

EDITOR'S INTRODUCTION TO THE SPECIAL ISSUE

REEVALUATING THE NORMS OF LAW AND GOVERNANCE IN ISLAMIC LEGAL HISTORY

by Mohammed Allehbi

This special issue explores the interplay of the norms of governance and Islamic law in Muslim societies, historically, from the eighteenth to late twentieth centuries, right at the moment when Western colonial powers arose to assert hegemony over the Muslim world. These four essays engage scholarly debates about continuities as well as discontinuities between historical and modern Islamic political–legal paradigms for state laws in imperial, colonial, and postcolonial contexts. Within this debate lies the opportunity to reexamine the modern legacies of early Islamic norms for law and governance as they intersected and diverged in novel ways.

Before the advent of colonial rule beginning in the eighteenth century and the rise of the modern Muslim nation-state in the nineteenth century, Muslim rulers asserted considerable discretionary–legal authority for themselves and government authorities. Muslim bureaucrats and jurists helped them formulate and legitimize that authority under the rubrics of *siyāsa* (governance) and *qānūn* (sultanic law). These areas of law were distinct from Muslim jurists' traditional ambit of *fiqh* (Islamic substantive law). Specifically, *siyāsa* and *qānūn* constituted sources of law for particular legal spheres typically marked as “public law”—including the criminal justice system, courts of *maẓālim* (grievances), taxation, the *ḥisba* (market inspection

and enforcement of public morality), as well as treaty-making and war.

Historians debate how these legal–governmental approaches coexisted alongside the jurisprudential methodologies of *fiqh*. Some historians, such as Wael Hallaq, categorize *siyāsa* and *qānūn* as “extra-*sharī‘a*” norms that were rooted in non-jurisprudential practices and driven by political expediency.¹ In contrast, Frank Vogel argues that *siyāsa* served as a key principle that was endemic to *sharī‘a* itself.² Both contend, however, that jurisprudential conceptions, specifically *al-siyāsa al-shar‘iyya* (governance according to divine law), served to define and limit any Muslim government’s legitimate scope of authority over law and governance.³ Mohammad Fadel asserts that the principle of *siyāsa shar‘iyya* also legitimized the state’s discretionary authority to promulgate positive law in cases pertaining to public interest.⁴ Both Fadel and Noah Feldman refer to this balance and coexistence between *siyāsa* and *fiqh* as the classical constitution of Islamic governance and law.⁵ These understandings on the precise Islamic legal nature of *siyāsa* and *qānūn* and their relationship with *fiqh* inform research about how Islamic law and politics developed and evolved under colonialism and modern nation-state building.

Historians further debate the consequences of the colonial incursions in the Muslim world. Scholars writing today about Islamic law and governance tend to agree that colonial powers’ efforts to centralize and codify law irrevocably expanded the legal authority and scope of governance for presidents

1 Wael B. Hallaq, *Sharī‘a: Theory, Practice, Transformation*, 214–16 (2009).

2 Frank E. Vogel, *Tracing Nuance in Māwardī’s al-Aḥkām al-Sulṭāniyyah: Implicit Framing of Constitutional Authority*, in *ISLAMIC LAW IN THEORY: STUDIES ON JURISPRUDENCE IN HONOR OF BERNARD WEISS* (Kevin Reinhart ed., 2014).

3 Hallaq, *supra* note 1; F. E. Vogel, *Siyāsa*, in *ENCYCLOPAEDIA OF ISLAM*, SECOND EDITION (P. Bearman et al eds., 1955–2005).

4 Mohammad Fadel, *Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State*, 14 *REVIEW OF CONSTITUTIONAL STUDIES* 105, 110–11 (2009).

5 Noah Feldman, *The Fall and Rise of the Islamic State* 31, 34 (2008); Fadel, *supra* note 4, at 108–13. See also Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (1996).

and kings of modern Muslim nation-states.⁶ However, some of these same scholars remain divided about whether this development built on or diverged from earlier political and legal dynamics of *siyāsa* and *fiqh* in the Muslim world. For example, Clark Lombardi argues that the late twentieth-century Supreme Court of Egypt (SCC) adopted the earlier Islamic concept of *siyāsa shar'iyya* as a guiding principle in its deliberations. Yet, he observes that the SCC also handed down decisions according to an interpretation of Islamic law based on a solid commitment to legal liberalism.⁷ Abdullahi Ahmed An-Na'im proposes that historical differentiation between the state and religion in societies during the Islamic Middle Ages, namely during the Fatimid and Mamluk periods, indicates that Islam and the secular state based on Western principles are compatible.⁸ Conversely, both Rachel Scott and Asifa Quraishi-Landes argue that attempts by modern Arab-Islamic reformists to codify juristic laws (laws articulated by Muslim jurists) as state law is a significant divergence from the historical divisions which had existed between *siyāsa* and *fiqh/sharī'a*.⁹ Different interpretations as to whether modern dynamics of state law and Islamic jurisprudence are contiguous with their earlier historical counterparts aptly show that the increase in and signification of greater governmental authority in the modern Muslim world was not monolithic. It was subject to diverging cultural, geographical, and temporal contexts.

We can achieve more nuanced answers to this question of continuity by shifting focus from a grand narrative of dichotomy between governance and Islamic law to analyzing government and intellectual elites who navigated the dynamics

6 ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE 97–102 (2010); HALLAQ, *supra* note 1, at 15–18; Sherman A. Jackson, *Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 FORDHAM INT'L L.J. 158 (2006); Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 ARAB L.Q. 3, 9 (1996).

7 CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 180, 235 (2006).

8 An-Na'im, *supra* note 6, at 97–102.

9 RACHEL M. SCOTT, RECASTING ISLAMIC LAW: RELIGION AND THE NATION STATE IN EGYPTIAN CONSTITUTION MAKING 54 (2021); Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 OHIO NORTH UNIVERSITY LAW REVIEW 545, 555–66, (2015).

of political expediency within the social and legal realities of their times. For instance, Nathan Brown emphasizes the initiative of local Egyptian Muslim officials and intellectuals under British colonialism in adopting and legitimizing the European legal systems at the expense of *sharīʿa*. According to Brown, these officials viewed *sharīʿa* as unsuitable in its current form for modern needs.¹⁰ His research argues that scholars cannot plausibly characterize governmental law-making—even in an age of unparalleled legal power and control by a central government—simply as a vertical imposition. Similarly, in her study of colonial northern Nigeria, Rabiʿat Akande demonstrates that indirect governance by British colonial bureaucrats allowed northern Nigerian emirs to radically expand the discretionary scope of *siyāsa* beyond precolonial models.¹¹ She shows how local Muslim power brokers took advantage of colonialism to shape older political models of *siyāsa* in inventive ways. Her findings on the substantial agency wielded by colonial subjects align with the conclusions of Nurfadzilah Yahya in her analysis of the expansion of colonial jurisdiction in Southeast Asia during the late nineteenth and early twentieth centuries. For example, Yahya reveals that a minority of Arab mercantile elites in Penang, Malacca, and Singapore would petition British administrators to centralize Islamic judiciary according to their own interpretations of Islamic law which shaped colonial law while at the same time suppressing the authority of Muslim judges from the indigenous populations.¹² Likewise, in his intellectual history of the eighteenth-century Ottoman statesman Ahmed Vâsîf Efendi (d. 1806), Ethan L. Menchinger examines how officials and courtiers of Sultan Selim III (r. 1789–1807) adapted Ottoman political principles to justify European-style reforms. Although some members of society perceived the European-style reforms as being in opposition to Islamic law, he sought to sway them by advocating for the sultan’s legislative powers rooted

10 Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 LAW AND SOCIETY REVIEW 103 (1995).

11 Rabiʿat Akande, *Governing Sharia*, in ENTANGLED DOMAINS: EMPIRE, LAW AND RELIGION IN NORTHERN NIGERIA 70–104 (2023).

12 NURFADZILAH YAHAYA, *FLUID JURISDICTIONS: COLONIAL LAW AND ARABS IN SOUTHEAST ASIA* 36–42 (2020)

in discretionary judgements, which was justified by historical Islamic legal norms.¹³ Collectively, these scholars show that government law, even during colonial and modern eras, was forged—not only by Muslim jurist *or* state authorities—but by a diverse group of actors deploying conflicting strategies and perspectives on *sharī'a*.

The four essays in this special issue of the *Journal of Islamic Law* build on these scholarly approaches that recognize the agency of imperial and intellectual elites, both Muslim and non-Muslim. These essays avoid generalizations about the reception of the interplay between historical norms of Islamic law and governance by colonial regimes and modern states. Instead, the articles written by Nihat Celik, Melike Batgiray Abbot, Omar Gebril, and Ovamir Anjum are intended to provide a critical and historical analysis of the actions and thoughts of bureaucrats and intellectuals, across the history and the lands of the modern Muslim world: eighteenth-century Ottoman Istanbul, colonial Sudan and Egypt, and, finally, the postcolonial Arab world. These historians offer fresh insights into the interpretations and applications of early Islamic notions of law and governance in the new legal–political structures established under imperialism, colonialism, and the modernizing state.

**CONTRIBUTING ARTICLES: ISLAMIC LAW AND GOVERNANCE
IN EIGHTEENTH-CENTURY OTTOMAN ISTANBUL, COLONIAL
SUDAN AND EGYPT, AND POST-COLONIAL ARAB WORLD**

Nihat Celik's article, "The Ottomans and International Law: The Russian Annexation of the Crimean Khanate in 1783 in the Light of the Documents from the Ottoman Archives," offers a window into the dynamics of Central Asian norms of Islamic law and governance on the eve of modernity. He examines the integration of *siyar* (principles of Islamic international law) into Ottoman officials' diplomacy and bureaucracy when the Ottoman Empire confronted the Russian Empire's annexation of the Crimean Khanate in 1783. Methodologically, he draws on

13 ETHAN L. MENCHINGER, *THE FIRST OF THE MODERN OTTOMANS, THE INTELLECTUAL HISTORY OF AHMED VASIF* 10 (2017).

archival documents and the meeting minutes of ad hoc Ottoman imperial consultation councils to inform his narrative. In the process, Celik explores how military and diplomatic strategies, geopolitical realities, and the theoretical constructs of Islamic law shaped imperial decisions and policies implemented by the Ottoman bureaucratic elites as they confronted a crisis of political and religious legitimacy. Celik argues that Islamic jurisprudential norms that favor temporary peace with non-Muslim populations during times of military weakness played a significant role in how Ottoman statesmen navigated the difficult decision of not declaring war against Russia. He also portrays Ottoman governmental law as rooted in military and diplomatic protocols that combined bureaucratic consensus and Islamic legal principles to achieve pragmatic goals as well as religious and legal legitimacy. In discussing these dynamics, this article illuminates how members of the Ottoman bureaucracy creatively acted as interpreters of Islamic law during a time of military and political weakness.

Melike Batgiray Abbot's essay, "Between Code and Custom: Middlemen as Agents of Legal Transformation in Early Anglo-Egyptian Colonial Sudan," brings into focus the bureaucratic and discretionary law-making behind the synthesis of Islamic jurisprudential norms, British penal codes, and customary law enforced by the British colonial regime in early twentieth-century colonial Sudan. Methodologically, she builds on existing scholarship and uses archival evidence to uncover the role of middle-ranking British bureaucrats in shaping vernacular law in the colonies. Specifically, she examines a selective blending of these disparate sources of law under the vague term conferred on it, "Mohammedan law," in the day-to-day operations of colonial criminal law in Sudan. Batgiray Abbot shows, for example, how British middlemen changed the Islamic legal category of *diya* (blood money) from a principle of restorative justice to an instrument of social control in criminal cases among tribal communities that they viewed as unruly and disruptive. Her main argument is that certain circumstances granted middle-ranking British officials considerable discretionary authority over criminal justice in ways that paralleled precolonial *siyāsa*

frameworks. These circumstances included a lack of comprehension of Islamic norms and customs, no intimate knowledge of the same, and the pragmatic local needs of governance. The important contribution of this article is that it incorporates middle-colonial British governance into a broader history of Islamic criminal law in Sudan.

Omar Gebril's "Recasting *al-Siyāsa al-Sharʿiyya* in 1920s Egypt: Formulating a Theory of an Islamic Modern State" explores the disparities between medieval and early modern frameworks of *siyāsa sharʿiyya* (governance according to Islamic law) alongside reformist interpretations of that concept by early twentieth-century Egyptian religious scholars. His starting point is the life and thought of the Egyptian jurist and legal thinker ʿAbd al-Wahhāb Khallāf (d. 1956). Gebril shows that, historically, jurisprudential discourse on *siyāsa sharʿiyya* sought to restrict the ruler's executive authority over law to cases requiring government intervention and discretion on behalf of the *maṣlaḥa* (public benefit). However, he argues that Khallāf expanded the executive–legislative scope of *siyāsa sharʿiyya*. Khallāf accomplished this expansion by proposing that modern states use a utilitarian approach to reevaluating rulings from Islamic law without prior restrictions of the historical tradition. This approach provides a means to enact new laws, so long as any new decisions do not contradict fundamental principles of Islamic law. By examining existing scholarship on the history of *siyāsa sharʿiyya* from the Middle Ages to the present day, Gebril contributes to the ongoing debate by showing the metamorphosis of Islamic legal–political traditions in Egypt as it developed from a British colony into a modern constitutional state.

Finally, in "Conjuring Sovereignty: How the 'Constitution' of Medina became an Oracle of Modern Statehood," **Ovamir Anjum** demonstrates how several modern Arab Islamic reform-minded thinkers anachronistically interpreted the famous agreement that the Prophet Muḥammad is known to have concluded with the people of Medina, the *Ṣaḥīfat al-Madīnā*. This document was a covenant reflecting the agreements concluded between the Prophet Muḥammad and the tribal clans of Medina, to which the young Muslim community migrated