Recasting *al-Siyāsa al-Sharʿiyya* in 1920s Egypt: Formulating a Theory of an Islamic Modern State

Omar Gebril
Columbia University

Abstract

This article primarily explores one of the Muslim scholarly discourses aiming to construct an Islamic governance model, harmonious with the modern state, that is intertwined with premodern Islamic traditions. It scrutinizes the reinterpretation and reconceptualization of the premodern concept of siyāsa sharʿiyya *in 1920s Egypt by modernist* ʿulamāʾ *(religious scholars) to align with the nation state's legal and constitutional landscapes. The study focuses on the legislative aspects of this modernized theory of* siyāsa sharʿiyya *and demonstrates how under this theory the state conceptually begins to play a legitimate role in defining Islamic law. Special attention is given to ʿAbd al-Wahhāb Khallāf's (d. 1375/1956) book,* al-Siyāsa al-sharʿiyya*, which highlights the transformative epistemological and constitutional repercussions of this discourse. Comparative analysis is conducted with the works of premodern progenitors of the concept, such as Ibn Taymiyya (d. 728/1328) and Ibn Qayyim al-Jawziyya (d. 751/1350) and later authors who have used the concept, to identify discrepancies between premodern and modern discourses in* siyāsa sharʿiyya*. The study also cites practical implementations of this modernized theory through a law project proposed in Egypt in 1926 that demonstrates how the new* siyāsa sharʿiyya *discourse bestowed an inherent legal authority to the state to independently legislate on sharīʿa laws based on an expanded conceptualization of* maṣlaḥa *(public benefit).*

Keywords: *siyāsa sharʿiyya*; legal transformation; *maṣlaḥa*; *ijtihād*; Islamic modern state; Egyptian legal system; ʿAbd al-Wahhāb Khallāf

Introduction

The major changes that have taken place in the legal systems of the Muslim countries over the past two centuries have sparked extensive debates about the definition, scope, and role of *sharīʿa* in the public sphere. To address these issues, scholars and legal historians have delved deeply into the premodern tradition to examine how premodern jurists formulated their understandings of the relationship between *siyāsa* and *sharīʿa*. Given the notable differences in the usage of the term *siyāsa* by premodern jurists, historians are left with a spectrum of differing conclusions about the nature of this relationship. Acknowledging the primary focus of the classical genre of *al-aḥkām al-sulṭāniyya* (the ordinances of government) on the normative requirements of the caliphal position and the administrative dimensions of Islamic governance, the postclassical scholarly works of *siyāsa sharʿiyya*, especially as articulated by Ibn Taymiyya (d. 728/1328) and Ibn Qayyim al-Jawziyya (d. 751/1350), provide seminal references for historians in illuminating the nature of this relationship. For instance, some of the historians who have studied the evolution of penal laws and the introduction of forensic medicine in Egypt's legal system in the nineteenth century, such as Rudolph Peters, Khaled Fahmy, and more recently, Brian Wright, argue that these advancements were aligned with the premodern tradition of *siyāsa sharʿiyya*.[1]

The *siyāsa sharʿiyya* discourse thus evolved into a framework for interrogating the compatibility of the *sharīʿa* with developments brought by the modern state in the legal system and for examining to what extent these modifications are influenced by Islamic traditions versus Western secularism. Although these studies do not primarily focus on the development of the discourse of *siyāsa sharʿiyya*, they may inadvertently imply that the conception of *siyāsa sharʿiyya* remained unchanged and that the many other modern adjustments introduced by the modern

1 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century 131 (2005); Khaled Fahmy, In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt 124 (2018); Brian Wright, A Continuity of Sharīʿa: Political Authority and Homicide in the Nineteenth Century 9 (2023).

state in the legal system might also resonate with this traditional understanding of the *siyāsa sharʿiyya*. This article, however, examines the concept of *siyāsa sharʿiyya* from a broader perspective within the modern Islamic legal system and demonstrates that the modern discourse of *siyāsa sharʿiyya*, which primarily started to be recast in the twentieth century, began to evolve in response to various developments and the increasing influence of secularism in the Muslim world.[2] It contests that the twentieth-century modernist use of *siyāsa sharʿiyya* in Egypt represents a departure from the structural and constitutional paradigms of the concept in premodern times and even the nineteenth century. The article illustrates how this notion of *siyāsa sharʿiyya* has been substantially broadened and reinterpreted to encompass nearly every aspect of *sharīʿa* law in a way that grants the state an inherent authority to define and decide on the various domains of Islamic law based on an expansive interpretation of *maṣlaḥa* (public benefit) proposed by *ʿulamāʾ* (religious scholars). To achieve a more adequate understanding of the conceptual changes that occur in the legal field, I shifted my focus from the discourse of the emerging legal elite that does not belong to the religious scholarly class, concentrating instead on the implications of this concept within the Azharī *ʿulamāʾ*. This is to demonstrate how Azharī *ʿulamāʾ* widely began to adopt a more conciliatory approach towards the modern political and constitutional arrangements of the state and to devise an Islamic theory grounded in premodern traditions which aligns with these developments.

This took place simultaneously with the intense constitutional and codification activities in Egypt in the 1920s, in a period that marked an early conceptualization of an "Islamic state." Considering that the first Egyptian constitution was

2 Mohammad Fadel argues, "As a historical matter, it was not until the modern era when Muslim states began using the power of *siyāsa sharʿiyya* expansively in an effort to transform Muslim societies. Prior generations of rulers had used this power sparingly, and largely to regulate state interests, such as taxation and land use, and in the field of criminal law. Until the nineteenth century, therefore, Muslim law could be fairly described as having been developed and applied largely by judges and jurists, not rulers." Mohammad H. Fadel, Islamic Jurisprudence, Islamic Law, and Modernity 16 n.26 (2023).

enacted in 1923, the modernized genre of *siyāsa sharʿiyya* began to be incorporated as a subject at Madrasat al-Qaḍāʾ al-Sharʿī (The College of *Sharʿī* Judiciary) in the same year.[3] Using textbooks, periodicals, proposed legislation, and scholarly rejoinders from this period, I explore how they have reconceptualized and redefined *siyāsa sharʿiyya* as a means to reconcile the modern state system, with its extensive legislative authority and various apparatuses, with Islamic constitutional theory. The article attempts to delineate the constitutional disparities between the premodern *siyāsa sharʿiyya* and the modern theory, as formulated by reformist religious scholars in Egypt during the 1920s. It presents first a brief overview of the concept of *siyāsa sharʿiyya* as paradigmatically conceptualized by its principal proponents, who are frequently cited and referenced by contemporary theorists of *siyāsa sharʿiyya*. This close reading serves to illuminate the foundational principles and notions underpinning this concept. In the second section, I scrutinize the initial emergence—at least within the Egyptian context—of the modernized literature of *siyāsa sharʿiyya*, focusing on ʿAbd al-Wahhāb Khallāf's (d. 1375/1956) book, *al-Siyāsa al-sharʿiyya,* a seminal text which fundamentally altered the scope and dynamics of premodern *siyāsa sharʿiyya*.[4] I discuss the structural components and epistemological implications of the reformed understanding of *siyāsa sharʿiyya* and its ramifications on modern Islamic constitutional theory. The concluding section provides a succinct overview of a practical exemplar of the evolution and influence of this theory among Egyptian Islamic legal reformers during a transformative period in Egypt's history. This section illustrates how the expanding role of *siyāsa sharʿiyya* became a unifying theme amongst reformist religious scholars. However, to illustrate that this interpretation was not universally accepted among Azharī religious scholars and remained characteristic of legal reformers, I refer to the critiques articulated by the distinguished Azharī scholar and

3 ʿAbd al-Wahhāb Khallāf, al-Siyāsa al-sharʿiyya aw niẓām al-dawla al-islāmiyya fī ʾl-shuʾūn al-dustūriyya waʾl-khārijiyya waʾl-māliyya 1 (1931).

4 Khallāf, who was one of the most prominent names in Islamic legal reform during the twentieth century in Egypt, served as a judge in the *sharīʿa* courts, a professor at Madrasat al-Qaḍāʾ al-Sharʿī, and later at the Cairo Law School.

mufti, Muḥammad Bakhīt al-Muṭīʿī (d. 1354/1935), who ardently opposed the reformist interpretations of *siyāsa sharʿiyya*.

Siyāsa Sharʿiyya in Pre-Modern Contexts

There are different political and constitutional genres which appeared in the classical Islamic era, such as *al-aḥkām al-sulṭāniyya* (the ordinances of government), statecraft treatises, mirrors for princes, and other genres of writings. However, it was only in the postclassical period that the genre of *siyāsa sharʿiyya* emerged. Although the term *siyāsa sharʿiyya* was first known to be used by the Ḥanbalī jurist Ibn ʿAqīl (d. 513/1119), it was Ibn Taymiyya who most prominently developed it into a constitutional theory.

Several scholars have studied Ibn Taymiyya's concept of *siyāsa sharʿiyya* and interpreted it in different ways. Baber Johansen views Ibn Taymiyya's *siyāsa sharʿiyya* as a means to "attack the formalism of the old doctrine on procedure and proof."[5] But he further interprets it as one that legitimizes the Mamlūk ruling and negates the caliphate as the obligatory form of Muslim rule.[6] Mona Hassan and Ovamir Anjum, however, reject Johansen's reading of Ibn Taymiyya's theory and argue that it does not reject the caliphate.[7] Anjum further argues that Ibn Taymiyya's political project was corrective to the prevailing Ashʿarī elitism in both politics and theology as well as the legal formalism, and that the *siyāsa sharʿiyya* was Ibn Taymiyya's sui generis.[8] Abdessamad Belhaj also understood it as "an ethical

5 Baber Johansen, *Signs as Evidence: The Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof*, 9 Islamic Law and Society 168, 192 (2002).

6 Baber Johansen, *A Perfect Law in an Imperfect Society: Ibn Taymiyya's Concept of "Governance in the Name of the Sacred Law," in* The Law Applied: Contextualizing the Islamic Sharīʿa: A Volume in Honor of Frank E. Vogel 176 (Peri Bearman, Wolfhart Heinrichs, and Bernard G. Weiss eds., 2008).

7 Ovamir Anjum, Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment 31 (2014); Mona Hassan, *Modern Interpretations and Misinterpretations of a Medieval Scholar: Apprehending the Political Thought of Ibn Taymiyya*, *in* Ibn Taymiyya and His Times 340–43 (Shahab Ahmed and Yossef Rapoport eds., 2010).

8 Anjum, *supra* note 7, at 30.

criticism of the community and of the state with a strong emphasis on coercive justice."[9] However, my concern in this article is the legislative aspects of this theory and its constitutional limits, and how its domain has been understood in modern times.

Therefore, before exploring the contemporary conceptualizations of *siyāsa sharʿiyya*,[10] it is crucial to shed light on some of the significant developments of this concept. I therefore present in this section a theoretical overview of the concept within the constitutional theories of its early proponents, Ibn Taymiyya and Ibn Qayyim al-Jawziyya, and later authors who have used the concept.

Progenitors of *Siyāsa Sharʿiyya*: Ibn Taymiyya and Ibn Qayyim al-Jawziyya

Ibn Taymiyya and Ibn Qayyim al-Jawziyya, as the progenitors of the literature of *siyāsa sharʿiyya*, necessitate an exploration of their conceptualization of *siyāsa sharʿiyya*. It is important to note that, for example, Ibn Taymiyya's book *al-Siyāsa al- sharʿiyya fī iṣlāḥ al-rāʿī wa'l-raʿiyya* (*Islamic Public Policy for the Righteousness of the Ruler and the Ruled*) is merely a fragment of his discourse on governance and constitutional theory, which is dispersed throughout his various legal and even theological writings. For Ibn Taymiyya, the term *siyāsa sharʿīyya* has two implications: one is more distinct, but both are still interrelated. Generally speaking, Ibn Taymiyya delineates *siyāsa sharʿiyya* as a model of governance, which is fundamentally rooted in two foundational concepts derived from the Qurʾān[11]—the principles of integrity (*amāna*) and justice (*ʿadl*). Integrity epitomizes the

9 Abdessamad Belhaj, *Law and Order according to Ibn Taymiyya and Ibn Qayyim al-Jawziyya: A Re-Examination of Siyasa Shar'iya*, *in* Islamic Theology, Philosophy and Law: Debating Ibn Taymiyya and Ibn Qayyim al-Jawziyya 400, 421 (Birgit Krawietz, Georges Tamer, and Alina Kokoschka eds., 2013).

10 For definitions of *siyāsa sharʿiyya*, see F. E. Vogel, *Siyāsa*, in Encyclopaedia of Islam, Second Edition (P. Bearman et al eds., 1955–2005); Felicitas Opwis, *Siyāsah Sharʿīyah*, *in* The Oxford Encyclopedia of Islam and Politics (2014); Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 200 (2009); Intisar A. Rabb, *Governance (al-Siyāsa al-Sharʿiyya)*, *in* The Princeton Encyclopedia of Islamic Political Thought 197 (Gerhard Böwering et al. eds., 2013).

11 Q 4:58–59.

fiduciary duties of governors and rulers in their administrative and financial responsibilities (*al-wilāyāt wa'l-amwāl*),[12] whereas justice embodies the imperative for the executive authority to uphold and implement *sharīʿa*, predominantly within the realms of penal and discretionary law; this encompasses both prescribed punishments (*ḥudūd*) and rights (*ḥuqūq*): of God (*ḥuqūq Allāh*) and the Muslim community (*ḥuquq al-ʿibād*), as well as the rights of individual Muslims.[13]

This first category of rights, which essentially relates to rights of God and the communal rights of Muslims, encompasses the adjudication and penalization of crimes against the community, such as theft, criminal acts, activities of highwaymen, and fugitive groups. Within this domain, the authority of the ruler is to assert and enforce the rights of God and the communal rights of the Muslims. Significantly, it is an intrinsic responsibility of the ruler to bring offenders to justice, even in instances where a plea for redress is not raised by the victims.[14] The implementation of punitive measures in this realm is mandatory and irreversible, and requires universal enforcement without any exemptions.[15] This area constitutes what Ibn Taymiyya specifically refers to as *siyāsa sharʿiyya*. He views that every case within this domain is unequivocally encompassed by *sharīʿa* law, whether through the prescribed punishments, discretionary punishment (*taʿzīr*), or specific corporal punishments established by jurists. In his perspective, even a discretionary punishment should not surpass the original prescribed punishment.[16] Thus, for Ibn Taymiyya, this indicates that this sphere is exclusively governed by *sharīʿa*. The function of the executive is to adjudicate based on these rulings akin to any other judge. In this respect, while some

12 Ibn Taymiyya, al-Siyāsa al-sharʿiyya fī iṣlāḥ al-rāʿī wa'l-raʿiyya 7, 40 (1418/1997–98).

13 For more on the concepts of *ḥuqūq Allāh* and *ḥuqūq al-ʿibād*, see, for example, Anver M. Emon, *Ḥuqūq Allāh and Ḥuqūq al-ʿIbād: A Legal Heuristic for a Natural Rights Regime*, 13 Islamic Law and Society 325 (2006); Wael Hallaq, *"God cannot be harmed": On Ḥuqūq Allah/Ḥuqūq al-ʿIbād Continuum*, *in* Routledge Handbook of Islamic Law 67 (Khaled Abou El Fadl, Ahmad Atif Ahmad, and Said Fares Hassan eds., 2019).

14 Ibn Taymiyya, *supra* note 12, at 83.

15 *Id.* at 84.

16 *Id.* at 148; Ibn Taymiyya, 35 Majmūʿ al-Fatāwā 376, 405 (2004).

aspects of this domain are traditionally referenced in classical political writings as *maẓālim* (grievances), Ibn Taymiyya considers that there is no dichotomy between *sharīʿa* courts and grievance courts, which reflects his view that there is no distinction existing between *siyāsa* and *sharīʿa*, as *sharīʿa* rulings are comprehensive, encompassing every conceivable case.[17]

It is important to highlight that Ibn Taymiyya's theory of *siyāsa sharʿiyya* does not afford the ruler any legislative authority within the realm of *fiqh*, nor does it permit interference in jurisprudential debates or allow the curbing of juristic pluralism by endorsing one position while rejecting others. In this context, Ibn Taymiyya distinguishes between two domains of law. The first encompasses the universal rulings (*aḥkām kulliyya* or *umūr kulliyya*) which include all legal rulings, immutable by anyone, most specifically the rulers. Beyond the Qurʾān, the Sunna (Prophetic traditions), and consensus (*ijmāʿ*), Ibn Taymiyya considered the area of legal reasoning (*ijtihād*)—where jurists hold conflicting positions—as part of these universal rulings. The second domain is related to judicial cases where the judge mandates the parties in a jurisdiction to adhere to a single position.[18]

In essence, Ibn Taymiyya's concept of *siyāsa sharʿiyya* mainly serves as a reconfiguration of the realms of *siyāsa* and *fiqh*, situating both firmly within the boundaries of *sharīʿa*. By incorporating grievances into the domain of the jurists' law, Ibn Taymiyya underscores the limited role of the executive and stresses the latter's role is excluded from the legislative domains of *fiqh*. His theory majorly accentuates the most intrinsic responsibility of the ruler, which is to enforce *sharīʿa* rulings.

The formulation of *siyāsa sharʿiyya* by Ibn Taymiyya's disciple, Ibn Qayyim al-Jawziyya, is a milestone in the evolution of this concept and its contemporary conceptualization. Although Ibn Taymiyya was foundational in articulating the relationship between *siyāsa* and *sharīʿa* and in revitalizing the doctrine of *siyāsa sharʿiyya*, it was Ibn al-Qayyim who significantly crystallized this concept. Ibn al-Qayyim's conceptualization of *siyāsa sharʿīyya* encompasses three primary aspects.

17 *Id.* at 20:392.

18 *Id.* at 35:357, 35:376, 27:297.

First, it involves the utilization of circumstantial evidence, including intuition (*firāsa*) which signifies insight or intuitive perception. This capacity allows the judge to discern and interpret signs through visual cues or by examining outward indications.[19] Most notably, this aspect of *siyāsa sharʿiyya* also concedes the admissibility of forcing a defendant to confess through physical coercion or torture by the judge.[20] The second aspect of *siyāsa sharʿiyya* presented by Ibn al-Qayyim emphasizes the admissibility of employing corporal and capital punishments—other than prescribed punishments—that fall under discretionary punishment, along with other penalties outlined in the *fiqh* corpus. It is important to note that, like Ibn Taymiyya, Ibn al-Qayyim believes that the penalties under discretionary punishment should not exceed the maximum limits set for non-capital prescribed punishments, as he considers these restricted instances of capital punishments as falling under the precedents set by the Companions of the Prophet. Through these two aspects, Ibn al-Qayyim demonstrated the practical application of *siyāsa sharʿiyya* by illustrating its utilization in judiciary (*qaḍāʾ*). As the title of his book, *al-Ṭuruq al-ḥukmiyya fī ʾl-siyāsa al-sharʿiyya* (*The Judicial Methods in Islamic Public Policy*), implies, it serves as a manual on how *siyāsa sharʿiyya* is applied in judiciary, specifically through the employment of tools of confession.[21]

The third aspect, succinctly mentioned by Ibn al-Qayyim, but crucial for our forthcoming examination of the modern theory of *siyāsa sharʿiyya* underscores certain temporal rulings enacted by the Rāshidūn Caliphs[22] in areas that fall under the

19 On the impact of Ibn Taymiyya, Ibn al-Qayyim, and later Mamlūk scholars such as Ibn Farḥūn on changing the classical *fiqh* doctrine on proof and procedure through their doctrine of *siyāsa sharʿiyya* see Baber Johansen, Signs, *supra* note 5; for further presentation of the classical legal doctrine on proof and procedure, see Hossein Modarressi, *Circumstantial Evidence in the Administration of Islamic Justice*, *in* Justice and Leadership in Early Islamic Courts 18 (Intisar A. Rabb and Abigail Krasner Balbale eds., 2017).

20 Ibn Qayyim al-Jawziyya, al-Ṭuruq al-ḥukmiyya fī ʾl-siyāsa al-sharʿiyya 3–4 (1428/2007).

21 On the significance of Ibn al-Qayyim in this context, see Modarressi, *supra* note 19, at 19–20.

22 The first four caliphs in Islam, namely, Abū Bakr (r. 11–13/632–34), ʿUmar b. al-Khaṭṭāb (r. 13–23/634–44), ʿUthmān b. ʿAffān (r. 23–35/644–55), and ʿAlī b. Abī Ṭālib (r. 35–40/656–61).

purview of the legal system of *fiqh*. Contrasting the prior two aspects, which pertained to penal law and the corpus delicti of the court system, this third area correlates with other domains, such as family law. Illustrative of such legally-reasoned (*ijtihādī*) rulings of the Caliphs is the approach taken by the second caliph, ʿUmar b. al-Khaṭṭāb. Ibn al-Qayyim recognizes that the legislative interpositions enacted by the Rāshidūn Caliphs are situated within the realm of temporal legal reasoning, applicable to instances such as the enactment of triple *ṭalāq* (divorce) set by ʿUmar. He contends that, superficially, such interpositions may appear to modify the *sharīʿa*, but he elucidates that within the framework of *sharīʿa*, there exist dual domains concerning their temporal applications.[23] The first domain is characterized as universal rulings: immutable rulings that persist inalterably through time. The second domain is described as temporal discretionary rulings (*siyāsa juzʾiyya*), predicated on temporal public benefit.[24] It is this second dimension that warrants close investigation for our research, for it holds significant implications for the modern articulation of *siyāsa sharʿiyya*.

As previously mentioned, Ibn al-Qayyim's seminal contributions to the development of *siyāsa sharʿiyya* theory in later premodern scholarship lie in his emphasis on the incorporation of circumstantial evidence and the application of physical force within this realm. This viewpoint would greatly influence later premodern scholarly discourses on the judiciary. However, another aspect of Ibn al-Qayyim's work—the emphasis on the instances of the legally-reasoned rulings of the Caliphs—resonated profoundly with the modern 1920s Egyptian constitutional movement, aspiring to Islamize the modern state. The writings of early twentieth-century reformers bear testament to this influence. Those modern scholars incorporated Ibn al-Qayyim's distinction of temporal rulings in their discussions around the reconciliation of Islam and the state's control over the legislation within the constitutional frameworks, as will be detailed in the third section of this study. However, the works and legal theories of both Ibn Taymiyya and Ibn al-Qayyim do not provide

23 Ibn al-Qayyim, *supra* note 20, at 3–4.

24 *Id.*

detailed development of these instances of the legally-reasoned rulings of the Caliphs, nor do they grant political authority the right to define Islamic law. The references made by modern theorists of *siyāsa sharʿiyya* to their works are not entirely harmonious with the comprehensive conceptual framework of Ibn al-Qayyim's and Ibn Taymiyya's constitutional theory and legal epistemology. These discrepancies are evidently manifest when comparatively studied with the different writings of Ibn Taymiyya and Ibn al-Qayyim that deal with the domain of these temporal rulings.

Late Mamlūk and Ottoman *Siyāsa Sharʿiyya*

Subsequent to Ibn al-Qayyim, scholarly compositions on *siyāsa sharʿiyya* were typically incorporated into the legal writings and genres of the judiciary, majorly emphasizing the two main aspects highlighted by Ibn al-Qayyim: circumstantial evidence and penal law. A notable Mālikī composition subsequent to Ibn al-Qayyim is Ibn Farḥūn's (d. 799/1397) *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-manāhij al-aḥkām* (*Illuminating the Judges About the Principles of Judicial Rulings and the Methods of Legal Verdicts*). This evolved genre of judge manuals advocated for the right of the judge to employ physical coercion to elicit confessions in particular circumstances, specifically when dealing with individuals notorious for perpetrating such crimes.

Ibn Farḥūn defines the domain of *siyāsa sharʿiyya* and sets its confined limits; he illustrates that any ruling in *sharīʿa* can be set under one of five categories. The first section is comprised of rulings instituted to cultivate the individual, such as worship. Following this is a segment dedicated to the preservation of human existence, encompassing necessities such as sustenance and matrimony. Subsequently, there is a part that is indispensable for societal transactions. The fourth division is devoted to the cultivation of moral comportment. The concluding fifth section specifically pertains to *siyāsa* and disciplinary measures (*zajr*).[25] Ibn Farḥūn explicates that this last category embodies what is

25 Ibrāhīm b. ʿAlī Ibn Farḥūn, 2 Tabṣirat al-ḥukkām fi uṣūl al-aqḍiya wa-manāhij al-aḥkām 115–16 (1986).

meant by *siyāsa sharʿiyya*.[26] Thus, this last category of *siyāsa sharʿiyya* is subdivided into six distinct subcategories. The first subcategory is aimed at the preservation of the soul, exemplified by retribution (*qiṣāṣ*), followed by a section to safeguard lineage, such as the prescribed punishment for adultery or fornication. The third is dedicated to preserving chastity, and the fourth is allocated for the protection of property, involving theft, which requires prescribed punishment and additional discretionary punishment. The fifth is set to protect the intellect, illustrated by prescribed punishment for drinking wine, and the final sixth subcategory pertains to crimes not specifically enumerated, and also serves as a method of deterrent.[27]

The concept of *siyāsa sharʿiyya* manifested in the writings of the late Mamlūk and early Ottoman eras within the genres of judiciary and *siyāsa*, became profoundly interconnected, adhering to the guidelines articulated by Ibn al-Qayyim and, more systematically, Ibn Farḥūn. Various authors closely followed the latter's work, albeit synthesizing the literature within the authoritative positions of their respective schools of law (*madhhabs*). For instance, the Ḥanafī ʿAlāʾ al-Dīn al-Ṭarābulusī's (d. 849/1445) *Muʿīn al-ḥukkām* (*Judges' Assistant*) on the judiciary stands almost as a Ḥanafī replica of Ibn Farḥūn's *Tabṣirat al-ḥukkām*. Here, he also defines *siyāsa sharʿīyya* as *sharʿ mughallaẓ* (severe law), which implies intensified punishments. It is similarly defined as "the intensification [of the punishment] of a tort that has a legal directive, in order to curtail corruption."[28]

The later Ḥanafī composition by Dede Efendi (d. 975/1567), for instance, although bearing title explicitly related to *siyāsa sharʿiyya*, predominantly concentrates on the domains of penal law and the application of circumstantial evidence in *qaḍāʾ* (judiciary).[29] However, modern theorists of *siyāsa sharʿiyya* regularly cite the definition provided by Ibn Nujaym (d. 970/1562–63) in *al-Baḥr al-rāʾiq* (*The Pristine Sea*). He defines

26 *Id.* at 2:116.

27 *Id.* at 2:116–17.

28 ʿAlāʾ al-Dīn al-Ṭarābulusī, Muʿīn al-ḥukkām fī-mā yataraddad bayna al-khaṣmayn min al-aḥkām 164 (1431/2009–10).

29 The treatise titled *Siyāsa sharʿiyya* attributed to Dede Efendi is also associated with several other Ḥanafī jurists, including Ibn Nujaym.

siyāsa as "the measures executed by the ruler to attain a perceived public benefit, even in the absence of specific evidence."[30] It is noteworthy, however, that Ibn Nujaym's use of the term *siyāsa* is invariably contextualized within his discussion of the concept of prescribed punishments. He introduced this definition as a means to rationalize the legal stances of the Ḥanafī schools of law, emphasizing that the executive holds the authority to ascertain which form of punishment best serves the public benefit in each separate case of criminal cases.[31] In addition, the late Ḥanafī authority, Ibn ʿAbidīn (d. 1252/1836), also views that within the school of law, *siyāsa* is synonymous with *taʿzīr* (discretionary punishment).[32] Derin Terzioğlu demonstrates how Ḥanafī scholars based in Rum during the sixteenth and seventeenth centuries engaged with Ibn Taymiyyah's *al-Siyāsa al-sharʿiyya* to address administrative punishment and the Ottoman *qānūn* as a kind of *siyāsa* that serves the ends of *sharīʿa*.[33] Said Salih Kaymakci extensively examined the reception of Ibn Taymiyya's *al-Siyāsa al-sharʿiyya* among Ottoman scholars of Rum, such as Aşık Çelebi (d. 979/1572) and Dede Çöngî (Dede Efendi).[34] These scholars, who were integral to the Ottoman enterprise, helped define the limits of the Ottoman government and law. Kaymakci argues that they denied *qānūn* as merely sultanic laws and instead grounded and limited sultanic power and military reform within the framework of classical *siyāsa sharʿiyya*.[35]

30 Zayn al-Dīn Ibn Nujaym, 5 al-Baḥr al-rāʾiq sharḥ Kanz al-daqāʾiq 11 (1997).

31 *Id.* for example at 5:17–18, 5:67, 7:126.

32 Ibn ʿAbidīn, 4 Ḥāshiyat radd al-muḥtār ʿalā ʾl-durr al-mukhtār 15 (1966); Mürteza Bedir further mentions: "The Hanafi jurists kept the word *siyasa* to mean a heavy punishment to be inflicted by the ruler, and they were not greatly interested in developing a political theory." Mürteza Bedir, *The Hanafi View of Siyasa And Sharia Between Idealism And Realism: Al-Hasiri's Conception Of Temporal And Religious Politics: (Siyasa al-Diniyye al-'Uzma and Siyasa al-Hissiyya al-'Uzma)*, 10 İslam Tetkikleri Dergisi 451 (2020).

33 Derin Terzioğlu, *Ibn Taymiyya, al-Siyāsa al-Sharʿiyya, and the Early Modern Ottomans*, *in* Historicizing Sunni Islam in the Ottoman Empire, c. 1450–c. 1750, 17, 103, 111, 116 (Tijana Krstić and Derin Terzioğlu eds., 2020).

34 Said Salih Kaymakci, The Constitutional Limits of Military Reform: Ottoman Political Writing During the Times of Revolutionary Change, 1592–1807, 25 (Ph.D. dissertation, Georgetown University, 2020).

35 *Id.*

As previously illustrated through the perspectives of its premodern proponents, *siyāsa sharʿiyya* emerged as a means to constrain the executive rather than to grant it more extensive legislative authority in the area that was traditionally governed by jurists' law. The jurists aimed to ensure that the entire judicial system operates under the umbrella of *sharīʿa*. As Frank Vogel articulates, *siyāsa sharʿiyya* "advances both a more expansive vision for *fiqh*, and also a constitutional theory by which the excesses of rulers may be curtailed and *sharīʿa* legitimacy extended to actual states."[36] Even during the nineteenth century, the discourse on *siyāsa sharʿiyya* remained mainly within the traditional themes, as presented here.[37]

Twentieth-Century *Siyāsa Sharʿiyya*

As Clark Lombardi observes, a number of Muslim legal scholars in twentieth-century Egypt integrated the terminologies and conceptual structure of *siyāsa sharʿiyya* theory and utilized it as the foundational basis for their reconceptualization of the Islamic state. Lombardi additionally states, "the decision to constitutionalize Islamic law in late twentieth-century Egypt represents a commitment to the idea that state law must be a modern analogue of *siyāsa sharʿiyya*."[38] In this section, I trace back to when the reformist *ʿulamāʾ* first discursively developed this modernized theory of *siyāsa sharʿiyya* and investigate how they conceptualized and integrated it within the constitutional framework of the modern Egyptian state. My analysis examines one of the earliest discourses on the modernized theory of *siyāsa sharʿiyya*. This involves a theoretical framework wherein the state is perceived—under a particular interpretation of premodern Islamic constitutional theory—as being endowed with the legitimate prerogative to engage in the domain of *sharīʿa*

36 Vogel, *supra* note 10, at 695.

37 See, for instance, authors such Barakāt Zādah (ʿAbd Allāh Jamāl al-Dīn; d. 1900) and Muḥammad Bayram al-Awwal (d. 1800), see Muḥammad Kamāl Imām, 1 Mawsūʿat al-siyāsa al-sharʿiyya: muṣannafāt al-siyāsa al-sharʿiyya fī Miṣr fī al-niṣf al-awwal min al-qarn al-ʿishrīn 65, 97 (2018).

38 Clark B. Lombardi, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law 49 (2006).

legislation. This encompasses not just the domains of discretionary and penal systems as presented by the earlier authors of *siyāsa sharʿiyya*, but also extends to the formulation and interpretation of *sharīʿa*. As Aria Nakissa describes Egypt as "the birthplace of reformist jurisprudence,"[39] this article also shows that the modern conceptualization of the *siyāsa sharʿiyya* theory was developed during the constitutional developments in 1920s Egypt.

The *ʿUlamāʾ* in the Legal and Educational Reform

In 1882, only a few months after the advent of British colonialism in Egypt, *al-Maḥākim al-Ahliyya* (National Courts) were established. The National Courts were instituted to prevent the *sharīʿa* courts from ruling on financial and criminal issues, leaving them jurisdiction only over matters of personal status and *awqāf*. By 1893, positions as judges and employees at the National Courts were limited exclusively to graduates of *Madrasat al-Ḥuqūq al-Khidīwiiyya* (Khedivial School of Law), established in 1886. Consequently, al-Azhar graduates' roles were restricted to the *sharīʿa* courts.[40] In addition, the *sharīʿa* courts faced numerous reform attempts. For instance, in 1899, *Majlis Shūrā al-Qawānīn* (The Advisory Law Council) received a proposal to appoint two judges from *Maḥkamat al-Istiʾnāf al-Ahliyya* (The National Appeal Court) to share the right of consultation with the judges of the high *sharīʿa* courts. Ḥassūna al-Nawāwī (1839–1924), who held both the positions of al-Azhar rector and State Mufti, objected to these decisions, arguing that "the high *sharīʿa* court acts as the mufti in most cases, and the judges of appeal do not meet the requirements of muftiship set by the *sharīʿa*." Consequently, Khedive Abbās Ḥilmī removed Ḥassūna al-Nawāwī from both positions. In his place, ʿAbdur-Raḥmān al-Nawāwī (1829–1909) was appointed

39 Aria Nakissa, *An Epistemic Shift in Islamic Law: Educational Reform at al-Azhar and Dār al-ʿUlūm*, 21 Islamic Law and Society 209, 213 (2014).

40 ʿAmr al-Shalaqānī, Izdihār wa-inhiyār al-nukhba al-qānūniyya al-Miṣriyya, 1805–2005, 237 (2013).

as al-Azhar Grand Imam, and Muḥammad ʿAbduh (1849–1905) was appointed as the State Mufti.[41]

After Muḥammad ʿAbduh was appointed as the State Mufti in 1899, Naẓārat al-Ḥaqqāniyya (The Ministry of Justice) assigned to him the responsibility of supervising and reforming the *sharīʿa* courts.[42] Muḥammad ʿAbduh was a member of Majlis Idārat al-Azhar (The Council of al-Azhar Administration), established in 1895 to reform education at al-Azhar. However, despite ʿAbduh's determined efforts to reform al-Azhar, his attempts failed as al-Azhar scholars often modified or neglected his suggestions. As a result, ʿAbduh shifted his reformist efforts outside al-Azhar. ʿAbduh's objectives for reforming the *sharīʿa* courts aligned with the intentions of Lord Cromer (1841–1917), the British governor of Egypt, who intended to reform the *sharīʿa* courts.[43] In April 1905, the Ministry of Justice formed a committee headed by Muḥammad ʿAbduh to establish the Madrasat al-Qaḍāʾ al-Sharʿī. By May 17, 1905, after holding many meetings, Lord Cromer provided Muḥammad ʿAbduh with information about a college established in Sarajevo by the Austrian government for the training of *sharīʿa* judges.[44] However, the death of Muḥammad ʿAbduh delayed the process. Saʿd Zaghlūl (1859–1927), who was the Minister of Education, completed the process in 1907 despite objections from Khedive Abbās Ḥilmī and al-Azhar scholars.[45] Since the Madrasat al-Qaḍāʾ al-Sharʿī

41 Aḥmad Taymūr Bāshā, Aʿlām al-fikr al-Islāmī al-ḥadīth 117 (2003).

42 Shalaqānī, *supra* note 40, at 82.

43 Lord Cromer wrote to Lord Salisbury about his intentions to demolish the *sharīʿa* courts in 1896: "There is only one effective remedy for this state of things. It is to abolish the Mehkeme Sheraieh [*sharīʿa* courts] as a separate institution altogether and to transfer their jurisdiction to the ordinary Civil Courts. This is what was done many years ago in India, and I do not altogether despair of seeing a similar change eventually made in Egypt." See Leonard Wood, Islamic Legal Revival 56 (2016); Blue Books: Reports by His Majesty's Agent and Consul-General on the Finances, Administration and Condition of Egypt and the Sudan 16 (1905); Muḥammad Ṭājin, Athar madrasat al-ḥuqūq al-khidīwiyya fī taṭwīr al-dirāsāt al-fiqhiyya, 1886–1925, 44 (2020).

44 ʿAbd al-Munʿim Ibrāhīm Jumayʿī, Madrasat al-qaḍāʾ al-sharʿī: dirāsa tārīkhiyya li-muʾassasa taʿlīmiyya 12 (1986); Blue Books, *supra* note 43, at 49.

45 ʿAbd al-Wahhāb Ghānim, Athar madrasat al-qaḍāʾ al-sharʿī fī al-fikr al-Islāmī 38 (2018).

was established to train *sharīʿa* judges, muftis, jurists, and court employees in a modernized manner distinct from the education at al-Azhar, its curriculum and pedagogy differed from what was available at al-Azhar during that time.[46]

Aria Nakissa shows that part of the educational reform in al-Azhar was the shift from text-based study to topic-based study.[47] The professors at the Madrasat al-Qaḍāʾ al-Sharʿī adopted a comparative approach to studying the various schools of Islamic law, as well as between Islamic and Western laws. They authored many topic-based books in the different legal fields, such as Islamic law, legal theory, constitutional and comparative law, that refashioned the classical text-based books. These books were significantly influenced by the major teaching approaches adopted at the institution. These approaches emphasized the comparability and compatibility between *sharīʿa* and *qānūn* (Western law).[48] Although the college survived for only twenty-three years, its impact continued even after the college was closed in 1930 and extended beyond its primary goal of training *sharīʿa* judges. Many of the professors and graduates of the Madrasat al-Qaḍāʾ al-Sharʿī held teaching positions at the newly established *sharīʿa* and law colleges at al-Azhar, Cairo University, and Dār al-ʿUlūm.[49]

Khallāf: *Maṣlaḥa*-Based and State-Centric *Siyāsa Sharʿiyya*

This educational reform created a discursive space and a conducive climate for substantive reforms in various fields of *sharīʿa* studies. In December 1923, the Madrasat al-Qaḍāʾ al-Sharʿī instituted a new academic discipline titled *al-siyāsa al-sharʿiyya*,[50] only a few months after the first Egyptian constitution was

46 Aḥmad Amīn, Ḥayātī 70 (1978).

47 Nakissa, *supra* note 39, at 236.

48 For more information about the curriculum of the Madrasat al-Qaḍāʾ al-Sharʿī, see Wood, *supra* note 43, at 182–85; Imām, *supra* note 37, at 1:267–86; Ghānim, *supra* note 45, at 48–49.

49 See Monique C. Cardinal, *Islamic Legal Theory Curriculum: Are the Classics Taught Today?*, 12 Islamic Law and Society 224, 246 (2005).

50 Khallāf, *supra* note 3, at 1–2.

enacted. In the introduction of his book, *al-Siyāsa al-sharʿiyya*, ʿAbd al-Wahhāb Khallāf, a prominent scholar at the Madrasat al-Qaḍāʾ al-Sharʿī, mentions that when he started teaching this subject, it had not been yet recognized as an independent discipline within such educational institutions; that literature was rather disseminated across multiple texts that are not unified under a thematic umbrella.[51] The book—whose full title, *al-Siyāsa al-sharʿiyya aw niẓām al-dawla al-Islāmiyya fī ʾl-shuʾūn al-dustūriyya waʾl-khārijiyya waʾl-māliyya* (*Sharīʿa-Based Politics or the Constitutional, External, and Financial System of the Islamic State*), combines the premodern term *al-siyāsa al-sharʿiyya* with the constitutional terminologies of the modern state—was Khallāf's attempt to harmonize *sharīʿa* with the bodies and institutions of the Egyptian state.

As noted by Muḥammad Kamāl Imām (d. 1442/ 2020), the contribution of Khallāf initiated a transformation in authoring in Islamic political thought that was characterized by a reconciliatory approach between the Islamic traditional sources and the constitutional principles of the modern state.[52] According to Imām, later works on *siyāsa sharʿiyya* have been influenced by Khallāf's organization and themes.[53] Although the understanding of the concept of *siyāsa sharʿiyya* varies among authors in modern times, a common theme among authors of the twentieth century involves expanding the domain of *siyāsa sharʿiyya* beyond the premodern understanding, which was mainly limited to penal law and circumstantial evidence. This expansion is similar to what Khallāf advocates, as will be examined further.[54]

Siyāsa Sharʿiyya: Redefining the Boundaries

By utilizing the term *siyāsa sharʿiyya*, Khallāf attempted to create a link between his theory and the premodern traditions. By

51 *Id.* at 2.

52 Imām, *supra* note 37, at 1:16–20.

53 *Id.* at 1:20.

54 See, for example, ʿAbd al-Raḥmān Tāj, al-Siyāsa al-sharʿiyya waʾl-fiqh al-Islāmī (1434/2013); Muhammad al-Bana, in Imām, *supra* note 37, at 2:147; ʿAbd al-ʿĀl Aḥmad ʿAṭwa, al-Madkhal ilā al-siyāsa al-sharʿiyya (1414/1993).

doing this, Khallāf presented his new theory of *siyāsa sharʿiyya* that aimed to answer the Islamization calls that emerged in response to the secularization of the law and constitution in the emerging Egyptian state. In Khallāf's analysis, jurists historically employed *siyāsa sharʿīyya* to provide governors latitude, enabling them to legislate in the sphere of unattested public benefit (*maṣlaha mursala*). He references Ibn Nujaym who defined *siyāsa* as the rulings of the ruler that seek to fulfill the public benefit in the absence of specific textual evidence to support these rulings. In contrast, non-jurists presented *siyāsa* in a broader sense: overseeing people's affairs in adherence to *sharīʿa*. Khallāf highlights the perspective of the famous Egyptian historian Maqrīzī's (d. 845/1442), who conceived *siyāsa* as laws enacted to implement ethics, public welfare, and the administration of public affairs.[55] Merging these interpretations of *siyāsa*, Khallāf's conception of *siyāsa sharʿiyya* emphasized the notion that achievement of public welfare is contingent on the space granted to rulers to legislate within the realm of unattested public benefit.[56]

By intertwining the broader conceptualization of *siyāsa*, as propounded by non-jurists, with jurists' interpretation, Khallāf evolved his new theory of *siyāsa sharʿiyya* which he defined as "the administration of the Muslim state's public domain in a manner that promotes societal welfare and avoids transgressions, provided it is in not in conflict with the principles of *sharīʿa*, even if these laws clash with the established opinions of the *mujtahids*."[57] This comprehensive meaning of *siyāsa sharʿiyya* encompasses, according to Khallāf, all the domains of the Muslim state, including the constitutional, fiscal, legislative, and judicial aspects, in addition to the executive branch.[58]

As demonstrated in the first section of this article, the domain of the premodern concept of *siyāsa sharʿiyya* was largely restricted to discretionary and penal laws as well as the implementation of circumstantial evidence by the judiciary. For Khallāf, however, the flexibility that is intrinsic to the doctrine

55 Khallāf, *supra* note 3, at 3–4.
56 *Id.* at 4.
57 *Id.* at 14.
58 *Id.* at 14–15.

of *siyāsa sharʿiyya* allows the laws to be reevaluated in order to resonate with societal needs. In effect, Khallāf contends that the Egyptian state had the legal authority to introduce specific family laws that may depart from the positions of the schools of law as based on the principle of prioritizing public benefit even when it is in conflict with the positions of the schools of law.[59]

Maṣlaḥa: Reimagining its Place in the Legal Epistemology

An important aspect of Khallāf's *siyāsa sharʿīya* is his conceptualization of public benefit. He defined unattested public benefit as benefits on which a *mujtahid* bases a ruling when there is no explicit *sharīʿa* evidence to validate or reject it. In his book, *Maṣādir al-tashrīʿ al-Islāmī fī-mā lā naṣṣ fīhi* (*Sources of Islamic Legislation When No Text is Found)*, Khallāf presents his approach on public benefit. Although he expresses reservations about Ṭūfī's (d. 716/1316) theory of public benefit that prioritizes public benefit over textual evidence and he apparently confines it within the boundaries of legal analogy (*qiyās*), Khallāf does not strictly adhere to this limited framework and extends the area of rulings based on public benefit by allowing for less reliance on the textual sources and greater emphasis on the fresh legal reasoning that considers the new needs and conditions.[60] He considers that public benefit can be invoked as a jurisprudential instrument in social transactions when there is an absence of a definitive text (*naṣṣ qaṭʿī*) or a consensus and when a *qiyās* is not feasible. He also acknowledges even those cases of public benefit that might be speculative or ambiguous. This suggests that the domain of unattested public benefit encompasses cases where the Qurʾān and the Sunna are not decisive. In other words, this includes most of the legal corpus.[61] By doing so, Khallāf

59 *Id.* at 14.

60 Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*, 12 Islamic Law and Society 212–13 (2005); Hallaq, Sharīʿa, *supra* note 10, at 509.

61 ʿAbd al-Wahhāb Khallāf, Maṣādir al-tashrīʿ al-Islāmī fī-mā lā naṣṣ fīhi 85-86 (1954); Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh 220 (1997). Opwis, *Maṣlaḥa*, *supra* note 60, at 212.

broadened the criteria of what is considered to be a valid public benefit. By expanding the scope of public benefit, Islamic law became more flexible and adoptable to the new environment of the modern nation state.[62]

This conceptualization of public benefit is what Khallāf delineates in his book *al-Siyāsa al-sharʿiyya*, in which he defines it as the latitude provided to rulers to enable them to legislate within the domain of unattested public benefit[63] as long as this does not contradict the universal principles of *sharīʿa*. More importantly, this legislative latitude continues even when it contradicts the interpretations of the *mujtahids* and jurists.[64] As *siyāsa sharʿiyya*, Khallāf explains, a manifestation of this can be seen in the family laws that the Egyptian state enacted during his time.[65] As this research will subsequently illustrate, the legitimization bases of reformers concerning the reform of marriage and divorce regulations drew inspiration from this modernized conception of *siyāsa sharʿiyya*. Among these reformed laws were the restriction of polygyny and the adoption of the stance that the triple divorce be regarded as a singular pronouncement.

Legal Reasoning Reconsidered: Its Redefinition and Relocation

It is essential to explore Khallāf's perspective on legal reasoning in order to conceive its influence in his comprehensive understanding of the Islamic legal system and to assess its fundamental effect on his conceptualization of *siyāsa sharʿiyya* in particular. Khallāf's concept of *siyāsa sharʿiyya* is anchored in his belief that the gates of legal reasoning had been closed. Khallāf considers that during the early Islamic era, the Companions of the Prophet and early generations of Muslims frequently utilized legal reasoning in a way that prioritized the broader societal

62 *Id.* at 211, 213; for further exploration of the conceptualization and application of *maṣlaḥa* as interpreted by Khallāf, as well as his interpretations of other concepts such as *ʿurf* and *istiḥsān*, see *Id.* at 209–13; Hallaq, History, *supra* note 61, at 220–24; Hallaq, Sharīʿa, *supra* note 10, at 508–10.

63 Khallāf, Siyāsa, *supra* note 3, at 4.

64 *Id.* at 13–14.

65 *Id.* at 14; Khallāf, Maṣādir, *supra* note 61, at 56.

welfare and public benefit; however, later jurists began to rely heavily on *taqlīd* (total submission to the prevailing doctrines of a school of law) and narrowed the scope of public benefit.[66] This shift, according to Khallāf, made Islamic jurisprudence less pragmatic and responsive to societal needs, which led to a deficit in its competence to manage the increasing needs in the Muslim states.[67] In response, rulers began legislating rules that considered these evolving needs. They particularly enacted laws in areas such as penal laws as well as the judiciary and investigation methods as in these areas, traditional *fiqh* seemed to lag.[68]

Historically, the domains Khallāf references are associated with grievance courts. It was a discretionary system that addressed matters outside the purview of the traditional *sharīʿa* courts. He observes that this persisted in his era. Due to the perceived gap between traditional Islamic jurisprudence and societal welfare, the state felt the need to intervene, especially in areas like family law, emphasizing broader societal benefits even if these went against established norms set by jurists as long as there was no text or jurisprudential consensus that contradicts it.[69] Just as premodern rulers created rules for the grievances domain, Khallāf believes that modern rulers should have a similar authority in other *sharīʿa*-governed areas.

As historically in Islam the religious scholars held the *sharīʿa* lawmaking authority, a point that Khallāf acknowledges,[70] yet within the framework of the modern nation state system, there exists a distinct legislative body responsible for lawmaking.[71] As Khallāf's primary goal in his writings was to demonstrate the compatibility of the modern nation state system with traditional Islamic governance, he argues that in a contemporary Muslim state, *ijtihād*—which is defined as individual legal reasoning—should evolve from being an individualized process to one that is collectively undertaken.

66 Khallāf, Siyāsa, *supra* note 3, at 8–11.
67 *Id.* at 12.
68 *Id.*
69 *Id.* at 13.
70 *Id.* at 42.
71 *Id.* at 41.

Khallāf believes that individual legal reasoning is no longer adequate in the context of the modern state as it often results in inconsistent and sometimes conflicting interpretations of Islamic law. He proposes instead a shift towards collective legal reasoning, arguing that this is not a novel idea as traces of collective legal reasoning can be found throughout Islamic history. For instance, Khallāf mentions that during the Umayyad era in Andalusian Córdoba, there was the establishment of the Shūrā al-Qaḍāʾ (Consultative Judiciary Body). He also considers a later continuation of it, during the Ottoman period, where a selected commission of scholars compiled the Ottoman *Mecelle*, primarily based on the Ḥanafī school of law.[72]

Analysis

By expanding the scope of public benefit and the domain of *siyāsa sharʿiyya*, as well as redefining legal reasoning and its authoritative foundations, the modernized theory of *siyāsa sharʿiyya* has not merely diverged from its premodern counterpart but also encroached upon the constitutional boundaries that were paradigmatically protected within the premodern system through the schools of law. Broadening the scope of *siyāsa sharʿiyya* is the most significant contribution of Khallāf in this regard. Now, *siyāsa sharʿiyya* extends beyond merely discretionary and penal laws as well as the application of circumstantial evidence; it further forms a constitutional theory wherein the legislative branch is orchestrated under the auspices of the state's legislature. Once the stability of the legal epistemology controlling the lawmaking process is undermined, the demarcation and boundaries of legislative authority are susceptible to infringement. Khallāf's modernized state-centric conception of *siyāsa sharʿiyya* was also accompanied by profound modifications in legal epistemology, where Khallāf, along with other reformers, effected major changes in the epistemology of legal reasoning.

Having demonstrated that public benefit is central to the modernized theory of *siyāsa sharʿiyya*, which has undergone

72 *Id.* at 47.

expansive interpretations to serve as a broader element of legal theory, the redefinition and reinterpretation of public benefit by Khallāf have induced a substantial epistemological shift. This, in turn, has facilitated significant intrusions into the *sharīʿa* legal framework. Attributing the responsibility of defining public benefit to the state in nearly every legal realm by Khallāf,[73] the state substituted the role of *mujtahids* as the interpreters of divine law. This causes a fracture in the backbone of Islamic legislative theory. More importantly, in addition to being epistemologically changed, this also entailed important constitutional implications. In effect, the state's legislature attained the authority to adopt any law within the extensive legal corpus, regardless of its authoritative standing and without adhering to the authoritative legal epistemology. The reformist religious scholars during that time insisted that the state has the liberty to adopt any law within the legal corpus based on this conception of public benefit.[74] Although Khallāf criticized juristic pluralism as legislation chaos (*fawḍā 'l-tashrīʿ*), his pragmatic theory of *siyāsa sharʿiyya* optimally capitalizes on this legal pluralism.

The utilization of legal pluralism within Islamic jurisprudence is nowhere more evident than in the advent of comparative Islamic law (*al-fiqh al-muqāran*). While the comparative analysis of the various schools of law has its antecedents in the premodern literature of *al-khilāf al-ʿālī* (inter-schools juristic dispute), a genre focusing on legal argumentation above the level of individual schools of law, the purpose of this new genre of comparative Islamic law was distinctively different. Recognizing that this genre emerged at the same reformist environment and place where the modernized genre of *siyāsa sharʿiyya* was developed provides insights into the objectives these new genres aimed to achieve. In this new genre of comparative Islamic law, the role of the jurist was to explore the *fiqh* books to unearth and present the overlooked positions of the early *mujtahids*. This includes not only the positions from the four Sunnī schools but

73 *Id.* at 13.

74 Muḥammad Muṣṭafā al-Marāghī, Buḥūth fī 'l-tashrīʿ al-Islāmī wa-asānīd qanūn al-zawāj wa'l-ṭalāq, raqm 25 sana 1929, 40 (Cairo, n.d.).

also from old, neglected schools and from non-Sunnī sects such as the Twelvers, Zaydīs, and Ibāḍīs.[75]

In the premodern legal system, normatively, the judge was obliged to adopt the preponderant position of the school of law or utilize his faculty of legal reasoning and adopt another position; however, he was bound by strict and unalterable hermeneutical techniques. In contrast, the state, as represented in the legislative apparatus or holder of authority (*walī 'l-amr*), possesses the executive authority to select the legal positions that best serve the state and its people, based on the concept of public benefit that was previously explained. While premodern scholars did acknowledge public benefit as considering all legal rulings to be informed by the intent to realize it, it was unambiguously the scholars who possessed the authority to define what public benefit entails and what objectives the *sharīʿa* seeks to preserve. More critically, they determined issues such as: What is the interpretation of public benefit? Does it pertain to the welfare of the man, the interests of the state, or the safeguarding of the *sharīʿa* paradigm and its ethical framework?

In the contemporary Islamic legal discourse, however, the conception of public benefit, as for instance conceptualized by Khallāf, has undergone a shift and has turned into a mere abstract utilitarian concept. This transition signifies a shift in legal philosophy from a more principle-centered approach to one that is highly anthropocentric and pragmatic and that emphasizes a reorientation of legal considerations around human-centric values and needs, potentially at the expense of the foundational, ethical principles of the *sharīʿa* paradigm. Felicitas Opwis presents two approaches, informed and refined from the Weberian typologies of rationality, regarding the attainment of legal certainty and public benefit. The first is formal rationality, which is concerned with the correctness of the law and is contingent upon the strict adherence to procedural rules. On the contrary, jurists adopting substantive rationality evaluate whether the inferred ruling resonates with the intended purpose of the law.[76]

75 See Muḥammad Ibrahim Ṭājin, Athar madrasat al-ḥuqūq al-khidīwīyah fī taṭwīr al-dirāsāt al-fiqhīyah, 1886–1925 M, 245–46 (2020).

76 Opwis, *Maṣlaḥa*, *supra* note 60, at 191–93.

Nevertheless, I contend further: when the state—wielding political power and controlling lawmaking—assumes the role of determining what constitutes public benefit, it does not truly fall within the realm of substantive rationality; jurists who possess the praxis of legal reasoning have the experience and nuanced understanding required to genuinely discern and interpret public benefit in its substantive essence.

There are structural and epistemic variances in the legal philosophy between the aforementioned models regarding the determination of what constitutes a public benefit, a task that scholars always believed is inherently intertwined with the praxis of legal reasoning. It is well established that premodern scholars typically posited that part of the prerequisites of legal reasoning is that the praxis in which the *mujtahid* engages is a pivotal element in identifying the public benefit or objectives of the *sharīʿa*. For instance, Taqī al-Dīn al-Subkī (d. 683/1355) detailed the third requirement of legal reasoning as follows:

> [The *mujtahid*] must possess virtue in praxis and insight into the implications of the objectives of Islamic law (*maqāṣid al-sharīʿa*) which grant him the ability to discern the intrinsic objective of the *sharīʿa* and to determine the suitable ruling in a given case, even in the absence of explicit declaration. This is analogous to an individual who lived with a king and became well acquainted with his proclivities and affairs, possessing an insight into the likely opinions or decisions the king would make under various circumstances, even those undeclared . . . Upon reaching this profound level and satisfying these three criteria, the jurist is deemed to have attained the full competency required for legal reasoning.[77]

This, however, has been replaced by a form of political pragmatism where the interests of the state play a pivotal role in defining what constitutes public benefit. Khallāf's understanding of

77 Taqī al-Dīn al-Subkī, 8 al-Ibhāj fī sharḥ al-Minhāj 1 (1984); Ibn al-Qayyim has made a statement close in meaning to this, see Ibn al-Qayyim, *supra* note 20, at 7.

public benefit was also ingrained with his conceptualization of the limitation of the domain of *sharīʿa* and its various law domains. According to Khallāf, *sharīʿa* arrives merely with foundational principles; the details pertaining to these principles are not explicitly addressed by the *sharīʿa*, which leaves it to the discretion of the ruler to decide what fulfills public benefit.[78]

Another key strategy which was developed to serve the legal tradition to be more adaptable and flexible for state utilization is the concept of legal amalgamation (*talfīq*). This concept, which has taken increased prominence in modern Islamic legal theory, describes the amalgamation of certain elements from one legal opinion—whether internal or external to a school of law—with elements from another legal position to create a new, composite legal position; this synthetic method empowered the deduction of legal rulings that accommodate the evolving circumstances and changes.[79]

The other critical angle of Khallāf's legal theory is his understanding of legal reasoning and the theorization of the accompanied authority it implies. Khallāf's conception of legal reasoning represents a transformative approach to *sharīʿa* which assigns and specifies the practice of legal reasoning to an exclusive group, which in turn limits the authority of jurists to those incorporated within the state's legislative body. By confining the authority of legal reasoning to a certain group within the state's elite and broadening the domain of *siyāsa sharʿiyya*, the *sharīʿa*-centric model came to be increasingly marginalized in the modern Muslim state. Khallāf's conceptualization of legal reasoning represents a metamorphosis in the *sharīʿa* domain through the concentration and specification of legal reasoning to a group of state official jurists. This limits the role of jurists to those represented within the legislative machinery of the state's bureaucracy. By confining the authority of legal reasoning to a certain cadre of the state's elite and widening the scope of *siyāsa sharʿiyya* to encompass every area as long as it does not include consensus (*ijmāʿ*) or a decisive text, as viewed by Khallāf,

78 Khallāf, Siyāsa, *supra* note 3, at 20–21.

79 For the discussion on the use of *talfīq* in legal deduction, see Hallaq, Sharīʿa, *supra* note 10, at 448.

the *sharīʿa*-centered paradigm has become marginalized in the modern Muslim state. This is because the domain of jurists is now restricted to a specific and selected elite who, in most instances, do not possess profound knowledge of *sharīʿa* and are inexperienced in the praxis of legal reasoning.

If we acknowledge that the authority vested in jurists is epistemic in nature—given they were the exclusive agents of legal epistemology and hermeneutics—this implies a multifaceted responsibility. Beyond the sphere of lawmaking, where they were not just architects of substantive law, they also served as guardians of the *sharīʿa*. Integral to their role was observing whether laws resonated with, and did not deviate from, the moral and ethical essence of the Muslim society.[80] In this vein, their role was central in ensuring that laws were in harmony with the societal framework—meticulously upholding the established ethical and equitable norms intrinsic to the *sharīʿa* paradigm. Once this role is lost, jurists have not only forfeited their authoritative control over the law, but also their societal responsibility to uphold *sharīʿa* as a central domain. Subsequently, this shift signifies a loss of the paradigmatic nature of the *sharīʿa* as a central domain which in turn restricted it to a narrowed, state-aligned dimension.

Khallāf's perception of legal reasoning also includes several structurally interconnected concepts, particularly his ideas regarding the "closure of the gates of legal reasoning" and the inherently collective—rather than individual—nature of legal reasoning in Islam. In respect of the latter, Khallāf not only calls for the unification of the different stances of the various *mujtahid*s but also insists that the process of legal reasoning itself should be collective.[81]

Reformers frequently discussed the idea of closing the gates of legal reasoning, which entailed far-reaching implications; it considerably influenced their understanding of Islamic constitutional thought and affected the development of their epistemological legal approach. These, in turn, mold

80 Wael B. Hallaq, *Juristic Authority vs. State Power: The Legal Crises of Modern Islam*, 19 Journal of Law and Religion 243, 246 (2003–4).

81 Khallāf, Siyāsa, *supra* note 3, at 24.

their understanding of the doctrine of *siyāsa sharʿiyya*. As a result, this dominant theme entails a reevaluation of the modern conceptions of Islamic constitutionalism and the dynamics of the premodern legal system. The idea that the gates of legal reasoning were closed inherently included a call for reopening these sealed gates. Leonard Wood noted that the notion of the closure of the gates of legal reasoning was a prevailing idea among legal reformers and began to coincide with more specific and practical objectives. The aim was to replace European laws with Islamic laws within the state and to introduce certain methodological innovations in order to support the goal of codifying the *sharīʿa* and expanding the substantive scope of Islamic jurisprudence.[82]

A Case Study: *Mashrūʿ al-Zawāj wa'l-Ṭalāq* (1926)

I examine briefly in this section one of the practical repercussions of the modernized doctrine of *siyāsa sharʿiyya*, a doctrine wherein the state, endorsed by the *ʿulamāʾ*, acquires an inherent authority to legislate on matters pertaining to *sharīʿa* law. In 1926, the Egyptian government initiated a project aimed at reforming some of the codes of the Personal Status Law. The committee was spearheaded by Muḥammad Muṣṭafā al-Marāghī (d. 1364/1945), who, at the time, held the role of president of the *sharīʿa* courts and would later assume the position of the Grand Imam of al-Azhar (1928–1930; 1935–1945). The project led to an intensive debate within al-Azhar's scholarly circles, essentially polarizing the religious scholars into two distinct factions: firstly, there were the reformist *ʿulamāʾ*, many of whom served as judges in the *sharīʿa* courts or as faculty at the Madrasat al-Qaḍāʾ al-Sharʿī; and, in contrast, a more conservative faction—predominantly other Azharī *ʿulamāʾ*—who vehemently opposed these reforms and questioned the legal foundations on which they were established.

One such provision sought to limit polygynous practices among men. The proposal mandated that already-married men seeking an additional wife were required first to obtain judicial

82 Wood, *supra* note 43, at 84.

permission. It would then fall upon the court to assess and determine the legitimacy of such a marriage. Other provisions advanced scholarly, yet unconventional, legal positions, such as endorsing Ibn Taymiyya's stance on divorce—treating multiple utterances of divorce as a singular act and nullifying declarations made under intoxication. While the specific articles and stipulations merit attention, my brief discussion here focuses on the foundational memorandum of the reform law project. Given that the *ʿulamāʾ*, at that time, still held remnants of their once-prestigious and influential position—which would subsequently erode—the prominent reformist religious scholars composed this project's memorandum to elucidate the legal justifications for the proposed amendments. Therefore, it is pertinent to examine some of these aspects briefly within the context of our discourse.

Akin to Khallāf, Marāghī delineates the modernized notion of *siyāsa sharʿiyya*. In section 22 of his writing, he emphasized the legal permissibility for rulers to exercise executive authority over law, when doing so aligns with the foundational principles of *sharīʿa*, in instances where neither decisive textual evidence nor consensus exists.[83] As mentioned previously, this area notably includes the vast majority of the *fiqh* corpus and designates the sphere traditionally reserved for the *mujtahids*. Marāghī considers that since the Qurʾān and the Sunna seldom provide exhaustive guidelines on every conceivable issue arising across different times and places, the instrument of *siyāsa sharʿiyya* becomes indispensable. Its principal function is to define and employ rulings that promote public benefit and justice for society.[84] This view underlines the preference granted for public benefit-centred *siyāsa sharʿiyya* over legal analogy, which traditionally represented the primary mechanism of the jurists' legal reasoning. Marāghī asserts that rulers do not have the authority to either negate religious obligations nor to enact laws that are not religiously permissible. With these constraints, rulers have the discretion to enact laws that resonate with the principles of public benefit; thereby, they have the capacity to regulate areas

83 Marāghī, *supra* note 74, at 40.

84 *Id.*

of permissible actions. Furthermore, the perspective of Marāghī reveals that, aside from the definitive textual proofs and consensus, even rulings regarding obligatory and prohibited actions that stem out from non-definitive textual sources might be incorporated into the ambit of *siyāsa sharʿiyya*.

Marāghī challenged the strict adherence to the four established schools of law and contended that such adherence is not obligatory. In his view, it is not obligatory in Islamic jurisprudence to abide exclusively by the interpretations of the schools of law.[85] He also maintained that it is jurisprudentially legitimate for a judge to rule based on the positions of other schools of law to his own.[86] Another principle Marāghī emphasized was the legitimacy of employing what might be perceived to be "weaker" positions in the broad spectrum of Islamic jurisprudence.[87] These foundational premises—which were universally adopted by the proponents of this reform project—formed the theoretical bedrock upon which the legal reformist projects were constructed. When these premises were confronted by opponents who contended that there exists a consensus that mandates adherence exclusively to the four recognized schools of law, some proponents of the project denied the concept of consensus itself in Islamic legal theory, as it is a task that is unachievable and cannot be substantiated or established, and therefore, it does not bind the Islamic legal discourse to the four schools of law exclusively.[88]

Some senior scholars at al-Azhar wrote vehement critiques of this project. One of the significant critiques was written by Muḥammad Bakhīt al-Muṭīʿī (d. 1354/1935), a former Grand Mufti and an esteemed member of the Council of Senior Scholars at al-Azhar.[89] In his response, *Rafʿ al-aghlāq ʿan mashrūʿ al-zawāj waʾl-ṭalāq* (*Dispelling the Obscurity Surrounding the*

85 *Id.* at 19–20.

86 *Id.* at 23.

87 *Id.* at 25.

88 Muḥammad ʿAbd al-ʿAzīz al-Khūlī and Muḥammad Aḥmad al-ʿAdawī, *Mashrūʿ al-Zawāj waʾl-Ṭalāq: Raʾy ustādhayn jalīlayn fīhi wa-fī radd Lajnat al-Azhar ʿalayihi*, 4 Majallat al-Qaḍāʾ al-Sharʿī 327, 328–329 (1346/1928).

89 Through studying Muḥammad Bakhīt al-Muṭīʿī, Junaid Quadri challenged the distinction between "traditionalist" and "reformist" scholars and showed how the epistemology of Muṭīʿī, who was prototypical of traditionalism, internal-

Proposed Legislation on Marriage and Divorce), Muṭīʿī analyzed and critiqued the premises made by the project committee led by Marāghī. Five foundational arguments upon which the project was predicated were countered by Muṭīʿī. Furthermore, in his book *al-Qawl al-jāmiʿ fī ʾl-ṭalāq al-bidʿī waʾl-mutatābiʿ* (*The Comprehensive Statement on Bidʿa and Sequential Divorce*), Muṭīʿī provided a critique of the adoption of the unconventional position of Ibn Taymiyya on treating triple divorce as a singular pronouncement.[90]

One of the most significant elements of Muṭīʿī's critique addressed the committee's second argument, which invoked the new concept of *siyāsa sharʿiyya* to contend that the holder of authority (*walī ʾl-amr*) possesses a prerogative right of legal reasoning.[91] Depending upon their interpretation of Ibn al-Qayyim's view, the committee argued that the ruling political authority has the right to adopt any procedure that supports the establishment and preservation of the principles of religion, even in the absence of textual evidence supporting such measures.[92] However, Muṭīʿī's response argues that the domain of *siyāsa sharʿiyya* should remain circumscribed to the issues related to the realm of grievances.[93] Also drawing upon the position of Ibn al-Qayyim, Muṭīʿī bifurcated the domain of *fiqh* into two categories.[94] The primary category is named *aḥkam al-ḥawadith al-kawniyya* (universal jurisprudence) and is solely defined by the quartet of principle sources of Islamic jurisprudence: the Qurʾān, the Sunna, consensus, and legal analogy.[95] Muṭīʿī considers that the second category is related to grievances, which encompasses the investigation of the methodologies and procedures necessary to adjudicate, particularly in complex cases where traditional *fiqh* might not suffice for providing

ized modern epistemological commitments. See Junaid Quadri, Transformations of Tradition: Islamic Law in Colonial Modernity (2021).

90 Muḥammad Bakhīt al-Muṭīʿī, al-Qawl al-jāmiʿ fī ʾl-ṭalāq al-bidʿī waʾl-mutatābiʿ (1320/1902–3).

91 Muḥammad Bakhīt al-Muṭīʿī, Rafʿ al-ighlāq ʿan mashrūʿ al-zawāj waʾl-ṭalāq 48–50 (2006).

92 *Id.* at 48.

93 *Id.* at 48–49.

94 Ibn al-Qayyim, *supra* note 20, at 3–4.

95 Muṭīʿī, Rafʿ, *supra* note 91, at 51.

conclusive evidence.[96] He thus argues that *siyāsa sharʿiyya* is strictly limited to procedural laws, explicitly excluding other areas such as family laws from its jurisdiction. He also emphasizes a scholarly consensus that restricts the purview of grievances to only this latter category.[97]

Conclusion

The formulation of *siyāsa sharʿiyya*, as articulated by ʿAbd al-Wahhāb Khallāf and other reformist *ʿulamāʾ*, presents a tradition-based Islamic constitutional theory that aligns with the modern state and the changes it precipitates in lawmaking. The changes that have taken place in the *siyāsa sharʿiyya* discourse primarily responded to the formation of the modern state and the introduction of Western legal codes. Scholars evolved this theory to allow the state to adopt legal rulings that achieve public benefit, provided these do not conflict with the principles of Islam. This also aimed at countering the encroachment of secularism and reasserting Islam and *ʿulamāʾ* in the public domain and in the lawmaking process, and to challenge the notion that Islam should be confined to the private sphere of beliefs.[98] While early discourses on *siyāsa sharʿiyya* addressed specific areas such as administrative and penal laws within the purview of political authority, modern discourse has expanded this authority to encompass almost every domain of Islamic law and transferred Islamic law into the state law. Although premodern theorists such as Ibn Taymiyya and Ibn Qayyim al-Jawziyya advocated for integrating *siyāsa* into *sharīʿa* to establish constitutional boundaries between *fiqh* and *siyāsa* to limit rulers' excesses,[99] the modernist interpretation of *siyāsa sharʿiyya*, by contrast, has led to the blurring of these boundaries.

Although some legal historians argue that, in practice, *siyāsa* in premodern times expanded beyond the discourse of *siyāsa sharʿiyya*, incorporated into substantive law and judicial

96 *Id.* at 51.
97 *Id.* at 52, 58–59.
98 Imām, *supra* note 37.
99 Vogel, *supra* note 10, at 695.

practice as far back as the Mamlūk and early Ottoman periods,[100] this, however, did not transform the paradigmatic nature of the law-making of Islamic law as jurist-centered law.[101] Beginning with Ibn Taymiyya, the *siyāsa sharʿiyya* literature was developed to restrict and delineate the constitutional limits of political authority. Even in cases where political influence or the impact of socio-cultural and political changes were recognized and acknowledged by the jurists and judges within substantive law and judicial practice, these influences remained constitutionally constrained and epistemologically defined within the legal epistemology of the school of law. In most instances, both jurists and judges were obliged to adhere to the predominant and authoritative positions of their respective school of law. Consequently, any interference in the domain of the jurists' law remained mainly limited and bounded by the rules and legal epistemology of the jurists. Even though jurists within a school of law might engage in debates over specific legal principles or the preference of one principle over another, their methodological argumentation always remains within the epistemological boundaries of their school. Thus, jurists continue to be the definitive makers of Islamic law. Therefore, the instances where the jurists within a school of law occasionally altered or favored positions within the school to align with the political authority, is insufficient to substantiate a paradigmatic influence of an external authority in the law-making.

However, as discussed in this article, the modern theory of *siyāsa sharʿiyya* was not only broadened to incorporate more aspects of Islamic law within the legislative authority of

100 See for example Samy A. Ayoub, Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafī Jurisprudence (2020); Guy Burak, The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire (2017); Yossef Rapoport, *Royal Justice and Religious Law: Siyāsah and Shariʿah under the Mamluks*, 16 Mamluk Studies Review 71–102 (2012).

101 See also Andrew March. He refers to Ayoub's book, in which Ayoub argues that "late Ḥanafī jurisprudence expanded the established jurisdiction of siyāsa to endorse a legislative role for the sultan." March contends that Ayoub's book primarily supports the view that Islamic law is "jurist-centered," rather than acknowledging direct sultanic involvement. Andrew F. March, *Review of Law, Empire, And The Sultan: Ottoman Imperial Authority And Late Ḥanafī Jurisprudence*, 70 American Journal Of Comparative Law 646–50 (2022); Ayoub, *supra* note 100, at 28.

the state, but this theory also coincided with numerous changes in legal theory and the legal system. These changes consequently encroached upon the constitutional limits set by the traditional theory of *siyāsa sharʿiyya*. Most notably, these modifications included diminishing the authority of the schools of law and reducing the influence of dominant and authoritative positions within each school often in favor of less authoritative and weaker positions. This was simultaneously accompanied by a modification in the epistemology of *maṣlaḥa* and who holds the authority to determine it.

Modern religious scholars and theorists who supported this discourse have comfortably adopted the theory, envisioning that the traditional concepts of religious scholars and legal reasoning would be modernized and serve as the legislative branch of the state. However, this has, on the contrary, gradually diminished the role of religious scholars in lawmaking. It has also paved the way for Islamic law to be adapted to a utilitarian positivism, allowing for a more flexible enactment of new laws, in areas constitutionally deemed Islamic, provided these laws do not conflict with a decisive text or consensus. As demonstrated by Samy Ayoub, the Egyptian Supreme Constitutional Court (SCC), comprised of a select group of legal jurists with limited knowledge and understanding of Islamic law and a lack of experience in legal reasoning, promotes a representation of the Egyptian State as the sole possessor of legal authority depicted as *walī ʾl-ʾamr*. This authority is not limited to interpreting Islamic law but extends even to Christian law. In this system, the SCC does not merely enforce the normative dicta in Islamic law; instead, it assumes the responsibility of reshaping and redefining the boundaries and content of these legal traditions and altering them to suit its concerns and interests.[102]

102 Samy Ayoub, *The Egyptian State as a Mujtahid: Law and Religion in the Jurisprudence of the Egyptian Supreme Constitutional Court*, 36 Arab Law Quarterly 1, 2, 6, 18 (2022).