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Special Issue:
The Dynamics of Islamic Law with the Rise of Modernity

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Editor's Introduction to the Special Issue

Scholarly Debates: Moving Past Structural Death

by Dilyara Agisheva, Special Issue Editor

This special issue explores the interactions between Islamic law and other legal traditions during the modern period, particularly in the contexts of colonialism, imperialism, and centralized bureaucratic states from the eighteenth to early twentieth centuries. The three essays in the issue contribute to the ongoing scholarly debates that present contrasting views on the fate of *sharīʿa* during this period. Between the two sides of this debate, there is a space ripe for exploring the fitness and movement of Islamic law in the contested period between tradition and modernity.

One view presents *sharīʿa* as a victim of modernity, suggesting that Muslim scholars were powerless against the expanding influence of the positive law regimes associated with colonial powers. For example, Léon Buskens, Baudouin Dupret, and Leonard Wood argue that colonialism transformed Islamic law into a legal category constructed to serve a colonial enterprise.[1] Avi Rubin, in exploring the decline of *sharīʿa* in

1 Léon Buskens and Baudouin Dupret, *The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient*, in After Orientalism: Critical Perspectives on Western Agency and Eastern Re-Appropriations (F. Pouillon et al., eds., 2015); Leonard Wood, Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt 1875–1952 (2016).

the Ottoman Empire, points to the Tanzimat reforms (1839–76) as an example of how legal positivism as a global phenomenon radically shifted Ottoman legal practice to the detriment of *sharīʿa* dominance.[2] Likewise, Raza Saeed asserts that the "normative orderings" of the colonial project in the Indian subcontinent drastically changed the underlying logic and rationality of *sharīʿa* to align with the interests of the colonial state.[3] Earlier, Wael Hallaq suggested that *sharīʿa* underwent "structural death" because modern political structures ended the longstanding "synthetic" tradition of scholarly legal discussion and education that had existed for centuries before.[4] In sum, the current opinion of a considerable number of scholars writing on Islamic legal history converges on the idea that institutional changes in political structures of the Islamic world—including European colonialism, imperialism, and the rise of a modern state—led to the corruption or even "death" of *sharīʿa* in the modern world.

By contrast, another set of historians have focused on Islamic law's responsiveness and transformation across different cultural and geographical contexts, even as they recognize the drastic impact of colonialism and the rise of modern nation-states. Iza Hussin, for example, argues that Islamic law is neither static nor fixed but that it has evolved in response to historical contingencies. Hussin's perspective sheds light on the dynamic nature of the local elite groups, who engaged in contestations, adaptations, and renegotiations in response to colonial pressures in Malaya, India, and Egypt.[5] Likewise, Muhammad Zubair Abbasi argues that Muslim scholars under British colonial

2 Avi Rubin, *The Positivization of Ottoman Law and the Question of Continuity*, in State Law and Legal Positivism: The Global Rise of a New Paradigm 154 (Badouin Dupret and Jean-Louis Halpérin, eds., 2022).

3 Raza Saeed, *Law and Coloniality of Empire: Colonial Encounter and Normative Orderings in the Indian Sub-Continent*, 19 Yearbook of Islamic and Middle Eastern Law 103 (2019).

4 Wael B. Hallaq, The Origins and Evolution of Islamic Law 122 (2005); Wael B. Hallaq, Shari'a: Theory, Practice, Transformation 15–18 (2009).

5 Iza R. Hussin. The Politics of Islamic Law: Local Elites, Colonial Authority and the Making of the Muslim State 9 (2016); Iza R. Hussin, *A Discussion of Wael Hallaq's Islam, Politics, and Modernity's Moral Predicament*, 12 Perspectives on Politics 461 (2014); Renisa Mawani and Iza Hussin, *The Travels of Law: Indian Ocean Itineraries*, 32 Law and History Review 733 (2014); Kelvin Ng,

rule in South Asia adapted the *waqf* (endowment) institution to modernity by building on the tradition of earlier reformers. He thereby demonstrates the use of complex legal reasoning as a form of resistance against colonial rule.[6] Similarly, Gianluca P. Parolin examines how a Muslim scholar of Islamic law, Rifāʿa al-Ṭaḥṭāwī (d. 1875), sought to align Islamic legal principles with the French Constitution of 1814. Through that examination, Parolin demonstrates how Muslim scholarly elites invested in new legal thinking.[7] Such works by Hussin, Abbasi, and Parolin highlight the agency of Muslim subjects and the adaptable nature of implementing *sharīʿa* principles under colonial rule.

In a similar vein, there are legal historians of the Ottoman Empire who write about the changing status of *sharīʿa* within the empire. Jun Akiba and Ruth Miller, for example, chart how Ottoman reformers staffed the Nizamiye (state-administrative) courts with *sharīʿa* court judges and other functionaries who had traditional Islamic law training.[8] Further, Ebru Aykut's research reveals that the conflicting views between *fiqh* and the Ottoman Penal Code about the definition of "premeditated murder" limited the Nizamiye courts' authority to impose death sentences in homicide cases.[9] These scholars of Ottoman Islamic legal history underscore the autonomy and persistence of

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Crosscurrents: Law, Economy, and Islam in the Indian Ocean, 11 South Asian History and Culture 323 (2020).

6 Muhammad Zubair Abbasi, *Co-Existence of Sharīʿa and the Modern State: A Historical Perspective from South Asia*, 19 Yearbook of Islamic and Middle Eastern Law 161 (2018).

7 Gianluca P. Parolin, *"Translating" the 1814 French Charter: Al-Ṭahṭāwī's New Semiotics of Law and Governance*, 19 Yearbook of Islamic and Middle Eastern Law 188 (2018); *Preface to Special Edition: Islamic Law and Empire*, 19 Yearbook of Islamic and Middle Eastern Law 1, 7 (2018).

8 Jun Akiba, *Sharīʿa Judges in the Ottoman Nizāmiye Courts, 1864–1908*, 51 Osmanli Araştirmalari 209 (2018); Jun Akiba, *From Kadı to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period*, in Frontiers of Ottoman Studies 43 (C. Imber and K. Kiyotaki, eds., 2005); Ruth Austin Miller, Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey (2005); Avi Rubin, *The Positivization of Ottoman Law and the Question of Continuity*, in State Law and Legal Positivism: The Global Rise of a New Paradigm 161 (Badouin Dupret and Jean-Louis Halpérin, eds., 2022).

9 Ebru Aykut, *Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire*, 4 Journal of the Ottoman and Turkish Studies Association 7 (2017).

sharīʿa before the rise of Turkey as a modern nation-state. They recognize that Islamic law was never too distant from politics and has always undergone transformations led by those from within its institutions.

In this special issue, we build on the latter trend of examining rather than assuming the death or dominance of Islamic law with the onset of modernity, and expand the inquiry beyond the main Ottoman provinces and the far-flung hinterlands to include developments in the nineteenth-century Egypt, Austria-Hungary, and the Russian Empire. That is, we shift the focus away from narratives of the encroachment of the imperial, colonial, or nation-state authorities upon *sharīʿa* and its normative legal structure. We shift toward investigation of the autonomy of local actors in adaptation and transformation of *sharīʿa* in the face of a changing social and political order with the rise of the modern nation-state.

Contributing Articles: Islamic law in Egypt, Austria-Hungary, and the Russian Empire in the Nineteenth Century

A collection of essays in this special issue of the *Journal of Islamic Law* authored by Brian Wright, Ninja Bumann, and Rozaliya Garipova contributes to the scholarly debates on the fate of Islamic law with the rise of modernity by providing a critical analysis of Islamic legal history in Egypt, Austria-Hungary, and the Russian Empire of the nineteenth century. These emerging scholars shed light on the encounters between *sharīʿa* and imperial or modernizing states, offering fresh insights into the intricate dynamics of Islamic law's interaction with non-Islamic legal traditions. Building on the scholarship above, these essays describe the processes and players involved in negotiating, borrowing, and intertwining Islamic legal practices with those of other legal systems beyond the experience of European colonialism. In line with the overarching theme of Islamic law's dynamism and resilience during this period, all three papers assert the continuity of *sharīʿa* despite the changing sociopolitical contexts of their respective regions. By delving into the

institutionalization of *sharīʿa* within the modernizing state apparatus, the authors raise thought-provoking questions about the agency of Islamic law practitioners and judges, and the flexible implementation of Islamic legal principles: How did the process of forced conceptualization or categorization of Islamic law unfold? Were Muslim judges, jurists, and other Islamic law practitioners mere passive bystanders unable to halt the conceptual transformations of Islamic law? Did they compromise Islamic principles to generate a unified legal system?

To answer some of these questions, Brian Wright's article, "Debating *Sharīʿa* in Egypt's National Courts," delves into a discussion that emerged in the early phase of Egyptian judicial reforms of the 1880s concerning the role of *sharīʿa*. The article contends that during this reform period, marked by the establishment of native courts (*al-maḥākim al-ahliyya*), the emphasis among the reformers was not on *whether* to implement *sharīʿa* within those institutions but rather on *how* to approach its application. Drawing on contemporary periodicals, including *al-Ḥuqūq* and *al-Ādāb,* the author explores how *sharīʿa* served as a foundational legal framework for both proponents and critics of the reforms, challenging the notion of its marginalization during the nineteenth century. Contrary to some scholars' claims, the article reveals the importance of *sharīʿa* in shaping the native courts' legal system, a novel legal institution that applied the relevant commercial, contract, and penal codes. The article delves into the public legal debates that resulted from these innovations, particularly the inclusion of Christian judges in native courts and the acceptability of capital punishment in criminal cases. As a part of this story, the author argues that the promulgation of the legal codes did not diverge from the Islamic or *sharīʿa*-dominated past. He shows that the penal code, for example, represented the outcome of local debates rooted in interpretations of *sharīʿa*. Engaging with existing scholarship on nineteenth-century Egyptian Islamic law—including the works of Mina Khalil, Rudolph Peters, Leonard Wood, Khaled Fahmy, Samy Ayoub, and Talal Asad—Wright contributes to the ongoing debate by showing that *sharīʿa* remained a vital legal source for Egypt's changing legal system. By shedding light on these

dynamics, this article illuminates the complexities surrounding *sharīʿa*'s continued influence within the changing societal and legal environment of nineteenth-century Egypt.

In an article entitled "Forging a Habsburg Islamic Legal System: Legal Transformation and Local Agency in Bosnia and Herzegovina (1878–1918)," Ninja Bumann explores the integration of Islamic law into the Habsburg administration in Bosnia and Herzegovina during the late nineteenth and early twentieth centuries. Building on scholarship on the issue of Habsburg reforms in post-Ottoman lands and on compelling archival evidence, including Austrian and Bosnian sources, Bumann is able to show the impact of legal reforms implemented by the Austro-Hungarian government following its 1878 occupation of the region. In this "quasi-colonial" regime, the Habsburg bureaucratic authorities limited the scope of Islamic law to family matters. The Habsburgs also established a two-tier appellate system with a Supreme Sharīʿa Court in Sarajevo under state supervision. Here, Bumann builds upon existing scholarship on European and Russian interventions in *sharīʿa*—including works by such scholars as Paolo Sartori, Ido Shahar, and Lauren Benton—to explore the efforts of the Habsburg regime to modernize and exert control over the *sharīʿa* judiciary. The author argues that the incorporation of *sharīʿa* courts into the Habsburg legal framework led to a translation of legal episteme and fostered a synthesis of Ottoman Islamic judicial practices and Habsburg legal structures. The scholarly contribution of the paper lies in its exploration of the agency and autonomy of local *qāḍī*s and plaintiffs navigating Habsburg legal reforms. In the process, the paper also sheds light on the hybridization of legal cultures. Overall, the article makes an important scholarly contribution to the study of Islamic legal structures in Habsburg Bosnia and opens avenues to similar comparative studies of encounters between *sharīʿa* and other multi-confessional imperial formations.

In a third and final contribution to this special issue, Rozaliya Garipova examines the legal reasoning and interpretation of Islamic law surrounding women's divorce claims in early nineteenth-century Russia in her article entitled

"'Emancipating' Muslim Women in Early Nineteenth-Century Russia: Ākhūnd Fathullah bin Huseyn al-Uriwi, Ḥanafī Law, and Muslim Women's Rights." Specifically, Garipova analyzes select court cases to demonstrate how Huseyn ughli, a prominent jurist of the Volga-Ural region, developed a pattern of legal interpretation that supported the rights of abandoned women to seek divorce. Garipova's research confronts the prevailing stance in the Islamic legal history literature that Muslim jurists in the Volga-Ural region lost their authority under tsarist rule. To the contrary, the author highlights Huseyn ughli's autonomy in making legal decisions despite the challenging social context of this period, which was characterized by changing practices of Islamic law and conflicting understandings of Islamic legal authority in the Russian Empire. The article's main argument is that Huseyn ughli developed a flexible approach to legal reasoning in ways that deviated from mainstream or traditional Ḥanafī thought. This deviation underscores Huseyn ughli's autonomy in shaping legal outcomes during this period. In sum, the core contribution of the article lies in its nuanced exploration of the negotiation and coping mechanisms that women employed, the influence of community values on law, and the autonomous decision-making by *ākhūnds* (scholars and jurists) in their pursuit of justice in the nineteenth-century Russian Empire.

Conclusion

The essays in this issue illustrate the interaction of *sharīʿa* within the imperial and nascent nation-state legal systems with the coming of modernity. Together, the authors' conclusions contribute to a new wave in the study of Islamic legal dynamism and resilience. They powerfully push against the prevailing demise-of-*sharīʿa* thesis. Namely, Wright demonstrates the continued importance of *sharīʿa* as a frame of reference for modern state codes and judicial practice, Bumann highlights the agency of local *qāḍīs* and plaintiffs in modern judicial institutions with reference to Islamic law, and Garipova underscores the continued use of legal reasoning and sustained influence of local Muslim scholars of Islamic law, *ākhūnd*s, in shaping legal outcome.

Collectively, these essays expand the scholarly inquiry by offering fresh perspectives on the negotiation, borrowing, and intertwining of Islamic legal practices with non-Islamic traditions, emphasizing the agency of Islamic legal practitioners and principles in the old world and the new.

Debating *Sharīʿa* in Egypt's National Courts[1]

Brian Wright
Independent Scholar

Abstract

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

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

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

Introduction

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

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

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

Khedive Tawfīq then addressed the gathering, stating,

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

2 Unnumbered order of June 14, 1883 (Lāʾiḥa tartīb al-maḥākim al-ahliyya [Order to Establish Native Courts]), art. 15 (Egypt).

3 Quoted in ʿAbd al-Raḥmān al-Rāfiʿī, Miṣr waʾl-Sudān fī awāʾil ʿahd al-iḥtilāl 66 (1983).

4 *Id.*

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

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

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

5 Al-Ahrām, April 24, 1883.

6 *Id.*

7 Rudolph Peters, Crime and Punishment in Islamic Law 141 (2009).

8 See, for example, Wael Hallaq, Sharīʿa: Theory, Practice, Transformations 443 (2009).

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

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

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

9 Aharon Layish, *The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, 44 Die Welt des Islams 86 (2004).

10 Baudouin Dupret, Positive Law from the Muslim World: Jurisprudence, History, Practices 54 (2021).

11 Talal Asad, Formations of the Secular: Christianity, Islam, Modernity 205–6 (2003).

12 Wael Hallaq, *Can the Shari'a Be Restored?*, in Islamic Law and the Challenges of Modernity 24 (Yvonne Haddad and Barbara Stowasser, eds., 2004).

13 Khaled Fahmy, In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt 279 (2018).

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

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

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

15 Samy Ayoub, *The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning Islamic Law in the Nineteenth and Twentieth Centuries*, 2 Journal of the Ottoman and Turkish Studies Association 123 (2015).

16 Iza Hussin, The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State 19 (2016).

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

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

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

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

17 Leonard Wood, Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt 1875–1952, 4 (2016).

18 *Id.* at 5.

Building the Native Courts

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

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

19 Laṭīfa Muḥammad Sālim, al-Niẓām al-qaḍāʾī al-miṣrī al-ḥadīth 26–28 (2010).

20 James Baldwin, Islamic Law and Empire in Ottoman Cairo (2017).

21 Sālim, Niẓām, *supra* note 19 at 28–52.

22 See Roderic Davison, *Tanẓīmāt*, in Encyclopedia of Islam, Second Edition (P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, and W. P. Heinrichs, eds., 2012), available at http://dx.doi.org/10.1163/1573–3912_islam_COM_1174; Avi Rubin, Ottoman Nizamiye Courts: Law and Modernity 23 (2011).

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

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

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

23 Rubin, Ottoman, *supra* note 22 at 81.

24 Fahmy, Quest, *supra* note 13 at 126.

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

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

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

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

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

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

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

27 *Id.*

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

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

28 Byron Cannon, Politics of Law and the Courts in Nineteenth-Century Egypt 126–28 (1988).

29 Rāfiʿī, Miṣr, *supra* note 3 at 61–62.

30 Lawrence Rosen, *Islamic Conceptions of the Rule of Law*, in The Cambridge Companion to the Rule of Law 88 (Jens Meierhenrich and Martin Loughlin, eds., 2021).

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

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

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

Is Egyptian Law Islamic?

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

31 Brian Tamanaha, On the Rule of Law: History, Politics, Theory 52 (2004).

32 Charles-Louis de Secondat, Baron de Montesquieu, Uṣūl al-nawāmīs wa'l-sharāʾiʿ (Yūsuf Āṣāf, trans., 1891).

33 Yūsuf Āṣāf, Dalīl Miṣr 223 (1890).

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

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

For Shmayil, Egypt's post-1883 legal system resembled the Tanzimat system adopted in the Ottoman Empire, of which Egypt was a part. The Tanzimat was a "dual system" of law in which *sharīʿa* and state (*niẓāmiyya*) operated simultaneously.[36] Shmayil outlined this division in an article from March 1888, writing:

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

34 Jurjī Zaydān, Tarājim mashāhīr al-sharq fī'l-qarn al-tāsiʿ ʿashr 2:245 (1903).

35 *Id.* at 2:245–48.

36 See Rubin, Ottoman, *supra* note 22.

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

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

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

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37 *Al-Qism al-ḥuqūqī: fī taʿaddud al-maḥākim wa ikhtilāf anwāʿ al-qaḍāʾ*, AL-ḤUQŪQ, March 17, 1888.

38 *Al-Muḥāmūn wa'l-maḥākim al-ahliyya*, AL-ḤUQŪQ, June 18, 1887.

39 *Al-Qism al-ḥuqūqī: al-ḥaqq al-jināʾī*, AL-ḤUQŪQ, April 27, 1889.

40 *Al-Qism al-qaḍāʾī*, AL-ḤUQŪQ, August 7, 1887.

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

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

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

41 *Al-Qism al-ḥuqūqī: fī al-bayʿ*, al-Ḥuqūq, August 7, 1887.

42 Fahmy, Quest, *supra* note 13 at 124.

43 *Al-Qism al-ḥuqūqī: fī al-sulṭa al-qaḍāʾiyya wa ādāb al-qāḍī*, al-Ḥuqūq, March 16, 1889.

44 *Id.*

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

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

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

45 Al-Ḥuqūq, May 1, 1886.
46 *Al-Qism al-adabī*, al-Ḥuqūq, June 5, 1886.
47 *Id.*

civil cases at fifteen years, was "nothing more than confirming that which had come before [i.e., the *sharīʿa*]."[48]

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

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

Defining the Purpose of *Qiṣāṣ*

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

48 Al-Ḥuqūq, November 19, 1887.
49 Penal Code 1883, art. 208 (Egypt).
50 *Id.*, art. 32.
51 *Id.*, art. 213.
52 Hallaq, Sharīʿa, *supra* note 8 at 348.

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

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

53 Muḥammad Yāsīn, Sharḥ qānūn al-ʿuqūbāt 29 (1886).

54 Amīn Afrām al-Bustānī, Mukhtārāt Amīn al-Bustānī al-Muḥāmī 143 (1919).

55 *ʿIqāb al-mujrimīn*, al-Qāhira al-ḥurra, February 27, 1888.

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

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

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

56 *ʿIqāb al-mujrimīn*, al-Ḥuqūq, March 17, 1888.
57 *Id.*

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

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

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

58 *ʿIqāb al-mujrimīn*, AL-ḤUQŪQ, March 3, 1888.

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

60 *ʿIqāb*, *supra* note 56.

61 QURʾĀN, 2:179.

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

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

62 *Wa-lakum fī'l-qiṣāṣ ḥayā*, al-Ādāb, March 22, 1888.

63 This maxim was controversial for pre-modern scholars, with the fourteenth-century jurist Aḥmad b. ʿAbd al-Ḥalīm Ibn Taymiyya criticizing it as invalid. See Majmūʿ al-fatāwā 6:444–45 (Medina: Mujammaʿ al-Malik Fahad li-Ṭibaʿa al-Muṣḥaf al-Sharīf, 2004).

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

original Qurʾānic rules maintained to allow judges to apply the harshest punishments more easily.

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

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

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

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

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

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

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

66 Hallaq, Sharīʿa, *supra* note 8 at 320.

67 ʿAlī Muḥammad al-Māwardī, al-Aḥkām al-sulṭāniyya 346 (Cairo: Dār al-Ḥadīth, 2006); Shihāb al-Dīn al-Qarāfī, al-Furūq 1:257 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998).

68 Al-Ḥuqūq, March 30, 1889.

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

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

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

69 *Id.*

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

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

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

Can Christians Judge according to Islamic Law?

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

70 Al-Bustānī, Mukhtārāt, *supra* note 54 at 144.

71 Eugene Clavel, *Mashrūʿ al-tawassuʿ fī'l-iʿdām: al-mādda 32 min Qānūn al-ʿuqūbāt al-miṣrī*, al-Muʾayyad, December 8, 1897.

72 Amīn Afrām al-Bustānī, *Khitām al-kalām ʿala al-mādda 32*, al-Muqaṭṭam, December 18, 1898.

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

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

Following these regulations, the judges of the native courts were drawn from a pool of existing government officials. Their selection was essentially a political decision. For example, one of the judges of the Cairo Appellate Court, ʿUmar Bek Rushdī, was a military expert with no legal experience until his appointment to the Alexandria Appellate Court in 1884. His biography mentions Rushdī's support of Khedive Tawfīq during the Urabi Revolution of 1879–82 that had sought to depose the Khedive due to perceived British and French influence. According to the entry, Rushdī"was never responsive to the calls to rebel" and "advocated for the support of the Khedive for better or worse."[76] However, appointments based on political loyalties should not indicate that the government ignored previous legal expertise when choosing judges for the native courts. The head of the Cairo Appellate Court in the 1890s, ʿAbd al-Ḥamīd Ṣādiq, had an extensive legal education and had served as a judge in the state councils since 1862.[77]

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

73 Order 12 of 1880 (Lāʾiḥa al-maḥākim al-sharʿiyya [Sharīʿa Courts Order]), art. 5.

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

75 *Id.*, art. 36.

76 Āṣāf, Dalīl, *supra* note 33 at 289.

77 *Id.* at 277.

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

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

78 Samir Seikaly, *Prime Minister and Assassin: Butrus Ghali and Wardani*, 13 Middle Eastern Studies 112 (1977).

79 *Saʿādat Buṭrus Bāshā Ghālī*, al-Qāhira al-ḥurra, October 27, 1887.

80 Al-Waṭan, October 29, 1887.

81 *Id.*

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

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

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

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

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

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

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

85 *Al-Qāhira wa'l-waṭan*, al-Ḥuqūq, November 5, 1887.
86 *Id.*
87 Al-Waṭan, October 29, 1887.

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

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

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

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

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

The *Sharīʿa* as National Justice

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

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

88 Ḥusayn Aḥmad al-Marṣafī, Risāla al-kalim al-thamān 28 (Khālid Ziyāda, ed., 2019).

89 Timothy Mitchell, Colonising Egypt 136 (1988).

90 Al-Marṣafī, Risāla, *supra* note 88 at 31.

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

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

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

91 *Id.*

92 *Al-Qism al-ḥuqūqī: fī'l-ḥaqq wa-ʿilm al-aḥkām wa mā li-ʿulamāʾ al-muslimīn min ṭūl al-bāʿ fī dhālik*, AL-ḤUQŪQ, June 31, 1886.

93 *Al-Qism al-adabī: fī taqaddum al-ʿuthmāniyya baʿd sana 1856*, AL-ḤUQŪQ, August 30, 1890.

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

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

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

94 *Id.*

95 *Al-Tārīkh al-usbūʿī, fī al-qaḍāyā al-jināʾiyya*, al-Ādāb, March 30, 1889.

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

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

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

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

97 *Id.*

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

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

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

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

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

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

100 *Al-Qism al-qaḍāʾī: tābiʿ al-ḥukm fī qaḍiyya al-dahāshana*, al-Ḥuqūq, November 1, 1888.

101 *Id.*

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

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

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

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

102 *Id.*

103 *Id.*

104 *Al-Ḥukm fī qaḍiyya al-marḥūm Muṣṭafa Bek Wāṣif*, Al-Ahrām, October 4, 1888.

105 Al-Ahrām, October 4, 1888.

106 *Al-Fayūm li-makātibinā*, al-Qāhira al-ḥurra, October 6, 1888.

districts of Beni Sueif, Asyut, and Qena just a few months later, in January 1889.[107]

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

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

107 Tūmā, Majālis, *supra* note 26.

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

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

Using *Sharīʿa* for the Public Good

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

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

110 Muḥammad Aḥmad Sirāj, Fī uṣūl al-niẓām al-qānūnī al-islāmī: dirāsa muqārana li-ʿilm uṣūl al-fiqh wa taṭbīqātihi al-fiqhiyya waʾl-qānūniyya 29 (2020).

111 Mathias Rohe, Islamic Law in Past and Present 5 (2015).

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

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

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

112 Felicitas Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*,12 Islamic Law and Society 182 (2005).

113 Mohammad Fadel, *Maṣlaḥa as "Flourishing" and Its Place in Sunni Political Thought*, 7 Journal of Islamic Ethics 1 (2023).

114 Quoted in ʿAlī ʿAlī Manṣūr, Khaṭwa rāʾida naḥw taṭbīq aḥkām al-sharīʿa al-islāmiyya fīʾl-Jumhūriyya al-ʿArabiyya al-Lībiyya 32 (1972).

115 For more on the question of utilitarianism and its impact on the *sharīʿa* in modern Egyptian law, see Clark Lombardi, State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law 78–85 (2006).

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

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

Conclusion

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

116 *Al-Ḥuriyya*, al-Ādāb, February 17, 1887.

117 For more on this period, see Wood, Islamic, *supra* note 17.

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

Forging a Habsburg Islamic Legal System: Legal Transformation and Local Agency in Bosnia and Herzegovina (1878–1918)

Ninja Bumann
University of Vienna

Abstract

The integration of Islamic law into the Habsburg administrative structures of Bosnia and Herzegovina following the 1878 occupation by Austria-Hungary marked a significant shift in the existing Islamic legal system. The Habsburg bureaucracy made notable reforms to the Islamic judiciary and reduced the application of Islamic law to the private sphere of family and marriage, which entailed the establishment of a two-tier court system, including a state-controlled Supreme Sharīʿa Court in Sarajevo. This paper examines the impacts of these legal reforms, focusing on the agency of local qāḍīs *and plaintiffs in the process. Its analysis suggests that the integration of the* sharīʿa *courts into the Habsburg administration launched a process of translation of legal norms, knowledge, values, and practices, resulting in a unique blend of Ottoman Islamic legal practices and Habsburg legal structures and values. The paper argues that despite increased government control, local actors, including* qāḍīs *and plaintiffs, still managed to retain some autonomy and thereby significantly shape the legal system.*

Keywords: Bosnia and Herzegovina, Austria-Hungary, Southeastern Europe, Islamic law, Muslim minority, family law, legal transformation

Introduction

The Congress of Berlin in 1878 marked a significant break for Muslim communities in the hitherto Ottoman territories of Southeastern Europe. The Treaty of Berlin redrew the region's borders and placed Muslims under (predominantly) Christian rule in the newly established successor states to the Ottoman Empire, while guaranteeing them civil and political rights as well as the free practice of their faith.[1] It also gave Austria-Hungary the mandate to occupy the province of Bosnia and Herzegovina, which remained a de jure part of the Ottoman Empire (until its formal annexation by Austria-Hungary in 1908). As stated in the Habsburg emperor's proclamation to Bosnia's inhabitants of July 1878, and specifically defined in the Habsburg-Ottoman Novi Pazar Convention of April 1879, the occupation mandate guaranteed freedom of worship to all inhabitants, including Muslims.[2]

To fulfill this obligation, the newly installed Austro-Hungarian authorities had to integrate Islamic institutions, including its legal system, into their own (secular) administrative structures. Following the occupation, *sharīʿa* courts were allowed to continue ruling on legal matters according to Islamic law, however, the Habsburg authorities soon introduced significant reforms. According to a report from the Austro-Hungarian finance minister Benjamin Kállay to the Cisleithanian prime minister Eduard Taaffe in 1883, the authorities aimed to control the *sharīʿa* courts and local *qāḍī*s, while also guaranteeing the free practice of Islam. Kállay thought that the Habsburg administration should lead to the "assimilation of a large part of the

1 A general overview on civic and religious rights of Muslims in post-Ottoman Southeastern Europe is provided by Emily Greble, Muslims and the Making of Modern Europe (2021).

2 *Proclamation an die Bewohner von Bosnien und der Hercegovina: Wiener Zeitung vom 28. Juli 1878, Nr. 172*, In Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: I. Band 3 (1880); *Convention zwischen Oesterreich-Ungarn und der Türkei vom 21. April 1879*," in Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: I. Band 5, Art. 2 (1880),; Mustafa Imamović, Pravni položaj i unutrašnjo-politički razvitak BiH od 1878. do 1914., 9–20 (2007).

Mohammedan-confessional legislation with that of the state," and believed that these reforms would be well received by the Muslim population due to the allegedly "increasingly evident undeniable merit of our laws."[3]

Kállay's concept of a "civilizing mission" aimed at modernizing and assimilating the Islamic judiciary aligned with the overall Habsburg "quasi-colonial" effort in Bosnia, characterized by asymmetrical power dynamics in governmental structures.[4] However, several studies have highlighted that this did not lead to the demise of Islamic law but, rather, led to marked transformations within it. As Fikret Karčić's seminal research has shown, much Ottoman-Islamic law "survived" in post-Ottoman Bosnia, while the Habsburg reforms were similar to those introduced elsewhere in European colonies, such as in Algeria and India.[5] Mehmed Bećić has argued that the Austro-Hungarian reforms were based on colonial models of administering the

3 Report by Benjamin Kállay, to Austrian Minister-President Eduard Taaffe (June 5, 1883) (Austrian State Archives (AT-OeStA), Allgemeines Verwaltungsarchiv (AVA), Justiz JM Allgemein Sig 1 A1238, Fasc. I N I Vz.1a, 20: ad 9343-1883/J. M.).

4 Scholars use a variety of terms to describe the asymmetrical relationship between Bosnia and the Habsburg monarchy's core. Since describing Bosnia as a "colony" can be controversial, a variety of specific terms, such as "proximate colony" (Donia), "semi-" or "quasi-colony" (Detrez), or "colonial governmentality" (Aleksov) have been proposed. This paper uses "quasi-colonial" to emphasize that Habsburg rule had many characteristics of colonial rule. See Bojan Aleksov, *Habsburg's "Colonial Experiment" in Bosnia and Hercegovina Revisited*, in Schnittstellen: Gesellschaft, Nation, Konflikt und Erinnerung in Südosteuropa 201–16 (Ulf Brunnbauer, Andreas Helmedach, and Stefan Troebst, eds., 2007); Raymond Detrez, *Colonialism in the Balkans: Historic Realities and Contemporary Perceptions*," available at http://www.kakanien-revisited.at/beitr/theorie/RDetrez1.pdf; Robert J. Donia, *The Proximate Colony: Bosnia-Herzegovina Under Austro-Hungarian Rule*, available at http://www.kakanien-revisited.at/beitr/fallstudie/RDonia1.pdf. Clemens Ruthner provides an overview of the historiographical assessment of Austro-Hungarian rule in Bosnia as colonial rule: Clemens Ruthner, *Bosnien-Herzegowina als k. u. k. Kolonie: Eine Einführung*, in Bosnien-Herzegowina und Österreich-Ungarn: 1878–1918, 15–44 (Clemens Ruthner and Tamara Scheer, eds., 2018).

5 See Fikret Karčić, Šerijatski sudovi u Jugoslaviji 1918–1941 (2005), esp. at 21–26; Fikret Karčić, *Survival of the Ottoman-Islamic Laws in Post-Ottoman Times in Bosnia and Herzegovina*, in Konflikt und Koexistenz: Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert 43–69 (Thomas Simon, ed., 2017).

Islamic judiciary.[6] By building upon these discussions of continuity and change in the Islamic legal system following the Habsburg occupation of Bosnia in 1878, this paper aims to investigate how the Ottoman Islamic legal system was adapted towards the new Austro-Hungarian political and administrative framework by focusing on legal practice at *sharīʿa* courts and the local Muslims' agency therein.

To date, most studies on the Islamic legal system in Habsburg Bosnia have emphasized its structure and legal norms,[7] although recent years have witnessed an increased interest in legal practice at *sharīʿa* courts. Hana Younis, for instance, has assessed the everyday life of Bosnian *qāḍī*s who, she argues, had to contend with the loss of their prestigious status, as well as limitations to their jurisdictional functions.[8] Other historians have also increasingly used *sharīʿa* court records to analyze the regulation of marriage and family issues.[9] Beyond the study of Islamic law, the situation of Muslims in Habsburg Bosnia is relatively well-studied and the most recent works have

6 Mehmed Bećić, *Novi pogled na transformaciju šerijatskih sudova u Bosni i Hercegovini: Da li je 1883. godine nametnut kolonijalni model primjene šerijatskog prava?*, LX Godišnjak pravnog fakulteta u Sarajevu 59 (2017).

7 In addition to Karčić and Bećić, Enes Durmišević also made a key contribution to the historiography of Islamic law under Habsburg rule, see, e.g., Enes Durmišević, Šerijatsko pravo i nauka šerijatskog prava u Bosni i Hercegovini u prvoj polovini XX stoljeća (2008); Enes Durmišević, *Šerijatski sudovi u Bosni u drugoj polivini XIX stoljeća*, 12 Anali Pravnog fakulteta Univerziteta u Zenici 75 (2013).

8 See Hana Younis, Biti kadija u kršćanskom carstvu: Rad i osoblje šerijatskih sudova u Bosni i Hercegovini 1878.–1914. (2021). Younis also examined the legal practice at *sharīʿa* courts on several selected topics, such as divorces, "prodigality", and children born out of wedlock. See Hana Younis, *Razvjenčanja kroz dokumente Vrhovnog šerijatskog suda Sarajevo u prvim decenijama nakon Austro-Ugarske okupacije*, in Proceedings of the Fifth International Congress on Islamic Civilization in the Balkans 419–36 (Eren Halit, ed., 2015); Hana Younis, *Rasipništvo u praksi šerijatskih sudova u Bosni i Hercegovini od 1878. do 1914. godine*, 44 Prilozi 81 (2015); Hana Younis *"Nezakonita" djeca pred zakonom: Dokazivanje očinstva u Bosni i Hercegovini na razmeđu 19. i 20. stoljeća*, 47 Prilozi 45 (2018).

9 See, e.g., Ninja Bumann, *Marriage Across Boundaries: Mixed Marriages at the Supreme Sharia Court in Habsburg Bosnia and Herzegovina*, 19 Historijska traganja 151 (2020); Ninja Bumann, *Contesting Juridical Authority: Sharia, Marriage, and Morality in Habsburg Bosnia and Herzegovina*, 53 Austrian History Yearbook 150 (2022); Adnan Jahić, Muslimansko žensko pitanje u Bosni i Hercegovini (1908–1850) (2017); Amila Kasumović, *Konkubinat u Bosni i Hercegovini na prijelomu 19. i 20. stoljeća*, 47 Prilozi 69 (2018).

specifically focused on the Ottoman cultural legacy and the ongoing trans-Ottoman networks and entanglements among Bosnian Muslim intellectuals.[10]

This growing historiographical interest in Islam and Muslims in post-Ottoman Bosnia corresponds to a broader trend to investigate the lives and the legal status of Muslims in Southeastern Europe following the cessation of Ottoman rule. Several recent studies have explored how Muslim communities became minorities in the newly established nation-states of Bulgaria, Greece, and Serbia, arguing that this resulted in the incorporation and transformation of the Ottoman legal heritage as well as the restructuring of Islamic institutions.[11] The present paper contributes to this growing scholarship by focusing on the transformation of the Islamic legal system in Habsburg Bosnia in court practice. In so doing, it also draws upon a growing body of literature relating to the incorporation of Islamic legal systems in colonial administrations of the late nineteenth century, such as in Russian Central Asia or African and Southeast Asian territories under French and British rule.[12]

Such legal transformations have been studied from different theoretical perspectives, while recently, the legal historian

10 See Leyla Amzi-Erdoğdular, *Alternative Muslim Modernities: Bosnian Intellectuals in the Ottoman and Habsburg Empires*, 59 Comparative Studies in Society and History 912 (2017); Harun Buljina, Empire, Nation, and the Islamic World: Bosnian Muslim Reformists Between the Habsburg and Ottoman Empires, 1901–1914 (2019) (Ph.D. dissertation, Columbia University); Dennis Dierks, *Scripting, Translating, and Narrating Reform: Making Muslim Reformism in the European Peripheries of the Muslim World at the Turn of the 19th Century*, in Knowledge on the Move in a Transottoman Perspective: Dynamics of Intellectual Exchange from the Fifteenth to the Early Twentieth Century 157 (Evelyn Dierauff et al., eds., 2021).

11 See Greble, *supra* note 1*;* Stefanos Katsikas, Islam and Nationalism in Modern Greece 1821–1940 (2021); Milena B. Methodieva, Between Empire and Nation: Muslim Reform in the Balkans (2021); Anna M. Mirkova, Muslim Land, Christian Labor: Transforming Ottoman Imperial Subjects into Bulgarian National Citizens, C. 1878–1939 (2017); Jelena Radovanović, Contested Legacy: Property in Transition to Nation-State in Post-Ottoman Niš (2020) (Ph.D. dissertation, Princeton University).

12 An overview of legal pluralism and the role of Islamic law in Muslim majority-colonies is offered by Paolo Sartori and Ido Shahar, *Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain*, 55 Journal of the Economic and Social History of the Orient 637 (2012).

Lena Foljanty has suggested viewing legal transfers as translations of knowledge, practices, and values. Through this process, legal transfers create hybrid legal models and norms that are characterized by an amalgamation of different practices and understandings.[13] Similarly, Lauren Benton's studies on the role of law in colonial cultures outline that the incorporation of indigenous and Islamic law into colonial pluralistic legal orders is characterized by negotiations about jurisdictional and cultural boundaries. She highlights how cultural and legal intermediaries have played a significant role in translating and brokering between imperial administrators and local societies. At the same time, she points out that colonial pluralistic legal systems often inhibited tensions and contests about legal authority and how these facilitated phenomena such as "legal jockeying" between different legal and jurisdictional orders.[14] Starting from these theoretical considerations, this article assumes that the translation of Ottoman Islamic law into the Habsburg framework should be analyzed beyond merely describing changes to legal structures and norms. Rather, the agency of local actors, including imperial administrators and judges, *qāḍī*s, and plaintiffs, in conflicts and negotiations, as well as the emergence of new norms and legal practices resulting from the amalgamation of different legal cultures are this study's focus.

This study's findings rely on the analysis of archival documents from the Supreme Sharʿīa Court (Bosnian: Vrhovni Šerijatski Sud) in Bosnia and Herzegovina, installed by the Habsburg authorities in July 1879 as an appeal body for local *sharīʿa* courts. The court records stored in the State Archives of Bosnia and Herzegovina (Bosnian: Arhiv Bosne i Hercegovine) in Sarajevo provide information on first-instance district *sharīʿa* court proceedings as well as on appeal procedures before the Supreme Sharīʿa Court. Due to the Habsburg legal interventions and archival practices, the available court records do not entail *sicils*, or *qāḍī* court registers, that are traditionally used for

13 Lena Foljanty, *Rechtstransfer als kulturelle Übersetzung: Zur Tragweite einer Metapher*, 98 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 89 (2015).

14 Lauren A. Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900 (2002), esp. at 1–30.

studying legal practice in the Ottoman context.[15] Rather, they include correspondence between the local court and the Supreme Sharīʿa Court, the plaintiff's appeal, and the decisions of the Supreme Sharīʿa Court. Since the type and number of archived documents vary from case to case, some also include additional material, such as minutes of court hearings, the verdicts of local trials of the first instance, and other types of correspondence and text material from different administrative institutions. The court material is to a large extent written in Bosnian (Latin script) and to a lesser extent in Ottoman Turkish (OT) and German.[16]

A close reading of selected cases from the Supreme Sharīʿa Court offers insights into the transformation of Islamic legal practice and the ensuing negotiations on jurisdictional and cultural boundaries as well as legal authority between different local actors. Besides describing the Habsburg structural reforms of the Islamic legal system, as outlined in the subsequent section, the analysis focuses on four key issues: the role of the Ottoman Turkish language and script for the continuity of Islamic legal practices; the rise in proceduralization and legal formalism in *sharīʿa* court proceedings; the formulation of Islamic legal opinions and the development of legal doxa; and finally, the responses of local plaintiffs to the Habsburg legal reforms by utilizing the new legal structures to make claims. Thereby, this paper argues that the Habsburg transformation of the Islamic legal judiciary led to a hybrid legal model, in which some parts of the Ottoman legal heritage were intentionally preserved, while others were replaced with Austro-Hungarian concepts or colonial legal models. This legal amalgamation was, however, not only shaped by top-down efforts of the Habsburg authorities to muzzle and control local *qāḍī*s, but equally, by local agents who managed to retain some autonomy within the Islamic legal system.

15 Coşgel and Ergene give a concise overview of the use of *sicil*s and methodological discussions for studying Ottoman legal practice, while, however, overly favoring and advertising a quantitative approach: Metin Coşgel and Ergene Boğaç, The Economics of Ottoman Justice: Settlement and Trial in the Sharia Courts 13–26 (2016).

16 Arhiv Bosne i Hercegovine (ABiH), Vrhovni Šerijatski Sud (VŠS), 1879–1918.

Sharīʿa Courts Under Habsburg Rule

From the fifteenth century, when Bosnia came under Ottoman rule, Islamic culture and institutions played a vital part in local society. The population consisted of four different confessional groups: Muslims (38 percent according to an official census from 1879), (Serbian) Orthodox Christians (43 percent), Catholics (18 percent), and a small Jewish community.[17] Non-Muslim groups were afforded considerable autonomy in administering family and matrimonial affairs, with the resulting pluralistic legal order referred to as the *millet* system. The term *millet*, ultimately derived from Arabic *milla*, roughly corresponded to a confessional community. However, this should not be equated with a clearly defined systematic order: Jurisdiction was fluid, and non-Muslims also used *sharīʿa* courts to regulate various issues, including family and matrimonial questions, according to Islamic law.[18]

Before the Danube Monarchy took over Bosnia in 1878, the mid-nineteenth-century Tanzimat (OT, Reorganization) reforms that aimed to modernize the empire and its administration by incorporating elements from European legal and administrative models had already significantly reshaped the Ottoman legal system. This had traditionally been based on Islamic law as well as the *qānūn*, or the sultan-issued state administrative regulations. The Tanzimat reforms introduced new legal codifications, some of which were based on a selective reception of European law, as well as courts. Thus, new penal (1840, 1858) and commercial codes (1850) were drafted that emulated French models. In the same vein, secular Nizamiye (OT, Regular) courts were established in 1865/66 in Bosnia, which regulated all civil legal affairs except for those issues that fell under the purview of separate commercial, consular, *sharīʿa*, or ecclesiastical courts. As of 1868, the Divan-i Ahkâm-i Adliyye (OT, Council

17 Robin Okey, Taming Balkan Nationalism: The Habsburg "Civilising Mission" in Bosnia, 1878–1914, 8 (2007).

18 A summary of the *millet* system and current historiographical debates is provided by Karen Barkey and George Gavrilis, *The Ottoman Millet System: Non-Territorial Autonomy and Its Contemporary Legacy*, 15 Ethnopolitics 24 (2016).

of Judicial Ordinances) was established as the highest court in the multi-level Nizamiye court system, putting appeal mechanisms under the control of a secular institution. Another significant step was the drafting of an Ottoman civil code, the Mecelle-i Ahkâm-i Adliyye (OT, Digest of Legal Rules; hereafter Mecelle) between 1870 and 1877, the form of which was akin to that of "European" codified law, while its content was based on Islamic law. Thus, on the eve of the Habsburg occupation of Bosnia, European legal concepts had been introduced into the Ottoman legal system, and the competences of the *sharīʿa* courts were already being drastically curtailed to (at least in theory) the administration of family, marriage, and inheritance affairs.[19]

The 1870s not only saw major legal and administrative reforms and changes in the Ottoman Empire but also the so-called Great Eastern Crisis, which led to several uprisings and wars, that challenged the empire's rule in Southeastern Europe. Following the Russo-Ottoman War of 1877–78, European powers intervened to redraw the region's borders. The initial peace treaty, signed at San Stefano in March 1878, was soon revised at the Congress of Berlin in June and July of that year, and resulted in the establishment of new nation-states (Romania, Bulgaria, Serbia, and Montenegro) which enjoyed varying degrees of independence from the Ottoman Empire. Austria-Hungary, which had remained neutral during the war, was granted the mandate to occupy and administer the Ottoman province of Bosnia and Herzegovina, which remained legally part of the Ottoman Empire until its annexation by the Habsburg Monarchy in 1908.

Due to this convoluted legal status, the Habsburg emperor, Franz Joseph, guaranteed the preservation of the existing legal system and laws, at least initially.[20] The Austro-Hungarian authorities soon implemented changes in the local court system to reduce the authority and jurisdiction of local *qāḍī*s. Several months after occupying Bosnia, they replaced local judges

19 Niyazi Berkes, The Development of Secularism in Turkey 160–72 (1964); Sami Zubaida, Law and Power in the Islamic World 129–33 (2003).

20 *Proclamation an die Bewohner von Bosnien und der Hercegovina: Wiener Zeitung vom 28. Juli 1878, Nr. 172*, in Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: I. Band 3–4 (1880).

at the "regular" (Nizamiye) civil courts with imperial officials, significantly limiting the *qāḍī*s' role, as they had previously often served at both *sharīʿa* and civil courts.[21] This move was motivated by the Habsburgs' general mistrust of local officials, who had hitherto served under the Ottoman government. While a few of them left Bosnia at the beginning of the occupation, those who remained were viewed with suspicion. A government decree in January 1879 even stated that the Ottoman officials who remained in the country were either "unsuitable" or "insufficiently trustworthy."[22]

In this spirit, the Habsburg government sought to restrict the jurisdiction of *qāḍī*s while fulfilling its international obligations and guarantees. In accordance with its occupation mandate, as specified in the Novi Pazar Convention of April 1879, the Austro-Hungarian authorities were bound to uphold freedom of religion for all inhabitants of Bosnia, including Muslims.[23] Thus, it was imperative that they preserve Islamic institutions as well as *sharīʿa* courts, yet limit their scope to marriage and family affairs. This jurisdictional limitation resembled the legal autonomy in the area of marriage and family that had been afforded to the non-Muslim communities under Ottoman rule. It was formalized through an 1883 decree on the "Organization and Scope of Sharīʿa Courts," which defined the responsibilities and jurisdiction of these courts exclusively to cover family, marriage, and inheritance matters among Muslims.[24] Although the Tanzimat reforms had already encroached upon the jurisdiction of *sharīʿa* courts, both Muslims and non-Muslims turned to *sharīʿa* courts in Bosnia to settle family and other civil disputes until the early years of the Habsburg occupation. However, the

21 Bećić, *supra* note 6 at 66.

22 *Erlass des gemeinsamen Ministeriums vom 1. Jänner 1879, Nr. 693 B. H., betreffend die Organisation der Justizverwaltung*, in Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: II. Band 6 (1881).

23 *Convention zwischen Oesterreich-Ungarn und der Türkei vom 21. April 1879*, in Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: I. Band 5, Art. 2 (1880).

24 *Verordnung über die Organisation und den Wirkungskreis der Scheriatsgerichte: No. 7220/III*, in Sammlung der Gesetze und Verordnungen für Bosnien und die Hercegovina 538–43 (1883).

1883 reform introduced by the Austro-Hungarian government established strict jurisdictional boundaries, effectively undermining the previous practice of jockeying or "shopping" between different courts. This change transformed *sharīʿa* courts into institutions with "special jurisdiction" (German: *Sondergerichtsbarkeit*) for Muslims in family and marriage issues. [25]

Such a "special jurisdiction" granted to religious institutions for marriage and family matters was also extended to the territory's other confessional groups. Hence, these issues were exempt from the jurisdiction of the civil courts and civil marriage did not exist in Habsburg Bosnia. Thus, while Muslims had to consult *sharīʿa* courts for such matters, the Serbian Orthodox, Catholic, and Jewish communities needed to turn to their respective religious institutions for settling marriage and family affairs.[26]

In some ways, this was similar to the autonomy that had been granted to non-Muslims under Ottoman rule, usually referred to as the *millet* system. In this sense, the Habsburg authorities transformed the Muslim community into a *millet*, exercising autonomy in the realms of marriage and family. Other post-Ottoman states in Southeastern Europe such as Bulgaria or Greece also used the Ottoman model as a template for granting autonomy to their Muslim population.[27] At the same time, applying different religious norms for regulating marriage and divorce was not alien to the Habsburg Empire. Since the Austro-Hungarian Compromise of 1867, Austria-Hungary was effectively divided into three legal regimes as far as marriage and family matters were concerned: The Austrian Civil Code of 1811 provided a legal framework for Cisleithania (Austria) based on Catholic-Canonic legal norms; Hungary and Transylvania fell

25 Mehmed Bećić, *Das Privatrecht in Bosnien-Herzegowina (1878–1918)*, in Konflikt und Koexistenz: Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert 117–18 (Thomas Simon, ed., 2017); Eduard Eichler, Das Justizwesen Bosniens und der Herzegovina 196, 242–50 (1889).

26 Bećić, *supra* note 25 at 122–25.

27 See *Nobuyoshi Fujinami*, *Defining Religion in a State That Wasn't: Autonomous Crete and the Question of Post-Ottoman Millet System*, 63 Journal of Church and State 256 (2020); Greble, *supra* note 1 at 53–80; Stefanos Katsikas, *Millets in Nation-States: The Case of Greek and Bulgarian Muslims, 1912–1923*, 37 Nationalities Papers 117; 1912 (2009).

under a wide array of confessional marriage laws until the introduction of mandatory civil marriage in 1894; and Croatia-Slavonia enjoyed some degree of autonomy since the Croatian-Hungarian Compromise of 1868 and applied civil law based on the Austrian Civil Code.[28]

Nevertheless, the Islamic judiciary did diverge from the other ecclesiastical courts in Bosnia that regulated family and marriage affairs in several ways. Most importantly, the *sharīʿa* courts were integrated into the regular court system under government control, due to the introduction of specific supervisory mechanisms. In July 1879, the Austro-Hungarian authorities created the Supreme Sharīʿa Court in Sarajevo, which served as an appeal body for the local *sharīʿa* courts of first instance. The latter could be found, before as well as after 1878, in each district town. From 1882, *sharīʿa* courts fell under the authority of the (local) district office; when independent district courts were established in 1906, the local *sharīʿa* courts became a division of each (local) district court.[29] The Supreme Sharīʿa Court in Sarajevo operated within the framework of the Supreme Court, the highest appeal body for the civil courts. Thus, from 1883 to 1913, only two out of the five judges that served on this body were Bosnian Muslim *qāḍī*s. The other three were non-Muslims and simultaneously judges at the Supreme Court, while its president also chaired the Supreme Sharīʿa Court. As such, these judges almost exclusively hailed from other parts of the Habsburg Empire and had studied law in Vienna, Prague, Zagreb, or other Austro-Hungarian universities. After 1913, the Supreme Sharīʿa Court was composed of three Muslim *qāḍī*s and a (non-Muslim) member of the Supreme Court, whereby the latter only had an advisory role and no voting power.[30]

Although classical Islamic law foresaw some types of review mechanisms and the late Ottoman Empire had established a review committee for *sharīʿa* court rulings, the Meclis-i

28 Jana Osterkamp, *Familie, Macht, Differenz: Familienrecht(e) in der Habsburgermonarchie als Herausforderung des Empire*, 31 L'homme 17 (2020), esp. at 24, 30.

29 Cf. Bećić, *supra* note 6 at 80–81; Bericht über die Verwaltung von Bosnien und der Herzegowina 1906, 512 (1906).

30 Bećić, *supra* note 25 at 85–86, 115.

Tedkikat-i Şeriyye (OT, Assembly of Sharīʿa Inquiries) within the office of the *şeyhülislam* (OT, the Ottoman chief *muftī*), the idea of a formal, state-controlled appeals body was a novelty within the Bosnian Islamic judiciary. Similar, two-tiered *sharīʿa* court systems could be found, however, in other Muslim societies under European colonial rule, such as Algeria and India.[31] As Mehmed Bećić has aptly demonstrated, this similarity was the result of an attempt on the part of Habsburg administrators to "transplant" a colonial model of Islamic law from Algeria to Bosnia.[32]

These reforms also raised questions about the relationship between *sharīʿa* courts and other Islamic institutions. First, Austro-Hungarian authorities reduced the role of the highest religious authority in Istanbul, the *şeyhülislam*, and established a local religious head for Bosnian Muslims in 1882, the *reis-ul-ulema* (Bosnian, "head of the *ʿulamāʾ*"). This position also served as the chair of the newly created four-member Ulema-Medžlis (Bosnian, Council of Scholars), which regulated Islamic affairs and education in Bosnia.[33]

The local population of Habsburg Bosnia had mixed reactions to the occupation and reforms. While some Muslims, including *qāḍī*s, chose to leave Bosnia for the Ottoman Empire to avoid living under Christian rule, others accepted Habsburg governance and collaborated with the occupation regime. For instance, in a November 1878 declaration, several members of the Muslim elites, such as the pro-Habsburg Sarajevo *muftī*, Hilmi Mustafa Omerović (the first *reis-ul-ulema*), and the supreme *qāḍī* Sunulah Sokolović expressed support for the Habsburg emperor and advocated for the establishment of a local Islamic hierarchy independent of Istanbul, a proposal that was eventually implemented in 1882.[34] Bosnians had, in general, only limited

31 Karćić, *supra* note 5 at 23–24.

32 Bećić, *supra* note 6 at 72–75.

33 On the Habsburg reforms of Islamic institutions and hierarchies, see, e.g., Zora Hesová, *Towards Secularity: Autonomy and Modernization of Bosnian Islamic Institutions Under Austro-Hungarian Administration*, in Imagining Bosnian Muslims in Central Europe: Representations, Transfers and Exchanges 104 (František Šístek, ed., 2021).

34 Cf. Younis, *supra* note 8 at 44–46; Imamović, *supra* note 2 at 131.

ability to shape or oppose the legal system at the administrative level. Irrespective of their religious affiliation, Bosnians were excluded from political participation until the establishment of the Bosnian parliament in 1910, which granted limited forms of political rights. As a result, the religious sphere remained the only area where the male population could actively participate, since religion was considered the main structural feature of the Habsburg administration in Bosnia. For this reason, local protest movements were often framed along religious demands.[35]

In this vein, a movement for religious autonomy emerged among the Muslim population in Bosnia around the turn of the century. Research literature points to the 1899 conversion to Catholicism of a young Muslim woman from Mostar as the catalyst for the widespread protest movement, largely supported by the landowning Muslim elite. Their main demand was greater autonomy in religious and educational affairs, as articulated through petitions to the government. However, the Habsburg authorities did not accept these demands and even banished one of the leaders, Mostar Muftī Ali Fehmi Džabić, when he traveled to Istanbul in 1902, resulting in the movement's temporary stagnation. It regained momentum in 1905, leading to the formation of the first proto-national political party in Bosnia, the Muslim People's Organization (Bosnian: Muslimanska Narodna Organizacija, MNO). The MNO leaders continued to advocate for religious autonomy, which was eventually granted after Bosnia's formal annexation in 1908 through the Autonomy Statute in 1909.[36]

Despite the new regulation, the central demands of Muslim autonomists regarding the Islamic legal system were not fully addressed. These included enlarging the *qāḍī*s' competences so that they could implement and enforce their verdicts, as well as restructuring the Supreme Sharīʿa Court without

35 Heiner Grunert, *Interreligiöse Konkurrenz und Kooperation im Imperium: Orthodoxe, Muslime und Katholiken in Bosnien-Herzegowina unter habsburgischer Verwaltung*, in Kooperatives Imperium: Politische Zusammenarbeit in der späten Habsburgermonarchie 266, 269, 277–78 (Jana Osterkamp, ed., 2018).

36 Xavier Bougarel, Islam and Nationhood in Bosnia-Herzegovina 17–20 (2018); Robert J. Donia, Islam Under the Double Eagle: The Muslims of Bosnia and Hercegovina, 1878–1914 (1981), esp. at 128–59; Nusret Šehić, Autonomni pokret Muslimana za vrijeme austrougarske uprave u Bosni i Hercegovini (1980).

interference from non-Muslim judges. Although the latter demand was granted in 1913, the former was never realized and remained a persistent request voiced by Bosnian *qāḍī*s, particularly during World War I.[37] Despite the limited opportunities to implement structural changes in the Habsburg-controlled Islamic legal system, Bosnian Muslims did utilize these legal forums as *qāḍī*s and plaintiffs. As the following will illustrate, Bosnian Muslims were able to maintain a certain level of autonomy in legal practice, actively shaping the application of Islamic law on the ground.

Preserving the Ottoman Turkish Language and Script

Despite the significant Habsburg interventions in the Islamic judiciary, as outlined above, much of the Ottoman Islamic legal heritage was preserved under Habsburg rule. Imperial officials understood that it would be crucial to maintain certain established Islamic legal practices in order to hold to their guarantee of the free exercise of Islam and to stabilize their rule, albeit it was not quite clear which practices and their extent. This can be best observed around the issue of the administrative language to be used at *sharīʿa* courts.

In the newly formed Austro-Hungarian administration, Ottoman Turkish was officially replaced with Bosnian (designated the "provincial language" in contemporary terminology) and German. However, the Habsburg authorities refrained from issuing a general language regulation and instead specified the use of language for each institution. As noted by the historian Dževad Juzbašić, this blurred the boundary between the administrative use of German and Bosnian.[38] While German dominated at most legal institutions in Bosnia, the situation was different at *sharīʿa* courts. In contrast to most other courts that were run by judges from elsewhere in the empire, local Bosnian *qāḍī*s could continue to adjudicate at *sharīʿa* courts. While

37 Bumann, *Contesting*, *supra* note 9; Durmišević, *supra* note 7 at 99, 124–25; Šehić, *supra* note 36 at 275–78.

38 Dževad Juzbašić, Jezičko pitanje u austro-ugarskoj politici u Bosni i Hercegovini pred prvi svjetski rat 7–15 (1973).

the language of communication at courts under Ottoman rule was likely a mixture of Bosnian and Ottoman Turkish, *qāḍī*s were trained and prepared documentation in the official Ottoman Turkish language, as explained by Tatjana Paić-Vukić.[39] Thus, a complete shift towards Bosnian, despite being the local population's native language, was deemed impractical by Habsburg officials, and *qāḍī*s continued issuing their written opinions and judgments in Ottoman Turkish, as it was considered the language in which they could most accurately formulate their explanations.[40]

At the same time, the use of Ottoman Turkish soon became an obstacle for communication with other legal and administrative institutions. In 1896, the Supreme Sharīʿa Court acknowledged that the many documents issued in Ottoman Turkish by the *sharīʿa* courts were causing difficulties for many court parties and authorities who were not familiar with the language. To address this issue, the supreme *qāḍī*s requested that local *qāḍī*s use Bosnian in their official functions.[41] The president of the Supreme Court, Martin Kenđelić, who also presided over the Supreme Sharīʿa Court, clarified several months later in a circular letter that this request was not intended to affect *sharīʿa* law, nor was it meant to prohibit the use of Ottoman Turkish in *sharīʿa* courts: The *qāḍī*s were to continue issuing their judgments, which fell within the jurisdiction of the *sharīʿa* courts, in Ottoman Turkish, but were encouraged to draft official documents and communications in Bosnian if able to do so.[42]

Moreover, the use of Ottoman Turkish at *sharīʿa* courts represented more than just practical considerations. It became

39 Tatjana Paić-Vukić, The World of Mustafa Muhibbi, a Kadi from Sarajevo 47 (Margaret Casman-Vuko, Tatjana Paić-Vukić, and Miroslav Vuko, trans., 2011).

40 Supreme Court to the Supreme Sharia Court (June 5, 1880) (ABiH, VŠS, box 1, A 1880-5: no. 1761, p. 2).

41 *340. 2719/Praes. Naredba vrhovnog suda za Bosnu i Hercegovinu od 17. novembra 1896*, in Zbirka naredaba za šerijatske sudove u Bosni i Hercegovini: 1878–1900, 210–20 (Sarajevo: Zemaljska vlada i Vrhovni sud za Bosnu i Hercegovinu).

42 *346. 484. Okružnica Predsjedništva Vrhovnog Šerijatskog suda od 21. marta 1897*, in *Id.* at 229–30.

a symbol of the preservation of the Islamic jurisdiction and the ongoing connection to the "trans-Ottoman" cultural and communication sphere.[43] Despite the shift by most Muslim intellectuals towards the use of Bosnian in public discourse after the Habsburg occupation of 1878, Ottoman Turkish and Arabic continued to be used under Habsburg rule. Ottoman Turkish periodicals such as the literary-political *Servet-i Fünun* (*The Wealth of the Arts*) circulated in Bosnia while Ottoman Turkish newspapers, such as *Vatan* (*Fatherland*) or *Rehber* (*Guide*), were published under the Austro-Hungarian administration. In this manner, Bosnian Muslims could continue participating in "trans-Ottoman" discourses and debates.[44]

Due to its symbolic importance, the Supreme Sharīʿa Court emphasized the maintenance of Ottoman Turkish language and writing style in court documents. Judges at the Supreme Sharīʿa Court reviewed local *qāḍī* verdicts to ensure their conformity to the traditional *sharīʿa* court recording practice, known as the *sakk-i şer'î*, written in Ottoman Turkish.[45] When Mustafa Redžić, a Sharia court trainee in Bihać, was unable to comply with the *sakk-i şer'î* due to his limited knowledge of Ottoman Turkish, the supreme *qāḍī*s encouraged him to write the verdict in Ottoman Turkish as best as he could. Since Redžić refused to do so, a disciplinary investigation against him was opened. However, the Bihać County Court ultimately ruled that the issue was not with the language used but rather Redžić's unauthorized signing of official documents.[46] The chairman of the Bihać County Court, Marian Turzanski, did, however, comment on the language matter:

43 For a conceptualization of the term "trans-Ottoman" as describing a trans-imperial sphere of communication and interactions, see Stephan Conermann, Albrecht Fuess, and Stefan Rohdewald, *Einführung: Transosmanische Mobilitätsdynamiken. Mobilität als Linse für Akteure, Wissen und Objekte*, in Transottomanica -Osteuropäisch-Osmanisch-Persische Mobilitätsdynamiken: Perspektiven und Forschungsstand 47–57 (Stefan Rohdewald, Stephan Conermann, and Albrecht Fuess, eds., 2019).

44 Amzi-Erdoğdular, *supra* note 10 at 923–25.

45 For an example, see Supreme Sharia Court to District Sharia Court in Tešanj (November 13, 1912) (ABiH, VŠS, box 29, B 1912-59, no. 776).

46 ABiH, VŠS, box 27, B 1910-24.

> Undoubtedly, Redžić himself must know best whether he knows the Turkish language well enough or not, and also undoubtedly, as a Muslim and a *sharīʿa* judge, he would like to know this language well enough to be able to issue his *ilam*s [Bosnian, "verdict"] in this language according to the regulations, and all the more so, as certainly every *sharīʿa* judge must perceive it as a flaw if he does not know the Turkish language well enough, this flaw also does not recommend him to his superiors and therefore hinders his progress.[47]

With his lack of knowledge of Ottoman Turkish, Redžić was arguably an extreme example, however, his case highlights that both Muslims and non-Muslims attached symbolic importance to the use of language in official *sharīʿa* court documents. Another example can be seen in the curriculum of the *sharīʿa* judge school established in Sarajevo by the Austro-Hungarian government in 1887 for prospective *qāḍī*s. In addition to studying classical Islamic law and Austro-Hungarian law, students were taught how to compose legal documents in the *sakk-i şer'î* in Ottoman Turkish.[48] This created tensions with the Habsburg education system's language policy, in which Bosnian was the main language of instruction and only Arabic, as opposed to Ottoman Turkish, was taught as a foreign language at Muslim educational institutions (starting from 1885). In addition, by the end of the nineteenth century, most Muslim writers had switched to Bosnian for participating in public debates and discussions.[49] Nevertheless, the Ottoman Turkish language remained in use among Bosnian Muslim intellectuals, as the above-mentioned circulation of Ottoman periodicals illustrates. This was also due to the fact that several Bosnian *qāḍī*s and members of the *ʿulamāʾ* complemented their studies at the Sarajevo Sharīʿa Judge School (Bosnian: Šerijatska Sudačka Škola) with earlier

47 Chairman Turzanski, to the Supreme Court for Bosnia and Herzegovina, no. 979 Praes (June 29, 1911) (ABiH, VŠS, box 27, B 1910-24).

48 Raspored predmeta po časovima i nastavnicima šk[ole]. 1900.–1908. god. (ABiH, Fond Šerijatska sudačka škola Sarajevo, box 49, 3). On the subject of the term *sakk* and its meaning, see Durmišević, *supra* note 7 at 113n68.

49 Dierks, *supra* note 10 at 175–76, 200–2.

or later studies in the Ottoman Empire, and therefore, possessed excellent knowledge of the Ottoman Turkish language.[50]

All the same, the use of the Ottoman Turkish language in the verdicts issued by *sharīʿa* courts was not without controversy. With the rise of the Muslim autonomy movement around the turn of the century, the state of the Islamic legal system became a pressing topic in negotiations between representatives of the movement and the Habsburg government. During a 1908 discussion on potential reforms of the *sharīʿa* courts, the question of language and form in the courts' rulings was raised. Adalbert Shek, the chair of the Justice Department at the provincial government (the highest administrative institution in Bosnia), supported the demands of conservative Muslim elites like Šerif Arnautović of the Muslim autonomy movement to maintain the traditional form of the *sakk-i şer'î*. Shek stated that "pragmatic *sharīʿa* matters must remain as they have been from time immemorial."[51] At the same time, he acknowledged that communication with other authorities could be in different forms and thus, also in Bosnian. The *qāḍī* Hilmi Hatibović, however, countered that the *sakk-i şer'î* was not prescribed by the *sharīʿa* and therefore, the form of *sharīʿa* court judgments could be modernized. Despite this, he did not object to retaining the *sakk-i şer'î* (in Ottoman Turkish).[52]

Proponents of maintaining *sakk-i şer'î* may have recognized that any alteration in the language and format of official *sharīʿa* court documents could have direct and undesirable legal ramifications. For example, Bećić has highlighted that the introduction of land registers (Bosnian: *gruntovnica*) between 1885/86 and 1910 resulted in the registration of *mukataalı vakıf* property (OT, buildings on *waqf* lands subject to rent) as private ownership of tenants. Despite protests from the Muslim

50 Apart from the *reis-ul-ulema* Džemaludin Čaušević (1914–30), these also applied, among others, to the following supreme *qāḍī*s: Salih Mutapčić, Hilmi Hatibović, and Ali Riza Prohić. Bumann, *Contesting*, *supra* note 9 at 167.

51 Enquete über die Reform der Scheriatsgerichte abgehalten vom 2. März 1908 bis 27. April 1908: II. Zapisnik od 9. marta 1908 sastavljen kod zemaljske vlade za Bosnu i Hercegovinu u Sarajevu, sa članovima ankete u pitanju reorganizacije šerijatske sudačke škole, te šerijatskih sudova prve i druge molbe, p. 25 (National and University Library Zagreb (NSK), Sign. R 5698).

52 *Id.* at 24–25.

community against this transformation of ownership structures in legal practice, the civil courts, which had jurisdiction over property relations, upheld the changes.[53] As noted above, Habsburg authorities only considered the realms of marriage, family, and inheritance to be within the purview of *sharīʿa* courts, in which they would not directly interfere. The civil courts, in contrast, often applied Austrian laws for the regulation of civil matters in practice, although de jure much of the Ottoman Tanzimat legislation, including the Mecelle, remained in force.[54]

Despite tendencies to retain the Ottoman Turkish language and style in *sharīʿa* court records, in practice changes were manifold, as many *sharīʿa* court documents were issued in Bosnian. This is also reflected in the available archival material of the Supreme Sharīʿa Court as well as selected local district *sharīʿa* courts. Even though Ottoman Turkish is common in the documents written by *qāḍī*s during the very first years of the occupation, starting from the late 1880s, more documents appear in Bosnian. Mostly, the *sharīʿa* courts used the same preprinted forms as found at other Habsburg courts. The prevalence of Bosnian in archival documents is also, in part, attributable to archival practices, according to which the documents of the local district *sharīʿa* courts were not systematically archived. Even though individual document collections are currently being sorted, organized, and indexed, only a few documents from specific years have been handed down for local first instance *sharīʿa* court proceedings; whereby the archival holdings do not contain any *sicil*s (the traditional Ottoman *qāḍī* court registers).[55]

Apart from that, the archival holdings of the Supreme Sharīʿa Court contain communications between the first instance district court and the appeal body and rarely include any official

53 Mehmed Bećić, *Pretvaranje mukata vakufa u Bosni i Hercegovini u privatno vlasništvo posjednika*, 17 Godišnjak pravnog fakulteta u Sarajevu 33 (2019).

54 Bećić, *supra* note 25 at 87–113.

55 See, for example, the fonds of the Supreme Sharīʿa Court in Sarajevo as well as of local district *sharīʿa* courts in Sarajevo, Mostar, and Tuzla: ABiH, VŠS, 1879–1918; Historical Archive Sarajevo (HAS), Kotarski Šerijatski sud Sarajevo, 1882–1916; Archive of the Canton of Hercegovina-Neretva, Mostar (AHNKŽ), Kotarski Šerijatski sud Mostar, 1888–1918; Archive of the Canton of Tuzla (ATKT), Kotarski Šerijatski sud Tuzla, 1894–1918.

documents, such as an *ilam* or *hudžet* (Bosnian, "deed"), issued by local *qāḍī*s.[56] Thus, the Ottoman legal heritage was only partially preserved, while Habsburg standards of language and court documentation to a great extent replaced it. This was accompanied by some changes in the legal practice of the *sharīʿa* courts, such as the form of court proceedings or the role of legal sources, as discussed in the following section.

Proceduralization and Legal Formalism

While some elements of the Ottoman Islamic legal tradition were retained during Austro-Hungarian rule, significant changes were made to *sharīʿa* court proceedings. At the local district level, court proceedings continued to be conducted orally in front of plaintiffs, defendants, witnesses, and experts, following the provisions outlined in the Mecelle.[57] As the Mecelle lacked provisions for appeal procedures, Austrian procedural law was adopted by the Supreme Sharīʿa Court, which was regulated by special laws and decrees.[58] These stipulated that the Supreme Sharīʿa Court should make decisions based on written appeals and other court documentation collected during the proceedings at the local *sharīʿa* court.[59] During its legal review, the Supreme Sharīʿa Court also evaluated compliance with these procedural regulations such as the proper composition of protocols and court documentation.

In practice, not all *qāḍī*s followed these provisions in detail, instead acting as the first point of contact when conflict arose. Often, they attempted to mediate conflicts outside of court. For example, in the spring of 1906, a marital dispute between Hamid Pašić, a shoe merchant from the town of Tešanj, and his wife Rašida was settled informally by Qāḍī Abid Sadiković. The disagreement was related to financial matters, but the exact circumstances cannot be reconstructed from archival materials.

56 See ABiH, VŠS, 1878–1918.

57 Franjo Kruszelnicki, Postupak pred šerijatskim sudovima u Bosni i Hercegovini: Otisak iz "mjesečnika" broj 11 i 12 iz g. 1916 i broj 1, 2 i 3 iz g. 1917, 37–48 (1917).

58 Karćić, *supra* note 5 at 121–22.

59 Kruszelnicki, *supra* note 57 at 49–54.

Compared to several other archival files, this one, with thirty pages of documents in Bosnian, contains quite a large amount of information. This includes a written appeal by Hamid Pašić submitted to the Supreme Sharīʿa Court, protesting the actions of Qāḍī Sadiković and his court clerk Mustafa Handžić, statements submitted by Sadiković and Handžić retorting Pašić's complaint, two short messages from the Supreme Sharīʿa Court to the District Sharīʿa Court in Tešanj, as well as one notice from the Tešanj District Office to the Supreme Sharīʿa Court.[60]

The contradictory statements contained in the file allow only a few conclusions to be drawn about the case: The couple had a similar dispute several months earlier, therefore, Qāḍī Sadiković decided in the most recent marital conflict against a regular court hearing in favor of an informal agreement between the two parties. In the end, the spouses reconciled, however, Hamid was displeased with how the *qāḍī* had interfered. More specifically, he claimed that the *qāḍī* and his clerk had urged him to divorce Rašida. The Supreme Sharīʿa Court's ensuing investigation revealed that the *qāḍī* had violated legal regulations by mediating outside of court, as opposed to initiating a regular court hearing, including its proper written documentation. In its final decision, the Supreme Sharīʿa Court refrained from intervening but warned that in further suits, the *qāḍī* had to act properly and document his actions in writing or face the consequences.[61]

Less than a year later, however, Qāḍī Sadiković again ignored procedural regulations: In March 1907, Ejub Bajraktarević sent a telegram to the Supreme Sharīʿa Court, complaining about Qāḍī Sadiković's misconduct. He alleged that Sadiković, without an official court hearing and assisted by police, had forcefully returned his cousin's fiancée to her father and prevented the two from marrying. According to the plaintiff, this action was unlawful and violated "religious and legal institutions."[62] In the subsequent investigation, it was found that Ejub's cousin had practiced the widespread tradition of "bride kidnapping" (Bosnian: *otmica*) and had taken his fiancée Zineta Kapetanović

60 ABiH, VŠS, box 25, B 1906-13.

61 *Id.*

62 Telegram from Ejub Bajraktarević, to the Supreme Sharīʿa Court (March 30, 1907) (ABiH, VŠS, box 26, B 1907-19).

(with her consent) to his abode during the night. As a result, Zineta's father had asked Qāḍī Sadiković to intervene. Sadiković justified his direct intervention without a formal court hearing by pointing to the inconvenient timing of the event at three hours after sunset. Moreover, he claimed that since the two families belonged to rival political factions, the elevated potential for violence had necessitated an immediate response. The Supreme Sharīʿa Court took note of this justification, however, did not pursue the matter further against Sadiković. This might have been owing to the fact that he had filed an official report with the District Sharīʿa Court in Tešanj immediately after the incident to justify his (otherwise) unlawful actions.[63]

These cases demonstrate that the Supreme Sharīʿa Court focused on ensuring proper procedure in local *sharīʿa* courts. However, this supervision of *qāḍī*s by the Supreme Sharīʿa Court stands at odds with the common description of traditional premodern Islamic jurisprudence as a mediation mechanism within local communities that operated outside of government control. Local conflicts within the neighborhood, or *mahala*, were typically resolved through informal arbitration by the *qāḍī*, village elder, or imam. As a result, disputes could often be settled without formal court intervention. Similarly, a *qāḍī*'s ruling generally aimed at reaching a compromise that preserved social equity within the local community, rather than exclusively favoring one party.[64]

Nevertheless, as early as the eighteenth century, the jurisdiction of *qāḍī*s in the Ottoman Empire came under greater state administrative control,[65] and the Tanzimat reforms, as described previously, increasingly centralized the Ottoman legal system, creating a multilevel judicial system with formal appeal bodies and widespread oversight mechanisms. Despite these changes,

63 ABiH, VŠS, box 26, B 1907-19.

64 See, e.g., Wael B. Hallaq, An Introduction to Islamic Law 57–64 (2009); Leslie P. Peirce, Morality Tales: Law and Gender in the Ottoman Court of Antaib 4–8, 142 (2003).

65 See, e.g., Rossitsa Gradeva, *On Judicial Hierarchy in the Ottoman Empire: The Case of Sofia, Seventeenth–Beginning of Eighteenth Century*, in War and Peace in Rumeli: 15th to the Beginning of 19th Century 151 (Rossitsa Gradeva, ed., 2010); Hallaq, *supra* note 64 at 93–103.

*qāḍī*s did not entirely forfeit their traditional role as mediators. The two court cases involving Qāḍī Sadiković highlight how *qāḍī*s continued to remain the first point of contact in local conflicts and that informal arbitration was still common.

The process of proceduralization fostered by the supervisory role of the Supreme Sharīʿa Court was not, however, a simple top-down process. Rather, locals seeking justice increasingly turned to the Supreme Sharīʿa Court with procedural claims. This was closely related to the increased involvement of lawyers in *sharīʿa* court proceedings. In the tradition of Islamic law, professional lawyers did not exist, although there were some forms of legal representation in court. This is often attributed to the fact that *sharīʿa* courts tended to reach solutions that were agreeable to all parties involved, thus favoring arbitration over adjudication. Avi Rubin explains the rise of professional lawyers in Ottoman courts with the consolidation of legal formalism in the 1870s. However, professional lawyers in the Ottoman Empire provided their services for legal representation not in Sharia courts, but in the newly developed Nizamiye courts, which fostered legal formalism with their inherent system of judicial review.[66]

In Habsburg Bosnia, legal representation was formally regulated as early as 1883, setting legal standards for the official recognition of lawyers and strictly limiting their number.[67] However, official documents indicate that civil courts regularly ignored these standards and allowed legal representation by unauthorized persons. More interestingly, the Attorney Regulations of 1883 only required candidates to pass an examination covering all civil and criminal law, as well as financial and administrative law. Knowledge of Islamic law was not a necessity, suggesting that lawyers were not specifically provided or envisioned for *sharīʿa* courts.[68]

Nonetheless, we can observe that lawyers in Habsburg Bosnia increasingly represented parties at *sharīʿa* courts. For example, two brothers from Sanski Most, Sulejman-beg and Ibrahim-beg Biščević, wanted to prevent the marriage of their

66 Avi Rubin, Ottoman Nizamiye Courts: Law and Modernity 102–3 (2011).

67 Bećić, *supra* note 25 at 113.

68 Advocaten-Ordnung für Bosnien und die Hercegovina 4 (1883).

sister to Sulejman Bilajbegović. They first claimed that their sister was only 13 years old when she was allegedly abducted and forced to marry Sulejman Bilajbegović. In addition, they asserted that the marriage violated the Islamic legal principle of equality (OT: *küf[ü]v*; Ar. *kufʾ*), which required both spouses to be of equal religious, social, and financial status. To underline their claims, the brothers hired Halid-beg Hrasnica, a lawyer, to file an appeal against the local *qāḍī*'s approval of their sister's marriage in early 1913.[69]

Hrasnica had studied law in Vienna and returned to Sarajevo after graduating, where he opened a law office. Although he had no official training in Islamic law, he agreed to represent the two brothers at the *sharīʿa* court. Their appeal was based on an alleged failure to comply with procedural requirements, and stated that the original verdict did not specify how the investigation was conducted, who the witnesses were, and how the "marriageability" of the allegedly 13-year-old child had been determined. It also criticized the fact that the witnesses suggested by the brothers had not been questioned. Taken together, the written appeal decried the entire process as flawed and that the proceedings had been conducted "superficially."[70]

The concept of formal legalism was not widely adhered to in *sharīʿa* courts. Historically, Ottoman *qāḍī*s enjoyed significant discretion and were not required to provide a justification or legal basis for their rulings. However, the Ottoman codification efforts in the nineteenth century brought greater standardization of court procedures and legal formalism, primarily in the Nizamiye courts.[71] Despite this, *qāḍī*s in Habsburg Bosnia were not necessarily bound by strict legal formalism and were not obliged to validate the legal basis of their verdicts. For instance, even though Qāḍī Sadiković had been admonished on several occasions by the Supreme Sharīʿa Court for violating

69 ABiH, VŠS, box 29, B 1912-54.

70 Appeal by Sulejman Biščević and Ibrahim Biščević submitted at the District Sharīʿa Court in Sanski Most (January 18, 1913) (ABiH, VŠS, box 29, B 1912-54).

71 Avi Rubin, *The Positivization of Ottoman Law and the Question of Continuity*, in State Law and Legal Positivism: The Global Rise of a New Paradigm 162 (Badouin Dupret and Jean-Louis Halpérin, eds., 2022).

procedural regulations, it upheld his verdict in the appeal filed by Hrasnica.[72]

The Supreme Sharīʿa Court's ruling, in turn, followed its usual formalistic approach, carefully stating the legal basis of its decision. As a result, the court dismissed the appeal and upheld the verdict of the local *qāḍī* by pointing out that both spouses met the criteria of equality, which had been confirmed by the *sharīʿa* court in Sanski Most, based on oral testimony. The Supreme Sharīʿa Court also referred to two important legal sources, the *Dürer* of Molla Hüsrev (that is, *Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām* by the fifteenth-century scholar Mullā Khusraw), and the *fatwā* collection of Kadîhan (Fakhr al-Dīn al-Qāḍīkhān, d. 1196), both of which were well-known standard works in the Ḥanafī legal tradition and included in seventeenth-century bibliographical compilations of the Ottoman imperial canon.[73] On the other hand, the Supreme Sharīʿa Court stated that the plaintiff's sister was of marriageable age and could therefore marry whomever she desired, referencing the Mecelle.[74]

The use of a combination of legal sources, including the Ottoman Ḥanafī canon from the seventeenth century and Tanzimat codifications, was common in Habsburg *sharīʿa* courts. Indeed, Habsburg administrators published in 1883 a manual on *Matrimonial, Family, and Inheritance Law of the Mohammedans according to the Ḥanafī Rite*, based on a compilation by Muḥammad Qadrī Bāshā, an Egyptian Islamic scholar, but never formally codified it into Islamic law for use in *sharīʿa* courts.[75] Instead, the provincial government issued additional regulations, which were used alongside classical Ḥanafī legal works and Ottoman Tanzimat laws as sources in *sharīʿa* courts.[76]

The Supreme Sharīʿa Court's formal and detailed approach to citing the legal basis of its ruling was strengthened by

72 ABiH, VŠS, box 29, B 1912-54.

73 Guy Burak, The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire 132–35, 149, 234, 240 (2015).

74 Message of the Supreme Sharīʿa Court, to the District Sharīʿa Court in Sanski Most (March 26, 1913) (ABiH, VŠS, box 29, B 1912-54).

75 See Eherecht, Familienrecht und Erbrecht der Mohamedaner nach hanefitischem Ritus (1883).

76 Durmišević, *supra* note 7 at 80–84.

the fact that the Habsburg authorities had implemented Austrian procedural law for court proceedings at this appeal body. Consequently, the latter's records to a large extent reflected Austrian procedural concepts.[77] Still, the supreme *qāḍī*s did not refer to concrete legal texts and sources in every judgment they handed down. When the Supreme Sharīʿa Court could not ascertain a need to specify their legal sources or was not explicitly asked to do so, it included only a short formulation as to whether a certain set of facts complied generally with the "*sharīʿa* regulations" (Bosnian: *šerijatski propisi*) or the "*sharīʿa* law" (Bosnian: *šerijatski zakon*).[78]

Moreover, citing legal sources and texts for the interpretation and application of Islamic law was also practiced in the Ottoman judiciary. According to Guy Burak, referring to authoritative texts of the Ḥanafī legal tradition dates to the sixteenth century and was accompanied by supervisory mechanisms. This was particularly evident in the case of provincial *muftī*s, who were expected to cite the texts they relied on for their rulings.[79] In the same vein, Rubin has observed a "positivization of Ottoman law" in the Nizamiye courts of the late nineteenth century, which partially drew on previous practices but was also inspired by French models. Still, he argues that older practices could change their meanings in the new setting of positivist legalism.[80] Similarly, the following section claims that references to Ḥanafī legal sources should not be seen only as a consequence of formal procedural requirements but also a means through which Bosnian *qāḍī*s could maintain their legal authority under Habsburg rule.

77 Karčić, *supra* note 5 at 121–22.

78 See, for example, the following cases: Supreme Sharīʿa Court, to the District Sharīʿa Court in Jajce (February 1, 1883) (ABiH, VŠS, box 17, B 1883-6, p. 12); Supreme Sharīʿa Court, to the Provincial Government (October 13, 1898) (ABiH, VŠS, box 88, E 1898-49).

79 Burak, *supra* note 73 at 130–35.

80 Rubin, *supra* note 71 at 150–77.

Negotiating Legal Authority

Despite the growing standardization and legal formalism in *sharīʿa* courts, the Ḥanafī legal doctrine continued to be applied in court practice. Habsburg reforms of *sharīʿa* courts did, however, affect the interpretation of Islamic law, particularly in resolving disputes pertaining to the limited jurisdiction of *sharīʿa* courts or legal reform. Historically, Islamic law was known for its diversity of legal interpretations, relying on a system based on divine revelation, a vast juridical literature, and authoritative legal interpretations. The *sharīʿa* , which encompasses not only legal norms but also general rules for Muslim life, such as regulations for prayer, could not easily be divided into individual areas of law, making it difficult to limit its scope solely to marriage and family. This resulted in multiple interpretations and, at times, conflicting legal opinions, particularly regarding the scope of Islamic law under Austro-Hungarian rule. These issues were frequently encountered in cases of interreligious marriages, concubinage, extramarital sexuality, and paternity.[81]

This state of affairs generated confusion, particularly among Habsburg officials and judges, who were mostly unfamiliar with Ottoman and Islamic legal traditions and who attempted to standardize *sharīʿa* court decisions and legal opinions by documenting them. This included, on the one hand, the compilation of the abovementioned *Matrimonial, Family and Inheritance Law of the Mohammedans according to the Ḥanafī Rite*.[82] It made the basic Ḥanafī legal principles understandable for Habsburg judges that had mostly come to Bosnia from other parts of the empire and were familiar with codified Austrian civil law.[83] On the other hand, the Habsburg administration created a legal repository for future use by registering and archiving the court files of the Supreme Sharīʿa Court. Its records also reveal that judges referred to prior rulings, judgments, and legal opinions stored in this administrative archive for guidance

81 See Bumann, *Marriage*, *supra* note 9; Bumann, *Contesting*, *supra* note 9; Kasumović, *supra* note 9; Younis, *"Nezakonita," supra* note 8.

82 See Eherecht *supra* note 75.

83 Bećić, supra note 25 at 84–85, 99–100.

in resolving then current legal matters. Owing to these factors, Islamic legal practice under Austro-Hungarian administration witnessed the amalgamation of two different legal cultures and traditions—the Ḥanafī and Habsburg.

As Paolo Sartori has documented for Islamic legal culture under Russian rule in Central Asia,[84] Habsburg authorities also expected definitive legal opinions from *qāḍī*s. However, Islamic law was characterized by a variety of opinions, despite the growing canonization of the Ḥanafī school in the Ottoman Empire since the sixteenth century.[85] Nevertheless, the Habsburg government did not codify Islamic law in regard to marriage and family, making it difficult to enforce an Islamic legal orthodoxy from the top down. Instead, they relied on the expertise of local Muslim legal scholars for Islamic legal questions, enabling the latter to retain their legal authority and continue to apply the Ottoman Ḥanafī legal tradition.

This was demonstrated in the 1901 case of Avdo Kolašović. The Supreme Court sought the Supreme Sharīʿa Court's opinion on the religious affiliation and jurisdiction of this illegitimate child, born to a Muslim father and non-Muslim mother. Nur Hafizović and Sulejman Šarac, the supreme *qāḍī*s, stated that, as the child of a Muslim parent, Avdo was Muslim. Their opinion was that the jurisdiction for guardianship must align with religious confession, meaning that the *sharīʿa* courts had jurisdiction in the case. They also emphasized that the guardian must be a Muslim, and the non-Muslim mother had to raise the child in the Islamic faith until the age of seven.[86] Although the supreme *qāḍī*s provided references to classical Ḥanafī collections of *fatwā*s, including the works of Muftī Ibn ʿĀbidīn from Damascus (1784–1836), and to the Mecelle, their legal opinion generated confusion among the non-Muslim supreme judges.

They had consulted a similar case from a decade earlier, in which the responsible supreme *qāḍī*s had reached a slightly

84 See Paolo Sartori, Visions of Justice: Sharīʿa and Cultural Change in Russian Central Asia 250–305 (2016).

85 On the creation of an Ottoman Ḥanafī legal canon, see Burak, *supra* note 73.

86 ABiH, VŠS, box 95a,. E 1901-24.

different opinion. Then, the Supreme Sharīʿa Court had concurred with a Supreme Court ruling that a Catholic guardian should be appointed for the illegitimate children of a Muslim father and a recently deceased Catholic mother.[87] Due to these ambiguities, the Supreme Court asked Hafizović and Šarac to explain the difference vis-à-vis the previous case and to translate the exact Islamic legal stipulations they referred to in their opinion in Kolašović's case.

The Supreme Sharīʿa Court subsequently clarified that the 1892 opinion, addressing the legal relationship between a father and his illegitimate child, was limited to the realm of kinship and inheritance, and thus did not broach the subject of religious affiliation. To support their December 1901 opinion, the supreme *qāḍī*s included Arabic quotes in Latin transliteration from authoritative Ḥanafī works, which they also translated into Bosnian. Hafizović and Šarac quoted two passages from the *Dürer,* a work that compiled and explained the Ḥanafī doctrine's most important legal opinions and one of the most important legal commentaries in the late nineteenth century alongside the *Mülteka* (the *Multaqā 'l-abḥur* of Ibrāhīm al-Ḥalabī). They also referred to a passage from ʿAlāʾ al-Dīn al-Ḥaṣkafī's seventeenth-century *al-Durr al-mukhtār* and three passages from Ibn ʿĀbidīn's nineteenth-century *Radd al-muḥtār ʿalā 'l-Durr al-mukhtār*, a commentary on the former. Both works were considered authoritative and regularly cited in *sharīʿa* court rulings in Bosnia.[88]

The case's ultimate outcome is not documented in the archives, however, what can be ascertained shows that the Ottoman Ḥanafī legal tradition remained in use under Habsburg rule. At the same time, it is possible to see that the efforts of Habsburg officials to standardize and regulate Islamic jurisprudence were dogged by their lack of expertise in Islamic law and over-reliance, if not outright dependance on the knowledge and interpretation of Bosnian *qāḍī*s. As a result, the Muslim supreme *qāḍī*s were able to maintain their authority in interpreting Islamic law and to continue applying the Ḥanafī legal tradition

87 ABiH, VŠS, box 65, E 1892-8. This court case has been described in greater detail in Younis, *"Nezakonita," supra* note 8 at 51–52.

88 ABiH, VŠS, box 95a, E 1901-24; Durmišević, *supra* note 7 at 70–72, 103, 111–14.

with some adaptations to the legal practices prevalent in the Habsburg Empire. These modifications included references to codified Islamic law, such as the Mecelle and the 1883 Austro-Hungarian compilation of Ḥanafī legal norms on marriage, family, and inheritance.

In fact, this tendency to modernize and codify Islamic law had already begun during the Ottoman Tanzimat reforms, when legal codifications of Islamic law, such as the Mecelle, were drafted.[89] The difference in the Habsburg period was that the *qāḍī*s were supervised by state officials who sought to standardize legal opinions and sources but who lacked sufficient knowledge of Islamic jurisprudence. As a result, Bosnian *qāḍī*s had to present their legal opinions in a form that was understandable to Habsburg judges and officials, which meant including references to authoritative legal works and codifications of Islamic law translated into Bosnian. Through this process, Bosnian *qāḍī*s were able to retain their legal authority.

However, when we examine attempts to reform the interpretation and application of Islamic law, we see that the *qāḍī*s were unable to significantly deviate from established legal practices. Often, explicit approval from above, including the Supreme Sharīʿa Court, the Ulema-Medžlis, and even the Habsburg provincial government, was necessary to bring about legal innovations and new practices. For example, in the mid-1890s, several district *qāḍī*s turned to the Supreme Sharīʿa Court because of the growing number of deserted wives. Since many of their husbands had emigrated to the Ottoman Empire, these women had been left without property or alimony, while also being both destitute and unable to remarry.

The Ḥanafī legal school (OT: *mezheb*; Ar. *madhhab*) followed in Bosnia had rather unfavorable provisions for such situations: A wife could only dissolve her marriage to a missing husband if he was declared dead. In the absence of official documentation, Ḥanafī jurists generally held that this was possible after a period of ninety to 120 years, making divorce unviable for

89 On the emergence of legal positivism in the Ottoman Empire during the nineteenth century, see Rubin, *supra* note 71.

abandoned women.[90] A *qāḍī* from the town of Visoko suggested in 1894 that in such cases the Mālikī doctrine, which allowed the dissolution of a marriage if the husband was absent and his whereabouts were unknown for at least four years, should be applied. After the Ulema-Medžlis issued a similar legal opinion, the Supreme Sharīʿa Court ruled on December 30, 1895, that in such serious cases, the *qāḍī*s could refer to the Mālikī school, which allowed the dissolution of a marriage under the above-mentioned conditions.[91]

Not all women who had been abandoned by their husbands were eligible for divorce, however. For example, if they had been left less than four years earlier or if they knew the whereabouts of their husbands, they could not file for divorce. The outbreak of World War I increased the number of such women due to the male population's mobilization and the ensuing economic hardship, reigniting debates about possible reforms of Islamic divorce. In this context, the reform-oriented Bosnian *reis-ul-ulema* Džemaludin Čaušević was inspired by a decision of the *meşihat* (OT, the office of the *şeyhülislam*) in Istanbul to adopt Ḥanbalī provisions allowing women to divorce if their husband had deserted them more than twelve months previously and left no property for their support. This facilitation of divorce was introduced by a *fatwā* issued by the *şeyhülislam* on February 28, 1916, which became effective by an *irade-i seniyye* (OT, "imperial rescript") on March 5, 1916.[92] After this legal reform, in mid-1916, Čaušević consulted with the *şeyhülislam* Ürgüplü Mustafa Hayri Efendi and proposed to do the same for Habsburg Bosnia. Therefore, the Supreme Sharīʿa Court drafted a similar decree, which was issued as a circular to all district *sharīʿa* courts after receiving formal approval from the provincial government in January 1917.[93]

90 Selma Zečević, *Missing Husbands, Waiting Wives, Bosnian Muftis: Fatwa Texts and the Interpretation of Gendered Presences and Absences in Late Ottoman Bosnia*, in Women in the Ottoman Balkans: Gender, Culture and History 344–49 (Amila Buturović and İrvin C. Schick, eds., 2007).

91 ABiH, VŠS, box 1, A 1895-10.

92 Nihan Altınbaş, Marriage and Divorce in Early Twentieth Century Ottoman Society: The Law of Family Rights of 1917, 143–46 (2014) (Ph.D. dissertation, İhsan Doğramacı Bilkent University).

93 ABiH, VŠS, box 31, B 1916-2; ABiH, VŠS, box 2, A 1917-1.

Achieving legal solutions by borrowing from another legal school, a phenomenon known as *takhayyur*, was common in the late nineteenth-century Muslim world in order to reform Islamic legal practices.[94] Already in the mid-eighteenth century, as Selma Zečević has pointed out, some Bosnian *muftī*s found it permissible for a woman to change legal school to obtain a divorce from a missing husband.[95] However, there were some general obstacles to legal borrowing in Ottoman court practice. Judith Tucker has explained how in eighteenth-century Ottoman Syria and Palestine, Ḥanafī judges strictly followed Ḥanafī doctrine, according to which deserted women seeking a divorce would turn to Shāfiʿī or Ḥanbalī judges, who would then apply the more favorable provisions of their respective schools, allowing for the marriage's annulment in cases of desertion and nonpayment of alimony.[96]

Yavuz Aykan, on the other hand, has shown that some *muftī*s considered it impermissible to turn to other legal doctrines for a divorce. For example, the *muftī* of Medina Esad al-Medeni (d. 1704), wrote a *fatwā* according to which a Ḥanafī woman could not go to a judge of another legal school for a divorce. However, he found a case from 1664 in which a woman from the city of Amid (modern-day Diyarbakır) converted to the Shāfiʿī school to obtain a divorce. Yet, the annulment of the marriage was performed by a *müderris* (OT, a religious professor) of the Shāfiʿī school and not by a judge of the Ottoman Ḥanafī court. Aykan views this as an indication of the limited authority of Ottoman *qāḍī*s, who, as judges of Ḥanafī institutions, could not easily turn to other schools of jurisprudence.[97]

Such limited borrowing between legal schools is also evident in Habsburg Bosnia, where *qāḍī*s sought explicit permission from above to apply other doctrines. This indicates that

94 Fikret Karčić, Društveno-pravni aspekt islamskog reformizma: Pokret za reformu šerijatskog prava i njegov odjek u Jugoslaviji u prvoj polovini XX vijeka 208–10 (1990).

95 Zečević, *supra* note 90 at 348.

96 Judith E. Tucker, In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine 83–84 (2019).

97 Yavuz Aykan, Rendre la Justice à Amid: Procédures, Acteurs et Doctrines dans le Contexte Ottoman du XVIIIème Siècle 164–66 (2016).

the Bosnian *qāḍī*s adhered to legal doxa, which generally crystallized in the Ottoman Empire in the late nineteenth century and eventually led to various codifications of Islamic law, such as the Mecelle.[98] Although Islamic law in the fields of marriage and family was not codified by the Habsburg authorities, Austro-Hungarian officials were supportive of issuing decrees that outlined clear provisions for regulating Islamic marriage and divorce, especially when it involved borrowing from other legal doctrines not traditionally practiced in Bosnia.

Contesting Local *Qāḍī*s

As outlined above, modifications to the Islamic legal system made by the Habsburg administration were contested among Bosnian Muslims and actively challenged by the Muslim autonomy movement. Nevertheless, Bosnian Muslims did use the newly established legal institutions, such as the Supreme Sharīʿa Court, to appeal the decisions of local *qāḍī*s.

According to official figures, the Supreme Sharīʿa Court registered 578 petitions in 1888 and 868 in 1905.[99] However, there remained several obstacles to filing a complaint with the Supreme Sharīʿa Court: Unlike the first instance proceedings in local *sharīʿa* courts, which were conducted orally by a *qāḍī*, the judges of the Supreme Sharīʿa Court decided on appeals on the basis of the documented appeal and written court documents, without the plaintiffs being physically present. Since eighty-eight percent of the Bosnian population was illiterate, at least according to official figures from 1910,[100] submitting a written appeal could be problematic.

98 See, e.g., Yavuz Aykan, *From the Hanafi Doxa to the Mecelle: The Mufti of Amid and Genealogies of the Ottoman Jurisprudential Tradition*, in Forms and Institutions of Justice: Legal Actions in Ottoman Contexts (Yavuz Aykan and Işık Tamdoğan, eds., 2018), available at http://books.openedition.org/ifeagd/2334.

99 This represented approximately 3 percent (1888) and 1 percent (1905) of all petitions filed in the first instance district *sharīʿa* courts. The decline was mainly attributable to a dramatic increase in the total number of petitions to the district *sharīʿa* courts. In 1888, 17,409 petitions were filed, compared to 75,842 in 1905. Bericht, *supra* note 29 at 519, 522.

100 Fabio Giomi, Making Muslim Women European 82–83 (2021).

Alternatively, plaintiffs could file an appeal with the local *qāḍī*, who would write up the petition and forward it to the Supreme Sharīʿa Court.[101] At the same time, written petitions allowed local plaintiffs, even from geographically remote areas, to communicate directly with the judicial authorities in Sarajevo, bypassing the local *qāḍī*'s authority. This was further facilitated by the expansion of communication infrastructure, such as efficient postal services and telegraph lines, which had been established under Ottoman rule and allowed for quick and direct correspondence with the Supreme Sharīʿa Court.[102] Most complaints filed at the Supreme Sharīʿa Court sought a revision of a local *qāḍī*'s judgment, often using arguments based on Islamic legal stipulations of the Ḥanafī tradition. However, we can observe that local plaintiffs used the Supreme Sharīʿa Court to contest the local *qāḍī*'s authority, such as by claiming that he acted inappropriately or corruptly.

For example, in the spring of 1880, some Muslim citizens of Travnik filed a complaint against the local *qāḍī*, Jakub Arnaut, for alleged incompetence.[103] Or in the town of Derventa, in 1892, Mustafa Omer Efendić filed a complaint against the local *qāḍī* for an alleged insult.[104] In both cases, the provincial government, which had to rule on the charges, rejected them as baseless. The authorities only intervened in individual cases of accusations against *qāḍī*s, especially when there was evidence of embezzlement of state funds and official fees. On these occasions, *qāḍī*s were prosecuted and sentenced to prison or, for lesser offenses, reprimanded.[105] The rare interventions against local *qāḍī*s may have been primarily driven by insufficient evidence and unverifiable accusations. In addition, the latter were subject to strict administrative control and, particularly during the first years of the occupation, were regularly checked for

101 The official procedural rules also explicitly provided for this possibility. See Kruszelnicki, *supra* note 57 at 49–50, 53–54.

102 On communication infrastructure in late Ottoman Bosnia, see, e.g., Zafer Gölen, Tanzîmât Döneminde Bosna Hersek: Siyasî, İdarî, Sosyal Ve Ekonomik Durum 358–62 (2010).

103 ABiH, VŠS, box 15, B 1880-63.

104 ABiH, VŠS, box 65, E 1892-23.

105 Younis, *supra* note 8 at 302, 310.

their ability and trustworthiness by Habsburg officials and the Supreme Sharīʿa Court.[106] Moreover, *qāḍī*s had to meet the same general employment requirements as other Habsburg officials, such as swearing an oath to the emperor.[107] These measures likely helped build a certain level of trust between the Habsburg government and local Bosnian *qāḍī*s.

Another reason for the administration's non-intervention was that Habsburg officials and the Supreme Sharīʿa Court judges often suspected plaintiffs of weaponizing complaints about *qāḍī* misconduct. For example, in 1890, in response to a complaint filed by Asif-beg Kapetanović of Derventa against the district *qāḍī*, the Supreme Sharīʿa Court stated that it was common practice among local *begs* (noblemen) to accuse *qāḍī*s of petty crimes, especially when the latter did not rule in the former's favor. Therefore, it found Asif-beg Kapetanović's complaint unfounded and his accusations mostly untrue.[108]

Even if in the present case archival documents do not clearly show the extent to which the Supreme Sharīʿa Court's assessment was actually correct, it is more pronounced in other court cases in which plaintiffs used accusations against *qāḍī*s as a means of supporting their legal claims. For example, Haso Bešlagić from Cazin complained to the provincial government at the end of October 1896 that the local *qāḍī* in Cazin, Hadžić, had offended him by insulting his wife. He also accused the *qāḍī* of accepting a bribe from his wife's brother.

Several days earlier, Haso had taken Zlata Oraščanin from the village of Pištaline to marry him. However, it was disputed whether Zlata had joined Haso voluntarily, as her brother Miralem intervened against the planned marriage. Specifically, he complained to the *sharīʿa* court in Cazin that Zlata had been abducted against her will. After hearing Zlata's testimony, District

106 *Circularerlass der Landesregierung in Sarajevo vom 25. Februar 1880, Nr. 757 Just., betreffend die Gehalte der Scheriatsrichter*, in Sammlung der für Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen: II. Band. Justizverwaltung 30 (1881), 30; Younis, *supra* note 8 at 52.

107 Verordnung über die Organisation und den Wirkungskreis der Scheriatsgerichte, *supra* note 24, art. 5.

108 ABiH, VŠS, box 59, E 1890-45.

Qāḍī Hadžić ruled that she should return to her brother, as she was both a minor and did not want to marry Haso. Nevertheless, Haso filed a complaint with the Supreme Sharīʿa Court, which subsequently opened an investigation and questioned several witnesses to the trial, all of whom contradicted one another.

The *muhtar* (Bosnian, neighborhood headman) from Cazin, Osman Toromanović, confirmed the accusations against Qāḍī Hadžić, describing how during the trial he became irate and pulled down Zlata's *feredža* (Bosnian, a type of garment typically worn in public by Muslim women), veil, and boots, while insulting her and Haso. On the other hand, the *muhtar* from Velika Kladuša, Omer Okanović said that Qāḍī Hadžić did not swear. At the same time, he questioned Qāḍī Hadžić's judgment because he testified that Zlata had voluntarily gone to Haso and should be able to marry without a proxy. Qāḍī Hadžić vehemently denied these accusations, which were also supported by the testimony of a *hodža* (Bosnian, a religious teacher) from a nearby village and the Cazin Sharīʿa Court's clerk. Because of these contradictory statements, the provincial government decided in May 1897 not to intervene in the matter, and Haso's complaint was rejected.[109]

At other times, false accusations could have legal consequences: A complaint written on October 2, 1903, in the name of the "citizens of Banja Luka" accused the local district *qāḍī* Sadik Džumhur and a trainee at the *sharīʿa* court, Mehmed Ćesović, of having issued a false power of attorney for Hamid Husedžinović, according to which the latter could manage the assets of Meleća Šibić. The latter was quickly suspected of having written the complaint, which she ultimately confirmed during interrogation on October 21, 1903.

The story behind the complaint was that Meleća had been placed under guardianship in 1902 owing to "prodigality" and could therefore no longer manage her property herself. As she was unsatisfied with the choice of guardian to manage her property, she appealed to the local *sharīʿa* court against the appointment of her uncle Hamid Husedžinović. However, Qāḍī Džumhur rejected her complaint and confirmed that Husedžinović

109 ABiH, VŠS, box 20, B 1896-22.

should administer Meleća's property as guardian. Subsequently, in September 1903, Meleća filed an appeal with the Supreme Sharīʿa Court against Qāḍī Džumhur's ruling.

Nevertheless, she did not even wait for the decision of the Supreme Sharia Court and drafted the abovementioned complaint in the name of the "citizens of Banja Luka" on October 2, 1903 with the help of a lawyer and his clerk. In it, she accused Qāḍī Džumhur and the trainee Ćesović of abuse of office. Džumhur, however, did not accept her slander and filed a complaint with the criminal court for "the wrongful accusation of abuse of office." As a result, Meleća was sentenced to seven days in prison by the criminal authorities. Meleća's appeal did cause the proceedings to be reopened, however, the result is not documented among the archival files.[110]

These cases illustrate how plaintiffs strategically used allegations of misconduct against *qāḍī*s, albeit often with moderate success due to insufficient or contradictory evidence. As Sartori has convincingly shown with reference to the Islamic legal system in Central Asia under Russian rule, the tendency of local populations to portray *qāḍī*s as corrupt can be seen as a consequence of colonial administration. There, Russian authorities viewed local *qāḍī*s with great suspicion and local plaintiffs integrated their doubts into their complaints. Thus, *qāḍī*s became "colonial scapegoats" who were blamed for making certain legal claims.[111]

The situation in Habsburg Bosnia is quite similar: The Austro-Hungarian authorities often regarded the Bosnian *qāḍī*s as untrustworthy and established mechanisms to control them—first and foremost the Supreme Sharīʿa Court in Sarajevo. As with the other civil servants, serious misconduct among *qāḍī*s, delineated in a law passed in 1907, was punishable by transfer, demotion, or suspension.[112] This influenced the legal consciousness of the local population, who were well informed that *qāḍī*s faced serious repercussions for misconduct. Accordingly, plaintiffs adapted arguments in their complaints and did not base claims solely on Islamic legal principles.

110 ABiH, VŠS, box 105, E 1903-54.

111 Sartori, *supra* note 84 at 129–56.

112 Younis, *supra* note 8 at 303.

Nevertheless, it should be mentioned that allegations of corruption and misconduct against *qāḍī*s had been widespread during Ottoman rule of Bosnia, and did not solely emerge during the Habsburg occupation. The Bosnian scholar Muhamed Emin Isević, for example, criticized the state of the administration in his treatise on *The Situation in Bosnia* (*Ahval-i Bosna*), written in the early nineteenth century, that described the *qāḍī*s and *naibs* (Bosnian and OT, a substitute judge) as extremely corrupt and incompetent.[113]

Plaintiffs also used other strategies to challenge the authority of local *qāḍī*s and to attempt to assert their legal claims in court proceedings. If they were dissatisfied with a *qāḍī*'s judgment, they appealed not only to the Supreme Sharīʿa Court but sometimes also to the Ulema-Medžlis. Such "jurisdictional jockeying" can be traced to the fact that the responsibilities of the Supreme Sharia Court and the Ulema-Medžlis for the interpretation and application of Islamic law were not clearly delineated.[114] For example, some plaintiffs who wanted to appeal a decision of a local *qāḍī* sent their complaint directly to the *reis-ul-ulema*, the chief *muftī* and highest religious authority for Muslims in Habsburg Bosnia.[115]

In one case, the plaintiff even explicitly asked to be judged by the *reis-ul-ulema* instead of a *qāḍī*: Džiha Imamović, the widow of a former *qāḍī* from Bijeljina, wrote a letter to the *reis-ul-ulema* just a few days after filing an appeal against the local *qāḍī*'s verdict. She disagreed with the latter's decision that she, as her son's guardian, should give the bride's prompt dower (Bosnian: *mehri muaddžel*; OT: *mehr-i muaccel*; Ar.: *mahr muʿajjal*) and the trousseau (Bosnian: *džihaz*; OT: *cihaz*) to her daughter-in-law. In her letter to the *reis-ul-ulema*, she also demanded that her case not be judged by a *qāḍī* but by the *reis-ul-ulema* himself, stating: "I do not want a *qāḍī* to judge me, but the *reis-ul-ulema*."[116]

113 Ahmed S. Aličić, *Manuscript Ahval-i Bosna by Muhamed Emin Isević (Early 19th Century)*, 50 Prilozi za orijentalnu filologiju 232 (2002).

114 Karčić, *supra* note 5 at 116–17.

115 See, e.g., ABiH, VŠS, box 32, B 1918-41.

116 Gjiha Imamović, rođ. Smajić, to the *reis-ul-ulema*, Bjeljina (March 10, 1913) (ABiH, VŠS, box 30, B 1913-15).

Džiha presumably hoped for a more favorable ruling from the *reis-ul-ulema* than from the Supreme Sharīʿa Court. And her letter did have an impact on the final verdict: After initially upholding the local *qāḍī*'s verdict on appeal, the Supreme Sharīʿa Court overturned the decision after the *reis-ul-ulema* forwarded Džiha's letter to the appeal court. Instead, the supreme *qāḍī*s recommended that her son and daughter-in-law seek a mutual agreement leading to a *khulʿ* divorce (one initiated by the wife and granted with the husband's consent; Bosnian and OT: *hul*) before the local *qāḍī* in Bijeljina. However, if no agreement could be reached, the court would have to further clarify the exact distribution of goods and money.[117]

Conclusion

The integration of Islamic law into the newly established Habsburg administrative structures in Bosnia ushered in significant changes to the extant Islamic legal system. At the same time, some aspects of the Ottoman Islamic legal tradition were preserved. Based on an analysis of archival documents from the Supreme Sharīʿa Court, this article argues that the modifications made by the Habsburgs led to an amalgamation of the Ottoman Islamic legal tradition with Austro-Hungarian legal concepts in court practice, paving the way for new legal understandings and practices.

More specifically, the restructuring of the Islamic legal system under Habsburg rule granted external administrators more control over Islamic jurisdiction, while its scope was strictly reduced to marriage, family, and inheritance matters among the Muslim population. Concurrently, a significant part of the Ottoman Ḥanafī legal tradition, including the use of the Ottoman Turkish language and script and Ḥanafī legal provisions and textual sources, continued to be applied. This hybrid legal system witnessed frequent negotiations about how Austro-Hungarian and Ottoman Ḥanafī legal practices could be combined in practice or where boundaries between the two should be drawn. Simultaneously, this fostered new legal practices, such as increased

117 ABiH, VŠS, box 30, B 1913-15.

proceduralization and legal formalism at *sharīʿa* courts. Although the Habsburg authorities certainly made significant interventions, some of the concepts they introduced were already familiar to the Ottoman legal system. Thus, a multi-level legal hierarchy with oversight mechanisms or legal formalism could be also found in the Ottoman Empire of the late nineteenth century.

Overall, Habsburg reforms to the Islamic judiciary were met with both opposition and approval. While *qāḍī*s, particularly those serving at the Supreme Sharīʿa Court, were actively involved in promoting legal changes, the supporters of the Muslim autonomy movement opposed the reduced jurisdictional function of Bosnian *qāḍī*s. Nevertheless, local actors, including *qāḍī*s and plaintiffs, actively shaped the Islamic judiciary under Austro-Hungarian administration. Despite the efforts of Habsburg officials to standardize and unify Islamic legal practice, Bosnian *qāḍī*s maintained some autonomy and the ability to further apply the Ḥanafī legal doctrine due to their legal expertise. Yet, their authority was simultaneously challenged by local plaintiffs who made use of the new legal institutions, such as the Supreme Sharīʿa Court, to focus on procedural and formal correctness as well as on accusations of misconduct or corruption to support their legal claims.

In conclusion, the integration of Islamic law into the Austro-Hungarian administrative structures in Bosnia can be seen as a process of translation of values, knowledge, and practices, resulting in a "hybridization" of the Ottoman Islamic legal tradition with Habsburg legal structures. Existing studies of Islamic law under Habsburg rule have primarily focused on legal norms and structures, thereby automatically emphasizing continuities or ruptures.[118] By zooming in on the micro-level, the present article offers a more nuanced view of the implications these changes had for Islamic legal practices on the ground. Rather than thinking solely about changes or continuities, this paper has highlighted the negotiations surrounding the amalgamation of new and old traditions that created new meanings and practices as well as the agency that local actors had in actively shaping legal practices.

118 Karčić, *supra* note 5; Bećić, *supra* note 6.

Equally, this article has contributed to the recently growing interest in the status of Muslim communities in the post-Ottoman Balkans. In the neighboring nation-states that emerged following the Congress of Berlin 1878, Muslims were also guaranteed religious freedom and autonomy. Similarly to Habsburg Bosnia, Islamic religious and legal institutions were integrated into the new administrative structures and thereby played a crucial role in ensuring the rights of Muslim communities under Christian rule.[119] However, in contrast to Bulgaria, Serbia, or Montenegro, Bosnia was administered by another empire, the rule of which is often characterized in a historiographic sense as "quasi-colonial." It does not come as a surprise, therefore, that Habsburg reforms of the Islamic judiciary were, to some extent, inspired by colonial models, such as those in French Algeria. In the same vein, Islamic legal practice under Habsburg rule produced similar phenomena as in other Islamic legal systems under colonial rule, such as in Russian Central Asia. Consequently, examining Islamic legal practices under Habsburg rule can enhance our understanding of encounters between Islamic law and European or other legal traditions that occurred outside the Balkans.

119 See, e.g., Greble, *supra* note 1; Methodieva, *supra* note 11.

"Emancipating" Muslim Women in Early Nineteenth-Century Russia: Ākhūnd Fathullah bin Huseyn al-Uriwi, Ḥanafī Law, and Muslim Women's Rights[1]

Rozaliya Garipova
Nazarbayev University

Abstract

*This paper examines the legal authority of Fathullah Huseyn ughli, a prominent jurist (*ākhūnd*) of the Volga-Ural region between the 1820s and his death in 1843. The analysis focuses on the* fatwā*s he issued and legal cases he resolved regarding women's divorce. Huseyn ughli's* fatwā*s reveal several significant points. Firstly, despite increased regulation of Muslim marriage and divorce by the Russian Empire during this period, Huseyn ughli maintained his legal authority and made independent legal decisions with the authorization of the Orenburg Assembly. Secondly, his* fatwā*s highlight his support for women who were suffering and his efforts to find solutions for each unique case with the assistance of local Muslim communities. He utilized his legal authority to identify loopholes and deliver rulings that diverged from mainstream Ḥanafī opinions, particularly regarding divorce based on non-maintenance. However, his flexibility was limited after 1841–42, when Muftī Suleymanov intervened, establishing the mainstream Ḥanafī position that prohibited divorce in such cases and enforcing it as a rule for all Volga-Ural* ʿulamāʾ.

Keywords: Ākhūnd Fathullah Huseyn ughli al-Uriwi, Islamic family law, delegated divorce, annulment, non-maintenance, Muftī Suleymanov

1 I thank Kenneth Cuno, Stuart Brown, and the anonymous reviewers for their valuable suggestions for this article.

On April 27, 1843, the *muftī* of the Orenburg Muslim Spiritual Assembly (hereafter the Orenburg Assembly), ʻAbdulwahid Suleymanov, received a letter from a prominent *ākhūnd*,[2] Fathullah bin Huseyn al-Uriwi,[3] (hereafter Huseyn ughli) who asked for a confirmation of his decision to annul (*faskh*) a marriage, based on a passage (*ʿibāra*) regarding a husband who does not provide maintenance for his wife found in the Ḥanafī legal manual *Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām*, by the fifteenth-century scholar Mullā Khusraw. Although until this point Huseyn ughli had been dissolving marriages on the basis of this legal source and an authorizing decree of the Orenburg Assembly from September 4, 1831 (no. 1206, hereafter Decree 1206),[4] the *muftī* of the Orenburg Assembly harshly rejected the request of Huseyn ughli. Muftī Suleymanov declared that neither the *ākhūnd* nor other religious scholars could use that passage from *Durar* to dissolve marriages, as it had a weak legal basis and could lead to "social strife" (*fitna*) within the Muslim community.[5]

The rejection of the *Durar* passage by the *muftī* of the Orenburg Assembly is understandable, as the Ḥanafī school of Islamic law (*madhhab*), which the Muslims of the Volga-Ural region of the Russian Empire followed, did not consider non-maintenance to be valid reason for dissolution of

2 *Ākhūnd*s were religious scholars in the Volga-Ural region of the Russian empire who were considered to be experts on Islamic legal matters, i.e. Islamic jurists.

3 Ākhūnd Huseyn ughli's biography is included in Rizaeddin Fakhreddin, Āthār (1905), in volume 2, part 9. On Ākhūnd Huseyn ughli, see Michael Kemper, Sufis und Gelehrte in Tatarien und Baschkirien, 1789–1889: Der islamische Diskurs unter Russischer Herrschaft (1998); Rozaliya Garipova, *Where Did the Ākhūnds Go? Islamic Legal Experts and the Transformation of the Socio-Legal Order in the Russian Empire*, 19 Yearbook of Islamic and Middle Eastern Law 38 (2018); Rozaliya Garipova, *Between Imperial Law and Islamic Law: Muslim Subjects and the Legality of Remarriage in Nineteenth Century Russia*, in Sharia in the Russian Empire: The Reach and Limits of Islamic Law in Central Eurasia, 1550–1917, 156–82 (2020).

4 Decree of the Orenburg Assembly from September 4, 1831, no. 1256 (or 1206, according to *Āthār*) about dissolution of marriages for the reason of non-maintenance (*o rastorzhenii brakov za ostavleniem muzh'iami zhen svoikh bez sredstv k propitaniiu*). Mentioned in TsGIA RB, f. 295, op. 3, d. 2809, l. 27 ob., l. 35. See also Garipova, *Between*, *supra* note 3 at 168.

5 Fakhreddin, *supra* note 3 at 2:33 (Letter 21).

marriages (*tafrīq*/*faskh*).[6] In different parts of the Islamic world, Muslim communities which followed the Ḥanafī school of Islamic law found different ways of circumventing that restriction.[7] Since other schools of Islamic law permitted separation on the basis of non-maintenance or desertion, women were able to "forum-shop" and resort to the help of Mālikī, Shāfiʿī, or Ḥanbalī judges, who granted annulment in these cases. In some societies, the Ḥanafī *ʿulāmaʾ* allowed women to claim a temporary change of the school of law that they followed and to apply the permissive rulings of the alternative school.[8] However, these methods were not accessible to the Muslims of the Volga-Ural region, and Muslim women whose husbands could not or would not support them had to suffer financial difficulties and could not obtain divorces, which would allow remarriage. This article claims that Huseyn ughli responded to that communal problem and supported women's right to dissolve marriage by going beyond Ḥanafī mainstream thought on divorce. After years of consistently recognizing that non-maintenance justified a woman's claim to divorce under Ḥanafī law, Huseyn ughli's seemingly flexible approach to legal reasoning fell victim to the intervention of his superior, the *muftī*, who wanted to bring more uniformity to the interpretation and practice of Islamic law from the top down. This effort was also in line with the Russian imperial efforts to bring order to the Muslim family.[9]

6 All other schools of Islamic law, except the Ḥanafī, allowed women to seek divorce or annulment of marriage with a *qāḍī*. See Judith Tucker, Women, Family and Gender in Islamic Law 52 (2008); Susan A. Spectorsky, Women in Classical Islamic Law: A Survey of the Sources 181–82 (2010).

7 Judith E. Tucker, In the House of the law: Gender and Islamic law in Ottoman Syria and Palestine 83–84 (1998); Kenneth Cuno, *Reorganization of the Sharia Courts of Egypt: How Legal Modernization Set Back Women's Right in the Nineteenth Century*, 2 Journal of the Ottoman and Turkish Studies Association 85 (2015).

8 İsmail Kıvrım, *17. yüzyılda Osmanlı Toplumunda Boşanma Hadiseleri (Ayıntâb Örneği; Talâk, Muhâla'a ve Tefrîk)*, 10 Gaziantep Üniversitesi Sosyal Bilimler Dergisi 371, 388 (2011); Hatice Kubra Kahya, *Çareyi Başka Mezhepte Aramak: Osmanlı Aile Hukukunda Mefkûd/Gâib Kocanın Evliliği Problemi*, 12 Islam Tetkikleri Dergisi (Journal of Islamic Review) 697, 703 (2022).

9 Rozaliya Garipova, *Bringing Order to the Muslim Family: Aleksandr Golitsyn and Imperial/Colonial Law for the Muslim Family*, 43 Acta Slavica Iaponica 25 (2023).

This study examines the legal authority of Fathullah Huseyn ughli, a highly regarded *ākhūnd* in the Volga-Ural region during a crucial period in the implementation of Islamic family law under Russian imperial rule. Appointed as an *ākhūnd* in 1814 and later as a senior *ākhūnd* in 1819, much of his work as *ākhūnd* occurred during the 1820s and 1830s. During this time, there were significant changes in the practice of Islamic law and the exercise of Islamic religious authority in the Russian Empire.[10] In an effort to bring order to Islamic marriage and divorce practices, imperial authorities introduced various regulations, including the confirmation of the Orenburg Assembly as the highest Islamic legal institution,[11] the introduction of civil registries in 1828, a requirement of 1836 to record and provide summaries of all family law petitions from Volga-Ural Muslims sent to the Orenburg Assembly, the 1835 decree on minimum marriage age for Muslims, the 1836 decree allowing Muslim wives of exiles to remarry, and a number of other decrees.[12] Ākhūnd Huseyn ughli's *fatwā*s from this period provide valuable insight into the exercise of Islamic legal authority during this time.

Scholars who study Islam in the Russian Empire claimed that the *ākhūnd*s lost most of their legal authority under tsarist rule.[13] This depiction reflects a broader pattern in the study of

10 On the changing conditions of Islamic legal practice in the first half of the nineteenth century, see: Danil Azamatov, Orenburgskoe magometanskoe dukhovnoe sobranie v kontse 18—nachale 20-go vv. (1999); Robert Crews, For Prophet and Tsar: Islam and Empire in Russia and Central Asia (2006); Mustafa Tuna, Imperial Russia's Muslims: Islam, Empire and European Modernity, 1788–1914 (2015); Garipova, *Where*, *supra* note 3.

11 The Orenburg Muslim Spiritual Assembly was established in 1788 by an imperial decree in an attempt to regulate relations of the Russian Empire with the Muslim population in the Volga-Ural region, Siberia, and the Kazakh steppe. The Assembly soon evolved into a Muslim court of appellations.

12 Dmitrii Iu. Arapov, Islam v Rossiiskoi imperii (zakonodatel'nye akty, opisaniia, statistika) 114–16 (2001).

13 Azamatov, *supra* note 11 at 92; Marsil' N. Farkhshatov, *İdil-Ural Müslüman Ruhanilerinin Resmi Hiyerarşisinde Ahunlar (18-20. Asrın Başı)* in Central Eurasian Studies: Past, Present and Future 501, 503 (Hisao Komatsu, Şahin Karasar, Timur Dadabaev, and Güljanat Kurmangaliyeva Ercilasun, eds., 2011); Nathan Spannaus, *The Decline of the Ākhūnd and the Transformation of Islamic Law under the Russian Empire*, 20 Islamic Law and Society 202 (2013).

Muslim societies under colonial or imperial regimes, which shows that legal experts often became co-opted by the state and had their influence curtailed.[14] More recent studies, however, have focused more on how Muslim elites coped with the challenges of colonialism and continued to address social problems and render legal decisions in colonial contexts.[15] As I have demonstrated elsewhere, *ākhūnd*s continued to be vital legal authorities and persisted in rendering final legal decisions until the end of the tsarist regime.[16] Despite being accountable to state institutions such as the Orenburg Assembly, *ākhūnd*s continued to adjudicate family law cases and make legal decisions independently. In fact, Huseyn ughli's *fatwā*s from the 1820s and 1830s demonstrate that he issued independent legal decisions on various marriage, divorce, and inheritance cases until the early 1840s. Although the Russian imperial state began to intervene in the Muslim community more assertively during this period, I suggest that the adjudication of Islamic legal cases remained relatively flexible and largely unaffected by state intervention. Huseyn ughli emerged as the leader of the Muslim community who sought to address a communal problem that he had observed in his community: the plight of women whose husbands abandoned them and failed to provide for their maintenance.

This paper is based on nineteen *fatwā*s delivered by Huseyn ughli upon request from different individuals seeking his legal opinion.[17] These cases are recorded in Rizaeddin Fakhreddin's biographical dictionary of the Volga-Ural region, *Āthār*, in the form of letters. Each letter represents a single legal

14 See, for example, Wael Hallaq, Sharīʿa: Theory, Practice, Transformations (2009).

15 M. Q. Zaman, The Ulama in Contemporary Islam: Custodians of Change (2007); M. Kh. Masud, B. Messick, and D. Powers (eds.), Islamic Legal Interpretation: Muftis and Their Fatwas (1996); M. Kh. Masud, R. Peters, and D. Powers (eds.), Dispensing Justice in Islam: Qadis and Their Judgments (2006); Nurfadzilah Yahaya, Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia (2020); Iza Hussin, The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State (2016); Sohaira Siddiqui, *Navigating Colonial Power: Challenging Precedents and the Limitation of Local Elites*, 26 Islamic Law and Society 272 (2018).

16 Garipova, *Where*, *supra* note 3.

17 I have used several of these letters in Garipova, *Between*, *supra* note 3.

case involving family and inheritance issues and includes the *ākhūnd*'s resolution. In addition, archival records of eight cases in which Huseyn ughli investigated and provided his decisions are also included in the analysis. Three of these archival cases overlap with the letters in *Āthār*, which were most likely discovered by Rizaeddin Fakhreddin when he served as a *qāḍī* at the Orenburg Assembly and organized the institution's archive. The paper aims to investigate how Huseyn ughli arrived at different conclusions and explore the basis on which he made his decisions.

Ākhūnd Huseyn Ughli as a Jurist

Ākhūnd Huseyn ughli (1767–1843) was born in the village of Ura, which lies approximately 70 miles (112 km) northwest of the city of Kazan.[18] After studying for a year at the important Muslim education center of the Volga-Ural region, Tatarskaia Kargala,[19] he went to study in Bukhara in 1787 and in 1790. In 1795 he returned from Bukhara and in 1799 received a license to serve as imam in the village of Ura. As a *mudarris*, he trained many students, but also wrote a number of treatises on various legal, theological, and other issues. My focus in this paper is only on his activity as a *sharīʿa* expert (or *ākhūnd*) in Islamic family matters. We know from his biography in *Āthār* that some of his students became *qāḍī*s at the Orenburg Assembly. He held high authority at the time of the *muftī* of the Orenburg Assembly, ʿAbdessalam ʿAbdrakhimov (1825–40). According to Rizaeddin Fakhreddin, members of the Orenburg Assembly privately asked Huseyn ughli's opinions on many legal issues and used them in official decisions.[20]

Huseyn ughli functioned as a *fatwā* issuer (*muftī*), a judge (*qāḍi*), and legal supervisor (Tatar Turki, TT: *ākhūnd*) in

18 R. R. Salikkhov, Sluzhilaia Ura: rozhdenie tatarskogo kapitalizma (2015).

19 Hamamoto Mami, *Tatarskaia Kargala in Russia's Eastern Policies*, in T. Uyama, Asiatic Russia Imperial power in regional and international contexts 32 (2012).

20 Fakhreddin, *supra* note 3 at 2:7–13.

his region.[21] He refers to himself as an *ākhūnd* to whom petitions were sent (TT: *ben morafi' 'aleyh akhund*).[22] Women and men asked for *fatwā*s (*istiftāʾ*) and wrote him petitions (TT: *'ariza*, *'arz itdem*, *prusheniya yazdim*). In such a case, a woman, after explaining her problem/situation, could write "I would like to ask for a *fatwā*": *shar' mujibinje fatwa yazib virsagez ide*, *fatwa yazib qulima viruegezne utenam*, or Huseyn ughli would mention in his reports that "a [man/woman] requested a *fatwā* from us, the *ākhūnd*" (TT: *biz akhunddan fatwa soradi*). In this case, Ākhūnd Huseyn ughli would issue a *fatwā* and indicate at the end that he authored it (TT: *oshbu fatwani yazib virdem*, *fatwa-name virdem*). A *fatwā* could be given in a written form or in an oral form (TT: *til ile fatwa verub idek*).[23]

As a judge, Huseyn ughli shouldered numerous responsibilities. He convened and supervised *sharīʿa* court gatherings (TT: *majlis*, *majlis shar'*) and presided as a judge.[24] Being a judge entailed building and navigating relationship with other *mullā*s and *ākhūnd*s. The working relationship of Huseyn ughli with various members of the *ʿulāmāʾ* constituted an important part of his work as a prominent *ākhūnd*. He investigated cases and sent orders and instructions to other imams to carry out processes of divorce and marriage and ordered them to record divorces and

21 In the Volga-Ural Muslim community religious scholars held several titles in a loose hierarchy. Graduates of madrassas could be appointed as imam, imam-khatib or muezzin to the mosques in the region after they received took an exam and received a license from the Orenburg Assembly. Senior scholars who were known to be legal experts acquired the title *ākhūnd* and senior *ākhūnd* and acted as supervisors of imams, and resolved or investigated legal cases. The titles *qāḍī* and *muftī* had different meanings among the Volga-Ural Muslim community. The title *qāḍī*, which meant a judge among most of the Muslim societies, was used by the members of the Orenburg Assembly. The title *muftī* referred to the head of the Orenburg Assembly.

22 Fakhreddin, *supra* note 3 at 2:19 (Letter 7).

23 *Id.* at 2:23–27 (Letter 10).

24 In Muslim contexts *majlis shar'* refers to a court, *shāriʿa* court, or *qāḍī* court; however, after the Russian conquest of the Kazan khanate, all local Muslim institutions were destroyed and there was no official institution of *sharīʿa* court. What Huseyn ughli was refering to an informal gathering of the local *ʿulamāʾ* and elders, sometimes presided by an *ākhūnd*, where they considered and resolved a *sharīʿa* case on a family matter, marriage, divorce, or inheritance. For more detail see Garipova, *Where*, *supra* note 3.

marriages in the civil registries (Russian: *metricheskie knigi*).[25] He questioned the plaintiffs, the accused, and the witnesses, with authority to instruct the police to summon people to these questionings. He invited *mullā*s to serve as mediators (TT: *midyatur*). He often had to find trustworthy people (TT: *i'timadli zatlar*) to act as witnesses and questioned the parties, for example, "in the presence of two imams" (TT: *ike imam huzurinda*),[26] or investigated a case together with other members of the *ʿulāmaʾ*.[27] As a judge, he also tried to reconcile (TT: *sulh*) people. And, finally, he took independent legal decisions and asserted his decision by saying: "I annulled their marriage" (TT: *faskh itdem*) or "I decided as such" (TT: *hukm itdem*).

Huseyn ughli also acted as a legal supervisor, in which role he would, upon receiving complaints from people or following instructions from the *muftī* of the Orenburg Assembly, investigate cases of imams accused of violating *sharīʿa*. In a letter dated December 1825, Huseyn ughli expressed his willingness to perform this role, particularly in cases where imams with insufficient knowledge incorrectly performed marriages, made erroneous decisions about the start and end of Ramadan, or committed other acts that misapplied Islamic law.[28] Additionally, imams sought his help in complex cases, which shows that Huseyn ughli was a prominent figure among the *ʿulāmaʾ* of his region and held esteemed authority. He skillfully managed his relationships, even in times of conflict, where he reversed the decisions of some imams to impose his own rulings.

His relationship with the Orenburg Assembly under Muftī ʿAbdessalam ʿAbdrakhimov was cooperative, and Huseyn ughli

25 Civil registries were the books kept by parish *ʿulamāʾ* in which they had to register information on cases of births, deaths, marriages, and divorces which occurred in the *maḥalla* (congregational district) of their jurisdiction. On the importance of civil registries see Garipova, *Married or not Married? On the Obligatory Registration of Muslim Marriages in Nineteenth-Century Russia*, 24 Islamic Law and Society 112 (2017); Dilyara Usmanova, *Musul'manskie metricheskie knigi v Rossiiskoi imperii: mezhdu zakonom, gosudarstvom i obshchinoi (vtoraia polovina XIX – pervaia chetvert' XX vv)*, 2 Ab Imperio 106 (2015); Elmira Salakhova, *Musul'manskie metricheskie knigi Rossii*, 1 Ekho Vekov 81 (2018).

26 Fakhreddin, *supra* note 3 at 2:29 (Letter 15).

27 *Id.* at 2:20 (Letter 9).

28 TsGIA RB, f. 295, op. 3, d. 174.

was often called upon to investigate problematic cases, which attests to his authority.[29] He sought to shape and engage with the Orenburg Assembly to enforce *sharīʿa* law and supervise its implementation. He called for the Orenburg Assembly to grant him the authority to investigate and bring order to issues arising in the Volga-Ural society. For instance, he asked the Orenburg Assembly to "send [him] instruction in our name" to investigate and prevent cases of disorder in family law.[30] In doing so, he regarded the Orenburg Assembly as a central authority that could help solve these problems.

Already in 1825, Huseyn ughli knew about many social and family problems and anticipated more of them in the future. He wrote to the Orenburg Assembly:

> I, senior *ākhūnd*, come across many disputes and animosities regarding marriage and deeds that were performed against *sharīʿa*. At certain times licensed [TT: *ukazli*] or unlicensed [TT: *ukazsiz*] imams perform marriages of women who were abducted or who did not have a legal guardian. Some people still live with their wives whom they had irrevocably divorced and live together as husband and wife without renewal of marriage. Some other people take a wife under certain conditions, or they give their wife a choice to divorce [TT: *mukhayyara*], but they do not respect that [given] condition, or, after their wives choose to divorce [TT: *talaq ikhtiyar*], they still live a conjugal life with them and commit a forbidden act [TT: *haram farash*].[31]

Admitting his reluctance to investigate these cases without an order from the Orenburg Assembly, Huseyn ughli pointed to the importance of an institutional decree:

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29 Fakhreddin, *supra* note 3 at 2:340–410; Liliya Baibulatova, *Orenburgskie muftii i ikh deiatel'nost' v 'Asare' Rizaetdina Fakhretdina*, in Istoriia Tatar s drevneishikh vremen 6:992.

30 Fakhreddin, *supra* note 3 at 2:15 (Letter 3).

31 *Id.* at 2:15–16 (Letter 4).

> Although we, in the position of senior *ākhūnd*, are officials who are generally responsible for ensuring that scholars do not perform any act against *sharīʿa*, in such cases it would be good if we received official permission [TT: *rukhsat*] to submit to the Orenburg Assembly petitions from victims according to regulations, to investigate their problems and to investigate orders/decisions that were taken against *sharīʿa*.[32]

Registration of cases at the Orenburg Assembly would give an institutional clout and would make it easier to enforce the decisions of an *ākhūnd*, or to make a husband to pay maintenance (*nafaqa*) and fulfill the conditions of a marital contract. Often women (and men) who approached Huseyn ughli also asked him to forward their cases to the Orenburg Assembly. Upon completing an investigation authorized by the Orenburg Assembly, Huseyn ughli would take a legal decision and ask for the authorization of his decision from the Orenburg Assembly. Thus, Huseyn ughli started to investigate legal cases, conducted the investigations and came to a legal decision with the authorization of the Orenburg Assembly.

Women's Petitions and Initiation of Divorce

All Islamic schools of law give more rights to men than to women regarding the annulment of marriage. A man has the unilateral right to annul his marriage with a woman (*ṭalaq*), but women do not have that right. There were certain conditions which allowed a woman to initiate a divorce, and this would require the involvement of judicial authorities. All Islamic schools of law put several restrictions on the implementation of this possibility. One of the ways in which a woman could initiate a divorce was to acquire that right from her husband if the latter had delegated his right to divorce to his wife on certain conditions (*tafwīd al-ṭalaq*). These previously-agreed-on conditions might include his disappearance during a war, abusive behavior towards his wife, acquiring or continuing bad habits, or others. Another way for a

32 *Id.*

woman to ask for annulment of her marriage was to prove that her husband was not capable of fulfilling the requirements of married life because of certain diseases or impotency. With certain differences, jurists from the main schools of Islamic law would allow women to seek divorce in that condition. Judges in the Shāfiʿī, Mālikī, and Ḥanbalī schools of law also allowed women to annul their marriages and protect their marriage rights in the case of the absence of financial support, desertion, or a husband's disappearance. In that regard, the Ḥanafī judges differed from those schools. Lack of support or disappearance of a husband did not constitute grounds to end a marriage in the Ḥanafī school of law. However, women could obtain divorce by repudiating some of their marital rights through a process called *khulʿ*.[33]

Most of the cases handled by Huseyn ughli at our disposal are the cases of women who initiated annulment of their marriages on the basis of the failure of a husband to provide and sustain his wife (and often a child). These petitions were written either by the women themselves, or by their fathers on their behalf. Other cases relate delegated divorce (*tafwīḍ al-talaq*). Several petitions which women sent to Huseyn ughli concerned the correctness of their divorce from their husbands, which Huseyn ughli always approved/confirmed, stating that divorce has taken place. Consider the following petition, a woman from Kazan named Ahmed qizi Mahbubjamal sent to Huseyn ughli is in the form of *istiftāʾ*:

> In 1829 my husband Yaqub Daud ughli was sent to perform army service. When I told my husband, "You are leaving me without provision and clothing [OT: *kiswalek*] and without place to stay [OT: *maskan*]. How can I, being so young, live alone? My husband replied, "You are right, I cannot leave you provision. I don't even have a chance to go to a *mullā* and write a divorce letter; I am being sent to the army right now . . . Therefore, in this situation, I give you the choice of divorcing yourself if or when you want to with an irrevocable divorce [*talaq bāʾin*]."

33 Tucker, *supra* note 8; Cuno, *supra* note 8.

> If you ask witnesses, they will witness before God, that two years later, on 3 December 1831, I divorced him with an irrevocable divorce. Now, after you question my witnesses, I would like to ask for a *fatwā* inquiring if this *talaq* was valid and if it was correct to marry another person of my choice [TT: *dilkhāhuma*]. [34]

Huseyn ughli noted:

> I received this petition from the aforementioned woman and authorized the annulment of her marriage on the ground of non-provision [*ʿadm ifāʾi nafaqa*] and on the basis of the decree of the Orenburg Assembly from September 4, 1831, no. 1206, which was based on an injunction from *Durar*, and on the basis of the order given by the Assembly to me, *ākhūnd*, on February 9, 1826, no. 91. Witnesses confirmed what the woman said and signed their testimonies. Therefore, the free choice of divorce of the aforementioned woman is, in my opinion, proven by testimonies. Since she had a free choice to divorce with irrevocable divorce, irrevocable divorce has taken place, without the necessity of a judge, on the basis of texts *Jāmiʿ al-rumūz*[35] and *Qazi Khan.*[36] The textual proofs for this are the following: . . . .
>
> And I issued the following *fatwā*: On the basis of these narrations, the woman who had a choice of divorce was divorced from her husband. It is correct for her to marry a person of her choice after completing the waiting period [*al-ʿiddah*]. And it is legally permissible for imams to perform her marriage. December 1, 1833.[37]

We can observe from this case that a woman asked if an irrevocable divorce was correct and valid and Ākhūnd Huseyn ughli's

34 Fakhreddin, *supra* note 3 at 2:17–19 (Letter 6).

35 Shams al-Dīn Muḥammad al-Khurāsānī al-Quhistānī, *Jāmiʿ al-rumūz*.

36 Imam Fakhruddin Hassan Bin Mansur al-Uzjandi al-Farghani, *Fatawa-i-Qazi Khan*. A collection of *fatwā*s from the Ḥanafī school.

37 Fakhreddin, *supra* note 3 at 2:17–19 (Letter 6).

fatwā confirmed her divorce. Delegated divorce was a practice in other Islamic contexts. Judith Tucker explains in regard to Ottoman Palestine:

> The muftis were often asked about this type of divorce, one in which a husband might swear (*ḥalafa*) or make conditional (*ʿallaqa*) a divorce as part of his promise to deliver on certain marital obligations, most commonly the provision of *nafaqa*. He might take such an oath before departing on a journey, or swear to remedy a present deficiency, such as inadequate housing, within a certain period of time. This type of conditional divorce was thus another road to what was in effect a *faskh*, or annulment for reasons of non-fulfillment of marital obligations. Rather than resorting to a Shafi'i or Hanbali judge, however, to annul a marriage in which the husband was not providing, some women managed to have their husbands swear a special oath to support them properly or divorce them. Should that support not be forthcoming, the divorce would be automatic, and require no adjudication. Of course, a husband might deny that he had sworn to divorce, and then, as we have seen, the woman would have to shoulder the burden of proof. Still, it was possible for conditional divorce to operate very much to a woman's advantage.[38]

To confirm irrevocable divorce, Huseyn ughli needed to interview the people who witnessed the husband's swearing. His *fatwā* confirms that the witnesses' testimony was valid. He confirmed that the status of this woman was *mukhayyara*, i.e. a woman who was given a choice to declare herself to be divorced. He primarily based this decision on Decree 1206, which allowed annulment in case of non-provision. The basis of that decree was an injunction about annulment for non-maintenance from an Ottoman legal text, Mullā Khusraw's *Durar*.

Mullā Khusraw was an important Ottoman scholar who held several official positions such as *mudarris*, *qāḍī*, *qāḍī*

38 Tucker, *supra* note 8 at 104.

ʿaskar, *muftī*, and *shaykh al-islām* in the fifteenth century. His *Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām* had an important place in the legal education and legal system of the Ottoman state. In this treatise, he embraced the Shāfiʿī reasoning for the annulment of marriages in the case of a husband's inability to provide for his wife when the husband is known to be alive. He mentioned that some Ḥanafī *ʿulāmaʾ* used that reasoning to annul marriages for the sake of (public) benefit (*maṣlaḥa*). He argued, however, that when a husband is missing (*ghāʾib*), his financial inability cannot be ascertained, so the marriage should not be annulled based on that Shāfiʿī reasoning. Nevertheless, he left the ultimate decision to the person who consulted his source, saying, "Make your own judgement" (Ottoman Turkish: *imdi otesini sen dushun*).[39] In all cases that were presented to Huseyn ughli for consideration, the husbands were alive and known to be refusing or unable to provide for their wives. Therefore, Huseyn ughli followed Mullā Khusraw's reasoning to apply the Shāfiʿī ruling allowing the annulment of marriages in case of the confirmed inability of a husband to provide for his wife.

After mentioning legal evidence that gave a right of annulment on the basis of non-maintenance, Huseyn ughli provided other Islamic sources on which he had based his decision. In particular, he cited specific narrations from the texts *Jāmiʿ al-rumūz* and *Qazi Khan* which allowed annulment of marriage without a necessity of a judge (*bilā iḥtiyāj ilā al-qaḍāʾ*).[40] Huseyn ughli clearly stated that he issued this *fatwā* and that it came into effect by the order of the Orenburg Assembly. He also underlined that the woman was free to marry a person of her choice after completing a waiting period. Huseyn ughli investigated this case and rendered a legal decision, with the permission (decree) of the Orenburg Assembly; there was no necessity to convene a *majlis* in this case. Thus, if there were no complications, a case could end with an independent decision of an *ākhūnd* where the decree of the Orenburg Assembly signified that Huseyn ughli was authorized to do this.

39 Mollā Khusraw, Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām, (c. 1480). I used the 1875 Ottoman translation of *Durar*: Kutub-i muʾtebere-i fikhiyeden Durer tercümesi 298–99 (Istanbul: Matbaa-i Amire, 1875).

40 Fakhreddin, *supra* note 3 at 2:17–19 (Letter 6).

A woman could announce irrevocable divorce when her husband violated the terms of a *taʿlīqnāma* – which was a document that stipulated the conditions, violation of which would give the right of divorce to his wife.[41] One such *taʿlīqnāma* was given to a woman, Ahmed qizi from the city of Kazan, by her husband, Khalid ughli, on June 5, 1839. In her petition to Huseyn ughli, she explained the following:

> My husband, Khalid ughli, in your presence and in the presence of many *mullā*s, promised that from now on, he will not consume alcohol and will not beat his wife Ahmed qizi; he will not say bad words to her and will provide her with daily maintenance, clothing, and housing; that he will not take her property without her permission; and that he will take the following items [enumerated items] from pawn within three days and the rest within three months.[42]

After explaining the text of the *taʿlīqnāma* and underlining that it was signed by her husband, an *ākhūnd*, and *mullā*s, she complained that "Now we are in January of 1841 and Khalid ughli still did not fulfill any conditions": he did not bring back pawned items, provided no maintenance nor any money for clothes, was constantly drunk, beat her, said bad words such as "infidel" (*KAFĪRA*) and "adulteress" (*zāniya*) and even threatened to kill her. Ahmed qizi finally informed the Third Chastʾ (police office) about her husband's deeds, left her husband's house with the permission of the police officers, and divorced him with irrevocable divorce because "he did not carry out the conditions stated out in the *taʿlīqnāma*." She finished her petition by requesting a *fatwā* from Huseyn ughli. After that, Ahmed qizi would have to prove that her husband did not fulfill the conditions stipulated in the *taʿlīqnāma*, which she appears to have done. The *ākhūnd* responded with a *fatwā* that read in part: "Because this woman chose to divorce (*mukhayyara*), in a situation without the necessity of a *qāḍī*, according to *Jāmiʿ al-rumūz* and *Qazi Khan* and

41 On the wives of Muslim exiles see Garipova, *Between*, *supra* note 3.

42 Fakhreddin, *supra* note 3 at 2:28–29 (Letter 14).

other prominent books, divorce has taken place." The text of the *fatwā* also underlined that Khalid ughli had to return her items that he pawned.[43]

We can observe from this *fatwā* that there had already been a problem between husband and wife. Ahmed qizi had already experienced hardship which led to her first applying to Huseyn ughli. It is clear that Huseyn ughli had already convened a court gathering (*majlis*) where he invited "many *mullā*s", most probably of the *maḥalla*s (congregational districts) of the residence where the woman and her husband lived. In this court gathering the authorities present had already forced Khalid ughli to sign a *taʿlīqnāma* that he would provide maintenance for his wife and avoid maltreating her in various ways. As she was able to prove her husband's maltreatment of her, and thus the violation of the *taʿlīqnāma*, there were clear grounds for Huseyn ughli to issue such a *fatwā*. It was apparent that conditional divorce was an effective form of pressure against abusive husbands and a decisive way to defend women in miserable situations.[44]

A more difficult situation for Huseyn ughli was a husband who denied that he had sworn to delegate divorce to his wife. Before leaving on a Hajj, Abuyazid Nazir ughli gave his wife, Omer qizi, *ikhtiyār ṭalaq* (a choice to divorce). Omer qizi divorced him and, after her waiting period was over, she married another man named Maqsud ughli. The second marriage was performed by an imam and senior *muḥtasib*,[45] Nurmuhammad Khujash ughli, who recorded it in the civil registries of 1833. When Nazir ughli returned from Hajj, he denied that he had granted his wife the right to divorce and started creating problems for his former wife. Firstly, he sent a petition to the Kazan land court (Russian: *zemskii sud*), asking to take his wife back. However, the assessor (Russian: *dvorianskii zasedatel'*) convinced him to make peace with his former wife and her new husband, and Nazir ughli signed an agreement stating that he would give a divorce letter to his former wife. However, he later

43 *Id.*

44 *Id.*

45 A religious title of a senior cleric who is responsible of supervising religious affairs in a given region.

submitted a petition to the military governor (*voennyi gubernator*), asking him to appoint an *ākhūnd* named ʻAbdennasir Rahmanquli ughli to investigate his case. This *ākhūnd* took a decision in favor of Nazir ughli, which would force his ex-wife to return to him.[46]

When the new husband of Nazir ughli's former wife brought the issue again to the attention of Huseyn ughli, he convened a large *majlis* attended by respected *mullā*s. In this *majlis* Huseyn ughli disputed and overruled the decision of Ākhūnd ʻAbdennasir Rahmanquli ughli. In the presence of mediators, Huseyn ughli interrogated Nazir ughli's former wife, Imam Khujash ughli, and other witnesses. On March 19, 1835, Huseyn ughli issued his decision, stating that "We established and confirmed that when Nazir ughli was going on the Hajj, he indeed gave a choice to Omer qizi to divorce him, and she did that." Therefore, Huseyn ughli confirmed her divorce and marriage to another men, announced his decision to the military governor, and sent all written evidence to the Orenburg Assembly.[47]

We can see that Huseyn ughli skillfully defended delegated divorce in this last case. While in the first case discussed (that of Ahmed qizi Mahbubjamal), he only issued a *fatwā* confirming a woman's divorce, the second and third cases required him to make thorough investigations. In this third case, Ākhūnd Huseyn ughli acted as an authority in his own right and contravened the military governor's decision and the ruling of another *ākhūnd*. Even though the other *ākhūnd*, Rahmanquli ughli, claimed that Huseyn ughli did not have authority to revoke the decision of another *ākhūnd*, Huseyn ughli asserted the woman's right to get a divorce in the presence of respected imams as mediators, and obtained authorization for his decision from the assessor of the land court. With assertiveness, Huseyn ughli tried to help women escape misery and hardship when they had the choice to obtain divorce and as we will see in the following section even when women were left without a choice to free themselves from dysfunctional marriages.[48]

46 *Id.* at 20–23 (Letter 9).
47 *Id.*
48 *Id.*

Annulment of Marriage on the Basis of Non-Maintenance

Petitions of annulment on the grounds of non-provision constitute the majority of the letters and cases that were included as examples of Huseyn ughli's adjudication in *Āthār*. While in the cases analyzed in the previous section, women used their delegated rights to obtain a divorce, there were many cases when women did not have the choice to divorce their husbands but were nevertheless left without financial support. The petitions asking for annulment on the grounds of non-maintenance were written by these women or by their fathers on their behalf. In certain cases, petitions were written by both father and daughter, one after the other.

Nafaqa is the maintenance that a Muslim husband must provide for his wife, regardless of her religion, as his main legal obligation to her. All the legal schools agreed on the major components of this maintenance, namely food, clothing, and appropriate accommodation. However, different legal schools had varying opinions on the appropriate course of action when a man failed to fulfill his duty of providing financial support. According to the Ḥanafī school, the judge should intervene and determine an appropriate amount of maintenance for the wife. In this scenario, the wife would be permitted to borrow this sum with the expectation of repaying it from the husband's funds. Alternatively, if the husband was not present, the judge could authorize the wife to utilize her husband's assets for maintenance, as long as they were suitable for necessities such as food and clothing. However, the Ḥanbalī, Mālikī, and Shāfiʿī schools had a different perspective. If a husband was unable to meet his responsibility of providing basic sustenance due to poverty or absence, his wife had the right to request a divorce. If the husband refused, the judge might advise patience, but ultimately, if the wife desired it, the judge would enforce the divorce.[49]

Since the Volga-Ural Muslims followed the Ḥanafī school of law, non-maintenance was not regarded as a valid reason for women to seek divorce. While other Muslim

49 Tucker, *supra* note 7 at 52.

communities adhering to Ḥanafī *fiqh*, but living together with Muslims from other schools of law, could follow another *madhhab* to release women from marriage, this was not an option for the Muslims of the Volga-Ural region. The difficult situation of married women who were left without financial support was a serious problem for the Muslim community in the Volga-Urals as well as for the women themselves, and Huseyn ughli provided a solution for the women and the community.[50]

On July 1, 1840, a certain Bashir qizi sent a petition to Huseyn ughli, recounting her marriage to a fellow villager, Habibullah ughli, in 1829. After some time, Habibullah ughli left for the city of Semipalatinsk (Simi) and ten years had passed since then. When he left he did not leave any lodging or maintenance money for his wife, compelling her to live in her father's house and under her father's care. During his absence, he never sent any maintenance money to either her or their nine-year-old son. She underlined that "Since that time we survived as we could. We borrowed money, but now there is nobody left who can lend money, and there is nobody to provide for us. We are experiencing extreme hardship." At the end of her petition, she asked for the annulment of her marriage and permission to remarry.[51]

As a response to Bashir qizi's petition, Huseyn ughli requested written evidence (Russian: *spravka*) from the community and from the *mullā*s of her residence. The community confirmed the woman's statements. The local imam, Ahmed Sa'id ughli, also corroborated the facts of the case of Bashir qizi to Huseyn ughli. In response, Huseyn ughli explained:

> Taking into consideration the different opinions of the great jurists, I favored annulment on the basis of non-provision. With reference to the sayings of great *ʿulāmaʾ* who were *muftī*s, and seeing the necessity, I annulled the aforementioned marriage. If, at the end of the waiting period, the aforementioned woman wants to

50 Kahya, *supra* note 9; Garipova, *Divorce from Missing Husbands: Rizaeddin Fakhreddin and Reform Within Islamic Tradition in Imperial Russia*, 65 JESHO 761 (2022).

51 Fakhreddin, *supra* note 3 at 2:27–28 (Letter 13).

> marry a man of her choice, I gave this letter of order so that imams can perform her marriage. We have ordered a local imam to record this annulment in the civic registries. In line with the narration of *Durar* regarding annulment due to non-maintenance, we received from the Orenburg Assembly a decree of September 4, 1831, no. 1206. I thus performed annulment under the power of that decree.[52]

It is remarkable how the legal case became a communal affair. First, the fellow villagers helped Bashir qizi survive in the absence of her husband, lending her money to sustain herself and her son.[53] After waiting for ten years and enduring extreme hardship, Bashir qizi wrote to Ākhūnd Huseyn ughli asking for annulment of her marriage. Huseyn ughli requested a written proof from the villagers that substantiated Bashir qizi's claims, verifying her husband's departure years ago and her miserable living conditions. The local *mullā*s corroborated the facts of her situation.

In his ruling in the case, Huseyn ughli demonstrated that he was aware of the difference of opinion of the prominent jurists on this matter, made reference to the sayings of *fatwā*-issuing great *ʿulāmaʾ* (TT: '*ulama-i kiramin mufti bihi qawllarena bina'en*) who said that annulment in case of non-maintenance was permissible (TT: *'adm ifa' nafaqa sabable faskh nikahni ja'iz kuruche*) in case of necessity (TT: *hajet wa dharuret da'iya*).[54] He specifically referred to the passage about non-maintenance from *Durar*. However, this was not a position accepted by the majority of the Ḥanafī *ʿulāmaʾ* and Huseyn ughli never included the original passage from *Durar* in his reasonings, nor tried to explain the legal reasoning which would permit the annulment of marriages. He simply wrote "per the passage from Durar (TT: *Durar ibarati mujibinja*)." For him, the stronger legal basis was a previous permission he received from the Orenburg

52 *Id.*
53 *Id.*
54 *Id.*

Assembly with Decree 1206 to annul marriages in the case of non-maintenance.[55]

The favorable approach of Huseyn ughli to the plight of women whose husbands left them without provision was known among the Volga-Ural Muslim community, and women specifically sought his help. In an archival record from 1835, a woman named Zahide Ahmer Adilsha qizi wrote in a petition that she specifically wished the Orenburg Assembly to appoint Huseyn ughli to investigate her case and give her the right to divorce from her husband, who "left her without maintenance, did not take her under his care, did not pay the *mahr*, accused her of being an adulteress, refused to accept paternity of their child, and physically and verbally abused her."[56] Huseyn ughli was promptly assigned to investigate the case. With the help of local police force, Huseyn ughli summoned the husband and questioned him in the presence of the petitioning woman, her father, and "well-respected imams who would be mediators" about his wife's accusations.[57] While the husband admitted his failure to provide for his wife, he rejected allegations of verbal abuse and denied the paternity of their child. However, he said that he left their house because they did not have affinity (TT: *tatuliq wa mahabbat*) and agreed to pay the deferred dower (*mahr*).[58]

In 1834 another woman, named Sarwijamal, asked the civilian governor of Kazan to appoint Huseyn ughli to annul her marriage, with a similar complaint about non-maintenance. With the help of the Russian authorities, Huseyn ughli summoned Sarwijamal's husband and ordered him to take care of his wife and within fifteen days. Despite the husband's assurance that he would take his family under his care, he failed to fulfill his promise and Huseyn ughli granted the woman annulment in 1837.[59]

55 *Id.*

56 TsGIA RB, f. 295, op. 3, d.1178.

57 *Id.*

58 *Id.* at l. 20, l. 22. On *mahr* and women's financial rights among Volga-Ural Muslims in the late eighteenth to early nineteenth centuries see Danielle Ross, *Complex Legal Lives: Separated Muslim Women's Financial Rights in Russia (1750s–1820s)*, 6 Genealogy 72 (2022).

59 TsGIA RB, f. 295, op. 3 d. 1429.

These two cases show the intertwined nature of Islamic and Russian imperial legal systems. The Russian authorities could not secure order without the judicial expertise of Islamic legal scholars. The Islamic legal authorities on the other hand, could not enforce their decisions without the assistance of the Russian imperial authorities. However, this cooperation between the Islamic legal scholar and Russian imperial authorities, which Robert Crews interpreted as helping the implementation of an Islamic orthodoxy[60] did not always benefit Muslim women such as those who had been assisted by Huseyn ughli in his flexible interpretation of Islamic law.

On February 6, 1830, the imperial state adopted a law that limited the right of women whose husbands had managed to change their exile status to army service to seek divorce. According to the law, such a woman could only ask for divorce if her husband had been deprived of all rights (Russian: *lishen vsekh prav sostoiania*).[61] In the following case Huseyn ughli's decision was overruled by the state decree. This case is recorded in two letters (Letters 7 and 12)[62] and the information in them varies because they present two different decisions by Huseyn ughli, one in 1834 and the second in 1839. Letter 7 tells us the case of Atiye ʻAbdurrashid qizi who wrote a petition to Huseyn ughli stating that her husband, Fathullah Subhi ughli, was detained in 1833 for theft at Makarya fair,[63] convicted, and exiled. She wrote that Fathullah "gave me *mahr* but didn't take me to his house; he left neither lodging nor maintenance and there is nobody who could provide for me. If it is appropriate according to *sharīʿa*, could you order to the imams to annul our marriage and perform a new marriage for me?" The woman provided letters taken from trustworthy people who confirmed the information on her petition. Huseyn ughli considered the case and decided to initiate annulment:

60 Crews, *supra* note 11.

61 Svod zakonov rossiiskoi imperii (The Digest of Laws of the Russian Empire), vol. 10 (1857), part 1, art. 51.

62 Fakhreddin, *supra* note 3 at 2:19 (Letter 7) and 2:26 (Letter 12).

63 Makar'yevskaia fair was a trade fair in Nizhniy Novgorod held annually every July near Makaryev Monastery.

> Therefore, I, *ākhūnd*, to whom the petition was sent, knowing that the petitioning woman is experiencing hardship and knowing the differences of the prominent jurists on this matter, annulled their marriage on the basis of the opinion of the *muftī* who considers it permissible to annul marriage on condition of non-provision. After the end of the waiting period, if the aforementioned petitioning woman wants to marry anew, I made an order that the imams in charge perform her marriage (TT: *khutba-i nikah*). The decree from September 2 [4], 1831, no. 1206 has arrived to us, *ākhūnd*, from the Orenburg Assembly regarding the performance of annulment on the condition of non-provision. On the basis of this decree, I initiated annulment (TT: *faskhke iqdam qilib yazdim*). September 3, 1834.[64]

However, Letter 12 suggests that this annulment did not happen. Letter 12 presents a response of Huseyn ughli to the order of the Orenburg Assembly from January 12–24 of 1839. First, he presents the abovementioned petition of Atiye ʻAbdurrashid qizi that she wrote to him in 1834. The summary of her petition included more details, in which she underlined that when she wanted to marry somebody else. The local imam, Mohammedrahim Mostay ughli, required that she obtain a *fatwā* from an *ākhūnd* before he would perform a marriage ceremony. She also added that the imam and the elders of her village knew that her husband was exiled to Siberia.[65] Upon learning this, Huseyn ughli asked a different imam, ʻImadeddin Monasib ughli from a village in Kazan province, to investigate the case. Meanwhile, Mostay ughli and the elders of her village confirmed, with signature, that Subhi ughli was indeed exiled to Siberia. As a result, Huseyn ughli explained that he gave *fatwā* to ʻAbdurrashid qizi, "referring to the *fatwā* of the Crimean *muftī* about persons exiled to Siberia and remarriage of their wives, which had been signed by the Senate; to the *fatwā* about annulment on the basis of non-provision from the 'famous books' (*kutub muʿtabira*);

64 Fakhreddin, *supra* note 3 at 2:19 (Letter 7).

65 *Id.* at 2:26–27 (Letter 12).

and to the decree of the Orenburg Assembly from September 4, 1831, no. 1206."[66]

However, following that statement, Huseyn ughli's tone sounded apologetic:

> I didn't know that Subhi ughli was a soldier. In the document it was only written that he was exiled. The document that I provided concerns the wives of exiles to Siberia. Probably he opted to serve in the army instead of his sentence. The order about annulment on the basis of non-provision affects thieves exiled to Siberia and sent to the army service. However, we gave our *fatwā* in 1834, and we received a *fatwā* concerning prohibition of divorce to the wives of soldiers only in 1836.[67]

After that Huseyn ughli proceeded to justify the ruling of the imperial decree. He stated that he did not have an objection to the decree which was limiting the right of divorce to wives of soldiers. He even claimed that it was legal and appropriate for rulers to ban their judges from intervening in certain cases. To justify this, he recited some rulings from well-respected Ḥanafī fiqh sources: "There is a record of fatawa of al-Aqkirmani saying that in certain cases emperors prevent *qāḍī*s [from producing *fatwā*s] according to *sharīʿa* and regulations."[68]

We may assume that Subhi ughli was indeed sentenced for theft and exiled to Siberia, and at a certain point he decided to apply for a change of his status. Imperial law allowed substituting exile as punishment for certain types of crime with the army service.[69] After the change of his sentence to army service, he most probably took an opportunity and appealed to his commander about the unjust decision of separation from his wife in his absence. Since the imperial law prohibited divorce of soldiers, his petition must have been led to an investigation by the Orenburg Assembly. It is unclear how the decision of Ākhūnd

66 *Id.*
67 *Id.*
68 *Id.*
69 I describe a similar case, also considered by Huseyn ughli, in Garipova, *Between*, *supra* note 3.

Huseyn ughli, which was taken before 1836, was recognized as invalid but if it were not for the new imperial law, the woman would have been granted a divorce. In his decision, Huseyn ughli employed a flexible approach: he recognized difference of opinions among the jurists and preferred to follow a particular opinion to grant divorce to ʻAbdurrashid qizi. We can also observe that he was collaborating with the local Muslim community. The elders (TT: *il qartlari*) and the local imam supported the petition of the woman (TT: *qul quymishlar*) and testified that her husband was exiled. However, the imperial law limited or even prevented the flexibility of options. While Huseyn ughli was able to find a legal reasoning within the Islamic tradition, he was now forced to justify his submission to imperial decree. Moreover, there was another change that halted other attempts by Huseyn ughli to grant women annulment for the failure to provide maintenance.

The New *Muftī* and Ākhūnd Huseyn Ughli: Failure of Annulment Based on Non-Provision

The next three letters (petitions to Huseyn ughli) were written by the fathers of the women who desired a divorce. The most important feature of these cases is that in all three instances, Huseyn ughli took a decision for annulment based on non-maintenance, yet the dissolution of marriage never transpired. I suggest that this has to do with the change of the *muftī*: Muftī ʻAbdessalam ʻAbdrakhimov died on January 1, 1840, and Russian authorities appointed ʻAbdulwahid Suleymanov as the next *muftī* on June 10, 1840. Muftti Suleymanov was from the Nizhnii Novgorod Muslim community and a son of an *ākhūnd*. He had higher religious education at a madrassa and had a good command of Arabic and Persian.[70] He engaged in trade in St. Petersburg, where Muslims appointed him as an imam of their community in 1822. Suleymanov knew some Russian and became acquainted with several high officials. In 1835 he taught Muslim boys in one of the military academies in St. Petersburg. When ʻAbderrahim died, Suleymanov went to Ufa to replace him as *muftī*. His

70 Ildus Zahidullin, Moftilär häm Kazyilar 107 (2021).

authoritarian style was emphasized in his biography in *Āthār*.[71] In particular, Fakhreddin underlines that Suleymanov tried to establish a strict hierarchy at the Orenburg Assembly. Fakhreddin refers to Suleymanov's constant rejection of candidates who had been suggested from Kazan for positions as *qāḍī*s and to Suleymanov's ambition to personally select the members of the Orenburg Assembly. Suleymanov also warned imams not to exceed the limits of their jurisdiction.[72] Suleymanov's decrees was in line with the actions of Russian imperial authorities, who had started to bring order to the application of legal systems among non-Orthodox populations in the nineteenth century.[73] Suleymanov is especially famous for his 1841 compilation of Muslim marriage and divorce rules based on *sharīʿa* and imperial law. Such a compilation was no doubt a move to impose uniformity of interpretation and systematization of practice from the top down.[74] Considering Suleymanov's decision to halt such annulments in the last case presented below, it is most probable that he rejected the annulment decisions by Huseyn ughli in the first two cases based on the same reasoning. We need to understand his decision in light of his effort and desire to regularize the law.

In May of 1837, an old man named Rahmanquli ughli wrote to Huseyn ughli that he had married his daughter Zohra to a certain ʻAbid ughli, with a *mahr* of four hundred rubles. ʻAbid ughli did not pay the *mahr* in full, did not take his wife to his home, and failed to provide for his wife. On top of that, he beat her and pronounced "words that could dissolve his marriage." Huseyn ughli convened a court gathering and said to ʻAbid ughli: "The father of your wife provided for her for six years, and he said that he cannot do this anymore; so now you have to provide for your wife and daughter yourself. And you should leave a written statement that you promise to provide

71 Fakhreddin, *supra* note 3 at 2:347–89.

72 Kemper, *supra* note 3 at 77–78; Fakhreddin, *supra* note 3 at 2:354–55; Baibulatova, *supra* note 28.

73 Paul Werth, The Tsar's Foreign Faiths: Toleration and the Fate of Religious Freedom in Imperial Russia (2016).

74 Sbornik tsirkuliarov i inykh rukovodiashchikh rasporiazhenii po okrugu Orenburgskogo magometanskogo dukhovnogo sobraniia 1836–1903, 15–18 (1905).

for her." 'Abid ughli responded by cursing marriage contracts, and saying, "I will find another judge!" Huseyn ughli responded to him that he could not just refuse like that, and ordered him to provide fifty kopecks per day for his eighteen-month-old daughter. 'Abid ughli did not follow this order. He did not take his wife and child to his house and refused to provide for them. Consequently, Rahmanquli ughli sent a petition to the military governor, which was forwarded to Huseyn ughli on April 29, 1838. This time Rahmanquli ughli asked for the annulment of his daughter's marriage and permission to marry her to somebody else because 'Abid ughli refused to comply with the *sharīʿa* ruling, disregarded the decree of the military governor, and failed to provide for his wife and child. Following this, on February 8, 1839, Huseyn ughli requested from the Orenburg Assembly permission (TT: *rukhsategezne talab idamez*) to annul the marriage of the couple, again by referring to Decree 1206 and once again reminding the *muftī* that he had already issued a decree allowing such annulments.[75]

Although Letter 11 ended with Ākhūnd Huseyn ughli's request, *Āthār* does not inform us whether his decision was implemented or not. When he asked for permission to annul that marriage from the Orenburg Assembly, Muftī 'Abdessalam 'Abdrakhimov was still in office, and it would have been expected that the *muftī* should have given permission for the annulment. However, from the archival records we understand that the annulment did not happen.[76] On November 10, 1842, Zohra's father Rahmanquli ughli wrote another petition to the Orenburg Assembly, describing the miserable state of his daughter and once again asking for annulment. The correspondence, which continued for years, ended with a document dating to 1851 which again obliged 'Abid ughli to pay his wife's *mahr* money. However, Zohra was not alive in 1851 to receive it. 'Abid ughli informed the authorities that his wife and her father had passed away, and the local imam confirmed their deaths.[77] This story does not tell us the exact reason why annulment had not taken

75 Fakhreddin, *supra* note 3 at 2:24–25 (Letter 11).
76 TsGIA RB, f. 295, op. 3, d. 1611.
77 *Id.*

place, but it shows that the Orenburg Assembly did not approve the decision of Huseyn ughli and did not find a solution to the desperate situation of the petitioning woman and her father, both of whom had died while they waited for it.

The next letter to Huseyn ughli (Letter 19) was written by another father, Ni'matullah ughli. He wrote that in 1838 he gave his daughter Habibjamal to a man named Seyfulmulk 'Abidullah ughli in marriage with a *mahr* set at six hundred rubles. Since that time, 'Abidullah ughli had not provided his wife with lodging or maintenance. He had left his wife in her father's house and travelled to Orenburg. When he came back, he promised to take her with his mother to Orenburg, but failed to keep this promise. After two years, Ni'matullah ughli wrote a letter to his son-in-law, requesting him to either send maintenance money or to bring his wife to Orenburg. However, the father received a blunt answer: "My business went wrong after I got married. Your daughter does not have luck, she married at a bad time!" Receiving such an answer, the father expressed disappointment and anger in his petition: "How long should I maintain somebody's wife?" He begged Huseyn ughli to give an order to annul the marriage of his daughter and son-in-law, and to allow her to marry another man. The letter ends with Huseyn ughli's request on January 24, 1843, seeking permission from the Orenburg Assembly to annul the marriage under the power of Decree 1206.[78]

The archival records of this case has a report, received and approved by the Orenburg Assembly, which states: "The decision should be implemented according to the report of the *ākhūnd* of Ura, Fathullah Huseyn ughli."[79] However, annulment was not granted. For several years, Habibjamal continued to send petitions to the Orenburg Assembly, reminding them of the resolution of Huseyn ughli and asking for the approval of her divorce. A divorce was finally granted in 1851, when Habibjamal's husband, Abidullah ughli, sent a letter of divorce. This divorce letter, however, included interesting information. Seyfulmulk stated the reason for the divorce was:

78 Fakhreddin, *supra* note 3 at 2:36–37 (Letter 19). It corresponds to TsGIA RB f. 295, op. 3, d. 1807.

79 TsGIA RB f. 295, op.3 d.1807, l. 7.

> [Habibjamal] has been living with ʻAbdurreshid ughli for several years, and they have a child. I have been living apart from my wife for several years and I have lost my affection towards her. In order that the children who were born to her not be considered my own children, and with the request of several respected people, I divorce Habibjamal with one *bāʾin ṭalaq*.[80]

This letter unveils a situation which in some other cases was implied but not explicitly mentioned. The letter suggests that in certain instances, some women asking for annulment of their marriage from their non-supporting husbands had been living with other men. Some of these women had children from these relationships. In other cases, women were complaining that their local imams refused to perform a new marriage without first obtaining a divorce from their non-supporting husbands or would ask for permission to divorce and to marry a man of their choice. Interestingly, the community within which these women lived did not display any disapproval of these "unlawful" cohabitations. On the contrary, the elders of the village or the neighborhood tried to facilitate the divorce of these women by providing supportive testimony for their requests for annulment, regarded them as divorced even though they did not get an official approval of their divorce, or contacted their non-providing husbands to grant them divorce.

The third case is from Letter 21. In this case, dated March 29, 1842 Muhammadqul Sultanbik ughli had petitioned Huseyn ughli with a request to marry his daughter to Hamid ughli in July 1840 by appointing a prompt (*muʾajjal*) *mahr* of three hundred rubles. During the *nikāḥ* Hamid ughli gave one hundred and ninety-four rubles, which was recorded in the civil registries, with the remaining hundred and six rubles to be paid later. After marriage, Hamid ughli visited his wife in her father's home several times for approximately a year, however he didn't take her into his care. He did not leave money for maintenance or for clothing. Sultanbik ughli tried to convince him to take his wife to his care through the local Russian imperial authorities

80 *Id.* at l. 147.

and through people who know him to no avail. Sultanbik ughli concluded that his son-in-law probably did not want to have his daughter as a wife.[81]

Later, two *maḥalla* imams, Yahude ughli and Mustay ughli, invited Hamid ughli to their presence and questioned him. He admitted that indeed he had not provided maintenance, clothing, or lodging to his wife. The imams, together with the head of the local Russian imperial administration, ordered him to provide twelve rubles of maintenance and clothing each month to his wife. If he did not pay it to her, this would be considered as a debt upon him. They authorized Sultanbik ughli to collect the money from him. When Hamid ughli failed to provide for his wife and did not follow the orders of the head of the local Russian imperial administration and the imams, the two *mullā*s asked Huseyn ughli to deal with this case and to annul the couple's marriage, and let the woman marry another person.[82]

On February 25, 1843, Huseyn ughli sent a report and a request to the Orenburg Assembly to annul the marriage of this couple upon the decision of the *maḥalla* imams, according to the passage from *Durar*, and according to the Decree 1206.[83] On April 27, 1843, the *muftī* of the Orenburg Assembly, 'Abdulwahid Suleymanov, harshly declined the request of Huseyn ughli. In his response, Suleymanov claimed that Huseyn ughli's decisions would lead to disorder and strictly prohibited him and any other scholar to perform such annulment. Huseyn ughli died in early May of the same year, just a couple of months after he issued this *fatwā*.

Conclusion

As he received numerous petitions from women and their families, Huseyn ughli would have been well aware of the gravity of the situation of the women who were left in limbo, without the support of husbands who were known to be alive but refusing to provide for their wives. The parents, neighbors, elders of the

81 Fakhreddin, *supra* note 3 at 2:31–34 (Letter 21).
82 *Id.*
83 *Id.*

villages where these women were living, as well as local and provincial administrators, were all looking for a solution to the plight of the women. As the spiritual leader of this community,[84] Huseyn ughli wanted to provide a solution and thus deviated from the mainstream Ḥanafī ruling on the divorce of women from non-providing husbands, instead relying on a legal source which explains the Shāfiʿī position on granting divorce in cases when a husband's inability to provide for his wife can be ascertained, but actually does not suggest annulment. Huseyn ughli's decisions seem to have aligned with the wishes of the community he served. In this sense, Huseyn ughli acted as a mediator between the legal tradition and the needs and expectations of his community. Women who wrote petitions to Huseyn ughli, either directly or through their fathers, found him to be a supportive ally. He recognized women's rights and demanded their fulfillment from husbands, Muslim religious authorities, and imperial authorities. Despite the twentieth-century focus on the need to reform women's family rights to emancipate women from the restrictions of the Islamic law,[85] cases from the previous century demonstrate that Muslim women, as well as the Muslim community and scholars, were trying to defend women's rights in marriage and divorce within the Islamic legal framework. The cases from the 1820s and 1830s reveal that Muslim women had already been exercising, claiming, and negotiating their rights within the family, and legal scholars such as Huseyn ughli supported those rights and produced *fatwā*s that favored and facilitated women's causes. However, this does not mean that defending marital rights of women was an easy or always successful undertaking.

As marriage and divorce were largely communal affairs, Huseyn ughli was often assisted by the members of Muslim community in his efforts to find a solution to women's plight. However, in the 1820s and 1830s, outside intervention in the form of a state decree and the change of the *muftī* created obstacles. Huseyn ughli was thus forced to adjust to the state decree

84 Huseyn ughli refered to himself in this way. TsGIA RB, F. 295, op. 8, d. 26.

85 Marianne Kamp, *Debating Sharia: The 1917 Muslim Women's Congress in Russia*, 27 Journal of Women's History 4 (2016).

in the case of a conscripted Muslim man's divorce. His decisions were repelled or somehow blocked by the new administration of the Orenburg Assembly, once 'Abdulwahid Suleymanov had become the *muftī*. Suleymanov systematized the marriage and divorce rules in his 1841 regulations on Muslim marriage and divorce, and his views about what constituted a legitimate divorce were very different from those of Huseyn ughli. Suleymanov preferred to base decisions on reliable Ḥanafī opinions instead of the needs of the community, as his remark to Huseyn ughli's *fatwā* suggested. As a result, Huseyn ughli was not able to achieve the same degree of success that he was able to before this outside intervention, despite the efforts of the community to help him.

Contributors

Dilyara Agisheva is a research fellow in the Program in Islamic Law at Harvard Law School and John W. Kluge Center at the Library of Congress. Dilyara's research interests are in Islamic legal history in the modern period, specifically in the history of legal change in Crimea after the Russian annexation of the Crimean Peninsula in the late eighteenth century. Her doctoral research, "Entangled Legal Formations: Crimea Under Russian Rule," received support from several scholarships and grants, including the Heath W. Lowry Dissertation Writing Fellowship and the Fulbright-Hays Doctoral Dissertation Research Fellowship. She received a BA in Middle Eastern Studies and Political Science at UCLA, an MA in Middle Eastern, South Asian, and African Studies at Columbia University, and a Ph.D. in Arabic and Islamic Studies at Georgetown University.

Brian Wright holds a Ph.D. in Islamic Studies from the Institute of Islamic Studies at McGill University and has taught at Zayed University in Abu Dhabi and the American University in Cairo. Dr. Wright is interested in the development of modern legal systems in the Muslim world and how Islamic law is understood and debated in contemporary Muslim contexts. His first book, *A Continuity of Shari'a: Political Authority and Homicide in the Nineteenth Century*, focuses on the penal codes created in the Ottoman Empire, Egypt, and British India in the second half of the nineteenth century and how the theory and application of these codes compare with pre-modern understandings of Islamic criminal law. He has also published articles in *Die Welt des Islams*, the *Journal for Islamic Thought and Civilization*, and *Islamic Studies*.

Ninja Bumann is presently a Ph.D. candidate at the Doctoral School of Historical and Cultural Studies at the University of Vienna, where she also serves as a university assistant at the Institute for East European History. In her doctoral dissertation, she analyzes the regulation and negotiation of Islamic marriages and

divorces at Sharia courts in Habsburg Bosnia and she is the author of the following publications: "Contesting Juridical Authority: Sharia, Marriage and Morality in Habsburg Bosnia and Herzegovina" (*Austrian History Yearbook*, 2022), "Marriage Across Boundaries: Mixed Marriages at the Supreme Sharia Court in Habsburg Bosnia and Herzegovina" (*Historijska Traganja*, 2020), and "Scharia nach k. u. k. Verordnung: Islamisches Recht und dessen Grenzen im habsburgischen Bosnien-Herzegowina (1878–1918)" (in *Recht und Diversität*, Bielefeld, 2020). Ninja Bumann holds an MA degree in East European History from the University of Vienna.

Rozaliya Garipova is Assistant Professor at the Department of History, Philosophy and Religious Studies at Nazarbayev University. Her interests include Islam under Russian and Soviet rule, religious authority (male and female), Islamic family law, women and gender in Islam, and the interaction between Islamic law and Russian imperial law. Among her recent publications are "Bringing Order to the Muslim Family: Aleksandr Golitsyn and Imperial/Colonial Law for the Muslim Family" (*Acta Slavica Iaponica*, 2023), "Divorce from Missing Husbands: Rizaeddin Fakhreddin, Collective Fatwa and Reform Within Islamic Tradition in Imperial Russia" (*Journal of Economic and Social History of the Orient*, 2022), "From Kolkhoz to Pulpit: Rashida Abistay and Female Religious Authority in Soviet and Post-Soviet Russia" (*Journal of Islamic Studies*, 2022), and "Between Imperial Law and Islamic Law: Muslim Subjects and the Legality of Remarriage in Nineteenth-Century Russia" (in *Sharia in the Russian Empire: The Reach and Limits of Islamic Law in Central Eurasia, 1550–1917*, Edinburgh University Press, 2020). She received her Ph.D. in Near Eastern Studies from Princeton University in 2013.

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Program in Islamic Law
Harvard Law School
Cambridge, MA 02138