and non-Muslims. The presence of non-Muslim judges created a problem for 'Ārif, as *fiqh* limited the construction and application of the law to Muslim jurists.

For Shmayil, a Christian, the *sharī'a* was not bound to a particular religious class. Instead, it was a legal system not unlike British common law or French civil law. Anyone could access it. When he studied with Ḥanafī scholars during his childhood in Lebanon or wrote about the *sharī'a* in *al-Ḥuqūq*, Shmayil did not feel that he was interfering in a discourse that was not his own. Quite the contrary, he actively participated in the Islamic legal tradition, using it as a basis for the Egyptian legal system.

'Ārif seems to have partially accepted Shmayil's argument that the *sharī'a* was not bound to Muslims when speaking of the native courts as aiming to apply "the truth" (*al-ḥaqq*). By doing so, 'Ārif equated the realization of the *sharī'a* to the more general idea of establishing justice, a concept that permeated local discourse throughout the second half of the nineteenth century. Even for a critic like 'Ārif, the native courts still reflected an application of the *sharī'a* and had no impact on the "Islamic" nature of the modern Egyptian state so long as they continued to push towards their goal of providing justice in their application.

Perhaps one of the most significant shifts of the legal reforms in the modern period was the universality of the native courts and the fact that Egyptians would no longer be classified upon religious grounds in matters of public law. The following section shows how the *sharī'a*, through the native courts, formed the core of a new national legal system.

THE *SHARĪ'A* AS NATIONAL JUSTICE

In 1881, two years before the establishment of the native courts and amid the Urabi Revolution, one of Egypt's most prominent scholars of the Arabic language and a founding member of the Dār al-'Ulūm Academy, Shaykh Ḥusayn al-Marṣafī (1815–90), published a text entitled *The Eight Words*. His work was directed to the “young intelligentsia,” stating that it would clarify “some of the most popular terms of this age.”⁸⁸ Although scholars identified al-Marṣafī's book as a foundational text of Egyptian nationalism and modernism, I argue that it is also representative of the reformist view of the *sharī'a*.⁸⁹ Through his writing, al-Marṣafī promoted an equivalency made by several reformers between *sharī'a* and achieving national justice.

In his opening section on the nation (*al-umma*), al-Marṣafī wrote that a prosperous nation is one in which every level of society respects one another yet is not afraid to speak up when the truth (*al-ḥaqq*) is threatened. Regardless of status, “no one should be afraid to respond [to something unjust], nor should anyone sneer at being rebuked.” This was because, in al-Marṣafī's view, “the developed purpose for all [members of a society] is the realization of truth, determining what is right [*al-ṣawāb*], and gaining what is good [*al-ṣalāḥ*].”⁹⁰ To bolster the importance of upholding the truth, al-Marṣafī referred his readers to pre-modern *fiqh* and a debate between two eponyms of the classical schools of Islamic law: Mālik b. Anas (d. 179/795) and his student Muḥammad b. Idrīs al-Shāfi'ī (d. 204/820). Mālik,

88 ḤUSAYN AHMAD AL-MARSAFĪ, *RISĀLA AL-KALIM AL-THAMĀN* 28 (Khālid Ziyāda, ed., 2019).

89 TIMOTHY MITCHELL, *COLONISING EGYPT* 136 (1988).

90 AL-MARSAFĪ, *RISĀLA*, *supra* note 88 at 31.

whom al-Marṣafī termed “the first great scholar of the nation,” was famously reported to have said, “Every one of us rebukes and is rebuked.” In one instance, al-Shāfi‘ī, although he was only a student of Mālik, openly questioned his teacher’s ruling regarding the validity of the sale of a slave. Once presented with the appropriate evidence, Mālik backed off, stating that al-Shāfi‘ī was correct on the law.⁹¹ Al-Marṣafī’s reference to these early Muslim jurists shows he believed that the goal of the *sharī'a* to promote truth was universal. The truth is not bound to a particular context. Examples of scholars seeking truth through the *sharī'a* can be found in both the pre-modern and modern periods.

Amīn Shmayil echoed al-Marṣafī’s equivalence of *sharī'a* and truth in the first year of *al-Ḥuqūq*. For Shmayil, the concept of *al-ḥaqq* was “the science of building knowledge of legal systems and their distribution.” The *sharī'a* “was the controlling factor of human activity. Whatever agrees with it is just, and whatever does not is unjust. [Therefore,] the science of law is to distinguish the just from the unjust.”⁹² Shmayil would later elaborate on the connection between divine *sharī'a* and positive law by stating that “The source of all legal systems is divine and natural truth [*al-ḥaqq al-ilāhī wa'l-ṭabī‘ī*]. However, there must be a positive and manmade law that completes the structure of justice [*al-binya al-'adliyya*]. The civil law [of the Ottoman Empire and Egypt] is the product of divine and natural law and composed of it.”⁹³ Shmayil’s “structure of justice” added to al-Marṣafī’s definition of truth and established the *sharī'a* at the core of Egypt’s legal system. The *sharī'a* constituted the inspiration and source for the law but needed further elaboration by positive law to ensure its implementation given the changing social circumstances of nineteenth century Egypt.

The proper application of the *sharī'a* for al-Marṣafī and Shmayil meant achieving justice within the national context, extracting the specific rules necessary for the time from the *sharī'a*’s commandments and principles. Creating practical

91 *Id.*

92 *Al-Qism al-ḥuqūqī: fī'l-ḥaqq wa-'ilm al-aḥkām wa mā li-'ulamā' al-muslimīn min tūl al-bā' fī dhālik*, AL-ḤUQŪQ, June 31, 1886.

93 *Al-Qism al-adabī: fī taqaddum al-'uthmāniyya ba'd sana 1856*, AL-ḤUQŪQ, August 30, 1890.

rules has been done in the past through *fiqh*. However, it was now essential to “widen the meaning of the *sharī‘a* to make it agree with the time, place, and people [it is applied to]. To do so, the gates of interpretation [*ijtihād*] must be opened, and the reform field expanded for the people of knowledge, who are the ultimate guardians of all legal systems, no matter their source.”⁹⁴ By calling on *ijtihād*, a term usually applied to Muslim jurists, Shmayil showed that he and the Egyptian committee that created the codes used in the native codes were performing the same task as those in the past. Like al-Marṣafī’s search for the truth, the process of *ijtihād* was universal and needed to continue to create effective law.

In *al-Ādāb*, Shaykh ‘Alī Yūsuf concurred that national justice was the goal of Egypt’s modern legal reforms. For example, he praised the criminal system’s development and its transparency. Before 1883, “administrators managed criminal cases without any established rules or foundations . . . cases were brought before judges who had no independence and issued rulings in the shadows against defendants they had never seen or heard a word from.” With the introduction of the native courts, judges “follow the path of legal investigation, transparent hearings, and give defendants every opportunity to defend themselves with representation.”⁹⁵ For Yūsuf, the success of the native courts was relevant because they applied the procedures necessary to realize justice. Yūsuf added the critical element of procedure to Shmayil’s overall structure. He confirmed that the realization of the *sharī‘a* occurred when evidence was presented and defendants could respond to accusations against them.

In practice, the image of national justice through transparent court procedure can be seen in a murder case from the Upper Egyptian oasis of Fayoum, adjudicated in 1888. A retired military general named Muṣṭafa Wāṣif Bek, who served with the Egyptian army’s ill-fated campaign into northern Ethiopia, had acquired a large plot of land from the government in the Fayoum Oasis village of Ihrīt in place of his pension. One evening during

⁹⁴ *Id.*

⁹⁵ *Al-Tārīkh al-usbū‘ī, fī al-qaḍāyā al-jinā‘īyya*, AL-ĀDĀB, March 30, 1889.

Ramadan, Muṣṭafa and two acquaintances, Muḥammad al-Ja'īdī and a Bedouin named Sa'd Ḥatwīsh, were invited to break their fast at the home of Khalīl and Khayr Allāh al-Dahshān, a prominent family of landholders. As the evening progressed, residents of the village heard shots fired from inside the house. When they rushed to see what had occurred, they reportedly found Muṣṭafa dead and one of the brothers, Khalīl, injured with a gunshot wound in his arm.⁹⁶

In 1888, the native courts only functioned in Lower Egypt. Local administrative councils initially managed the investigation and trial in Fayoum. When the case was brought before the council, the al-Dahshān brothers testified that they heard an unidentified Bedouin man yelling outside the home and began to fire. They were not sure of the motive behind the crime but suggested that there was a blood feud between the anonymous attacker and Muṣṭafa's companion. Khalīl and Khayr Allāh were innocent bystanders caught in the crossfire.⁹⁷

As the case involved the murder of a high-ranking former military officer, the local investigative report was sent to Cairo, where it eventually reached the office of the Prime Minister, Muṣṭafa Riyāḍ Bāshā. The Prime Minister ordered specialists from the police and the Cairo Public Prosecutor's Office to go to Fayoum and conduct a more comprehensive investigation. When they reported back to Cairo, they expressed concerns that the local council had failed to conduct their investigation accurately. They suggested that the al-Dahshān brothers had intentionally murdered Muṣṭafa.⁹⁸ In response, Riyāḍ Bāshā ordered a special tribunal be set up in Fayoum to retry the defendants. The tribunal would be staffed by prominent judges from the first instance and appellate sections of the native courts in Cairo with no option for appeal, and each party would have full legal representation. The state was represented by Aḥmad Ḥishmat, general counsel for the native courts. The two defendants had three attorneys: Aḥmad al-Ḥusaynī, Khalīl Ibrāhīm, and Akhnūkh Fānūs, each with a high public profile. Finally, the family of

96 *Al-Qism al-qaḍā'ī: muḥākama qātilī al-marḥūm Muṣṭafa Bek Wāṣīf*, AL-ḤUQŪQ, October 6, 1888.

97 *Id.*

98 *Ḥāditha al-fayūm*, AL-AḤKĀM, November 1, 1888.

Muṣṭafa Wāṣif was represented by Saʿd Zaghlūl, who would go on to become one of Egypt’s most famous lawyers and revolutionary politicians.⁹⁹

The tribunal began its work on the first of October 1888 in the Khedival court of Fayoum city. The trial lasted two full days and included sixty-four witnesses for the prosecution, medical reports, and even geographical surveys of the al-Dahshān home and surrounding area. In response, the defendants provided no additional witnesses beyond those presented in the initial investigation. Their attorneys argued that the public prosecutor had mistreated the brothers, that witnesses had been pressured to give false testimony, and that they deserved to be treated with mercy.¹⁰⁰

During the trial, the tribunal found that shots could not have come from outside the home. The al-Dahshān residence was set against a hill, and the trajectory of the bullet wounds found in both Muṣṭafa and Khalīl were inconsistent with an external attack. The court also examined the testimony of one of Khalīl’s neighbors, who stated that Khalīl had come to him after the incident and asked him to help fake a bullet wound in his arm and cut his clothes, making it seem he was injured.¹⁰¹

Through the testimony of several other witnesses, the tribunal discovered that during the evening in question, Khalīl had asked to examine an old war revolver that Muṣṭafa carried with him. After Muṣṭafa told him that the pistol was rusted and probably would not work, Khalīl aimed it at him and shot him in the arm. Muṣṭafa cursed at the brothers and yelled, “This is treachery, and what people say about you is true. May God destroy your home!” The other brother, Khayr Allāh, then blocked the exit, aimed a carbine rifle at Muṣṭafa, and fired into his chest, killing him instantly. The brothers then tried to hide Muṣṭafa’s body and lied to the gathering villagers. Only when the body was found, and questions raised about Muṣṭafa’s death, did the brothers use their influence to pressure the villagers into testifying that they had seen Khalīl injured and Muṣṭafa dead, setting

99 *Al-Qism al-qaḍāʾī: muḥākama*, *supra* note 96.

100 *Al-Qism al-qaḍāʾī: tābiʿ al-ḥukm fī qaḍīyya al-dahāshana*, AL-HUQŪQ, November 1, 1888.

101 *Id.*

up the story of an external attack.¹⁰² After the proceedings, the tribunal sentenced Khalīl and Khayr Allāh al-Dahshān to execution and ordered them to pay the hefty sum of three hundred Egyptian pounds as restitution to the victim's family. They were publicly hanged one week later.¹⁰³

As seen from the level of attention and detail the local press provided, the al-Dahshān brothers' trial was a spectacle of the new Egyptian court system in action. According to some reports, the proceedings were attended by no less than 2500 members of the public who had come from all parts of the country.¹⁰⁴ The trial was designed to show off the competency of the native courts, push back against critics, and confirm that the courts represented a new standard of justice that applied to all areas of the country. A reporter writing in *al-Ahrām* remarked, "This trial was a pinnacle of organization, perfection, fairness, and justice. The voices of the local population cry out for the native courts to be extended to Upper Egypt due to what they have seen in their procedures compared to the local councils."¹⁰⁵ In *al-Qāhira al-ḥurra*, its reporter wrote,

As justice is the basis for all power and dominion, spread over all areas of the country under the authority of the Khedive, and flowers amongst his subjects, not a day has passed where we have not seen new efforts in establishing justice from members of his government . . . I have seen a significant difference between the organization of the native courts and the Upper Egyptian councils that function according to the old ways.¹⁰⁶

The tribunal and the praise it received had their desired effect. The native courts were expanded to the Upper Egyptian

102 *Id.*

103 *Id.*

104 *Al-Ḥukm fī qaḍīyya al-marhūm Muṣṭafa Bek Wāṣif*, AL-AHRĀM, October 4, 1888.

105 AL-AHRĀM, October 4, 1888.

106 *Al-Fayūm li-makātibinā*, AL-QĀHIRA AL-ḤURRA, October 6, 1888.

districts of Beni Sueif, Asyut, and Qena just a few months later, in January 1889.¹⁰⁷

For Amīn Shmayil in *al-Huqūq*, the al-Dahshān trial was not only a victory for Egyptian law but one for the *sharīʿa* as well. “There is no doubt,” he wrote, “that the result of this trial will be the spread of calm and peace over general Egyptian society and a terrible deterrent to criminals, who will not dare to commit similar acts.” He rebuked critics of the trial who questioned the evidence presented and that the court did not follow the conditions of *qiṣāṣ*—requiring two eyewitnesses or a confession—turning in his defense to the broader view of the *sharīʿa* that included the right of the political authority to make law (*siyāsa*). He wrote, “The ruler [*walī al-bilād*] may legislate in extraordinary circumstances such as these. We must also consider the competency of the investigating committees, the court, and the testimony of witnesses in confirming the charges leveled against the defendants [as more valuable] than these tawdry claims.”¹⁰⁸ Holding a public trial and presenting evidence were sufficient guarantees for Shmayil that the *sharīʿa*, in both form and process, had been achieved.

By 1889, the idea that the native courts represented a modernized and nationalized venue for applying the *sharīʿa* to all Egyptians was firmly established. Even ʿAlī Yūsuf, writing in *al-Muʾayyad*, agreed that the native courts were, despite their shortcomings, “the best way to preserve the rights of Egyptians.”¹⁰⁹ The trial of the al-Dahshān brothers was an important example of the success of the native courts. Its result confirmed for most observers that accessing the *sharīʿa* to create rules relevant to current circumstances that were then applied by a transparent process was the only way the country could solve past problems and guarantee justice.

107 Tūmā, Majālis, *supra* note 26.

108 *Al-Qism al-qaḍāʾī: muḥākama qātilī al-marḥūm Muṣṭafa Bek Wāṣif*, AL-ḤUQŪQ, October 6, 1888.

109 *Maḥkama Miṣr al-ahliyya*, AL-MUʾAYYAD, December 10, 1889.

USING *SHARĪ'A* FOR THE PUBLIC GOOD

As noted at several junctures, the reformers and commentators in late nineteenth-century Egypt did not conceive of the *sharī'a* as a set of fixed laws. Likewise, they did not view the works of jurists as having an intrinsic authoritative or normative value. Instead, the discussion of which rules should be chosen for the Egyptian codes was open-ended. Reformers viewed the *sharī'a* as a legal system (*nizām qānūnī*), a body of guiding principles, viewpoints, and substantive rules that could be accessed by classical jurists and non-jurists alike to create law. Muḥammad Sirāj has elaborated on the idea of the *sharī'a* as a holistic legal system, arguing that the methodology of the Islamic system consists of “the science of extracting the rules of the *sharī'a* (*al-ahkām*) from their sources”—the traditional definition of the fundamentals of jurisprudence (*uṣūl al-fiqh*)—combined with “the mechanisms for implementing these rules in practical reality through legislation and the judiciary.”¹¹⁰ Sirāj's definition of the *sharī'a* can be helpful as an alternative framework to the jurist-centered approach present in the current literature on Islamic legal history. Like the work of Fahmy, Sirāj removes the *sharī'a* from its pre-modern barriers and integrates the role of the political authority.

More importantly, Sirāj's conceptualization of the *sharī'a* accurately reflects the sentiments of reformers in the nineteenth century. Reformers like Shmayil and Shaykh 'Alī Yūsuf were most interested in the idea that the law should apply to “practical reality” or, as the German historian of Islamic law Mathias Rohe put it, the idea that every legal system is “integrated within a social context and influenced by it to a significant degree.”¹¹¹ When Amīn Shmayil and Shaykh 'Alī Yūsuf debated the purpose of punishment for homicide, they were both fully aware of the pre-modern groundings of their positions in the *sharī'a* and *fiqh*. Their concern was *which* of these approaches would most appropriately fit the specific needs of the time. However, the *fiqh*

110 MUHAMMAD AHMAD SIRĀJ, *FĪ UṢŪL AL-NIZĀM AL-QĀNŪNĪ AL-ISLĀMĪ: DIRĀSA MUQĀRANA LI-'ILM UṢŪL AL-FIQH WA TATBĪQĀTIHI AL-FIQHIYYA WA'L-QĀNŪNIYYA* 29 (2020).

111 MATHIAS ROHE, *ISLAMIC LAW IN PAST AND PRESENT* 5 (2015).

was not discarded entirely. The rulings of classical jurists could remain applicable, but only so long as they continued to fulfill the needs of modern Egyptian society.

The focus on practical reality refers to a concept in pre-modern juristic discourse known as the “public good” (*maṣlaḥa*). Developed in classical legal theory during the eleventh century CE,¹¹² *maṣlaḥa* became a tool for adapting Islamic law to changing circumstances. Mohammad Fadel has suggested that *maṣlaḥa* reflected “the political or social dimension of the law.”¹¹³ *Maṣlaḥa*, as a technical term, was rarely explicitly mentioned in *al-Ḥuqūq*, *al-Ādāb*, or *al-Mu’ayyad*. Nevertheless, *maṣlaḥa* played a critical role in justifying the *sharī’a* legitimacy of the codes used for the native courts. For example, when the draft of the Egyptian Penal Code of 1883 was presented to a committee of jurists from each of the four Sunnī schools of jurisprudence, their final report stated that “the articles of these laws either match what is found in a text from one of the four schools of law, do not oppose them, or are considered part of the public good [*al-maṣāliḥ al-mursala*] in which interpretation [*ijtihād*] is permissible, taking into consideration the needs of the population.”¹¹⁴

Many conservative intellectuals were concerned that the broader definition of the *sharī’a* and the use of *maṣlaḥa* to meet the needs of Egyptian society carried with it a tinge of utilitarianism.¹¹⁵ If the *sharī’a* was no longer an end, subsidiary to pursuing broader goals such as justice and modernization, the legal system could stray too far from its foundations. Writing in *al-Ādāb* in 1887, ‘Alī Yūsuf argued that more attention should be paid to the *sharī’a* as a “controlling factor” than had been accepted by Shmayil in *al-Ḥuqūq*. Defining the term “freedom”

112 Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 ISLAMIC LAW AND SOCIETY 182 (2005).

113 Mohammad Fadel, *Maṣlaḥa as “Flourishing” and Its Place in Sunni Political Thought*, 7 JOURNAL OF ISLAMIC ETHICS 1 (2023).

114 Quoted in ‘ALĪ ‘ALĪ MANṢŪR, KHAṬWA RĀ’IDA NAHW TAṬBĪQ AḤKĀM AL-SHARĪ‘A AL-ISLĀMIYYA FĪ L-JUMHŪRIYYA AL-‘ARABIYYA AL-LĪBIYYA 32 (1972).

115 For more on the question of utilitarianism and its impact on the *sharī’a* in modern Egyptian law, see CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪ‘A INTO EGYPTIAN CONSTITUTIONAL LAW 78–85 (2006).

(*al-ḥuriyya*), Yūsuf wrote that “there is no human power that can bring such just laws [as the *sharī'a*] that provide a barrier to the [uncontrolled] desires of individuals and bind the general legal system.”¹¹⁶ Allowing public opinion to define the contours of the law or moving beyond the restrictions provided by the *sharī'a* in favor of unrestrained human reason was the greatest threat to the progress achieved with the creation of the native courts.

The concerns expressed by Yūsuf would fuel the narrative that Egypt's legal reforms transformed the divine *sharī'a* and subjugated it to man-made state law. However, these ideas flowered later and should be seen as a product of Islamist movements that find their ideological home in the circumstances of the twentieth century.¹¹⁷ For reformists writing during the late nineteenth century, the native courts were a step towards the realization of a national system of justice, albeit imperfect and debated, with the *sharī'a* still operational at its core.

CONCLUSION

Whether Egypt's modern legal system is an authentic representation of the *sharī'a* and whether the influence of European norms has fundamentally changed the nature of Egyptian law remain contentious issues for Islamic legal historians and practitioners alike. The activities of the native courts and the periodicals that followed their early development demonstrate that reformers had little concern that the *sharī'a* continued to operate in Egypt. Ideas informed by European movements, such as evolutions in the rule of law, the separation of powers, and the creation of an independent judiciary, helped shape the reforms. However, commentators from different ideological orientations debated and understood these ideas as comfortably placed within the realm of the *sharī'a* and believed in a more holistic approach that included the state's role in creating law. Similarly, pre-modern juristic approaches to law continued to matter, reshaped to find the best *sharī'a*-guided path to reform the Egyptian legal system and provide justice for all.

116 *Al-Ḥuriyya*, AL-ĀDĀB, February 17, 1887.

117 For more on this period, see WOOD, ISLAMIC, *supra* note 17.

Significant work remains to develop a clearer picture of the legal reforms in the Muslim world during the colonial period and how evolving norms were synthesized into modern Muslim legal systems. Further observations should be centered around the perspectives of those living and working at the time, allowing for a more accurate understanding of the complexities, differences of opinion, and ideologies at work.