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Editor's Introduction to the Special Issue

Reevaluating the Norms of Law and Governance in Islamic Legal History

by Mohammed Allehbi

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

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

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

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

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

1 Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformation, 214–16 (2009).

2 Frank E. Vogel, *Tracing Nuance in Māwardī's al-Aḥkām al-Sulṭāniyyah: Implicit Framing of Constitutional Authority*, *in* Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss (Kevin Reinhart ed., 2014).

3 Hallaq, *supra* note 1; F. E. Vogel, *Siyāsa*, *in* Encyclopaedia of Islam, Second Edition (P. Bearman et al eds., 1955–2005).

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

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

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

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

6 Abdullahi Ahmed An-Naʿim, Islam and the Secular State 97–102 (2010); Hallaq, *supra* note 1, at 15–18; *Sherman A. Jackson, Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?*, 30 Fordham Int'l L.J. 158 (2006); Mohammad Hashim Kamali, *Methodological Issues in Islamic Jurisprudence*, 11 Arab L.Q. 3, 9 (1996).

7 Clark Lombardi, State Law as Islamic Law in Modern Egypt 180, 235 (2006).

8 An-Naʿim, *supra* note 6, at 97–102.

9 Rachel M. Scott, Recasting Islamic Law: Religion and the Nation State in Egyptian Constitution Making 54 (2021); Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 Ohio North University Law Review 545, 555–66, (2015).

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

10 Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 Law and Society Review 103 (1995).

11 Rabiat Akande, *Governing Sharia*, in Entangled Domains: Empire, Law and Religion in Northern Nigeria 70–104 (2023).

12 Nurfadzilah Yahaya, Fluid Jurisdictions: Colonial Law and Arabs in Southeast Asia 36–42 (2020)

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

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

Contributing Articles: Islamic Law and Governance in Eighteenth-Century Ottoman Istanbul, Colonial Sudan and Egypt, and Post-Colonial Arab World

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

13 Ethan L. Menchinger, The First of the Modern Ottomans, The Intellectual History of Ahmed Vasif 10 (2017).

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

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

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

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

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

ten years after Islam's advent in Mecca. Several scholars have called the document the "world's first written constitution." But Anjum critiques and unpacks that label. He juxtaposes a critical historical analysis of the document's text with interpretations of it by Muslim modernists and pro-authoritarian reformist thinkers. From this exercise, Anjum argues that the reformist readings divorce early Islamic history and law from the tradition of Islamic jurisprudence in order to justify modern state concepts such as territoriality, secularity, and religious and pluralistic citizenship. Their aim is to root those modern concepts in historical bases for the political and legal foundations of Islam. The article offers rich details about how reformist understanding and interpretations of early Islam are shaped and influenced by the political and legal ethos and dictates of the modern state.

All in all, this special issue of the *Journal of Islamic Law* investigates the processes by which Muslim and non-Muslim state officials and intellectuals expanded, distorted, and otherwise molded notions of Islamic law and governance under the Ottoman Empire, British colonialism, and the modern state. Each author's conclusions highlight imperial and local actors' inventiveness and agency in formulating law and governance in Muslim countries. Celik demonstrates how Ottoman diplomacy supplemented bureaucratic-protocols with jurisprudential principles to devise flexible legal practices for an ever-shifting international stage. Batgiray Abbot underscores that British colonial bureaucrats, ironically like past Muslim rulers, merged discretionary law-making and Islamic legal principles to ensure state control. Both Anjum and Gebril show how secular–national and constitutional–modern realities prompted Arab-Muslim religious scholars and thinkers to inventively adapt the early Islamic history of law and political–legal traditions. In sum, these essays enhance our understandings of the new intersections of *siyāsa* and *fiqh*. Collectively, these authors reveal how diverse thinkers from different times and circumstances refashioned early notions of Islamic law and governance in light of the rapidly expanding demands of modernity.

The Ottomans and International Law: The Russian Annexation of the Crimean Khanate in 1783 in the Light of the Documents from the Ottoman Archives

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Abstract

*The Russian annexation of the Crimean Khanate was a severe blow to the Ottomans, since the empire was forced to accept the annexation of an independent polity populated by Muslims without a shot being fired, and against the stipulations of past treaties. While the Crimean population sent delegations to the imperial capital and asked for help, the Ottomans also feared the harm the annexation would inflict on their legitimacy; however, they were aware of their military and financial weakness in the face of the Austro-Russian alliance and could not risk a multi-front war. To handle this difficult situation, the Ottoman government resorted to two strategies: first, it sought an intra-bureaucratic consensus by employing the consultation principle of Islamic governance to allow bureaucratic participation in the decision-making process with unanimous decisions to avoid any criticisms that would trigger a popular backlash and, secondly, legitimizing the government policy by benefiting from the principles of Islamic law and portraying the current situation as a temporary one which would be corrected once the empire gained enough military strength. This article will use primary and secondary sources to show how the Ottoman government navigated this diplomatic crisis while aiming to legitimize its decisions by creatively adapting the principles of Islamic international law (*siyar*). It will emphasize the interaction between political authority, legitimacy, and Islamic law by discussing how the Otto-*

mans interpreted Islamic law with respect to the termination of treaties and to power asymmetry in war decisions when the empire faced a multi-front war with Russia and Austria.

Keywords: international law, Islamic law, diplomatic history, treaties, eighteenth century, Ottoman empire, legitimacy, Crimea, Russia.

Introduction

Once an Ottoman tributary state, the Crimean Khanate became an independent polity with the Treaty of Küçük Kaynarca (1774), even though Ottoman sultans retained some symbolic powers. Yet, in 1782, using the uprising against its ruler, Şahin Giray, as a pretext, Russia intervened militarily and installed the deposed khan on the throne again. Later on, Russia declared its annexation of this polity in 1783. Benefiting from its alliance with Austria, Russia demanded a de jure recognition of the annexation in the form of a protocol (*sened)* that would modify the stipulations of the past treaties and threatened war if its demand was rejected. This fait accompli created great difficulties for the Ottomans; while facing the risk of a multi-front war with Austria and Russia, the Ottomans were uneasy about duly accepting the incorporation of the Crimean Khanate into the Russian Empire because, first, it violated the stipulations of the peace treaty that granted independence to the khanate, and, second, the Muslim population of the khanate, who were already pleading for help by sending delegations to the imperial capital, would come under Russian rule.

The Ottoman statesmen were aware of the empire's military and fiscal weakness. They wanted to avoid a war which could lead to further territorial losses, despite the difficulty of accepting the Russian demands. In addition, they had to consider the domestic political repercussions of their decision. This posed another dilemma: accepting the Russian annexation and leaving a large Muslim community under the rule of a Christian power could lead to a popular revolt. On the other hand, rejecting the Russian demands and starting hostilities with Russia and Austria, in addition to the risk of losing more territory as a result of military

weakness, could disrupt the imperial capital's food supply, because the empire lacked the naval might to protect these routes. In turn, this disruption could lead to scarcity and price increases, triggering riots and political turmoil, putting the Ottoman bureaucrats' careers and existence at risk. Navigating through this difficult period, the Ottoman statesmen sought legitimacy for their decisions through two strategies. First, ad hoc consultation councils that included the larger bureaucracy were employed to discuss the issues, reach decisions unanimously, share responsibility, and avoid future criticism through an intra-bureaucratic consensus. As a second strategy to legitimize this unpopular decision, the Ottoman government invoked the principles of Islamic law with regards to the impact of power asymmetry on war decisions and termination of treaties, and tried to present the annexation as a temporary situation which was imposed by conditions, yet would be abolished once the empire reached sufficient capabilities when compared with its enemies.

The next section will provide insight into Islamic law principles regarding war decisions and treaties, the Ottoman understanding and interpretation of these principles, and the Ottomans' changing views on peace and war as the empire faced defeats on the battlefield. Then, the following section will offer a historical backdrop for the emergence and development of the crisis and use this context to build a narrative. For this purpose, documents from the Ottoman Archives section within the Presidency of the Republic of Türkiye's Directorate of State Archives (formerly *Başbakanlık Osmanlı Arşivi*, hereafter referred to as the State Archives of Türkiye/SAT) will be used.[1] In addition to the archive documents, the accounts provided by the official

1 Working with the Ottoman archival documents presents many challenges. Documents such as reports penned by grand viziers to sultans (*telhis*) often do not include information about the date (*datum*). Sometimes, it is possible to deduce information about their day and month. The information provided by the catalog can sometimes be misleading because that information is based on the date that the document arrived at the chancellery for safekeeping. For this reason, a document from 1782 may be dated to 1788 in the catalog. In order to clarify that I used relevant documents about the case here, I will try to benefit from other hints mentioned in the document's text and the information provided in the official histories of the era. About the dates of Ottoman documents see: Mübahat Kütükoğlu, Osmanli Belgelerinin Dili (Diplomatik)181–83 (2013).

historians of the Ottoman Empire, Sadullah Enverî and Ahmed Vâsıf Efendi, as well as secondary sources, will be employed to create a more accurate chronology of events and build a narrative.[2] The fourth section will underline the power asymmetry and the Ottoman statesmen's views about the empire's weakness. The last section will focus on the final phases of the crisis and the Ottoman efforts to legitimize the decision based on the power asymmetry. There will be a more detailed discussion about the two documents due to their importance in showcasing the bureaucratic decision-making processes in the Ottoman Empire, military and fiscal weakness, the need for legitimacy, the Ottoman understanding of international law, and threat perceptions. Also, their Turkish transcription will be provided at the end of the article.[3]

This study is intended to contribute to the literature in foreign policy analysis, diplomatic history, and international law by bringing an early modern Muslim power into the spotlight.

War and Treaties in Islamic Law and the Ottoman Practice

Siyar is the specific branch of Islamic law that can be defined as the Islamic law of nations.[4] The Ottomans followed the Ḥanafī school of Islamic law founded by Abū Ḥanīfa (d. 150/767) and

2 The critical edition of Ahmed Vâsıf's history covering this period has been published by Mücteba İlgürel, and I will use this edition throughout this study: Ahmed Vâsif Efendi, Mehâsinü'l-Âsâr ve Hakaikü'l-Ahbâr (Mücteba İlgürel ed., 1994). While these official historical accounts may serve these purposes and provide valuable information, they must be considered cautiously because of their authors' biases and factional loyalties. For example, Ahmed Vâsıf Efendi was also a bureaucrat and member of the reformist coalition led by his patron, Halil Hâmid Pasha, and spoke for that faction. Ethan L. Menchinger, The First of the Modern Ottomans, The Intellectual History of Ahmed Vasif 10 (2017).

3 Arabic names, terms, and concepts will be transliterated. However, for Turkish names, official titles, words, and transcription of documents, I will use a style closer to modern Turkish orthography while trying to retain the authentic style of the era. Anglicized versions of some widely used Turkish words, such as grand vizier or pasha, will also be used.

4 Majid Khadduri, The Islamic Law of Nations: Shaybānī's Siyar 3 (1966).

his disciples in the eighth century.[5] With the failure of the Islamic wave of expansion to encompass the globe through *jihād*, the realities of life required the establishment of peaceful relations with other societies, even if temporary in theory. Parallel to these developments, *siyar* also changed. For example, Abū Ḥanīfa' school is the only one that recognized the territoriality of law, recognizing the existence of non-Islamic legal systems outside the Islamic realm.[6] In this respect, Abū Ḥanīfa and his disciples Abū Yūsuf Yaʿqūb b. Ibrāhīm (d. 182//798) and Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) served as important sources for the Ottoman understanding of the law of nations, and their books were also translated into Turkish.[7]

Unless the Muslim community were to become the target of a sudden attack, Islamic jurists considered *jihād* as *farḍ al-kifāya* which makes it a collective, not individual, obligation. If some members of the community fulfill the obligation, it ceases to be obligatory for the rest of the community. However, if no community member performs the duty, the community falls into error.[8] This aspect of *jihād* makes it a state instrument, since its employment depends on the state's decision.[9] Though it is a permanent state of war, this does not mean continuous fighting. Some jurists even regarded preparations for the *jihād* as fulfilling the obligation.[10] There are also considerations about the balance of power. Though many jurists ignored the possibility of an unsuccessful war, according to Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), the leader of the Muslim community (*imām*) could make peace with the enemy if a catastrophe had befallen the Muslims, on the grounds of force majeur, yet, the period of peace could not exceed the terms of the Ḥudaybiya treaty (ten years). After the treaty's expiration, the leader may decide to renew it for a similar period if he believes that the Muslims are not powerful enough to fight. Otherwise, he may resume the war. In this

5 Colin Imber, Ebu's-Suud: The Islamic Legal Tradition 24 (2009).

6 Khadduri, *supra* note 4, at 3–5.

7 Viorel Panaite, Ottoman Law of War and Peace: The Ottoman Empire and its Tribute-Payers from the North of the Danube 9–10 (2019).

8 Majid Khadduri, War and Peace in the Law of Islam 60 (2010).

9 *Id.* at 61.

10 *Id.* at 64–65.

respect, other jurists such as Shaybānī and Abū Isḥāq al-Shīrāzī (d. 476/1083) argued that the Muslims would be relieved of the duty to fight if their number was less than half of the enemy.[11] There is a consensus among jurists that approves concluding a peace treaty (*ṣulḥ*) with non-Muslims when Muslims are weak. Yet, when Muslims gain power, fighting should resume.[12] Viorel Panaite rightly put forward that jurists like Abū Yūsuf and Shaybānī emphasized the importance of power equilibrium and the concept of emergency and even legitimized a temporary peace that required Muslims to pay an annual tribute to the enemy for peace due to a situation of weakness, a view adopted by Ottoman jurists too.[13]

The respect of treaties emerges as an important pillar of Islamic Law. The Qurʾān commands Muslims to obey and honor contractual obligations since it demonstrates qualities and attributes of ideal believers' conduct. At the same time, it warns against betrayal of contracts, breaking or violating contracts, breach of trust, and lack of observance.[14] The Ottomans, too, adhered to the principle of *pacta sunt servanda*.[15] Hence, observance of treaties and fulfillment of treaty obligations are required as long as the treaty remains in force and valid:

> Once concluded, the treaty must be observed by the Muslims to the end of the specified period unless the other party violates it. The Imām may terminate the treaty, but a notice to the enemy demanding denunciation of it must first be sent, together with the reason for it. The principle of *rebus sic stantibus* seems to be applied here; otherwise, the Imām must abide by the treaty on the strength of the principle *pacta sunt servanda*.[16]

Treaties can be terminated. Termination on the basis of the text involves the violation (*naqḍ*) of any of the treaty's

11 *Id.* at 134–35.

12 Labeeb Ahmed Bsoul, International Treaties (Muʿāhadāt) in Islam (2008).

13 Panaite, *supra* note 7, at 87–89.

14 Bsoul, *supra* note 12, at 127.

15 Harriet Rudolph, *The Ottoman Empire and the Institutionalization of European Diplomacy, 1500–1700*, *in* (ed.) Islam and International Law: Engaging Self-Centricism from a Plurality of Perspectives 169 (Marie-Luisa Frick and Andreas Th. Müller eds., 2013).

16 Khadduri, Islamic, *supra* note 4, at 55.

conditions agreed upon by both parties. Yet, the violation must be evident to both parties.[17] If non-Muslims violate the treaty by committing treachery, it cannot be violated after that, and Muslims are required to terminate the contractual obligation and can retaliate without any notification.[18]

Adherence to Islamic law and defense of the Islamic faith served as the basis of Ottoman claims to legitimacy; in the sixteenth century, Shaykh al-Islam Ebüssuûd Efendi (in office 1545–74) formulated the legitimacy of sultanic authority in its most elegant form.[19] However, this legitimacy and sultanic authority were not absolute; they were contingent on meeting the objectives of the *sharīʿa*.[20]

For this purpose, legal opinions (*fetva*) penned by the ulama were used. They were not limited to the areas of criminal law and taxes; they could cover other state affairs, such as war and peace. Sultans, grand viziers, and other high-ranking government officials could request a legal opinion.[21] Also, many anti-piracy legal opinions were issued upon the requests of the Venetian and French diplomats to solve piracy-related cases and to enforce treaties.[22]

These documents were used in difficult government decisions for legitimacy.[23] They provided legal justification for imperial orders, such as waging war against Christian powers or Muslim heretics.[24] The Ottoman government benefited from the prestige and moral authority of the shaykh al-Islam's office to bolster its foreign policy and ensure compliance from

17 Bsoul, *supra* note 12, at 132.

18 *Id.* at 134.

19 Imber, *supra* note 5, at 5.

20 Samy A. Ayoub, Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafī Jurisprudence 3 (2000).

21 Usually, the text of legal opinions was prepared by a clerk, but almost always, the reply was handwritten by the *muftī* himself. Legal opinions in which both the text and reply were handwritten by the shaykh al-Islam were rare since these were issued upon the sultan's query on important government affairs. Uriel Heyd, *Some Aspects of the Ottoman Fetvā*, 32 The Bulletin of the School of Oriental and African Studies 42, 55 (1969).

22 Joshua M. White, Piracy and Law in the Ottoman Mediterranean 213 (2018).

23 Imber, *supra* note 5, at 7.

24 Panaite, *supra* note 7, at 13.

its subjects. The shaykh al-Islam considered political necessities and policy as well as jurisprudence, handled difficult cases, and produced applicable rulings by resorting to legal arguments for flexibility.[25] Since waging war against other Muslim powers posed problems, the Ottomans obtained legal opinions from the Egyptian ulama before declaring war against the Karamanids in the fifteenth century.[26] In the sixteenth century, the legal opinion of Shaykh al-Islam Kemal Paşazâde (in office 1526–34) was obtained to legitimize the war against the Safavids.[27] Also known as the mufti of Istanbul, shaykh al-Islam served as the head of the spiritual authority in the Ottoman Empire. They commanded enormous authority even if they were not a member of the Imperial Council or they were appointed and could be removed from their post by sultans.[28] Their influence increased, and starting with the seventeenth century, their opinion was asked in important state affairs; from the eighteenth century on, war and peace decisions required their approval. They were also the authority that sanctioned the dethronement of sultans with their legal opinions.[29]

In practice, just like other political entities, the Ottomans, too, considered political and military circumstances in foreign affairs and aimed to protect the interests of "faith and state." For example, Ibrahim al-Halebi (d. 1549) pointed out that a "useful/profitable" peace could be made with non-Muslims, otherwise there would be no peace.[30] Regarding the principle of *pacta sunt servanda*, the Ottoman practice has generally been consistent. On the other hand, there are cases of violation of treaties because of the principle of *necessitas non habet legem*. For breaking a treaty without violating the principle of

25 White, *supra* note 22, at 184.

26 Ramazan Boyacıoğlu, *Osmanoğullarının Karamanoğlu İbrahim Bey Aleyhine Aldığı Fetvalar*, 4 Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi 65 (2000).

27 Halil İbrahim Bulut, *Osmanlı-Safevî Mücadelesinde Ulemanın Rolü Kemal Paşazâde Örneği*, 7 Dini Araştırmalar 187 (2005).

28 R. C. Repp, The Müfti of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy 301 (1986).

29 İsmail Hakki Uzunçarşili, Osmanli Devletinin İlmiye Teşkilâti 188–89 (1988).

30 Panaite, *supra* note 7, at 86–89.

pacta sunt servanda, a legitimate cause was invoked: violation of the treaty by non-Muslims, protection of the interests of the Muslim community, and the invalidity of certain stipulations or an entire agreement.[31] There are many examples of treaty termination in Ottoman history upon violation by non-Muslims or based on their possible betrayal. On the other hand, the null causes and agreements provide another set of legitimate causes. If a treaty left Muslims under non-Muslims' rule or led to a territorial expansion against the Abode of Islam, no matter when that took place, termination is justified. For example, in 1570, when Sultan Selim II expressed his intention to break the treaty with Venice and conquer Cyprus, Shaykh al-Islam Ebüssuûd Efendi justified the termination based on the fact that Cyprus was conquered by Muslims eight centuries ago.[32]As a result of the changing power balance in the sixteenth century and external and internal developments, Ottoman intellectuals of the seventeenth century, such as Koçi Bey, started to produce literary works that addressed the empire's decline and offered remedies for returning to the glory of the Ottoman "Golden Age."[33] Unsurprisingly, these new perspectives emerged with the Ottoman–Austrian War of 1593–1606, also known as the "Long War." Some contemporary Ottoman scholars like Hasan Kâfî Akhisarî promoted the idea of peace and opposed war.[34] Yet, a more cataclysmic event was on the horizon: the Great Turkish War (1683–99) between the Ottomans and the Holy League. The war ended with the Treaty of Karlowitz in 1699, culminating in the loss of large tracts of territory for the Ottomans. This unprecedented defeat had repercussions not only for the Ottoman elites but also for the broader Islamic world. Intellectuals of the era faced new challenges and sought to develop creative solutions.[35] A contemporary historian and bureaucrat, Musta-

31 *Id.* at 211.

32 *Id.* at 210–16.

33 Marinos Sariyannis, A History of Ottoman Political Thought up to the Early Nineteenth Century 188–209 (2019).

34 Panaite, *supra* note 7, at 89.

35 Ethan L. Menchinger, *Intellectual Creativity in a Time of Turmoil and Transition*, in The Wiley Blackwell History of Islam 459–60 (Armando Salvatore ed., 2018).

fa Naîmâ, argued in favor of peace as a strategy to avoid the Ottoman decline. While defending his patron, Hüseyin Pasha, who negotiated the Treaty of Karlowitz, he came up with ideas about the benefits of peace, which would allow gaining time and resources and lead to a future victory. He used the Prophet's practices, especially the Treaty of Ḥudaybiya, to support his stance.[36] Other intellectuals of the eighteenth century tried to address the internal and external crises the Ottoman order faced while arguing for reforming the empire. They borrowed concepts and ideas from the Islamic heritage to add legitimacy to their arguments and reused and readapted them.[37] Parallel to these developments, the Ottoman approach to foreign policy and international law started to change. For example, they started to make treaties with the Habsburgs lasting twenty years, such as the Treaty of Zsitvatorok (1606), surpassing the ten-year period set by the example of the Treaty of Ḥudaybiya. The Treaty of Belgrade (1739) was signed for a period of twenty-seven years.[38] In addition, even though it was legitimized by supposedly being based on *siyar*, the Ottomans and their rivals in the eighteenth century, especially Russia, abolished slavery and ransom practices and introduced a prisoner-of-war regime for captives through treaties and customs.[39]

The interaction and mutually reinforcing relationship between the judicial establishment and the Ottoman sultanic authority, on the one hand, and the flexibility in the interpretation of legal concepts pertaining to foreign policy and international law enabled the Ottoman jurists and scholars to maintain and reinforce the sultanic authority and its legitimacy when the empire started to suffer defeats and crises.

In the next section, a detailed account of the 1783 crisis will be provided, aiming to present a context and show how the Ottomans interpreted and applied these principles of Islamic law.

36 Sariyannis, *supra* note 33, at 313–14.

37 Menchinger, *supra* note 35, at 476.

38 Panaite, *supra* note 7, at 181.

39 Will Smiley, From Slaves to Prisoners of War: The Ottoman Empire, Russia, and International Law 233 (2018).

The Russian Annexation of the Crimean Khanate and the Ottoman Policy

Catherine the Great (r. 1762–96) succeeded Peter III, her husband, after a successful military coup in the summer of 1762.[40] The strategic aims of Russian foreign policy in this era, directed mostly by the able diplomat Nikita Panin, were reunification with the Ukrainian and Byelorussian lands still under Polish rule, consolidation of Russia's position in the Baltic, and advancement to the Black Sea.[41] Upon the internal disturbances following the emergence of the Confederation of Bar, Russia deployed forces in Poland, and a group of Russian forces violated the Ottoman territory near the city of Balta, east of the Bug River. The Ottomans declared war on September 30, 1768.[42] Before the war, the Ottomans enjoyed an era of relative peace, starting with the Treaty of Belgrade (1739). They also missed the new developments in military science by remaining outside the Seven Years' War battlefields, which introduced new tactics and methods. In addition, in this period, the Ottomans replaced most of their professional army with a militia-based army. Under these circumstances, the Ottoman forces suffered defeats in the face of better-trained and disciplined Russian troops, the supply system of the Ottoman army collapsed, and strategic fortresses such as Hotin, İsmail, Kilya, and Bender were lost.[43] To the surprise of the Ottomans, the Russian Baltic Fleet under Admiral Alexis Grigori Orlov's command succeeded in inflicting a sudden attack on the Ottoman Navy at the Çeşme Bay on 5 July 1770 while in June 1771, Russian forces invaded Crimea, facing little resistance.[44]

40 Nicholas. V. Riasanovsky and Mark. D. Steinberg, A History of Russia 237 (2005).

41 Sergei V. Bakhrushin and Sergei. D. Skazkin, *Diplomacy*, *in* Catherine the Great: A Profile 185 (Marc Raefl ed., 1972).

42 Édouard Driault, La Question D'Orient, Depuis Ses Origines Jusqu'a Nos Jours (1912).

43 Virginia H. Aksan, Ottoman Wars 1700–1923: An Empire Besieged 60–64 (2022).

44 David R. Stone, A Military History of Russia: From Ivan the Terrible to the War in Chechnya 81 (2006).

Sultan Abdülhamid I (r. 1774–89) rose to the throne on January 21, 1774, at a very chaotic time due to the ongoing war. With the internal problems caused by the Pugachev rebellion (1773–75) in Russia and the growing burden of the war for both sides, the parties decided to negotiate a peace treaty. The Treaty of Küçük Kaynarca, signed by the Ottoman and Russian delegates on July 21, 1774, ended the war.[45] The treaty dramatically changed the administration of the Crimean Khanate, which had been an Ottoman vassal state since 1475, where the rulers (khans) were appointed directly by the Ottoman sultans. With the treaty, it was to become an independent state. It was stipulated in the treaty that the khan would be elected by the Crimean Tatars (nobility), contrary to the Ottoman practice of being appointed by the sultan, and neither the Ottoman Empire nor Russia would interfere with its domestic affairs. Still, the status of the Ottoman sultan as the caliph of Muslims was accepted in the treaty, and sultans were to approve the election of a new khan by providing an imperial patent (*menşur*) and symbols of sovereignty (*teşrifât*). The Ottomans surrendered the strategic strongholds of Kilburun, Kerç, and Yenikale to the Russians and recognized Russian sovereignty over the Kabartais.[46] The loss of the first Muslim-inhabited territory seriously affected the Ottomans' prestige.[47]

Rather than providing unity and stability, the independence fuelled the nobility's internal rivalries and power struggles in Crimea. Due to internal pressures, Sahib Giray was replaced by Devlet Giray in 1775.[48] This was not the last instance of internal unrest in Crimea, however. Losing his popular support and facing a candidate supported by Russia for the throne, Devlet Giray had to flee Crimea, and Şahin Giray was elected as khan in April 1777. At first, the Ottomans did not recognize the election and started preparations for war against Russia. The French Ambassador in Istanbul, François-Emmanuel Guignard de

45 For its clauses see Jacques Droz, Histoire Diplomatique de 1648 à 1919, 144–45 (1952); Driault, *supra* note 42, at 54–55; Aksan, *supra* note 43, at 66.

46 For the khanate's history under the Ottoman hegemony especially see: Alan W. Fisher, The Crimean Tatars (1978).

47 Aksan, *supra* note 43, at 66.

48 Hâlim Giray, Gülbün-ı Hânân 116 (1332/1913–14).

Saint-Priest (1768–85), offered mediation and negotiated with the Russian Ambassador Alexander Stakiev. With the War of the Bavarian Succession going on, Russia wanted to avoid another war and accepted the French mediation offer.[49] The Ottomans had to accept this fait accompli with the Aynalıkavak Convention (*Tenkīhnâme*) on March 21, 1779 (Rabīʿ al-Awwal 3, 1193).[50] Having spent his youth in St. Petersburg, Şahin Giray was considered a snob in the conservative Crimean and Ottoman circles, and he was known to be pro-Russian. However, with the convention, he was appointed as khan in a lifetime position. His policies, such as suppressing his rivals, abolishing the privileges of the pious foundations, imposing new taxes, and forming a new army clad in Western-style uniforms, further alienated the public.[51]

In April 1782, an uprising led by Şahin Giray's brother, Bahadır Giray, erupted against his rule. In the following days, two men, the representatives of the Taman residents, arrived in Istanbul. They brought with them the petitions and grievances of the population. On May 25, 1782, they presented a verbal report, and officials who interviewed them prepared a written report (*takrir*). They aired their complaints about Şahin Giray and his oppressive rule. The representatives expressed the wish of the residents of Taman: either the Ottoman sultan would designate a province for them in the Ottoman territory to which they could emigrate, or, as in the past, Taman must be placed under Ottoman rule. They also added that they came to Istanbul hoping for salvation, and that unless the Ottoman government protected them, the residents of Taman would perish. The report also provided information about the uprising led by Bahadır Giray and Arslan Giray, their popularity, and the flight of Şahin Giray toward Russian territory.[52]

The Crimean Crisis occurred during the American War of Independence (1775–83). In 1778, France joined the war against

49 For the details of the negotiations, see his memoirs: François Emmanuel Guignard de Saint-Priest, 1 Mémoires: Règnes de Louis XV et de Louis XVI 170–73 (1929).

50 For the original text see SAT., TS. MA. d/9923.

51 Vâsıf, *supra* note 2, at 11.

52 SAT., AE., SABHI., 115/7758, 12/6/1196.

Britain.[53] Finally, Britain and the United States started negotiations and signed their preliminary peace agreement in November 1782. The defeat the British fleet inflicted on the French fleet at the Battle of the Saintes (Îles des Saintes in the West Indies) on April 12, 1782, and the unsuccessful attack on Gibraltar by the joint French and Spanish fleets in September 1782, convinced the parties to sue for peace. The preliminaries were signed on January 20, 1783. The war was to end with a series of treaties signed at Versailles on September 3, 1783.[54] In this period, given the need to form an alliance to balance France in Europe, British foreign minister Charles Fox favored the idea of appeasing and forming an alliance with Russia.[55] This diplomatic situation created favorable conditions for Russia's expansion against the Ottoman Empire and neither France nor Britain was in a position to diplomatically or militarily support the Ottomans.

Russia strengthened its position even more by forming an alliance with Austria, the long term rival of the Ottomans. Russian foreign policy went through a modification in the 1780s. Nikita Panin built the Northern System/Alliance (an alliance with Prussia), which increased Russian influence and prestige in Europe.[56] However, Panin, seen as pro-Prussian, lost his influence and was replaced by Alexander Bezborodko in May 1781, whom Prince Grigorii Potemkin supported. This change was the expected result of abandoning the Prussian alliance and pursuing a more ambitious expansion plan toward the Ottoman Empire.[57] This objective, the so-called Greek project that envisaged the partition of the Ottoman Empire between Austria and Russia, was to be based on the secret Austro–Russian Treaty of 1781 (May–June). In January 1781, a draft treaty was penned. However, the issue of which monarch would take precedence in signing the treaty stalled the negotiations. In a letter written to

53 Paul W. Schroeder, The Transformation of European Politics, 1763–1848, 38 (1994).

54 Droz, *supra* note 45, at 156–58; Andrew Stockley, The European Powers and the Peace Negotiations of 1782–1783, 177–83 (2001).

55 Schroeder, *supra* note 53, at 46.

56 Hugh Ragsdale, *Russian Foreign Policy, 1725–1815*, *in* 2 The Cambridge History of Russia 512 (Dominic Lieven ed., 2015).

57 *Id.*

Potemkin in April, Catherine mentioned a solution to overcome the precedence problem: rather than a formal treaty, the two monarchs would exchange letters signed individually by each.[58] The treaty came in the form of an exchange of letters written by the respective hands of the two monarchs, and its existence was revealed only in June 1783.[59] According to the treaty, among other obligations, Emperor Joseph of Austria undertook to declare war or make a diversion with forces equal to those used by Russia against the Ottoman Empire if the latter failed to fulfill its obligations. The plan of operation and "equivalents," the Ottoman possessions that Austria would gain, were to be discussed in advance. In addition, he undertook to defend Russia with all his forces if Russia was attacked by another power while at war with the Ottoman Empire. The treaty was to last eight years.[60] In this period, Russia and the Ottoman Empire negotiated two major issues: a trade treaty, and taxes in Wallachia and Moldavia. The uprising and upheaval in the Crimean Khanate added another major issue to the agenda. Even though the empire had its sui generis patrimonialist structure of authority and decision-making processes (in Weberian terms, "sultanism"), it is possible to observe that the civilian bureaucracy (*kalemiyye*) started to grow and gain power after the sixteenth century.[61] Sultan Abdülhamid resorted to the method of consultation councils to reach unanimous decisions with the participation of the larger bureaucracy to ensure the legitimacy of the decisions made in the face of difficult negotiations with Russia.[62]

58 These letters are dated in Julian, also known as the Old Style, and throughout this paper, I will convert them to Gregorian. The letters contain valuable information about state affairs and have been translated into English from their Russian originals. Douglas Smith, Love & Conquest: Personal Correspondence of Catherine the Great and Prince Grigory Potemkin 112–13 (2005).

59 Isabel de Madariaga, *The Secret Austro-Russian Treaty of 1781*, 38 The Slavonic and East European Review 114 (1959).

60 *Id.* at 124–25.

61 Halil İnalcık, *Decision Making in the Ottoman State*, *in* Decision Making and Change in the Ottoman Empire 13 (Caesar E. Farah ed., 1993).

62 Neumann pointed out the deficiencies of these councils since their decisions "stayed within the narrow bounds of a given, formulated policy and consisted ultimately in gaining time, waiting, and delaying." Christoph K. Neumann, *Decision Making without Decision Makers: Ottoman Foreign Policy circa 1780*, *in* Decision Making and Change in the Ottoman Empire 31 (Caesar E. Farah ed., 1993).

In the first week of July 1782, another delegation from Crimea arrived in Istanbul. They, too, were supporters of Bahadır Giray. An undated report (*telhis*) by the grand vizier (*sadrazam*) provided information to the sultan about the situation in Crimea. The document provides information about the interregnum period in Crimea, which started with Şahin Giray's flight to Kerch (Kerç) for Russian protection and Bahadır Giray's political activities. It mentions that a delegation from Crimea arrived the day before, bringing with them the petitions of the residents of Crimea and a letter from Arslan Giray. In addition, Zahid Efendi, *qāḍī* of Caffa (Kefe), who headed the delegation, presented a report. All these documents were handed to the chief of scribes (*reisülküttâb*) and shaykh al-Islam, and they were all read aloud. According to the grand vizier, as the petition for Bahadır Giray's election had not arrived, it was wise to wait until its arrival. Then, the Ottoman government would inform the Russian ambassador in Istanbul and tell him that since the Tatars elected a new khan, based on the traditions and clauses of the treaties between the Ottoman Empire and Russia, the Ottoman government would approve the election. The grand vizier reported that he also had informed the other senior bureaucrats through his chief assistant (*sadâret kethüdâsı*) and a consultation council (*meşveret meclisi*) with the participation of senior bureaucrats would take place to discuss the issue. Then, on the top margin of the same document, the Sultan summed up his thoughts. In his view, Russia would not give up its support of Şahin Giray. What would happen if Russia insisted on installing Şahin Giray back on the throne again and breached the treaty? When the election petition arrived, it would be necessary, with extreme diligence, to discuss and solve the issue with the Russian ambassador in the framework provided by the treaty.[63]

Another report penned by the grand vizier is connected with the previous document, and it mentions that the Sultan had requested a consultation council to discuss the petitions of the residents of Crimea brought by Zahid Efendi three days prior and also the minutes of the meeting with the delegation and to decide for the Porte what course to follow. It was convened on

63 SAT., AE., SABHI.,16/1455, 10/07/1203.

July 7, 1782.[64] The participants decided it would be best to wait until the arrival of the petition confirming the election of the new khan. However, in the meantime, to show Russia that the Porte adhered to its treaty obligations, the petitions of Crimean residents were to be shown to the Russian ambassador.[65] One of the participants, Ahmed Resmî Efendi, born in 1700, was 82 years old at that time and had no senior position in the bureaucracy; in modern terms, he was retired from government service. However, thanks to his vast experience in diplomacy, he was invited to the meeting (he died on August 31, 1783).[66] Aware of the Russian support for Şahin Giray, despite the dislike of him on the Ottoman side, the Porte did not hastily side with Bahadır Giray. The Ottomans felt responsible for protecting the Muslim population of Crimea: it was hard to ignore their pleas for help. The Crimean delegation had an audience with the grand vizier on July 27, 1782 (Shaʿbān 16, 1196), asking for assistance.[67]

As the upheaval in Crimea continued, France, a long-time ally of the Ottoman Empire, felt it necessary to warn the Porte. The chief translator stated that he was instructed by his

64 The document does not provide any information about its year but clearly states that the meeting occurred on Rajab 26. However, a clue helps us to date its year as 1196 AH. So, the date of the document would be July 7, 1782. The document provides the list of participants and mentions the director of the Imperial Arsenal, Halil Hamid Efendi, as one of the participants. As one of the leading statesmen of the period, he served in various posts. He was appointed as the director of the Imperial Arsenal on September 23, 1781 (Shawwāl 4, 1195), and he served in this post until August 24, 1782 (Ramaḍān 15, 1196), when he was appointed chief assistant for the second time. This information helps us to confirm the date of the aforementioned report. Also, based on the phrase "three days prior," it is possible to deduce that the audience with the second Crimean delegation took place on July 4, 1782. In the zeyl written by Ahmed Cavid, which is also known as *verd-i mutarrâ*, to Ahmed Taib's work on the biographies of the Ottoman grand viziers, more information about Halil Hamid Pasha's life and career is provided, see: Osmanzâde Ahmed Taib, Hâdîkatü'l Vüzerâ 34–36 (1274/1857–58). See also Mehmed Süreyya, 2 Sicill-ı Osmanî yahûd Tezkire-ı Meşâhîr-ı Osmaniye 299 (1308/1890–91); İsmail Hakkı Uzunçarşılı, *Sadrazam Halil Hamid Paşa*, 5 Türkiyat Mecmuası 216 (1935).

65 SAT., AE. SABHI., 10/893, 10/07/1203.

66 On his life and role in the Ottoman bureaucracy, see an excellent study by Virginia H. Aksan, An Ottoman Statesman in War & Peace, Ahmed Resmi Efendi, 1700–1783 (1995). Grand Vizier Halil Hamid Pasha, when in office, provided him with an honorary post in the government. *Id.* at 179, 184.

67 Sâdullah Enverî. 2 Tarih-ı Enverî f. 266/A (İstanbul Üniversitesi Nadir Eserler Kütüphanesi, No. T. 2437).

ambassador to suggest the Porte act cautiously regarding the approval of the new khan. Three months prior, the king of France ordered his chancellor to pen a letter, which instructed the French ambassador to have a careful eye on the foreign affairs of the Ottoman Empire so that it would not open a campaign for minor matters but rather follow a cautious foreign policy because it was not the right time to start a war. It was suggested that the Porte send the imperial patent only after informing and discussing the issue with the Russian ambassador. In reply, the chief of scribes denied the intention to approve the elections and stated that the Ottoman Empire respected its treaty obligations and would continue to do so. On the top margin of this report, the sultan wrote his opinion. According to him, if Şahin Giray fell out of favor in the eyes of the Tatar nation, they would naturally elect someone else, and as the Russian ambassador would be informed afterward, why should it violate the treaty stipulations?[68]

The election of Bahadır Giray further complicated Ottoman–Russian relations. Bahadır Giray then sent a delegation to Istanbul to present the election petition and demand official documents for his enthronement. Ahmed Vâsıf does not provide the exact date of this new delegation; however, thanks to a report, it is possible to determine its date.[69] In this difficult situation, a consultation council was convened, and the abovementioned report informed the sultan about its decision. The text clearly states the meeting date is Shaʿbān 21. Though it does not provide information about the year, as Halil Hamid Efendi is listed among the participants as the director of the Imperial Arsenal, it is safe to date it for the year 1196. Thus, the meeting date is August 1, 1782 (Shaʿbān 21, 1196). The stipulations of the Küçük Kaynarca Treaty and Aynalıkavak Protocol about the status of the Crimean Khanate and the petitions of the Crimean population were read aloud; then it was asked what the best course of action would be. Since Bahadır Giray was elected as khan, should the documents approving his election be dispatched immediately, or were the two states bound to discuss the issue first? Then, the participants discussed the issue and decided to inform

68 SAT., AE., SABHI., 15/1349.

69 Vâsıf, *supra* note 2, at 12.

the Russian ambassador as stipulated in the treaties. In his written opinion on the document, the sultan stated that he found the council's decision logical and ordered the grand vizier to inform him about the forthcoming interview with the ambassador. However, if the ambassador wanted to communicate with his sovereign or totally refused the new elections and Şahin Giray rose to the throne again, it would mean destruction for the Crimean people. As a result, the Porte would be held responsible for it, and it would cause popular discontent. According to the sultan, establishing Bahadır Giray on the throne was the better option, and he wanted the grand vizier to focus on the issue.[70]

The last week of August 1782 witnessed important changes in the Ottoman administration. A large fire that started on August 22 and lasted about three days destroyed many neighborhoods of Istanbul, and the Janissaries' inefficiency and lack of discipline in putting out the fire led to the dismissal of Grand Vizier Mehmed İzzet Pasha. He was dismissed on August 25, 1782 (Ramaḍān 16, 1196), and Yeğen Mehmed Pasha succeeded him. In addition, Ömer Vahid Efendi, the chief assistant, was replaced by Halil Hamid Efendi.[71] With the increasing problems in foreign policy, the sultan probably wanted a more dynamic administration. A few weeks later, Shaykh al-Islam Mehmed Şerif Efendi was removed from his post, and Seyyid İbrahim Efendi, the then chief of the descendants of the Prophet, succeeded him on September 13, 1782 (Shawwāl 5, 1196).

These developments later evolved into a diplomatic crisis, resulting in a series of meetings between Ottoman government members and lengthy diplomatic negotiations with Russian ambassador Bulgakov, as Russia insisted that Şahin Giray was the legitimate ruler and backed him. In a letter dated June

70 SAT., HAT., 1429/58520, 29/12/1196. I could not find any document clearly mentioning sending the imperial patent for the approval of Bahadır Giray's election, yet this document shows the sultan's willingness to support his claim to the throne. Enverî is silent on the issue and claims that the Ottomans waited for the Russian ambassador's reply before issuing the patent: Enverî, *supra* note 67, at ff. 267/B–267/A. Fisher suggests that the Ottoman government approved the elections and issued the patent, and at the end of May 1782, the Tatar delegation returned to Crimea with the patent. Alan W. Fisher, The Russian Annexation of the Crimea, 1772–1783, 123 (1970).

71 Enverî, *supra* note 67, at f. 270/A.

16, 1782, Catherine informed Potemkin about the uprising in Crimea and asked Potemkin to go to Crimea to support the khan.[72] However, Şahin Giray used his loyal military forces in Crimea and Russian support to cruelly suppress his rivals and the people, ultimately alienating even Catherine, as his behavior could easily trigger another uprising. In a letter dated September 23, 1782, Catherine reminded Emperor Joseph about the secret clauses of their alliance and a possible partition scheme of the Ottoman Empire.[73] Joseph replied by listing the Ottoman territories he was interested in as part of the partition scheme, yet also mentioning the diplomatic and military difficulties that the opposition of France and Prussia could cause for Austria. France's passivity was vital; maybe it could be convinced with a share of the partition, such as Egypt.[74]

Potemkin returned to St. Petersburg in October 1782, and in a long letter, probably written before Catherine's secret order (December 25, 1782) authorizing him to annex the Crimean Khanate, he urged Catherine to annex the khanate immediately. He was probably pointing out the ongoing Anglo–French War when he emphasized the urgency of the annexation. Then, he listed the advantages of annexation from political, security, and economic viewpoints.[75] Catherine signed a written order on December 25, 1782, that authorized the annexation of the khanate when

72 Smith, *supra* note 58, at 120–22.

73 Alfred von Arneth published this letter in his book. Even though the book is in German, he published this and other letters between Catherine and Joseph in their original language, French. For the full text, see: Alfred von Arneth, Joseph II und Katharina von Russland: Ihr Briefwechsel 143–57 (1869). In this long letter, Catherine evaluated the situation of other monarchies of Europe and the weak state of the Ottoman Empire to convince Joseph that a war against the Ottoman Empire would be easy and would not create much diplomatic difficulty with France and Prussia. She also stated that Russia could demand only the Ottoman city of Özi and its environs between the Bug and Dniester rivers ("*la ville d'Oczakof avec son district entre les rivières du Bog and et du Dniester*") and one or two islands in the Aegean Sea to improve her subjects' trade and security ("*une ou deux îles dans l'Archipel pour sûreté et la facilité du commerce ses sujets*") for the purpose of equality of acquisitions.

74 *Id.* at 169–75.

75 He wrote: "If you do not seize right now, there will come a time when everything we might now receive for free, we shall obtain for a high price." Smith, *supra* note 58, at 123–25.

certain conditions emerged.[76] Nolde has published this order in his book: Catherine mentioned the endless instability and the influence the Ottoman Empire had over the Crimean population, uprisings in the Crimean Khanate after becoming independent, and the high cost of suppressing them for Russia as the excuse for annexation. Still, the idea appears hypothetical as a plan to implement in case of a war with the Ottoman Empire.[77]

In the fall of 1782, Russian forces entered Crimea and completed the conquest in October, installing Şahin Giray on the throne.[78] The Ottoman government protested against this intervention. Yet, in the first half of December, due to the alliance between Russia and Austria, their ambassadors presented ultimatums to the chief of scribes, Mehmed Hayrî Efendi. The Russian ultimatum included three demands. The first demand was for the right to trade and navigation in the Ottoman Empire. The second article was on Crimea. It urged the Porte to refrain from interfering either openly or covertly in the affairs related to the khanate. The Porte was reminded that the khan was an independent ruler and was not under the Porte's tutelage. The third demand was about the *jizya* tax to be paid by the autonomous principalities of Wallachia and Moldavia.[79] The Austrian ultimatum warned that as Russia was its loyal ally, due to this firm alliance and the proximity of common borders between Russia and the Ottoman Empire, the Emperor would not be a neutral observer about the mentioned disputes, and it included the same demands in the Russian note. Both ambassadors requested an urgent reply to their notes.[80]

These ultimatums led the Ottoman government officials to convene a consultation council on December 14, 1782 (Muḥarram 8, 1197). In the view of the Ottoman statesmen, Austria and

76 De Madariaga, *supra* note 59, at 135.

77 Boris Nolde, 2 La Formation De l'Empire Russe: Études, Notes et Documents 162–63 (1953).

78 Fisher, Russian, *supra* note 70, at 130.

79 Vâsif, *supra* note 2, at 12.

80 *Id.* at 13. At this point, it must be added that the references to the alliance relationship in the ultimatums could be understood as a reference to Austria's accession to the League of Armed Neutrality in October 1781. However, as De Madariaga underlined, ". . . it should have been obvious that the alliance referred to in the ultimatums presented to the Porte could not have been the League of Armed Neutrality." De Madariaga, *supra* note 59, at 134.

Russia had already deployed troops on the borders and were ready to attack anytime, while the Ottoman borders lacked such preparation. As a result, they decided to gain time for military preparations in case a war became inevitable and inform the ambassadors that the Ottoman government would continue to respect its treaty obligations.[81]

As the crisis escalated, on December 31, 1782 (Muḥarram 25, 1197), Mehmed Pasha was dismissed, and Halil Hamid Pasha succeeded him as grand vizier. Mustafa Efendi became his chief assistant.[82] Thanks to his skills, Halil Hamid Pasha rose to that position at the age of forty-eight, a relatively young age compared to his predecessors; according to Bouquet's calculation, the average age of his predecessors was fifty-seven.[83] As the prospect of a war with Russia loomed over the horizon, this energetic and able grand vizier tried to reform the Ottoman military, especially the Janissary Corps, to maintain discipline and organize the deployment of troops and storage of food supplies and ammunition in strategic garrisons which his predecessors had mostly ignored.[84]

Around the same time, the princes of the Ottoman autonomous principalities, Wallachia and Moldavia, who served as the intelligence gathering centers, started sending detailed intelligence reports. In his report dated December 30, 1782 (Muḥarram 24, 1197), Nikola (Prince of Wallachia, *Eflâk Voyvodası*) informed the Porte about the preparations of Austria and Russia: Russia was preparing its Baltic Fleet to deploy it in Italy.[85] In a report dated December 31, 1782 (Muḥarram 25, 1197), Aleksandr (Prince of Moldavia, *Boğdan Voyvodası*), also provided alarming information. According to his report, Russia had built three warships in Kherson, and despite the orders of the Tsarina to complete the building of three similar ships there by May, sixteen

81 Vâsıf, *supra* note 2, at 12–15.

82 Ahmed Taib, *supra* note 64, at 35; Süreyya, *supra* note 64, at 2:299; Uzunçarşılı, *supra* note 64, at 217; Enverî, *supra* note 67, at f. 284/A.

83 Olivier Bouquet, Vie et Mort d'un Grand Vizir, Halil Hamid Pacha (1736–1785) 135 (2022).

84 Uzunçarşılı, *supra* note 64, at 222–23.

85 SAT., C., HR., 72/3557, 24/01/1197.

workers had died of the plague, and the construction stopped.[86] Russia had twelve divisions alongside the Polish border, and generals like "Repnin" (Nikolai Repnin) and "Soltıkof" (Ivan Saltykov) were ready in their positions. The Russian generals waited for the Ottoman government's reply to the ultimatums. Austria had issued sleighs for a quick deployment and winter clothing with sheepskin lining to its soldiers.[87] Nikola sent another alarming report on January 27, 1782 (Ṣafar 22, 1197). Austria was stepping up its military preparations, transporting arms and ammunition, and taking out large loans from the lenders in Brussels and Vienna. Like Russia, Austria awaited the Ottoman reply to the ultimatums. Austria was reinforcing its Danube Fleet, and 80,000 Austrian soldiers were deployed along the Ottoman border. A French source from Vienna provided the information that the emperor had a long interview with the French ambassador. Due to its relationship with Austria, France could not be of much help to the Ottoman Empire, and it could not oppose the Russian right to navigation. The same source stated that the rumors about an alliance between Austria and Russia were heard in Vienna, too, but he did not find that information reliable.[88] Another report by Nikola, dated February 8, 1783 (Rabīʿ al-Awwal 5, 1197), provided more information on Austria's military preparations. Emperor Joseph inquired if Prussia would attack Austria in case of a war with the Ottoman Empire and received assurances. The workshops were preparing for war production, even on Sundays, considered holy by the Austrians. Russia's Black Sea Fleet consisted of six large and fifteen medium- and small-sized ships. More importantly, due to the rumors in Vienna that France would take part in a war against Austria, the French ambassador, on various occasions, had made it clear that France would not intervene in the affairs concerning the Ottoman Empire.[89] The

86 Arriving in Kherson and writing to Catherine on May 24, 1783 (May 11, 1783, O.S.) Potemkin was very disappointed with the progress the Admiralty at Kherson had made regarding shipbuilding in Kherson. It had been decided to build seven ships in 1783, though, upon his return, he found that there was not enough wood and the existing wood had rotted. He immediately started to organize and establish a special commission. Smith, *supra* note 58, at 132.

87 SAT., HAT., 12/439, 25/01/1197.

88 SAT., C., MTZ., 16/800, 23/02/1197.

89 SAT., C., MTZ., 18/856, 05/11/1197.

intelligence reports showed the Ottomans the readiness levels of Austria and Russia to start a war even during winter, and they could clearly not rely on France for their cause.

In a letter dated January 17, 1783, Catherine invited Joseph to start formal negotiations with her regarding the partition of the Ottoman Empire and joint military planning.[90] Still, Joseph was hesitant in his response. In his letter to Catherine dated February 25, 1783, he was satisfied with the Porte's acceptance of the ultimatums and was very happy about the success of their joint *démarches*. Regarding Catherine's last letter, which invited him to start formal negotiations for partition and war planning, Joseph replied that "*le grand objet*" (the partition scheme) was for a situation in which the Ottoman Empire declared war and as this was not the case, he had no reason to attack.[91] Catherine tried to convince Joseph in another letter, but Joseph argued that the Porte fulfilled its obligations.[92]

Finally, Catherine shared the idea of annexing Crimea in her letter dated April 18, 1783. According to her, despite the promises they made in the face of the joint ultimatums, the Porte had sent an officer with a detachment to Taman to take Taman into the sultan's possession and exercise his sovereignty. After the Crimean Khan sent one of his officials as an envoy, the Turkish commander beheaded him publicly. She was now forced to bring about "a new situation" between Russia and the Ottoman Empire, and she hoped that the Porte would prefer peace to war. If not, her forces were ready to enter the war and repel an attack.[93] In his reply, dated May 19, 1793, Joseph mentioned receiving the manifesto attached to her letter. However, there were differences between his and her positions about executing the goals. A quick look at his topographic and political situation would convince her. In addition, Russia's annexation of Crimea, Taman, and Kuban differed from the stipulations of the Treaty of Küçük Kaynarca and its following conventions.[94] Emperor Joseph did not want to be dragged into a war, given the difficult

90 Von Arneth, *supra* note 73, at 182–88.
91 *Id.* at 188–91.
92 *Id.* at 191–95.
93 *Id.* at 193–95.
94 *Id.* at 202–4.

position of his empire. Yet, since it was his duty to convince France, he used this opportunity to finally inform France about the "defensive treaty" between Russia and Austria. If Austria did not want to lose Russia to an alliance with Prussia, then Austria had no choice but to support her, a fact that France could understand since its policy also aimed at containing Prussia. Still, Austria would obtain Moldavia and Wallachia from the Ottoman Empire if a war erupted.[95]

Thanks to the new intelligence reports, the Ottomans started to receive more information about the situation in the khanate. Aleksandr, the Prince of Moldavia, sent a report dated April 20, 1783 (Jumādā al-Awwal 17, 1197). According to his sources Şahin Giray, with the aid of 26,000 Russian soldiers, had gained control over the khanate, and got twenty nobles killed while imprisoning his brother, who revolted against him. Austria and Russia wanted Wallachia and Moldavia to become independent. Austria was also interested in territories in Bosnia and the city of Belgrade. Venice had completed the construction of seven warships and started constructing three galleons and six frigates. It dispatched a flotilla consisting of eight galleons to the island of Corfu, along with orders to be ready.[96] This news indicated Venice's possible intentions to attack the Ottoman possessions in the Mediterranean in cooperation with Russia.

Catherine was anxious to complete the annexation by publicly announcing the annexation manifesto as soon as possible since Britain and France signed the preliminaries in January 1783, and France could turn its attention to the east and start supporting the Ottoman position. However, there were delays. In his letter dated June 10, 1783, Potemkin replied to her criticisms about the delay and complained about the khan.[97] Finally, on July 23, 1783, Potemkin informed Catherine that the Crimean elites had taken the oath of allegiance.[98] A document in the SAT confirms this chronology. It is a letter that was sent

95 De Madariaga, *supra* note 59, at 138.

96 SAT., TSMA., E., 731/1, 17/05/1197.

97 He wrote: "At present the Khan has still not departed, which prevents me from publishing the manifestoes. The Tatars will not be free to act till he leaves the Crimea." Smith, *supra* note 58, at 134.

98 *Id.* at 142.

to the garrison commander of Hocabey (modern-day Odesa) by a resident of Crimea. The document states that Russians came to Karasu with their soldiers and set up a big tent. Their leader, named Kotamke and Grap ("*Kotamke ve Grap dimekle mâruf,*" referring to Prince Potemkin and his title in German, "*Graf*"), gathered all the leading people of the Crimea to that tent and read aloud the sublime edict of his monarch on July 21, 1783 (Shaʿbān 20, 1197).[99]

Based on an Ottoman document, it is safe to assume that the Ottomans did not know about the annexation or the manifesto as of mid-June. However, they had suspicions about Russia's intentions. A consultation council was convened on June 15, 1783 (Rajab 14, 1197). A report about Russia's intention to annex the Crimean Khanate sent by the French ambassador through the chief translator of the Swedish embassy was read aloud.[100] The military situation and preparations were discussed. In addition, it was mentioned that Russia had about ten ships in Alikurna (Livorno in Italy) and was about to send twelve more ships. The movement of the Russian fleet from the Baltic Sea to the Mediterranean was seen as part of a plan to attack the Ottomans.[101] The participants agreed to postpone the war decision to the following spring with the condition that preparations continue.[102]

It seems the Ottomans learned about the annexation sometime in late October. Vâsıf provides a translation of the Russian annexation manifesto, which the Porte received. In addition, according to his account, the Ottoman statesmen discussed issuing a counter-declaration against the Russian manifesto since it blamed the Ottoman Empire for the chaos in the khanate. However, they decided that without completing the military preparations, issuing a declaration would invite the enemy to start hostilities, so they decided to postpone issuing

99 SAT., HAT., 23/1108, 29/12/1197.

100 It is possible that since France was an Austrian ally, the French ambassador did not want to convey that information officially and instead chose unofficial channels.

101 To my knowledge, the Russian Baltic Fleet was not deployed in the Mediterranean. It seems Potemkin suggested this move initially, but Catherine refused. In a letter dated May 3, 1783, he wrote, "Time will prove to you how wisely you acted in not sending the fleet." Smith, *supra* note 58, at 130.

102 SAT., HAT., 1415/57856, 14/07/1197.

it.[103] According to a report located in the SAT, the grand vizier informed the sultan about this council and its decision. The document does not contain any information on its date; however, it is possible to infer that it was written sometime in October as it mentions military preparations during the approaching winter. It clearly mentions the draft counter-declaration and the participants' decision to postpone issuing it. The participants believed that issuing it before the military preparations were completed would only serve to provoke the enemy and decided that the preparations must be completed by the spring and only after that the counter-declaration be issued. However, the sultan was not very happy with that decision. He penned his opinion and criticized the bureaucrats for postponing everything to the following spring.[104]

The chief of scribes met the British ambassador on October 23, 1783 (Dhū 'l-Qaʿda 26, 1197). Given how well-prepared Russia and Austria were, the ambassador warned against a possible war and shared Britain's intention to offer its good offices in the crisis. The chief of scribes insisted on France's involvement in the initiative. Shortly after, another consultation council convened, and after reading the intelligence reports, Ottoman officials discussed the possibility of a military attack by Russia and Austria during the winter months. They also discussed the precautions for ensuring discipline in the military.[105] An important topic on the agenda was whether to issue a declaration concerning the Russian violation of the peace treaty. The fleet admiral favored issuing it, and he argued that postponing it so long was inappropriate. Then, the grand vizier argued that the idea behind postponing it was to gain time until the spring since issuing it would mean declaring war, and because the preparations were not completed yet, it would lead to an enemy attack on the Ottoman territory. He also reminded the admiral that the previous consultation council decided to postpone its declaration unanimously. The admiral replied that the Russians might interpret postponing it further as a sign that the Ottoman Empire

103 Vâsıf, *supra* note 2, at 25–29.
104 SAT., HAT., 1451-80, 10/07/1203.
105 Vâsıf, *supra* note 2, at 32–33.

accepted this fait accompli in Crimea. Grand Vizier Halil Hamid Pasha and Fleet Admiral Hasan Pasha did not get along well; the latter was greatly respected and influenced Sultan Abdülhâmid, undermining the grand vizier's authority; they were heads of rival factions within the bureaucracy.[106] The fleet admiral supported a more aggressive policy against Russia. Shaykh al-Islam Mehmet Atâullah Efendi joined him this time and supported issuing the counter-declaration.[107] The participants were asked to vote, and it seems the opposition led by Hasan Pasha changed their minds, and they unanimously voted to issue it without further delay. It appears that since his influence over the sultan was known, Hasan Pasha's criticisms might have been regarded as the sultan's opinion, and by appealing to the participants' emotions, he could change their position on issuing the counter-declaration. However, according to Vâsıf, it was postponed again upon warnings by "the well-wishers" of the Ottoman Empire.[108] At this point, one may argue that the grand vizier may have convinced the sultan.

The Ottomans regarded this annexation as a clear breach of the peace treaty of 1774, which had provided independence to the Crimean Khanate. The military preparations under the leadership of the new grand vizier continued, but there were many problems in equipping and deploying troops. The Ottoman statesmen tried to gain time through negotiations until the spring of 1784 and to involve Britain and France as mediators. However, sometime in early November, the Russian ambassador, Yakov Bulgakov, demanded an official document (*sened*) from the Ottoman government to modify the past treaties' clauses on the Crimean Khanate and to provide a de jure recognition of the Russian annexation of Crimea, Taman, and Kuban. He gave a translated text of the document to the chief of scribes and warned that it was impossible to modify even one letter of that document.[109]

106 İsmail Hakkı Uzunçarşılı, *Cezayirli Gazi Hasan Paşa'ya Dair*, 7–8 Türkiyat Mecmuası 21 (1942); Bouquet, *supra* note 83, at 305.

107 He was appointed to this post on May 20, 1783 (Cemaziyelahir 17, 1197), see: Süreyya, *supra* note 64, at 3:476.

108 Vâsıf, *supra* note 2, at 34.

109 *Id.* at 58–59.

While Austria and Russia gradually increased diplomatic and military pressure on the Porte, their alliance created suspicions in France and Prussia. It was shocking for France, technically speaking, an Austrian ally. It was especially alarming for Prussia as Russia and Austria could now deal a serious blow to Prussia in the event of war. This development led to some rapprochement between France and Prussia. However, despite his chancellor, Count Kaunitz-Rietberg, who strongly wished to obtain an equivalent from the Ottoman Empire to compensate for the Russian gains, Joseph hesitated and was unwilling to continue with the partition scheme. First, as he rightly observed, Russia had already gained what it wanted, but to get her gains, Austria would probably fight the whole Ottoman army in the Balkans while Russia would remain as "*inattaquables spectateurs*" in Crimea. In addition, Austria's gains could provoke Prussia and expose Austria's northern frontiers when Austria was fighting the Ottomans.[110] It is possible that Frederick II managed to obtain the text of the secret Russian–Austrian alliance.[111] Joseph, at least, was sure of it or pretended to be sure to point out his difficult situation to Catherine as he wrote to her in his letter dated October 6, 1782.[112]

Though far from proving Joseph's suspicions, probably sometime in January or February 1783, the Prussian chargé d'affaires warned the Ottomans that Austria and Russia formed an alliance and Russia would invade Crimea and Özi while Austria would invade Bosnian and Serbian provinces.[113] Probably in the summer or autumn of 1783, Frederick sent a letter to his chargé d'affaires at the Porte, who then sent the translator to read the translation of this letter to the chief of scribes. According to Frederick, if the Ottomans tolerated and accepted the Crimean situation, the independent (actually autonomous) lands of Wallachia and Moldavia would share the same fate. Then, the Austrian

110 M. S. Anderson, *The Great Powers and the Russian Annexation of Crimea, 1783–4*, 37 The Slavonic and East European Review 29 (1958).

111 De Madariaga, *supra* note 59, at 143.

112 Joseph wrote: "Je suis bien sûr que le Roi de Prussie est enformé avec détail de tout ce qui se traite entre nous deux, même dans le correspondance autographe." Von Arneth, *supra* note 73, at 162.

113 SAT., HAT., 18/799, 29/12/1197.

emperor would act similarly and conquer Belgrade, Serbia, and Karabuda provinces. However, if the Ottomans rejected the Russian demands, European circles believed that Austria's attitude would change.[114]

Sometime in fall 1783 (Dhū 'l-Qaʿda 1197, September 28–October 27, 1783), Chief Assistant Mustafa Efendi was dismissed from his post, and Mehmed Hayrî, the chief of scribes, succeeded him. According to Enverî, Mustafa Efendi disagreed with the grand vizier on foreign policy; he argued that the grand vizier's war preparations were a waste of resources and that Russia did not intend to act against the Ottoman Empire. Upon this appointment, Mustafa Efendi, who served at that time as affixer of the sultan's monographic signature (*tevkî'*), came to the post of chief of scribes.[115]

After these developments, on November 29, 1783 (Muḥarram 4, 1198), Ottoman bureaucrats convened to discuss the situation. Documents related to the Russian demand for the *sened* and King Frederick's letter were read to the participants. Then, the grand vizier reminded them that they were all beneficiaries of the empire. To fulfill their responsibility to the state that provides for them, they were required to share their views freely on the issue. After ordering the documents to be read aloud again, he addressed the participants and asked their opinions. There was silence. As a result, he suggested that the participants read the relevant documents in their residences and share their opinions later. He stated that he aimed to gain time with negotiations, at least until the following spring.[116] After he gave his views about the military situation and the possibility of a multi-front war, the answer to be given to the Russian ambassador was read aloud, and the grand vizier claimed that he would try to ensure the appointment of a khan, rather than direct Russian rule, and also, gain time. The participants wanted

114 SAT., HAT., 22/1068, 29/12/1198. About this letter, see: Vâsif, *supra* note 2, at 59–60.

115 Enverî, *supra* note 67, at f. 316/B. Mehmed Süreyya only gives the year (1197/1783) for Mehmed Hayrî's appointment to this position and gives his name as Hayrî Mehmed. He was a poet and had a divân. He used Hayrî as his pseudonym, see Süreyya, *supra* note 67, at 2:320.

116 Vâsif, *supra* note 2, at 63.

the government to continue preparations as if there would be a war.[117]

The fleet admiral met the British ambassador in December 1783. The ambassador advised avoiding a war given the military situation and assured the admiral that his government would see that no new demands would emerge from Russia and Austria.[118] Sometime after this meeting, on December 15, 1783 (Muḥarram 20, 1198), the Ottoman delegation met the Russian ambassador and informed him that the British and French ambassadors had written to their governments for mediation, and until they received a reply from their governments, the Ottoman government must postpone giving an answer to the Russian demands. The delegation also implied their willingness to involve Britain and France as guarantors in the negotiations. The ambassador rejected any mediation and stated that his instructions required him to obtain a "yes-or-no answer" on issuing the *sened* by the Ottoman Empire. His fear was that thirty days had passed since he shared his government's demands, and as deploying troops on the borders was costly, one day, his government could decide not to wait any longer and, instead, recall him.[119]

The next section will show how Ottoman statesmen evaluated the empire's military and fiscal weakness and power asymmetry in the face of a war against Russia and Austria. Given the situation, the Ottoman statesmen regarded peace as necessary. This understanding of the situation would form the basis of their legitimizing efforts.

Accepting the Empire's Military and Fiscal Weakness and the Necessity of Peace

Given the fact that Crimean khans were the successors of the Cinghisid dynasty, and their vassal status contributed greatly to the Ottoman claims of imperial leadership and legitimacy, the independence of the Crimean Khanate was already a great blow to their status. Still, the Ottoman sultans maintained their

117 *Id.* at 64–69.
118 *Id.* at 78–79.
119 *Id.* at 79–81.

right to exert influence, at least in the religious sphere, with the 1774 treaty. The Russian annexation of Crimea, Taman, and Kuban was a worse situation for the Ottomans as Muslims mostly populated these areas. The residents of these areas had sent many delegations to the Ottoman capital throughout the crisis, and their demands increased the psychological pressure on the Ottoman decision-makers as with the annexation, these people had to come under the rule of a Christian monarch. The gravity of the situation and the consequences of a possible decision made reaching a decision very difficult. Suggesting the acceptance of Russian demands was in conflict with all the values Ottoman statesmen stood for and could lead to loss of prestige and legitimacy, yet suggesting the other option, war, could lead to disastrous results and loss of even more territory and population.

The first of the documents transcribed at the end of this article can be classified as meeting minutes (*mazbata*).[120] It is written on an oversized (*battal)* paper.[121] It is an important document as it shows the officials' names and titles, allowing us to understand their views on the empire's military and fiscal weakness and power asymmetry. It also provides an insight into their concerns about the domestic consequences of their decisions. Though its text does not contain any information about its date, it is dated December 18, 1783 (Muḥarram 23, 1198) in the catalog. As mentioned in the previous section, in the consultation council that gathered on November 29, 1783 (Muḥarram 4, 1198), when asked about their opinion, most government officials had chosen to remain silent given the gravity of the issue at stake. Grand Vizier Halil Hâmid Pasha realized this situation and tried to eliminate the potential impact of group pressure by asking the bureaucrats to share their views privately with the chief assistant. It is also possible that the sultan previously demanded it from the grand vizier to find out what his bureaucrats thought about the situation when freed from the risk of disagreeing with the grand vizier publicly. Due to the location of

120 SAT., TSMA., E., 705/29, 23/01/1198.

121 On the characteristics of Ottoman documents and different types of papers used, see: Kütükoğlu, *supra* note 1, at 24–70.

this document (the Topkapı Palace Fond), it is possible to argue that the sultan may have seen it. The bureaucrats visited Chief Assistant Mehmed Hayrî in his office, and the minutes of Fleet Admiral Hasan Pasha's interview with the British ambassador were read to them. Then, they stated their views on the Russian demand, and their opinions were recorded in this document.

It is safe to argue that Ahmed Vâsıf had access to this document as he included it almost verbatim in his account. The document has a page number on the top right margin, and it seems it is the ninth and last page, as the text only covers half of the paper. The names and titles of the officials were written in red ink, which has now partly faded away. When compared to the account provided by Ahmed Vâsıf, we can see that he started with the views of Süleyman Feyzi, the chief accountant, and followed the same order, yet, in the document, Süleyman Feyzi's first few sentences are missing as they were probably on the previous page.[122] It is possible that the previous pages included the minutes of the interview between Fleet Admiral Hasan Pasha and Sir Robert Ainslie, the British ambassador. The document does not include any information as to its date. Still, from the date of the dispatch that Ainslie wrote to Fox in London about his meeting with the fleet admiral, this document can be dated a few days after December 6, 1783.[123]

A total of five Ottoman statesmen visited the chief assistant in his office to share their views: Süleyman Feyzi (chief accountant),[124] Ahmed Nâzîf (director of the registry of landed

122 Vâsıf, *supra* note 2, at 82–87.

123 Ainsle to Fox, Foreign Office 78/4, no. 27, 10 December 1783, quoted in Ali İ. Bağış, Britain and the Struggle of the Ottoman Empire: Sir Robert Ainlie's Embassy to Istanbul, 1776–1794, 16 (1984).

124 As mentioned above, even though his name is not listed on the document, the document starts with his views (continuing from the absent previous page), and through a comparison with Vasıf's account, it is possible to infer that it was Süleyman Feyzi. He was appointed to that post in November 1783. In 1777, he was appointed to the post of chief assistant to the grand vizier, and the next year, he was removed from that post to serve as superintendent of the Imperial Arsenal. In 1779, he became chief of scribes, though he was removed from the post in 1781. In 1786, he was again appointed to the post of chief assistant to the grand vizier, a post he served about five months before his removal. He died in 1794, see, Süreyya, *supra* note 64, at 3:90.

property),[125] Çelebi Mehmed (*tevkî'*),[126] Ebubekir Paşazâde Süleyman Beyefendi (*rûznamçe-i evvel*),[127] and Süleyman Penâh (director of the Imperial Kitchen).[128] Lâlelili Mustafa (former chief assistant)[129] chose to send a written document instead.

Süleyman Feyzi pointed out the disturbing fact that Russia had a fleet in the Black Sea of 150 pieces. It could also obtain naval support and ships from its allies in the Mediterranean, and Russian and Austrian troops were ready to attack alongside the borders. At the same time, the Ottoman Empire lacked the military capacity to stop them.[130] Though it was difficult to accept their demands, waiting longer to discuss the issue could lead to war. He suggested giving the reply decided at the consultation council (to convince the Russian ambassador to wait for a reply from the British and French governments). If he did not accept it and insisted on returning to his country, then the chief of scribes must tell him that they did not know he was determined to return to his country and ask for some more time so that the Ottoman government would reach an answer. Then, by convening the state officials, a decision must be made.

125 He is also known as Nâzif Ahmed. His father was Hacı Selim Ağa, who had close ties to Sultan Abdülhamid I. In addition to serving in other important posts, Ahmed Nâzif briefly served as chief assistant to the grand vizier in 1785. Then, he was appointed to that post again in 1788, serving for approximately one year. However, he and his brother were executed by the new sultan, Selim III, in June 1789. *Id.* at 4:562.

126 He was appointed as *tevkî'* and superintendent of the imperial mint in 1782, though he was appointed to the post of *nişancı* in October 1783. He served in other posts and died in 1800. His brother Lâlelili Mustafa also served in important government posts. *Id.* at 4:271–72.

127 His father was Ebubekir Paşa (Alâiyeli). He served in various government posts and died in 1785. *Id.* at 3:86–87.

128 He served at various posts and died in 1786. *Id.* at 3:87.

129 Also known as Lâleli Mustafa, he served in various government posts, and in 1781, he became chief assistant to the grand vizier, though he was removed from that post in January 1782. He served in other positions and died in 1798. *Id.* at 4:454–55.

130 This figure seems very much exaggerated. The Black Sea Fleet consisted of fifteen ships of the line and twenty frigates at that time. For the development of the Black Sea Fleet see John P. LeDonne, *Geopolitics, Logistics, and Grain: Russia's Ambitions in the Black Sea Basin, 1737–1834*, 28 The International History Review 28 (2006). The intelligence report sent by Nikola, prince of Wallachia, in February 1783 gave the number of fifteen ships of various sizes. Süleyman Feyzi's figure, 150, may also include merchant ships that could be equipped with guns.

Ahmed Nâzîf argued that the decision made at the consultation council was to convince the ambassador to wait a bit more until a reply came from Britain and France. However, after reading the minutes of the interview between the British ambassador and the fleet admiral, there was no doubt that the former would inform the Russian ambassador about the details of his interview. As a result, he would not accept the Ottoman demand and would insist on leaving for his country. The chief of scribes must still give the decided reply. If the ambassador made it clear that he would leave for his country, he must convince the ambassador to postpone the issue to another meeting. During this time, the Ottoman government would convene and discuss the issue. According to him, despite the difficulty of accepting the Russian demands on Crimea, it was known by all that the Ottoman Empire lacked the naval forces to protect its shores on the Black Sea and the army to protect its borders. If the ambassador left for his country, it would mean war, and it was known that Russian and Austrian forces were ready to march towards the Ottoman border.

Çelebi Mehmed mentioned that it was evident that the Russian ambassador would not accept waiting for a reply regarding English and French mediation. It was also evident that if a negative reply was given to him, being ready, Russian and Austrian troops would march to the Ottoman borders during winter, and Russian naval forces would attack the Ottoman Black Sea coast. The Ottoman Empire lacked the troops to defend its borders, and deploying troops would be difficult under winter conditions. In addition, the letter previously sent by Süleyman Pasha, Governor of the Çıldır Province, through himself, informed the government that Prince Heraclius of Tbilisi accepted Russian suzerainty and Russian forces entered the area and opened new roads in Georgia through the Ananur route suitable for carts. If the gates of war opened, Heraclius, in cooperation with the Russian forces, would attack Çıldır and Kars, and another Georgian prince, Solomon, would attack Çıldır, Faş, and Anakra. It had been just two months since the men who were sent to repair the Çıldır fortress arrived at their destination, and artillery pieces and ammunition intended for Çıldır could not be transported and were still in Trabzon. If war started, that front, too, would need

commanders, soldiers, large amounts of ammunition, food supplies, and money. The enemy would launch attacks on all fronts to create panic and diversion. These issues must be thoroughly taken into account, and for these reasons, in his opinion, rather than giving the ambassador a final answer, the chief of scribes must do his best to postpone the issue until another meeting when the government officials must come together to discuss the issue again. It was imperative to consider the situation of the Ottoman Empire and its enemies.

Ebubekir Paşazâde Süleyman (*rûznamçe-i evvel*) mentioned that due to his responsibilities with the Imperial Arsenal, the fleet admiral shared the interview with the British ambassador with him. The ambassador had assured the admiral that the Crimean problem would be solved without issuing any official document about the Russian annexation, and Austria would not come up with demands. In his view, if these guarantees were given, as the empire had preferred to remain silent in the last eight or nine years, continuing the same policy for a few years more was the better choice. According to him, the moment the gates of war opened, initially, thirty thousand purses would be needed. In addition, it would require the obedience and perseverance of the soldiers and sufficient preparations to resist two enemies on land and at sea. Given the lack of discipline among the soldiers, if the enemies were to launch their attacks from different directions, God forbid, with their lack of obedience to the senior commanders and officers, the result would be disastrous. This could be inferred from the incident in Sofia and the failure of the efforts to reinforce the border garrisons, such as Ismail, Silistre, and Sofia, and especially Adakale, which was directly facing the enemy, with five to six thousand janissaries even though in the last six to seven months, day and night, many orders were issued and officials were appointed for that purpose.[131] He argued that power

131 He was probably referring to the riot against Eğribozlu Mehmed Pasha, the Governor of Rumeli Province, who was appointed to that post due to the possibility of war with Russia. He resided in Sofia, but his cruelties and corruption ignited a riot. The residents of Sofia and the soldiers deployed there forced him to flee after laying siege to his palace, causing a fight, and even launching cannon fire on his palace. He was deposed, and on December 1, 1783, Abdi Pasha was appointed to that post. Vâsif, *supra* note 2, at 54–57.

and strength belong to God, and there is no doubt that God will help the weak and oppressed. However, even though only God can know the results of future developments, launching a war with two such powerful enemies for an uncertain victory despite the visible weakness was like drinking poison and hoping that the antidote would work. God forbid, if devastation occurred, it would be unfortunate for the Ottoman Empire. According to him, if the ambassador insisted on returning to his country, the chief of scribes must postpone the final answer to another meeting, and this issue must be discussed again.

Süleyman Penâh, director of the Imperial Kitchen, said the current campaign could not be compared to the past campaigns as Russia controlled the coasts of the Black Sea, and as was heard, it had a fleet consisting of 150 small and big ships deployed in the Azov Sea, around Yenikale (Kerch), Kerch Strait, and in the Dnieper River. Its soldiers were ready at the borders, Austria was also ready for hostilities, and its battalions facing the borders were waiting for a signal. If the final reply was given to the Russian ambassador and he returned to his country, it was evident that war would start. What would the result be if the infidel ships sailed into the Black Sea and soldiers marched against the borders like invading grasshoppers? It was even possible that they would attack the ships in the Black Sea. God forbid if grain and basic supplies were not provisioned to the city for thirty or forty days, then all hell would break loose, and they (government officials) would end up seeking their survival. While, now, there was no state of war, if a few of their ships fired a few shots against the suburbs outside the Bosphorus, panic would start in Istanbul, and the people would lose their heads. He argued that a potential campaign could not be compared to others. In the last (1768–74) and past campaigns, Russia did not have a fleet in the Black Sea. For this reason, according to his limited knowledge, the preferred option must be preventing war. If the Russian ambassador did not accept the reply and insisted on returning to his country, the chief of scribes must postpone the answer to the next meeting, and then, they must convene another consultation council to decide.

Former chief assistant Mustafa sent his opinion in a letter to the chief of scribes. He suggested that during his interview with the Russian ambassador, the chief of scribes should mention that Russia violated the peace treaty despite the Ottoman Empire's loyalty to its stipulations and the Ottoman government promised the ambassadors of Britain and France that a solution to the crisis would be found within the framework of the peace treaty which they communicated to their governments. As no reply had come yet, if the Ottoman government gave a "yes-or-no" answer, this would offend them. For this reason, after their replies arrived, the issue could be negotiated again.

This document provides detailed insights into the Ottoman statesmen's perceptions of the empire's military and financial weaknesses and what factors shaped their decisions about a war over Crimea. First of all, it seems that the Ottoman statesmen were aware of the lack of discipline in the Ottoman army and military deficiencies. The problem of discipline made the deployment of troops at strategic military positions difficult. The corruption in the Ottoman army was known to the grand vizier; there was a big discrepancy between the number of payrolls and the number of available soldiers ready for a campaign. Despite being a risky task, since many people obtained salary benefits, the grand vizier still made some modest attempts to ameliorate this problem by ordering headcounts in the garrisons and canceling the payrolls of those absent.[132]

A visible concern among the participants was the need to fight a multi-front war against Russia, Austria, and their allies in the Caucasus, the Georgian princes. From their evaluations of the situation, they expected to fight at least on three fronts, covering the Balkans and the Caucasus. In addition, they expected the Black Sea and the Mediterranean to be the naval theater of operations since they expected that Russia could deploy its Baltic Fleet and use it against the Ottoman possessions. The memories of the Battle of Çeşme (1770) were still fresh; Fleet Admiral Hasan Pasha, commanding a galleon, was a veteran of that battle.[133] However, another major concern was the

132 Uzunçarşılı, *Sadrâzam*, *supra* note 64, at 231–32.

133 Uzunçarşılı, *Cezayirli*, *supra* note 106, at 20.

emergence of the Russian Black Sea Fleet which posed another challenge: the provisioning of the Ottoman capital. Providing an adequate supply of grain to this population at an affordable price was a priority of the Ottomans and a source of legitimacy.[134] Due to the cost-efficient nature of maritime transportation compared to overland transportation, ports and maritime routes were vital in provisioning the capital city. In 1758, 85 percent of grain consumed in Istanbul came from areas around the Black Sea and the Sea of Marmara.[135]

Provisioning the imperial capital represented the sultan's power and sovereignty, and its failure could lead to riots.[136] In case of war, the flow of food supplies would be disrupted. Bureaucrats feared an uprising that would harm their careers and even cost their lives. The "mob" of Istanbul, ignited by military failures, economic hardship, and rising prices, could take to the streets and demand "justice," these social forces had proved their capacity by even dethroning sultans in past revolts.[137] Between 1603 and 1703, six out of nine sultans' reigns ended with dethronement. Tezcan showed how the new political transformations limited the sultans' absolute authority as other power centers, such as the ulama and janissaries, emerged.[138] On July 17, 1703, six hundred soldiers whose pay had been in arrears for months staged a rebellion. The Treaty of Karlowitz (1699) and the territorial losses had already harmed the sultan's legitimacy and created discontent. In addition, Shaykh al-Islam Feyzullah Efendi, the sultan's tutor, had been

134 Rhoads Murphey, *Provisioning Istanbul: The State and Subsistence in the Early Modern Middle East*, 2 Food and Foodways 217 (1987).

135 Fariba Zarinebaf, Mediterranean Encounters: Trade and Pluralism in Early Modern Galata 154 (2018). In addition to grain, the Black Sea basin was a significant source of other food supplies such as rice, butter, meat, and cheese. For different types of food supplied to Istanbul and their geographical origins, see Table 5 in Candan Turkkan, Feeding Istanbul: The Political Economy of Urban Provisioning 233–34 (2021).

136 *Id.* at 49.

137 For an evaluation of the urban revolts, the motivations, and connections of the urban rebels, see Marinos Sariyannis, *Unseen Rebels: The "Mob" of Istanbul as a Constituent of Ottoman Revolt, Seventeenth to Early Nineteenth Centuries*, 10 Turkish Historical Review 155 (2019).

138 Baki Tezcan, The Second Ottoman Empire: Political and Social Transformation in the Early Modern World 5–7 (2010).

granted enormous control over the sultan and government. His nepotism and other grievances brought together a coalition of factions from the ulama, military, and merchants. Shaykh al-Islam Feyzullah Efendi was killed as a result of the rebellion, and the sultan was dethroned.[139]

With these concerns and the possible disastrous results of a multi-front war in mind, the Ottoman statesmen sought to legitimize their acceptance of the Russian annexation by resorting to the principles of Islamic law. They were to invoke and adapt these principles to appease the bureaucracy and maybe the Ottoman public. These efforts will be mentioned in the next section.

Legitimizing the Peace and the Acceptance of the Russian Annexation

The Russian demand required a consultation council with a broader participation of the bureaucratic elites. But some people invited to the council had no detailed information about the ongoing crisis. A memorandum was prepared and sent to the sultan for approval. It was to be read aloud at the beginning of the council.[140] Upon reading the memorandum, the sultan issued an imperial decree, requesting a unanimous decision from the grand vizier and warning him and the participants: after the council, no one should complain that they were not properly informed about the situation and criticize the decision; those who prefer silence when they were expected to air their views freely and afterward criticize the handling of the crisis would be punished.[141]

The consultation council met on December 18, 1783 (Muḥarram 23, 1198).[142] The memorandum was read aloud. Then, the grand vizier addressed the participants, clarifying that there were only two options: accepting the Russian demands or declaring war on Russia. At this point, he urged the participants to air their views

139 Rifa'at Ali Abou-El-Haj, The 1703 Rebellion and the Structure of Ottoman Politics 9–23 (1984).

140 Vâsıf, *supra* note 2, at 89.

141 *Id.* at 89–90.

142 *Id.* at 90.

freely, without fear.[143] During these lengthy discussions, Süleyman Penâh Efendi, director of the Imperial Kitchen, said that the financial and military situation of the state had become known to all participants by the reports that were read aloud. He shared his experience of the last Ottoman–Russian War (1768–74). At that time, there was only one enemy, Russia, but now Austria was also an enemy.[144] At this point, the fleet admiral interrupted him and gave the bad news: there were not two enemy states; there were now three or four. Venice could join, too, and the ruler of Georgia had already submitted to the Russian authority. He went on to say, "Under these circumstances, we have four enemies that are ready to attack us on land and sea in Anatolia and Rumelia." Süleyman Penâh Efendi continued his speech and brought attention to the grain provisioning of Istanbul. A few Russian warships approaching the Black Sea entrance of the Bosphorus firing a few shells could easily cut off the supply lines. He warned that even now, the quality of bread had decreased due to the rumors of war. In the event of war, in his view, all state officials would be forced to stop thinking about the conduct of war and rather concentrate all their energy on food provision problems. He suggested accepting Russia's demands.[145]

The grand vizier addressed the participants and mentioned his efforts to prepare the state for war despite the short time—about one year—since he came to the post. The participants all affirmed that the grand vizier had done the best he could. He continued his speech, stating it was his duty to inform all that this level of preparation was far from sufficient compared to the enemy. He urged everyone to take this fact into account.[146] Süleyman Feyzi (first accountant)[147] agreed with the grand vizier. He stated that since Islamic law was binding for the Ottoman Empire, he requested the opinion of scholars and jurists. He seemed to be trying to save the administrative and military

143 I will only include some of the comments here since the full account can be found in: *Id.* at 90–99.

144 *Id.* at 92.

145 *Id.* at 93.

146 *Id.*

147 He was appointed to that post in November 1783, see: Süreyya. *supra* note 64, at 3:90.

bureaucracy from any responsibility by turning it into a decision of the ulama. Naturally, this would cause opposition in their ranks. Müftîzâde Ahmed Efendi and Tevfik Efendi responded by stating that the approval for war or peace necessitates having detailed information about the weaknesses of the state.Yet, the scholars had no information on these issues.[148] This comment prompted the grand vizier to reply. He argued that everything was made clear by the information provided at the council about the weakness of the state. Still, as the financial situation was one of the important sources of the weakness, the chief financial administrator could provide more information about it. Then he replied shortly by putting forward that even in the absence of a military campaign, the expenditures of the state exceeded its revenues.[149] Other bureaucrats gave evidence of the military and financial weakness of the state to successfully wage a war. [150]

Sırrı Selim Efendi, director of the Imperial Arsenal, mentioned the costs of naval deployments as planned by the grand vizier and emphasized that they necessitated a great amount of money. Then he asked: "Under these conditions, how would it be possible to start a campaign?" He finished his speech by emphasizing that even the fleet admiral, a usually hawkish vizier, did not favor war. The fleet admiral agreed, suggesting that given the state of weakness, war would end in disaster.[151] The grand vizier wanted the participants to openly and freely air their views. He reminded everyone that the sultan's edict clearly stated that those who preferred silence in the council and later talked in a way like sowing the seeds of discord would be punished heavily.[152]

After other participants shared their views, the shaykh al-Islam, *nakibü'l-eşrâf,* and Müftîzâde Ahmed Efendi started to discuss among themselves. By citing the principle of choosing between bad and worse, they argued that, in the current situation, peace with Russia should be preferred to war.[153] Then, the

148 Vâsıf, *supra* note 2, at 93.
149 *Id.* at 94.
150 *Id.*
151 *Id.* at 95.
152 *Id.* at 96.
153 *Id.*

chief assistant made important comments. He stated that if the council unanimously accepted the Russian demands, by working day and night, the financial and military situation should be improved, border provinces should be reinforced militarily, and war preparations should continue. Because the enemy was aware of the Ottomans' military and financial weaknesses, it would come up with new demands soon. If it were decided to accept the Russian demands, preparing the state for a war should be added to the council decision as its condition. This peace should not be considered eternal (*sulh-i müebbed*).[154]

Finally, the shaykh al-Islam wanted to hear the opinion of the head of the fatwa department (*fetva emini)*. The latter replied, "Due to the weaknesses of the Ottoman Empire and its limited military power, Islamic law approves accepting the Russian demands." Müftîzâde Efendi stated that he agreed with this view. The grand vizier and shaykh al-Islam started to address all participants, asking the majority individually if they agreed with accepting the Russian demands. They all agreed and approved.[155]

Ahmed Vâsıf, too, portrayed this decision as a necessity. He cited the well known principles of Islamic law, choosing the lesser evil and the necessity/duress that made normally prohibited acts acceptable. He likened the situation to the amputation of one limb to save the rest of the body. He emphasized the temporary nature of the Russian annexation and peace, because once the state gained enough strength, this situation would be corrected. Menchinger pointed out how Ahmed Vâsıf's arguments were built upon the arguments that historian Mustafa Naîmâ put forward to legitimize the peace made through the Treaty of Karlowitz in 1699. In addition, his views showed some similarities to the contemporary bureaucrat Dürrî Mehmed's work that defended the Küçük Kaynarca Treaty (1774) and argued about the necessity of reforms after pointing out to the decaying military and fiscal system of the empire. Dürrî Mehmed underlined the necessity of peace and reform for liberating Crimea and opposed opening a premature war without sufficient preparations.

154 *Id.* at 97.
155 *Id.* at 98.

He used the case of Saladin to legitimize his point and explained how, after completing the preparations, he was able to take Jerusalem and Damascus back from the Crusaders in ten years.[156]

On December 22, 1783, Austrian ambassador/nuncio Herbert presented a note to the Porte, which clarified that Austria would join and support Russia in case of war.[157] Another consultation council with a limited number of participants took place. Süleyman Feyzi pointed out the fact that many Muslims were living in Crimea and Kuban, and he stated his concerns about their future treatment under Russian rule. Another bureaucrat, probably the chief assistant, told him this issue had been discussed with the Russian ambassador previously, and the ambassador made it clear through his translator that no stipulation to that end could be added to the official text of the *sened* that Russia requested. Süleyman Penâh argued that if Russia refused the Ottoman demand, then it would be necessary to oppose it; but, the state lacked such power, and since *jihād* becomes an obligation only when one has the capability, given the fact that the state lacked it, then, they were exempt from this obligation.[158] Süleyman Feyzi replied by stating that his intention was not to insist on imposing such a solution; however, it was evident that for approving the act of leaving those Muslims under Russian rule, government officials would become "targets to the arrows of condemnation and scolding." As a result, this issue was referred to the grand vizier. In his reply, he pointed out that, despite their calls for aid, the state was in no position to help and, in fact, needed aid, and he asked this situation to be considered.

Süleyman Feyzi pointed out another concern: since many Crimean elites and people lived in the Rumelia, they could claim that the Ottomans left their nation under infidel rule, and other Ottoman subjects could agree with this agitation and join them. To be prepared for such a situation and to protect the government officials from such criticisms, at least this

156 *Id.* at 99; Menchinger, *supra* note 2, at 88–89. On Dürrî Mehmed and his work, *Nuhbetü'1-emel fî tenkîhi'l-fesâdi ve'1-halel*, see: Ali İbrahim Savaş, *Lâyiha Geleneği içinde XVIII. Yüzyıl Osmanlı Islahat Projelerindeki Tespit ve Teklifler*, 9 Bilig 92–96, 87–114 (1999).

157 Anderson, *supra* note 110, at 39.

158 Vâsıf, *supra* note 2, at 102.

issue must be demanded from the ambassador so that it would be included in the meeting's minutes and the bureaucrats would be able to say they did whatever they could, but the ambassador refused it. This necessitated a member of the ulama to be present, and Müftîzâde Ahmed was called. Süleyman Penâh[159] also pointed out that having sufficient strength was a condition for assisting other Muslims and gave the example of Muslim prisoners of war kept in Malta who could not be saved with a military campaign. He suggested that this issue be brought to the ambassador's consideration in a friendly manner during the negotiations. Later on, the ambassador rejected this request.[160] However, this last meeting clearly showed that even though the bureaucrats were concerned about the fate of the Crimeans, they were also worried about the legitimacy of such a decision and the possible blame that could bring to themselves or even trigger a rebellion. For this reason, they at least wanted the issue to be mentioned to the ambassador and, this way, to be included in the meeting's minutes. It might be argued that this evidence would be used to convince other Ottoman elites, maybe the ulama and factions within the bureaucracy who could influence public opinion, that everything possible was done to protect the Crimean Muslims.

The second document I will include in my article is a report (*telhis)* by the grand vizier presented to the sultan.[161] It is written on a *telhis*-sized paper, and upon reading the grand vizier's report, the sultan inscribed his edict on it. It showcases the efforts to legitimize the government's decision through Islamic law and a legal opinion. From the document, we understand that when Grand Vizier Halil Hamid Pasha visited the sultan some days before, the sultan emphasized that the *sened* would be issued because of the state's weakness, and asked a question: When, with God's help, who is invincible, sufficient power to avenge the enemy is accumulated, would it be lawful to

159 Here, Vâsıf refers to him as "Moralı Süleyman Efendi" due to his birthplace and to avoid confusion with other participants.

160 *Id.* at 104.

161 SAT., HAT., 1451/77, 10/08/1203. Its text does not contain any information about its date, and the date provided in the catalog is May 6, 1789 (Shaʿbān 10, 1203). Yet, due to its contents, it can be dated to December 1783 or early 1784.

terminate the treaty and declare a campaign against the enemy? Upon this question, the grand vizier continued, he had asked for a legal opinion (*fetva*), and a draft was penned and then read to the shaykh al-Islam, who issued his opinion. The grand vizier informed the sultan that to be stored, the document would be presented to him.

The sultan wrote his opinion on this document. He argued that the document that contained the legal opinion, due to its legal nature, must contain the shaykh al-Islam's signature and seal, and he approved its delivery to him for safekeeping. The sultan ended the document with a prayer showing his intention to declare war against and avenge Russia when the state accumulated enough strength for a campaign.

I could not locate in the SAT the text of the legal opinion for which the sultan asked. Yet, it is very much in accordance with Islamic law, and since, according to the Ottoman statesmen, Russia violated the treaty by annexing the independent Crimean Khanate, it made the treaty null and void, ending the state of peace between the two empires. Hence, the Ottomans, in their view, gained the right to retaliate against that violation militarily. However, due to their weakness at that time, they chose to postpone exercising that right. It seems that the sultan and grand vizier wanted to legitimize the Ottoman acceptance of the annexation by showing that it was only temporary and that this wrong would be corrected once enough strength was gained. It also can be argued that the sultan did not want to leave anything to chance and wanted the legal opinion to be binding, so he insisted on having the shaykh al-Islam's signature and seal on it. It is interesting that he wanted to keep that document, maybe to use it to legitimize his own situation in case of a future rebellion.

The Ottoman Empire officially recognized the Russian annexation of the Crimean Khanate, and the Ottoman delegates signed and presented the *sened* demanded by the Russian ambassador on January 9, 1784 (Ṣafar 15, 1198). Remarkably, the Ottoman delegation consisted of three delegates who represented the three branches of the Ottoman bureaucracy as if to show their unity and approval: Hasan Pasha (fleet admiral),

Müftîzâde Ahmed (former qāḍī of Istanbul), and Mustafa Efendi (chief of scribes).[162]

Conclusion

The legitimacy of the sultanic authority was a great concern for sultans in the late Ottoman Empire since defeats and territorial losses combined with other problems could provoke rebellions and result in dethronement. It was difficult for the Ottomans to accept the Russian violation of the peace treaty and remain indifferent to the Crimean Muslims' pleas for assistance as they came under the rule of a Christian power. Worse, this loss was not a result of a war; the empire faced a fait accompli and was forced to accept it without firing a shot. On the other hand, the Ottoman statesmen were aware of the empire's military and financial weaknesses and refrained from declaring war against Russia. Facing this situation, the sultan tried to maintain his legitimacy by using the consultation councils as a decision-making body in order to reach a bureaucratic consensus and by invoking the principles of Islamic law on power imbalance in war decisions and termination of treaties. The bureaucrats benefited from the precedents set by the Prophet and other Muslim rulers and scholarly works that favored a temporary peace forced by the conditions. At the same time, they had to consider the domestic consequences of their decision and legal/religious legitimization also served as a tool that could limit the possibility of a rebellion. This search for legitimacy in the face of crisis with the empire's more powerful enemies and popular uprisings can account for the increasing influence of the ulama in this period.

162 SAT., A., DVNS., DVE., D., 083/1, pp.158-160. The transcription of this important document, which consisted of three articles, was published, see: Osman Köse, "Osmanlı Devleti Tarafından Kırım ile İlgili Rusya'ya Verilen Resmi Belge 'Sened' (1784)," *History Studies* 2, no. 2 (2010), 353-362.

Transcription of Document I (SAT, TSMA.-E., 705/29)

1. irili ufaklı yüz elli pâre gemisi olduğundan başka, Ak
Deniz'de dahi müttefiklerinden küllî donanma pey-
dâ edeceği ve Mosku ve Nemçe'nin askerleri hudud
başlarında müheyyâ oldukları ecilden,
2. def'a varacak hücumları ve serhadlerde el'ân anlara mu-
kavemet ve müdafaaya vâfî askerimizin adem-i vücudu
hatıra geldikce ârâm ve rahatı selb ediyor. Bunların tek-
liflerini kabul müşkil
3. olduğu gibi, vakt-i mütâla'a ile ebvâb-ı cengin küşâdı
dahi işkâl olduğu bî-iştibâhdır. Hoşimdi gayri çare nedir?
Meclis-i meşveretde karar bulan cevâb bir kerre ilçiye
virülsün, lâkin
4. kabul etmeyüb devletine avdetini metâlib ve ısrâr mef-
hum olduğu takdirde, re'is efendi kendüye hitâb idüb,
ilçi bey, senin böyle devletime avdet iderim diyeceğin
bizim ma'lûmumuz değil idi
5. çünki me'mûriyetin böyle imiş, sûret-i hâli efendileri-
mize ifade edelim, ne gûne re'y buyururlar ise sana beyân
ideriz kelâmını edâ ve hâkîmâne meclisi vâkt-i âhara
ta'lîk eylesün, yine bir yere gelünüb bir kat
6. dahi söyleşilüb zirâ avâkıb-ı kârı fikr lâzımdır makâlâtını
irâd eyledi. Mükâleme-i mezbûre hâlâ Defter Emîni
Nâzîf Ahmed Efendi bendelerine dahi gösterildikde, ilçi-
ye irâd olunacak cevâb Kırım keyfiyeti
7. Françe ve İngiltere devletlerine ilçileri taraflarından
yazıldı, anlardan ecvibe gelmedikçe Devlet-i 'Aliyye
buna lâ ve na'am diyemez kelâmından ibâret olacak idi.
İşbu mükâlemenin mefhumuna göre elbette İngiltere
8. ilçisi kapudan paşa hazretleri ile mülâkâtını ve ne söz
söylediğini Rusya ilçisine söylemişdir. Bu sûretde ilçi-i
mersum verilecek cevâbı ısgâ eylemeyüb İngiltere dev-
letinin vürûd edecek haberini
9. ilçileri size ifâde itdi ve Françe devletine dahi devletimiz
kat'ice mukaddem cevâb verdi makâlini dermeyân ede-
ceği mukarrerdir. Mesfûr Rusya ilçisi işidildiğine göre
adem-i mümâşât sözünü

10. aldıkda avdet edecek imiş, meclis-i mülâkâtda avd ve insırâfını tebyin ve ısrar ve bizim tarafdan dahi sen bilirsün mu‘âmelesi gösterildiği gibi muhârebe kapıları açılacağı ve Nemçe ve Rusyalu
11. ikisi birden müheyya olmalariyle serhaddâta yürüyecekleri bedîhîdir. Hududlarımızda a‘dâyı mukabeleye vâfi asâkir ve Karadeniz’de sevâhil-i İslamiye’yi muhâreseye kâfi ceng sefâinimiz
12. olmadığı cümleye ma‘lûmdur, bu bâbda kulûba hayret ârız olacak şeydir. Kırım maddesini kabûl müşkil ve reddinde hudûs-ı ceng muhakkak ve serhaddâtın gereği gibi el virecek asâkirden
13. hulüvvu mukarrer ve zamâna muhtac idüğü ve a‘dâ vakit vermeyeceği nümâyân olmağın, re’is efendi ilçi ile mülâkâtında mücâb olmayub avdet sadedinde musırr olduğu hâlde, hakîmâne ne işlerse
14. işleyüb, cevâb-ı kat‘îyi meclis-i âhara ta‘lik eylemesi ve ba‘dehû bir yere gelinüb tekrâr Bâb-ı âsafî’de bir meşveret-i umûmîyye akd ve ilâcı müşâvere olunması münâsib mülâhaza olunur deyû takrir eyledi.
15. hâlâ Tevki’i Çelebi Mehmed Efendi dahi kapudân paşa ve İngiltere ilçisinin mükâlemelerini kırâ’ât ve kelâma ibtidâr idüb, ilçi-i mesfûr verilecek cevâbı ısga eylemeyeceği zâhîr oldu.
16. buna kat‘î cevâb verildikde beher hâl muharebe avdet ve Rusyalu ve Nemçelü kış demeyüb hududlarımızda ve Moskulu sefâin-i menzûlesi Karadeniz’e hücum edecekleri bi-iştibahdır. Bu suretde
17. bizim her cânibde müdâfa‘a-i a‘dâya vâfiye asâkirimiz olmadığı ve eyyâm-ı şitâda askeri istediğimiz gibi ihrâc ve düşman karşusuna îsâle imkân olamıyacağı (…) [vâzıhâtla?] Tiflis hânı Erekli Hân
18. didikleri mel‘ûn Moskulu’ya teba‘ıyyet Ananur[163] tarikiyle Moskulu Tiflis ve Gürcistan’a arabalar işler yollar açdıkları ve tabur-ı makhûrunın ucu Tiflis’e geldiği bundan akdemce Çıldır Valisi

163 Ananuri in Georgia. It was a military stronghold on the bank of the Aragvi River.

19. Süleyman Paşa'nın benim yedimle vürûd eden tahrirâtında ve gönderdiği havâdis kağıdlarında muharrer olmağla, ebvâb-ı ceng açıldığı gibi, Erekli Hân ma'iyyetinde olan Mosku askeri ile
20. Çıldır eyaleti ve Kars etrâfına ve Açıkbaş Hâkimi Soloman bî-imân dahi bir tarafdan Çıldır ve Faş ve Anakra'ya sû-be-sû itâle-i pây-i tecâvüz idecekleri muhakkakdır. Henüz
21. Çıldır kılâ'ını tâ'mire me'mûr binâ emînleri mahalline varalı iki ay oldu ve gönderilen tob ve mühimmât Trabzon'dan nâkl olunamadı. Ol havâli dahi müte'addid seraskerlere ve külliyetlü asâkir
22. ve mühimmâta ve akçe ve zehâire muhtâcdır. Şirâze söküldüğü halde küffâr-ı hâk-sâr her cânibden bize şaşkınlık virmek içün taraf taraf baş gösterecekdir. Bunlar etrâflıca mülahâza
23. olunub, Mosku ilçisine meclis-i mülâkâtda kat'î cevâb verilmekden ise, hâkîmâne meclis-i âhara ta'lik ve tekrâr bu husus cümle ile bir kât dahi müşâvere olunmasını emr-i sevâb zân iderim, zirâ avâkıb-i kârı
24. ve Devlet-i 'Aliyye'nin ahvâlini ve düşmânlarımızın hâllerini mütâla'a ve muvâzene lâzımdır deyû takrîr ider. Rûznamçe-i evvel Ebubekir Paşa-zâde Süleyman Beyefendi bendeleri, kapudan paşa hazretleriyle İngiltere ilçisinin
25. mükâlemesini ledelmütâla'a Tersâne-i âmireye me'mûriyetim sebebiyle bu mükâlemeyi kapudan paşa hazretleri bana tamâmca ifade etdi ve şifâhen bana söylediği kelimâtda Kırım maddesi sened virilmeksizin
26. bir sûret kabûl edeceğini ve Nemçelü tarafından bir teklif zuhur etmeyeceğini ta'ahhüd eyleyeceğini İngiltere ilçisi mecliste beyân eylediğini dahi söyledi. Müşârünileyh hazretlerinin dedikleri gibi İngiltere ilçisi sened i'tâ
27. olunmaksızın Kırım hususunda devlet-i ebed-müddetin sükûtiyle işe râbıta virüb, Nemçelünün dahi bir gûne teklifleri olmayacağını tanzîm eylediği sûretde, kendü akl-ı kâsırıma göre sekiz-dokuz

28. senedir sükût olunduğu gibi birkaç sene dahi iğmâz mu‘âmelesini tecviz ederdim, zirâ ceng kapuları açıldıkda ibtidâ otuz bin kise nakde ve asâkirin itâ‘at ve sebâtlarına
29. ve berren ve bahren iki düşmana mukâvemete vâfi tertibâta muhtâc, askerimizin adem-i zabıtâları Rabbülâlemîn’e sığınarak a‘dâ taraf taraf hücûm eyledikleri hâlde vüzerâ ve zabitâna adem-i inkıyâd ıle
30. perişânlık göstermeleri Sofya’da vuku‘ bulan hâdiseden ve altı-yedi aydır leyl-ü-nehâr bu kadar evâmîr-i ekîde ısdâr ve mübâşirler tâ‘yin olunmuşiken henüz serhâdlerimizde ve İsmâ‘il ve Silistre
31. ve Sofya’ya ve husûsâ düşmanın muvâcehesinde kâin Ada-kal‘asına bi-ecma‘iha beş-altı bin yeniçeri îsâl olunamadığından, istidlâl olunur kuvvet ve kudret Hakk’ın olub, âciz ve mazlûma
32. mu‘în olacağından eğerçi şübhemiz yokdur, lâkin, âdât-ı ilâhiyye her şey’i esbâb ile halk edegeldiği dahi inkâr olunamaz. Havâdis-i âtiyennin netâyicine ilm Allah’a mahsûs olmağla, esbâb-ı zâhirede
33. min-külli’l-vücuh fıkdân derkâr iken, nusret-i gaybiyyeye istinâden böyle kavî düşmanlar ile ebvâb-ı harbi açmak tiryâkin hâsiyyet-i mechûlesine iğtirar birle zehr-i mülhîki içmek gibidir, Hudâ göstermeye,
34. bâdî-i emirde perişânlık dahi olur ise, Devlet-i ‘Aliyye’ye yazık olur. Muhassal-ı kelâm, re’is efendi ilçi ile mülâkâtda ilçi-i mesfûr mülzem olmayub, elbette devletime avdet ederim dirse, hakîmâne
35. iskât ve tekrâr bu emr-i hatîrı cümle ile bir kat dahi müşâvere içün cevâb-ı kat‘îyi meclis-i diğere ta‘lîk eylemesi münâsib olmak gerek, yine fermân efendilerimizindir deyû takrîr ider.
36. Hâlâ Matbah-ı âmire Emîni Süleyman Penâh Efendi kulları dahi getürdilüb sâlifülbeyân mukâleme kâğıdı ira‘et olundukda, kelâma ibtidâr idüb, bu sefer, evvelki seferlere kıyâs olunamaz. Karadeniz’in
37. sahilleri Moskulu’nun yed-i tasarruflarında ve işitildiğine göre yüz elli pâre kebîr ve sagir gemileri Azak

Denizi ve Kerş ve Yenikal‘a Boğazı ve Özi suyu içinde mevcud, askerleri hudud başlarında
38. amâde ve Nemçelü dahi mu‘adâta müheyyâ ve tabur-ı mesfûrları serhâdler karşularında işârete muntâzır olmalariyle, Mosku ilçisine cevâb-ı kat‘î î‘tâ ve devletine avdet eylediği gibi, harb-i kıyâm ideceği zâhîrdir.
39. Küffâr gemileri Bahr-i Siyâh’a ve asâkir-i menzûleleri serhâdlerimizde bir cerâd-ı münteşir gibi yürüdüklerinde hâl neye varır? Karadeniz’e çıkan gemilerinde [gemilerimize?] dahi hücûm etmeleri bedihîdir. Bu şehre Hakk’a sığınarak otuz-
40. kırk gün zehâir ve levâzım-ı zârûriyye gelmese, başımızda kıyâmet kopar ve kendü derdimize düşeriz. Henüz bir gâ‘ile yoğiken, ale’l-gafle a‘dânın birkaç teknesi boğazdan taşralarda
41. birkaç tob atsa, İstanbul’a gulgule düşüb ahâlisi birbirine girmekle, cümlemizi şaşururlar. İşte, bu sefer evvelle kıyâs olunamaz dediğimin sırrı budur. Geçen seferde ve eslâfda Bahr-i Siyâh’da
42. Moskov’un donanması yoğidi. Benim akl-ı kâsırıma kalırsa, Allah’a sığınarak, def‘aten vâhideten ceng kapuları açılmamağa sa‘y olunmak vâcibdir. Hâsıl-ı kelâm, karardâde olan cevâbı Mosku ilçisi
43. ısga eylemeyüb avdet iderim cevâbında ısrar gösterdiği takdirde, re’is efendi cevâb-ı kat‘îyi meclis-i âhara ta‘lik ve tekrar akd-i meşveret ve bade’l-istişare ne de karâr buyurulursa, ana göre
44. ‘amel olunmak lâzımdır deyû ifade eyledi. Kethüdâyi esbâk Lâlelili el-hâc Mustafa Efendi re’yini şifâhen söylemeksizin re’is efendi kullarına tahrîren ifâde etmekle, anın me’al-i muhassalı dahi ilçiye Rusyalu’nun
45. âhdinde durmadıklarını ve Devlet-i ‘Aliyye’nin sebât-ı kâdîmine dâir ba’zı akvâl îrâd olunarak şu Kırım maddesinin âhdnâmelere tevfîk olunarak bir nizâm-ı müstahsene rabtiçün İngiltere ve Françe
46. ilçilerine söz virülüb, anlar dahi devletlerine tahrirâtlariyle henüz cevâb gelmedi, böyle iki devlet-i azîmeye

söz verilmişiken, cevâbları kablelvürûdunda lâ ve na'am cevâbı verilmek anların
47. iğbirârlarını mucîb olur, bakalım, anlardan cevâb gelsün, sonra görüşürüz cevâbı virilmek mazmûnundan 'ibârettir.

Transcription of Document II (SAT, HAT 1451/77)

hüve

1. Şevketlû, kerâmetlû, mehâbetlû, kudretlû, velîni'metim efendim,
2. Çâkerleri huzur-u hümâyûn-u kerâmet menfurlarında iken Kırım ve Taman ve Kuban içün Rusyaluya verilecek sened ber muktezâ-yı vâkt-ü-hâl
3. adem-i kudret hasebiyle 'it'â olunacakdır, 'avn-ü inâyet-i müntekim-i kahhâr ile a'dâdan ahz-ı sâr edebilecek kuvvet-ü-miknet husûle geldiği
4. vakt, nakz-ı 'ahd ile düşmân üzerine sefer etmekde cevâz-ı şer'-i şerîf ne vechile olduğu su'al-i hümâyûn buyurulmuşidi. Husûs-u mezbûrun
5. vech-i şer'îsi semâhatlû efendi dâ'îlerinden su'al ve istiftâ' içün bir kıt'a fetvâ-yı şerîfe sûreti kaleme aldırılmağla manzûr-u mekârim mevfûr
6. dâverâneleri buyurulmak içün merfû'-ı 'atebe-i 'ulyâ-yı dâverâneleri kılındığı ve ba'de efendi-i müşarünileyh dâ'îlerine irâ'et ve fetvâ-yı
7. şerîfesi ahz ve nezd-i hümâyûnlarında hıfz içün huzûr-u şahânelerine 'arz ve takdîm olunacağı ve İsma'il'den gelen tertib-i 'asker
8. resmi tahrîrâtdan girü kalmağla hakpây-ı mülûkânelerine şimdi 'arz olunduğu ma'lûm-u dâverâneleri buyurulduk da emr-ü fermân şevketlû,
9. kerâmetlû, kudretlû, hamiyyetlû, velîni'metim efendim pâdişâhım hazretlerinindir.

(Hatt-ı hümâyûn)
(B)

1) Benim vezîrim,
2) Sûret-i fetva-i şerîf vech-i şer'îsi
3) mucîbince hâlâ mesned-i fetva
4) olan semâhatlü efendi dâ'îmizin
5) fetva-i şerîfesi imzâ ve mühriyle
6) alınub taraf-ı hümâyûnumuza hıfz olmak
7) içün irsâli münâsibdir.

(A)

1) İsma'il'den gelen tertib-i 'asker resmi
2) mânzurum ve ma'lûmum olmuşdur
3) Cenâb-ı hâzret-i müntekim-ül-kahhâr olan Allâh azze şânühü (…)[164]
4) ittifâk ve gönül birliği ile bu dinsize (…)
5) ahz-i intikâm müyesser eyleye. Amin
6) yâ hayrül-nâsîrîn.

Reverse page[165]

1. Sâdr-ı fetva semahâtlü efendimiz tarafına virilmek içün nezd-i sâdr-ı 'âzâmîye (…)
2. şahsa virile.[166]

164 This sentence in the document is difficult to read so it is with great caution that I have interpreted it as shown in the transcription.

165 Reverse pages of documents were used for writing instructions on the next process or the authority the document would go through.

166 This inscription is located on the bottom right of the page, written in the opposite direction. There is another inscription near the top left margin of the document but due to ink smudges, I could not read it.

Between Code and Custom: Middlemen as Agents of Legal Transformation in Early Anglo-Egyptian Colonial Sudan[1]

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Abstract

Departing from narratives that simplify colonial law as a top-down imposition, this work reveals how middle-ranking British officials were pivotal in shaping a hybrid and strategically manipulative legal system within Sudan's Anglo-Egyptian Condominium. Focusing on inspectors lacking formal legal training, the analysis highlights their crucial role in exercising wide legal discretion to selectively blend elements of British Penal Codes, customary law, and a distorted interpretation of Islamic law. This pragmatic approach, driven by the interests of colonial control, allowed for the selective application of certain Islamic legal principles, even within British criminal courts, by subsuming them under the vague term "Mohammedan Law." The case of Sir Harold MacMichael offers insights into this broader trajectory, illustrating how these middlemen, themselves shaped by the colonial system, wielded

1 This work was supported by the Max Planck Institute for Legal History and Legal Theory, which funded my archival research in the United Kingdom, Egypt, Turkey, and Sudan. I am also deeply grateful for the Chevening Fellowship, part of the U.K. government's global scholarship program funded by the Foreign, Commonwealth and Development Office (FCDO) and partner organizations. The Chevening Fellowship enabled me to pursue my research at Oxford University for six months. Additionally, I would like to extend my sincere appreciation to the Oxford Centre for Islamic Studies for their invaluable support in hosting me during my Chevening Fellowship.

agency to transform legal frameworks. Ultimately, this article demonstrates how colonial legal systems were dynamic and contested sites where hybridity was a tool of control, shaped by the selective use of Islamic elements, extensive legal discretion, and a pragmatic focus on maintaining power.

Keywords: Colonial law, Anglo-Egyptian Sudan, "Mohammedan Law," Legal discretion, Middle-ranking British officials

Introduction

In the heart of Sudan, in 1935, a seemingly unremarkable incident sparked a legal battleground that would reverberate through the corridors of colonial governance. An intertribal affray between the Kabbabish and Aulad Agoi of Dar Hamid erupted, fueled by accusations of theft and insults.[2] In the ensuing chaos, a member of the Dar Hamid tribe died. Ahmed Sanad of the Kabbabish was accused of murder and sent for trial in the major court, thrust under the unfamiliar lens of British criminal law. District Commissioner G.C. Scott presided, wielding the tenets of a penal code far removed from the customary practices swirling in the dust outside the courtroom.

Scott found Sanad guilty of murder, sentencing him to a twelve year imprisonment. But the story did not end in this major court. Ahmed Sanad's case was taken to the Court of Appeal, where C.J. Owen, a figure steeped in the complexities of colonial rule, scrutinized the proceedings. Owen saw a fundamental misalignment in the judgment. He argued that isolating Sanad ignored the collective nature of tribal conflict and the customary role of *diya*[3]—rooted in the Islamic tradition as compensation for bloodshed, a concept absent from the British criminal code—as a potential path to reconciliation. In his eyes, *diya* and

2 Sudan Government v. Ahmed Sanad & Others, KDN. MAJ—Ct. -41. C. 37-35; AC-CP-169-1935, September 10, 1935, Sudan Judiciary Archive, Khartoum, Sudan, 115–19.

3 A practice which existed before Islam and in which families of victims received compensation (*diya*) in cases of accidental or intentional killings. This system was later incorporated into Islamic law.

imprisonment could each serve a purpose—the former appeasing tribal tensions, the latter asserting the state's authority.

Owen detected a fundamental incompatibility, one exacerbated by the distance between the codified Penal Code of Sudan and the on-the-ground realities interpreted and navigated by middle-ranking[4] British officials who acted as both administrative and judicial agents in Sudan's remote provinces. His intervention wrestled with more than this single case. It laid bare a central question: how could a legal framework like the 1899 Sudan Penal Code, rooted in British and Indian models, function within the unique Sudanese context? This tension highlights the need for flexibility and adaptation within colonial governance, a process often driven by middle-ranking officials who were agents of a discretionary legal system that bore resemblance to how some Islamic legal frameworks emphasize ruler-based pragmatic decision making. Figures like Owen, stationed far from the centers of power, grappled with interpreting laws while navigating the nuances of Islamic custom, tribal conflict, and the very notion of justice in a land they sought to govern.

Middle-ranking officials, such as Owen, played a crucial role that transcended simply being cogs in a colonial machine. Operating in remote Sudanese districts, they functioned as interpreters, negotiators, and conduits for imperial rule. They bridged the gap between the lofty ambitions of the British empire and the daily realities of the Sudanese people. These on-the-ground experiences, like Ahmed Sanad's case, shaped their understanding and potential misinterpretations of Islamic legal principles. Their actions unintentionally mirrored aspects of flexible legal interpretation found within certain Islamic legal frameworks focused on achieving just outcomes, even when it necessitated departing

4 In this article, I use the term "middlemen" or "middle-ranking men" to refer to British officers who served in positions between high level administrators and local populations. These were not policy-makers, but their actions fundamentally influenced law on the ground. Tasked with implementing British directives and understanding local realities, their reports, judgments, and interactions became a crucible where the rigidity of codified law encountered the demands of governance characterized by adaptability and a focus on achieving stability and control. See Anthony Clayton and David Killingray, Khaki and Blue: Military and Police in British Colonial Africa 4 (1989); James S. E. Opolot, Police Administration in Africa: Toward Theory and Practice in the English-Speaking Countries 81–82 (2008).

from strict legal codes. While lacking the nuanced understanding of Islamic jurisprudence associated with *siyāsa*, their actions bent and adapted the law as they navigated the complex interplay between local customs and Islamic legal principles.

Colonial interventions in established legal systems often stemmed from a lack of understanding and a misguided sense of superiority. This is exemplified in the British administration of Sudan and its impact on Islamic legal traditions. While British officials might have invoked pragmatism or expediency, their actions often reflected a fundamental misunderstanding of the flexible and nuanced nature of Islamic legal concepts. This resulted in unintended distortions of practices like *diya* as they attempted to codify and integrate them into the colonial legal system. Importantly, this article analyzes how British colonial administrators' application of discretion and political expediency in law bears similarities to the flexibility found within some Islamic legal frameworks, despite their lack of familiarity with Islamic jurisprudence. This comparison highlights the interplay between these approaches and Islamic legal principles. Throughout this work, terms such as "legal discretion" and "pragmatism" will be employed to describe the British approach. Ultimately, despite their differing intentions, these British actions offer a powerful case study of how legal principles, when removed from their original context, can be manipulated for the purposes of control.

The Anglo-Egyptian Condominium in Sudan provides a revealing case study of how British colonial actions unintentionally created a system marked by discretionary decision-making and a pragmatic approach to legal administration. While rooted in vastly different philosophies compared to Islamic governance concepts, the British approach in Sudan bore certain resemblances to the adaptability often associated with *siyāsa*.[5] This flexibility in legal interpretation, coupled with the integration of

5 For a deeper understanding of *siyāsa* and its role in Islamic jurisprudence, see Bernard Lewis, *Siyasa*, *in* In Quest of an Islamic Humanism: Arabic and Islamic Studies in Memory of Mohamed al-Nowaihi 3–14 (Arnold H. Green ed., 1986); Knut Vikør, Between God and the Sultan: A History of Islamic Law 193–95 (2005); Rabiat Akande, *Governing Sharia*, *in* Entangled Domains: Empire, Law and Religion in Northern Nigeria 70–104 (2023).

local customs, aimed to achieve a workable system of adjudication within the colonial context. It is important to emphasize that this approach lacked the grounding in Islamic governance and jurisprudence that characterizes traditional *siyāsa*. However, this adaptation reveals a key aspect of colonial legal systems: their capacity to distort and reshape preexisting legal practices to serve the interests of the colonizers. At times, these adaptations might have offered unintended benefits to the colonized, but this did not negate their fundamentally exploitative nature. Analyzing this evolution offers valuable insights into the complex interplay between imported law, traditional Islamic practices, and the pragmatic necessities of maintaining control in a colonial setting.

This article challenges narratives that paint colonial criminal law as a monolithic, top-down imposition. It reveals the dynamism, the negotiations, and the agency of those who stood at the intersection of empire and customary practices. Through the lens of overlooked cases and the documented experiences of middle-ranking officials in the provinces, it offers a more nuanced understanding of how colonial power was exerted alongside an evolving respect for and adaptation of Islamic legal principles—a dynamic that not only shaped Sudan but reflects broader processes of legal change and legal pluralism within colonial empires.

This analysis delves into the evolving application of colonial criminal law in Sudan, examining how British middle-ranking officials, through their misunderstandings and pragmatic adaptations, influenced the integration of Islamic jurisprudence and customary practices. These actions created a blended legal system characterized by discretion and flexibility. The realities of colonial governance necessitated flexibility and adaptation. The example of Sir Harold MacMichael's career offers insights into broader trends where officials acted as intermediaries: reporting on local customs, adjudicating cases flexibly, and ultimately shaping the on-the-ground application of law in ways that diverged from formal codification.

The case of Ahmed Sanad exemplifies this tension between codified law and implemented practice. While *diya*

payments were recognized in principle, Sanad's case reveals how they were often applied in ways that contradicted the intent of the penal code. This disconnect reflects the unintended consequences of the British colonial approach in Sudan. Their attempts to implement a codified legal system, while lacking a deep understanding of existing practices like *diya*, created a space where middle-ranking officials wielded considerable discretion. This system, characterized by flexibility and pragmatic adaptation, often resulted in the distortion of traditional practices to fit colonial aims. To fully understand this complex adaptation of a British-inspired legal code to Sudan, we must briefly trace the history of legislation from the establishment of the Anglo-Egyptian Condominium in 1899 and see how this set the stage for the unique legal landscape encountered by C. J. Owen and his contemporaries.

I The Disconnect: Idealized Colonial Law vs. Sudanese Realities

On 4 September 1898, as British and Egyptian flags were raised in Khartoum, Sudan's legal landscape reflected a complex confluence of influences. Traces of both the recent Mahdist state and the legacy of Ottoman rule in Sudan remained potent, embedded in cultural and legal practices.[6] Examining the Mahdist legal framework illuminates the fundamental disjunctures between preexisting Sudanese legal traditions and the colonial system imposed by the British. This contrast underscores the inherent challenges and distortions resulting from colonial legal adaptation.

The Mahdist state, established by Muhammad Ahmad in 1881 as a revolt against harsh Ottoman rule and exploitation, left a distinct mark on Sudan's legal landscape.[7] Muhammad Ah-

6 M. W. Daly, Empire on the Nile: The Anglo-Egyptian Sudan, 1898–1934 1 (1986).

7 Yusuf Fadl Hassan, *History of the Ottoman Empire: Some Aspects of the Sudanese-Turkish Relations*, *in* Rising Africa and Turkey 297–316 (Turkish Studies Unit, Institute of African and Asian Studies, 2004). Available at: https://tasam.org/Files/Icerik/File/some_aspects_of_turco-african_relations_with_special_reference_to_the_sudan_197491b8-0820-40a6-9b57-d1ed77206a08.pdf.

mad, proclaiming himself the *Mahdī*,[8] the guided one, sought to establish a new order based on his interpretation of Islamic principles. Despite its relatively short lifespan until 1898, the Mahdist emphasis on Islamic law and centralized leadership significantly influenced Sudanese legal practices.

While Islamic law served as the foundational source, Muhammad Ahmad placed his own interpretations of the Qurʾān and the Sunna at the center of legal authority.[9] This shift, characteristic of the self-proclaimed Mahdī's claim of divinely guided leadership and his vision for a state adhering to his understanding of Islamic principles, resulted in frequent deviations from established Sunni schools of Islamic jurisprudence.[10] In contrast to the Ottoman legal system he challenged, the Mahdī's vision aimed for a stricter interpretation, one he believed reflected a return to the purer principles of early Islam.[11] This challenge provoked intense political and theological debate within Islamic discourse, as the legitimacy of rebelling against another Muslim power based on religious grounds became a central question.[12]

The Mahdist legal system implemented a centralized structure with the Mahdī at the apex as the ultimate judicial authority.[13] He delegated legal decision-making to a network of appointed *qāḍī*s, judges who preside according to Islamic principles, across the state.[14] The *qāḍī 'l-Islām* held the highest position within this hierarchy, overseeing the *qāḍī*s and ensuring adherence to Mahdist doctrine.[15]

The Mahdist legal system emphasized a strict, sometimes idiosyncratic, interpretation of Islamic law as outlined

8 This title, derived from the Arabic verb *hadā* meaning "to guide," signifies his belief in receiving divine guidance; Ahmed Uthman Ibrahim, *Some Aspects of the Ideology of the Mahdiya*, 60 Sudan Notes and Records 28 (1979).

9 Olaf Köndgen, The Codification of Islamic Criminal Law in the Sudan: Penal Codes and Supreme Court Case Law under Numayri and Bashir 34 (2018).

10 *Id.* at 35.

11 Rudolph Peters, Sharia Law, Justice and Legal Order: Egyptian and Islamic Law: Selected Essays 441 (2020).

12 *Id.*

13 P. M. Holt, The Mahdist State in the Sudan, 1881–1898: A Study of Its Origins Development and Overthrow 128 (1958).

14 Köndgen, *supra* note 9, at 35.

15 *Id.*

by the Mahdī.[16] This included the reintroduction of *ḥudūd* punishments, such as amputation for theft and stoning for adultery, and abolishment of *diya*.[17] The system also aimed to enforce a rigid social and moral code, prohibiting activities deemed as vices, such as smoking, drinking alcohol, and dancing.[18] These harsh punishments and social regulations reflected the Mahdī's vision for a reformed society based on his understanding of Islamic principles. While the Mahdī's emphasis on Islamic law and centralized legal structures left a lasting mark, the legacy of Ottoman legal concepts persisted in Sudan. This persistence stemmed from the fact that the Khedivate of Egypt,[19] technically an Ottoman province, governed alongside the British during the colonial period after the downfall of Mahdist State in Sudan. This created a system of legal pluralism, where Ottoman, Egyptian, British, and Sudanese legal traditions coexisted. This complex environment set the stage for the ongoing adaptation of law, shaping the evolution of both customary and British-authored criminal codes.

Despite the stipulations of the Condominium Agreement signed in January 1899 between the British Empire and Egypt, customary elements inevitably influenced the application of British law in practice.[20] The agreement was clear evidence of

16 *Id.* at 34.

17 *Id.* at 34–35.

18 *Id.* at 34.

19 The Ottoman Empire granted Egypt a new status in 1866, elevating it from an eyalet (province) to a khedivate (viceroyalty). This change gave the khedive, or viceroy, of Egypt a number of new powers, including the right to confer titles, increase the size of the army, change the law of succession, raise loans, and conclude treaties with other states. The title of khedive also signified that the viceroy of Egypt had a status above that of other viceroys in the Ottoman Empire. This change in status reflected the growing importance of Egypt in the Ottoman Empire, as well as the ambitions of the khedive, Ismail Pasha.

20 "Laws, as also Orders and Regulations with the full force of law, for the good government of the Soudan [Sudan], and for regulating the holding, disposal and devolution of property of every kind therein situate, may from time to time be made, altered, or abrogated by Proclamation of the Governor General. Such Laws, Orders, and Regulations may apply to the whole or any named part of the Soudan, and may, either explicitly or by necessary implication, alter or abrogate any existing Law or regulation," SAD 57/1/372, article 4 of the condominium agreement done in Cairo, the 19th of January, 1899. "No Egyptian Law, Decree, Ministerial Arrete, or other enactment here after to be made or promulgated shall apply to the Soudan or

the British intention of monopolizing the law-making process in Sudan through the British governor-general,[21] who, as the highest-ranked administrator in Sudan, held the right to change and abolish law. This policy excluded Egyptian and local authorities from the rule of Sudan and vested the supreme civil and military command in the British-nominated governor-general.[22] Even though Egypt gained the right to jointly rule Sudan under the British flag, in practice, the governor-general and many of the high-level government officials employed by Britain's Sudan Political Service (SPS) controlled Anglo-Egyptian Sudan,[23] while Egyptian and Sudanese people were mostly used as local administrators under the British policy of indirect rule.[24]

In the domain of customary law, the British administration recognized the existence of Islamic law with the Mohammedan Law Courts Ordinance of 1902. Other customary traditions allowed them to continue to operate alongside the newly British-made colonial law introduced by the British administration.[25] A dual court system that consisted of the Native Courts

any part thereof, save in so far as the same shall be applied by Proclamation of the Governor General in manner hereinbefore provided," SAD 57/1/372, article 5 of the condominium agreement done in Cairo, the 19th of January, 1899. "The jurisdiction of the Mixed Tribunals shall not extend, nor be recognized for any purpose whatsoever, in any part of the Soudan except in the town of Suakin," SAD 57/1/373, article 8 of the condominium agreement done in Cairo, the 19th of January, 1899. See 91 British and Foreign State Papers 19 (H.M.S.O. 1898–1899).

21 On the same day that the condominium agreement was signed, Lord Kitchener of Khartoum was appointed as the first *Sirdar* and governor-general of Anglo-Egyptian Sudan and stayed on duty for a short time until he was relocated. On December 23, 1899, Sir Francis Reginald Wingate was appointed governor-general of the Sudan and *Sirdar* of the Egyptian army and held his position until 1916. From 1917 until his assassination in 1924, Sir Lee Stack stayed in duty as governor-general of Sudan. For more information see, Gabriel Warburg, The Sudan Under Wingate: Administration in the Anglo-Egyptian Sudan, 1899–1916 (2018); London Gazette, March 6, 1900: "Colonel Sir F.R. Wingate, K.C.M.G., C.B., D.S.O., Aide-de-Camp to the Queen, having been appointed Sirdar of the Egyptian Army, is granted the local rank of Major-General whilst so employed. Dated 22nd December, 1899."

22 Warburg, *supra* note 21, at 2.

23 91 British and Foreign State Papers 54 (H.M.S.O. 1898–1899).

24 Carolyn Fluehr-Lobban, Islamic Law and Society in the Sudan 35 (2008).

25 "Mohammedan Law," *sharīʿa*, was also given a place in the judicial system under the condominium rule for the issues regarding marriage, divorce, guardianship of minors or family relationships, waqf, gift, succession, wills, and interdiction guardianship of an interdicted or lost person, provided that the parties were

and the Mixed Courts was established. The Native Courts were responsible for administering Islamic law and customary law while the Mixed Courts were responsible for administering the new laws introduced by the British administration.[26] Islamic law was relegated to a narrow domain within specialized Mohammedan Courts, whose jurisdiction extended only to specific areas—primarily wills, inheritance, marriage, divorce, gifts, and *waqf*.[27] Even within this restricted sphere, the grand *qāḍī*'s authority was subject to oversight and potential intervention by British legal secretaries.[28]

The term "Mohammedan Law," employed in the Mohammedan Law Courts Ordinance of 1902, offered a limited and external perspective on Islamic legal traditions. This categorization failed to capture the rich complexities and diverse schools of thought within *sharīʿa*. This limited understanding likely influenced the narrow scope of the Mohammedan Courts and the ongoing British oversight.

Unlike other colonies, where customary figures sometimes played a role in criminal law, the British Empire initially sought to impose a uniform legal model on Sudan. This rigid approach disregarded the need for a flexible and adaptable approach system of governance, a system that could accommodate

all Muslims. This court was the only place that an Egyptian could have been in a high level position in the Sudanese government as the chief justice of the Islamic or Sharīʿa Division of the Legal Department. The grand qāḍī was an Egyptian officer. See D. Gwyther Moore, *Notes on the Legislation of the Anglo-Egyptian Sudan*, 6 Journal of Comparative Legislation and International Law 131–34 (1924); Faisal Abdel Rahman Ali Taha, *Some Legal Aspects of the Anglo-Egyptian Condominium Over the Sudan: 1899–1954*, 76 British Yearbook of International Law 337–82 (2006).

26 For more information, see, Mohamed A. Babikerin, *Customary Law and Courts in the Context of Sudan's Legal Pluralism: Marginalized or Empowered under English Common Law and Islamic Law? in* Anthropology of Law in Muslim Sudan: Land, Courts and the Plurality of Practices 236–60 (Barbara Casciarri and Mohamed A. Babiker eds., 2018); and Akolda M. Tier, *Conflict of Laws and Legal Pluralism in the Sudan*, 39 International & Comparative Law Quarterly 611–40 (1990).

27 "Report on the Egyptian Sudan in Relation to Northern Nigeria by H.R. Palmer," May 1912, Oxford, Bodleian Libraries, Sudan, 1898–1940, MSS. Lugard 91/1, 12; "Notes of an interview with Paul Howell on administration in the Sudan", December 6, 1932.

28 Warburg, *supra* note 21, at 125.

the unique customary and legal landscape of Sudan. This stands in stark contrast to the Islamic concept of *siyāsa*, which grants rulers discretionary power to achieve outcomes even if it falls outside of strict legal codes. Drafted by Sir William Edwin Brunyate, the first Sudan Penal Code and Code of Criminal Procedure were heavily based on Indian legal precedents.[29] This approach, common in British colonialism, disregarded the importance of tailoring legal frameworks to specific cultural and legal contexts. In Sudan, the result was a code ill suited to the realities of the societies it aimed to govern, necessitating adaptation from its very inception.[30]

Gathering accurate information about indigenous legal systems and traditions was crucial for making informed decisions regarding criminal law in Sudan. It is well documented that Rudolf Carl von Slatin, the high-ranked inspector-general of Sudan, who was responsible for the Native Affairs administration, had a network of informers among the middle-ranked officials throughout the country, upon whom he relied for intelligence.[31] These informers served as an extra layer in the colonial law-making process in Sudan, gathering information that shaped the law, at least at the local level, if not in formal codification. However, what has been overlooked is that these middlemen interpreted the information according to their own views and biases before reporting it to their superiors who then believed it to be accurate and used it to make colonial laws in practice.

29 *Id.* at 124; Moore, *supra* note 25, at 132. The reason for using the Indian Penal code was that British administrators in India had already learned to use law to legitimate imperial goals. The codification of law was seen as a way to bring order to confusing legal systems that existed in these colonies. The East India Company managed a variety of legal sources, such as regional regulations, Acts of Parliament, Hindu and Muslim personal law, Islamic criminal law, and the Roman principle of "justice, equity, and good conscience," which was open to broad interpretation. This variety made the Indian Penal Code of 1860 a suitable model for the other British colonies to avoid confusion. Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 Law and History Review 631–83 (2005).

30 The report of the Earl of Cromer, a high-ranked British colonial administrator in Sudan, confirms that the 1899 Penal Code was actually accepted as open to inspection in accordance with the need. See "Viscount Cromer to the Marquess of Salisbury," October 6, 1899, FO 403/284.

31 Harold Alfred MacMichael, The Anglo-Egyptian Sudan 109 (1934).

While the role of middlemen within British colonial contexts has been explored, this article offers a fresh perspective by highlighting their agency in shaping legal realities. Specifically, it examines how these middlemen actively integrated Islamic and customary legal elements into Sudanese criminal courts. This on-the-ground adaptation, characterized by flexibility and responsiveness to local needs, fundamentally diverged from the written directives of the penal code. Their discretionary decision-making arguably mirrored unintentionally, aspects of how some Islamic legal systems demonstrate flexibility in achieving practical solutions. A concept this article analyzes is the unintended consequences of colonial legal policies. This analysis offers a novel contribution to the literature, demonstrating how middle-ranking officials were not mere conduits of information but pivotal figures who shaped the very application of colonial law in ways often overlooked by traditional legal histories.

Although these middle-ranked men did not explicitly record their aims and actions for legal reform in their diaries, their impact on the law-making process can be discerned by reading their diaries against the grain and correlating their accounts of observations, meetings, and reports to the development of laws.[32] These officials were observing, meeting, and reporting: their diaries routinely detail the court hearings that they attended and the reports they drafted.

This work challenges top-down legal narratives of Sudan by examining how legal practice diverged from formal directives. Through a careful interpretive approach, analyzing diaries as non-legal sources reveals how colonial legal history was shaped not solely by statutes, but by the adaptive actions of those implementing them. Reading the diaries of middle-ranking officials against the grain, alongside Sudanese and British archival sources, uncovers patterns connecting day-to-day experiences to shifts in legal policy and practice. Unlike formal reports or court records, these diaries offer unfiltered perspectives of newly appointed, non-legal trained officials. This provides unique

32 A similar, but more general statement about inspectors of the British Empire in colonies is in P.W.J. Bartrip, *British Government Inspection, 1832–1875: Some Observations*, 25 The Historical Journal 602–26 (1982).

insights into the complexities of colonial legal adaptation—a process often characterized by discretionary decision-making and a focus on workable solutions, driven by the realities of colonial governance.

This study draws upon a rich array of primary sources, including those located in both the United Kingdom and Sudan. The Durham University Sudan Archive offers an extensive collection of administrative papers, personal diaries, correspondences, reports, photographs, and other materials related to the Anglo-Egyptian Condominium period. These sources, readily accessible and predominantly in English, were crucial in understanding the administrative and legal structures of the early Condominium. Of particular relevance was the Catalogue of the Papers of General Sir (Francis) Reginald Wingate, which provided insights into high level policy and decision-making.

Importantly, the personal diaries and correspondences of junior inspectors within the Durham collections were analyzed to discern the perspectives and experiences of these middle-ranking officials, revealing their influence on the ground. The National Archives of the United Kingdom in London provided valuable correspondence data, which this research interpreted as reporting. Furthermore, the Bodleian Library's unique Sudan, 1898–1940 manuscript collection offered a distinctive window into the personal experiences of British officers, providing insights into the evolving legal structures of the period. These varied sources collectively reveal the communication networks and information flow that drove the adaptation of legal practices within Sudan, often through processes embodied by discretionary decision-making and a pragmatic focus on on-the-ground realities.

This research also delves deeply into primary sources located within Sudan, offering crucial perspectives that complement and at times challenge the records found in the United Kingdom. The National Records Office of Sudan provides unparalleled access to documents tracing MacMichael's legislative and administrative roles, particularly within the civil secretary (CIVSEC), legal department, and the legal files classified as El-Mecmua. These records illuminate the on-the-ground

developments and transformations of the Condominium's administrative and legal apparatus. Importantly, they contain unique court cases and reports unavailable in the U.K., highlighting discrepancies between written law and its practical application and revealing the complexities and nuances of Sudan's colonial legal landscape. Without these sources, a crucial piece of the puzzle would be missing, hindering a complete understanding of the Sudanese legal experience.

Furthermore, the Judiciary Archives within the Judiciary building offer a wealth of early court cases within the Sudan Law Reports: Civil and Criminal Cases. The Faculty of Law Library at Khartoum University provides access to printed materials authored by Sudanese scholars, along with crucial compilations such as the Court of Appeal of the Sudan, Sudan Law Reports, and the Laws of Sudan series. Finally, the Sudan Library holds primary sources including issues of the Sudan Gazette and additional unique court records from the early Condominium period.

While U.K. based sources illuminate policy and high level decision-making, the Sudanese archives and legal collections bring to life the messy, often contradictory realities of legal application on the ground. This contrast underscores the need to examine the role of middle-ranking officials, who stood at the intersection of colonial directives, local customs, and Islamic legal principles. These officials acted as interpreters and mediators, their daily actions and experiences—marked by discretionary decision-making and practical necessity—shaping the lived reality of Sudanese law far more than any statute alone could.

II Middle-Ranking Officials: Agency and Influence in Colonial Law Enforcement

Although the role of middle-ranked British officials in shaping the Sudanese legal system has not been examined in detail, a number of researchers have sought to understand the middle-ranked officials' position as an extra layer in law-making in the colonies. In the context of vernacular law, Lauren Benton and Lisa Ford have discussed the theory of "middlemen" as

imperial agents of the British Empire in their colonies.[33] These middlemen served as the local eyes of the empire for the social order of people, places, and transactions through a sort of international law.[34] According to this theory, the British Empire made a serious attempt after 1780 to establish imperial law against so-called "tyrannical despots" through elite and non-elite dissidents of the British administration, including legal officers, prisoners, captives, and sailors.[35]

While the literature on vernacular law has helped to illuminate the role of middlemen in the colonies, it has not yet explored their involvement in shaping criminal law. A great deal of research has been published on the nature of colonial criminal law, and most of these studies have focused on the intentions of the colonizers in creating this body of law. A common argument, with which I agree, is that the goal of colonial criminal law was to control and repress local populations in the colonies, often through the use of violence.[36]

Another argument which is also widely accepted is that colonial criminal law often ignored local customary law and was largely based on English law, even when it incorporated some customary elements that colonial officers were not familiar with.[37] Although most colonial criminal laws in the British col-

33 See Lauren Benton and Lisa Ford, Rage for Order: The British Empire and the Origins of International Law, 1800–1850 (2016).

34 *Id.*

35 *Id.* at 1.

36 For more information see Elizabeth Hopkins, *The Politics of Crime: Aggression and Control in a Colonial Context*, 75 American Anthropologist 731–42 (1973); Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 Journal of African Law 218–38 (2000); H. F. Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa*, 1876–1935, 18 Journal of African Law 6–23 (1974); G. H. Boehringer, *Aspects of Penal Policy in Africa, with Special Reference to Tanzania*, 15 Journal of African Law 182–212 (1971); Rhoda E. Howard, *Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law*, 7 Third World Quarterly 323–47 (1985); Elizabeth Kolsky, Colonial Justice in British India: White Violence and the Rule of Law (2010); H. F. Morris, *How Nigeria Got Its Criminal Code*, 14 Journal of African Law 137–54 (1970); Richard Roberts, *Law, Crime, and Punishment in Colonial Africa*, *in* The Oxford Handbook of Modern African History 171–88 (John Parker and Richard Reid eds., 2013).

37 David Anderson and David Killingray, Policing the Colonies of Settlement: Government, Authority, and Control, 1830–1940, 5 (1991).

onies were based on the Indian Penal Code, which was drafted by a British parliamentary commission and was not suitable for any of the colonies' customs, a neglected group of actors in the secondary literature on colonial criminal law-making processes unintentionally modified existing penal codes to incorporate more customary elements in the colonies: British middle-position holder officials. Middle-position holders, which I will refer to as "middlemen," or "middle-ranking men" played a key role in the creation of a blended criminal law in British colonies that incorporated local customs while basing itself on British criminal law as a product of British colonialism themselves.

These middlemen did not merely gather information; they interpreted local realities, shaping the arguments and priorities of high-level policymakers. Inspectors, particularly crucial in this process, were often overlooked historical figures. Yet, their on-the-ground experiences fundamentally molded Sudanese criminal law. They navigated the complexities of colonial directives, local customs, and Islamic legal principles, reconciling these often competing systems within the daily operations of colonial courts. This ongoing process of adaptation contributed to the evolution of legal codes in Sudan.

Inspectors as Middlemen: On-the-Ground Agents

In the early years of the Anglo-Egyptian Condominium, Sudan's administrative and legal structure reflected a blend of military heritage and emerging civilian control.[38] The governor-general held significant authority, supported by four key advisors: the inspector general, civil secretary, legal secretary, and financial secretary.[39] The colony was divided into thirteen provinces, each governed by a British *mudīr*.[40] Under the *mudīrs* were Egyptian *maʾmūrs*, responsible for smaller administrative districts.[41]

38 MSS. Lugard 91/2. 6; "Notes of an interview with Paul Howell on administration in the Sudan," Oxford, Bodleian Libraries, Sudan, 1898–1940, MSS. Lugard 91/2, 6.

39 *Id.*

40 *Id.* Initially it was divided into six provinces as Dongola, Berber, Kassala, Sennar, Fashoda, and Khartoum.

41 *Id.*

British inspectors, initially numbering twelve, supervised the *maʾmūr*s and handled most general administrative and judicial duties.[42] In some cases, "judicial" inspectors were appointed by the legal secretary to assist *mudīr*s with their court workloads, though remaining under the *mudir*'s broader authority.[43]

In 1901, the legal secretary, Bonham Carter, initiated a shift from military rule in Sudan toward a civilian administration staffed by young British graduates.[44] This process accelerated in subsequent years, with waves of Oxford and Cambridge graduates recruited and appointed as "inspectors" across Sudanese provinces.[45] Following brief training in Khartoum, these inspectors faced a two year probationary period.[46] To secure their positions, they had to demonstrate proficiency in Arabic and law, along with general suitability for the role, which included restrictions on marriage and social engagements.[47] Those who successfully completed this probationary period could look forward to a promising career within the Sudan Civil Service, later known as the Sudan Political Service, including generous salaries, leave, and an early retirement guarantee.[48] Young, inexperienced inspectors wielded significant authority at the local level, finding themselves responsible for vast territories.[49] The diverse responsibilities of these inspectors encompassed both administrative and judicial duties, making them pivotal figures in the evolving structure of colonial law in Sudan.

Sudan's early legal system, established in 1899 under Egyptian martial law, placed significant authority in the hands of

42 *Id.*

43 *Id.*

44 Harold Alfred MacMichael, Sudan Political Service (1958).

45 Harold Alfred MacMichael, The Sudan 105 (1954).

46 Michael S. Coray, In the Beginning, *in* The British in the Sudan, 1898–1956: The Sweetness and the Sorrow 34 (Robert O. Collins and Francis M. Deng eds, 1984); information retrieved from interview with Sir Harold MacMichael by Robert O. Collins, Nov 14, 1962.

47 MacMichael, The Sudan, *supra* note 45, at 105; Coray, *supra* note 46, at 34.

48 A beginning third inspector was paid £E 420 per year, rising to £E 480 after two years. After fourteen years' duty he would have been earning £E 900 as a first inspector. John W. Frost, *Memories of the Sudan Civil Service*, *in* The British, *supra* note 46, at 65.

49 MacMichael, The Sudan, *supra* note 45, at 105.

the governor-general and the legal secretary. However, a shift towards civilian administration brought modifications, and on-the-ground adjudication largely fell to provincial officials. *Mudīr*s' courts, composed of the *mudīr* and two other magistrates, held broad jurisdiction within the provinces.[50] Sentences passed by these courts required confirmation by the governor-general.[51] Lesser offenses were handled by subordinate courts, where decisions were subject to either the *mudīr*'s confirmation or the right of appeal before him.[52] Inspectors, along with other administrative staff, served as magistrates in these lower courts, handling both civil disputes and criminal offenses, demonstrating the decentralized nature of colonial justice.[53] The system allowed for appeals to be made to the *mudīr*, or in cases of greater complexity, directly to the judicial commissioner.[54]

While the governor-general touted the system's potential for efficiency and order, a stark reality confronted those tasked with its implementation.[55] Inspectors, the system's local executors, faced a fragmented legal landscape with no single handbook. This necessitated a flexible approach, often leading them to bridge the gap between codified law and practical governance. In some instances, these adaptations even conformed to existing local customs and Islamic law, highlighting the unintentional consequences of colonial policy. With only a short training period upon arrival in Khartoum—and often lacking any prior legal background—inspectors faced the immense challenge of navigating a fragmented and inconsistent legal landscape.[56] The early colonial system was marked by inconsistency. Some provinces were governed by centralized codes, while others remained under tribal law or were even subject to martial law.[57] As late as 1906, the enforcement of standardized

50 Report on the Finances, Administration, and Condition of the Sudan 1903, 17. Sudan Archive, Durham University.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 16.

56 *Id.* at 42.

57 Warburg, *supra* note 21, at 125.

legal codes remained incomplete.[58] Inspectors, particularly those in remote regions, were granted significant discretion, having to decide when to apply colonial law, uphold local customs, or make ad hoc rulings based on vague notions of "justice, equity, and good conscience."[59] This principle, central to British legal thought, ostensibly aimed to ensure fairness in the adjudication of cases. However, in the context of colonial rule, it granted widespread latitude to administrators operating in unfamiliar legal landscapes. While this flexibility might have addressed local specificities to some extent, it also opened the door for potential misinterpretations and inconsistencies.

It is also known that inspectors were sometimes tasked with adjudicating matters of Muslim personal status, filling a judicial gap in the absence of *qāḍī*s. or *sharīʿa* courts.[60] This placed immense responsibility on young, inexperienced officials, forcing them to become on-the-ground interpreters of both Islamic and customary law. Their rulings were likely shaped by a mix of limited legal knowledge, practical considerations, and their understanding of colonial aims—highlighting the potential for misalignments between legal ideals and local realities. This decentralized system, while administratively complex, paradoxically increased inspectors' autonomy.

The governor of Upper Nile's 1906 report highlights the inspectors' crucial role in documenting and interpreting local customs.[61] Their lack of formal legal background forced them to become first-hand researchers, as evidenced by the inspector who compiled a Dinka customary law guide.[62] While the governor acknowledged potential errors due to inexperience, he stressed the importance of respecting tribal law.[63] The success of British inspectors in resolving thousands of intertribal disputes demonstrates their active engagement in understanding local legal practices.

58 *Id.*

59 *Id.* at 124.

60 *Id.* at 128.

61 Report on the Finances, Administration and Condition of the Sudan 1906, 742.

62 *Id.* at 742–43.

63 *Id.* at 743.

This report illustrates how inspectors were not merely enforcers of colonial law but also contributors to its evolution, influencing the unique blending of British legal concepts with local customary practices within the context of criminal law. Their observations and interpretations, documented in reports to higher authorities, likely informed the development of handbooks and codes that reflected a nuanced understanding of Sudanese legal traditions. Their seemingly routine tasks of inspection, reporting, and adjudication held surprising power, subtly transforming the legal practice on the ground.

The written laws of the Anglo-Egyptian administration were an abstraction until applied in the context of Sudanese realities. Inspectors in Anglo-Egyptian colonial Sudan documented a wide range of experiences in their reports to *mudīr*s and other superiors. These reports covered their judicial duties, including case details, rulings, and petitions submitted by local residents. Additionally, the inspector was tasked with investigating complaints, supervising revenue collection, and overseeing the performance of the police in carrying out their duties.[64] They became pivotal in bridging the gap between the written legal code and the complexities of Sudanese society. The governor-general sought to maintain good relations with local leaders for the sake of colonial control, encouraging the application of local customs and Islamic law whenever possible.[65] This directive created a complex landscape for inspectors. Their observations shaped the understanding of where and how the code needed adaptation, not just for workable implementation, but to solidify colonial control. This process was driven by a discretionary approach focused on maintaining order and upholding colonial authority. This imperative at times conflicted with the governor-general's own directive to incorporate local customs and Islamic law where possible, revealing the inherent tensions within the colonial legal project. To navigate these complexities, local level

64 Gail S. Schoettler, *The Genial Barons*, *in* The British in the Sudan, 1898–1956: The Sweetness and the Sorrow 110 (Robert O. Collins and Francis M. Deng eds., 1984).

65 J. N. D. Anderson, *The Modernization of Islamic Law in the Sudan*, 60 Sudan Law Journal and Reports 292–312 (1960).

research into Islamic and tribal customs and legal practices became a necessity for inspectors.

Inspectors faced the complex task of interpreting how Sudanese societies applied law, both customary and Islamic, at the local level. This interpretation went beyond mere observation. Shaped by their own biases, understandings of the penal code, and perceptions of colonial priorities, they filtered the information they gathered through the local leaders and influential figures, as the governor-general directed and emphasized the importance of building relationships with local leaders.[66] These connections were considered essential for inspectors to gain a nuanced understanding of local customs, beliefs, and power dynamics. Through these interactions, inspectors could gather information that would help them shape legal implementation in ways that were both aligned with colonial aims and respectful of local traditions.

However, these efforts to understand local legal practices were inherently limited. Inspectors' reliance on local leaders and influential figures, who were predominantly older males, created a significant blind spot. These leaders' own social positions and biases likely influenced the information they passed on, potentially reinforcing existing power structures and overlooking the perspectives of marginalized groups, like women, younger generations, or ethnic minorities. This dynamic could lead inspectors to misunderstand the complexities of customary law and its application within different communities.

Furthermore, inspectors' interpretations were shaped not just by their background but also by the broader colonial context. Their understanding of the penal code and colonial priorities often overshadowed the nuances of Islamic jurisprudence and customary practices. This could result in the selective application of *diya*, as will be discussed in later sections, or the misinterpretation of local rituals as potential threats to colonial control.

Inspectors' subsequent reports were not neutral reflections of reality but carefully constructed narratives. Emphasis on what they considered "important" played a significant role

66 MacMichael, Anglo-Egyptian, *supra* note 31, at 73–74; Report on the Finances, Administration and Condition of the Sudan 1899, 55.

in shaping how higher-ranking officials perceived Sudanese legal realities. A key example is the delayed implementation of legal reforms. Although the British had identified areas in need of reform before 1924, the revolution ultimately served as the catalyst for the changes they then enacted.[67] This move reflects a calculated use of legal change as a control mechanism, a pattern that will be discussed in further detail later.

Over time, these filtered, and at times distorted, perspectives subtly influenced the evolution of legal practice in Sudan. Inspectors, perhaps unwittingly, molded the understanding of Islamic and customary law held by the colonial administration. Their reports document how they actively interpreted local customs and how these interpretations influenced, or even led to, the incorporation or modification of those customs to fit within the colonial legal framework. This pragmatic approach, characterized by prioritizing functionality within the colonial context, mirrored aspects of how some legal systems emphasize practical solutions. Their actions, however unintentional, shaped the evolution of colonial governance in Sudan.

Beyond inspection and reporting, inspectors wielded significant power through their judicial duties in district courts. Lacking a comprehensive legal handbook to guide their decisions, they navigated a complex legal landscape where the penal code, Islamic law, and local customs intertwined. Their discretion in how and when to apply specific legal principles was immense. As part of their duties, inspectors meticulously recorded the details of each case, their interpretations, and the sentences given. This information found its way into both provincial annual reports and the governor-general's annual reports, which were sent to the consul-general of Egypt and eventually to the British foreign secretary, Sir Edward Grey.[68] In addition, inspectors directly informed their superior, Inspector-General Slatin Pasha,

67 Correspondence from Wingate's Sudan career; Parker re the need for reinforcements at Talodi in Kordofan, the need for a separate penal code for the Sudan, June 1906, SAD.278/6/6–8.

68 Duties of Inspector General drafted by R. von Slatin, the Inspector-General of Sudan in the years 1900–1914; and amended by Sir Reginald Wingate, April 1902, arts. III, IV, VII, VIII, SAD.403/6/16–19.

about the development of political and legal systems in Sudan.[69] Although Slatin Pasha was responsible for providing legal opinions on cases involving local and political matters, he relied on the reports of middle-ranked inspectors to inform his decisions. These reports also provided valuable information to the governor-general about the local situation in Sudan.

While not standard practice across British colonies in Africa, the use of inspectors for legal guidance in Sudan highlights a peculiar dynamic. Despite their rulings not being formally binding, the cases they tried and reported on likely created a body of informal precedents that influenced other officials. These decisions, shaped by individual understandings of justice, necessity, and colonial aims, subtly molded the application of law in Sudan. This reliance on personal interpretation resulted in a system that, while aiming to be responsive to local realities, was inherently unpredictable. This discretionary power, driven by a focus on finding workable solutions and maintaining stability, resembled aspects of how flexible legal systems seek practical outcomes. Ironically, this seemingly adaptive approach could also be seen as a manifestation of disregard for Sudanese legal traditions. By sidestepping established legal scholars or relying on formalized customary procedures, the British system prioritized colonial expediency over the nuanced and consistent application of local legal principles.

To maintain control, colonial administrators relied on middlemen. Necessity dictated a pragmatic approach, balancing British directives with local realities. This dynamic is exemplified in cases like Ahmed Sanad's, where traditional notions of *diya* were likely reshaped to align with a punitive approach. This reliance on personal discretion highlights how pragmatism often trumped adherence to written law, and ironically, turned these middlemen into influential interpreters of Islamic law in Sudan. Figures like Sir Harold MacMichael offer a multifaceted lens into this process, where officials selectively codified customary practices and adapted legal concepts to serve the aims of colonial control.

69 MacMichael, The Sudan, *supra* note 45, at 105.

Case Study: Sir Harold MacMichael

The Judiciary of Sudan building still stands in Gamma Avenue in Khartoum, a towering yellow edifice that dominates the skyline. Its facade, adorned with white pillars and green roof tiles, achieves a distinctively Sudanese appearance through a harmonious blend of colonial stylistic elements. Constructed during British rule, the building now functions as a symbol of independent Sudanese legal sovereignty. However, this symbolism is inherently complicated, reflecting the tensions between aspirations for justice and the enduring influence of past colonial structures. This tension is mirrored within the building's interior. The absence of portraits commemorating precolonial Sudanese legal figures, contrasted with the prominence of British officials, suggests a selective representation of historical authority within the institution. While postindependence portraits of Sudanese judges signify a shift, the continued presence of Sir Harold MacMichael's portrait underscores the complex and contested narrative of legal evolution in Sudan. This contested visual representation necessitates critical examination—an examination that this work undertakes by analyzing the influence of colonial figures on Sudan's legal development. Without formal legal training, MacMichael initiated a unique approach to criminal law that blended English law, Islamic law, and Sudanese customary law—which is a process that has not been fully documented in the literature.

Sir Harold MacMichael serves as a compelling case study for understanding how middle-ranking officials shaped colonial legal adaptation. A product of the colonial system himself, his career trajectory, from district inspector to civil secretary, offers a unique lens into how Sudanese law evolved. Driven by realities of governing Sudan, MacMichael embraced a pragmatic approach that blended elements of English law, Islamic principles, and Sudanese customs. This is evident even in his early inspector years, where his reports and writings showcase flexibility in adapting legal frameworks to local needs. These actions influenced the perspectives of high ranking British officials, highlighting the impact of middle-level figures on broader

legal policy Additionally, MacMichael's prolific documentation, including extensive diaries, offers invaluable insights into the process of legal adaptation for historical research.

Sir Harold MacMichael's prolific research and extensive fieldwork contributed significantly to his understanding of Sudanese customs, law, and society. His publications reveal the vast scope of his investigations. Numerous articles including in *Sudan Notes and Records*, such as "The Kababish,"[70] "Notes on the Zaghawa,"[71] or "The Tungur-Fur of Dar Furnung,"[72] demonstrate his ethnographic interests across diverse regions of Sudan. Additionally, his books, including *A History of the Arabs in the Sudan*[73] and *The Tribes of Northern and Central Kordofan*,[74] showcase his focus on tracing both historical lineages and contemporary tribal structures. This comprehensive body of work likely shaped MacMichael's interpretations of customary laws and his perception of which practices might be adaptable within the colonial legal system.

MacMichael's work highlights the tension between in-depth study of Sudanese society and the practical need to maintain colonial control. This tension, common in colonial contexts, was often reflected in the works of district officers and magistrates, who published ethnographic writings that influenced evolving legal knowledge within British colonial Africa. In Sudan, this pragmatic approach often led to a selective and distorted interpretation of local legal practices, revealing a conflict at the heart of colonial governance. This process, while distinct from the direct application of Islamic law, reflects a similar pragmatism and distortion of traditional legal systems that characterized

70 Harold Alfred MacMichael, *The Kababish: Some Remarks on the Ethnology of a Sudan Arab Tribe*, 40 The Journal of the Royal Anthropological Institute of Great Britain and Ireland 215–31 (1910).

71 Harold Alfred MacMichael, *Notes on the Zaghawa and the People of Gebel Midob, Anglo-Egyptian Sudan*, 42 The Journal of the Royal Anthropological Institute of Great Britain and Ireland 288–344 (1912).

72 Harold Alfred MacMichael, *The Tungur-Fur of Dar Furnung*, 3 Sudan Notes and Records 24–32 (1920).

73 Harold Alfred MacMichael, A History of the Arabs in the Sudan and Some Account of the People who Preceded them and of the Tribes Inhabiting Darfur (1922).

74 Harold Alfred MacMichael, The Tribes of Northern and Central Kordofan (1912).

colonial rule. Analyzing MacMichael's actions highlights the agency of middlemen in shaping the evolution of colonial law, even when their actions were not explicitly framed in terms of Islamic jurisprudence.

He was one of the Cambridge graduates recruited into the Sudan Political Service. MacMichael's interest in the Sudan Political Service was initiated by his professor during his undergraduate degree at Cambridge. Professor E. G. Browne had been asked to suggest some brilliant young students for the service in Sudan by Lord Cromer himself.[75] MacMichael was Professor Browne's suggestion and was summoned to a selection board in London.[76] He stayed and studied Arabic in London after he passed the board, which was presided over by Reginald Wingate.[77]

His being "a product of colonization in Sudan" starts with his first assignment in Anglo-Egyptian Sudan as a deputy inspector in 1905; he was promoted to junior Inspector in 1910, in the Kordofan Province.[78] In 1912, he was appointed as junior inspector to the Blue Nile Province, where he stayed until he was ranked as senior inspector to Khartoum in 1913.[79] That means, in Anglo-Egyptian Sudan, he held a middle-ranked position which was not a colonial minister but had some influence on colonial law-making. As the definition of the British middle-ranked officer in this context, he was responsible for implementing policies and maintaining order in the colonies and for training local officials and maintaining good relations with local leaders.[80] As will be explained in light of his diaries, correspondences, newspaper cuttings, and other archival documents, he played a significant role in developing criminal law which blended with Islamic and local traditions in Sudan through his official duty and which gave him the responsibility of administering justice.[81]

MacMichael's inspections and reports had a profound impact on his understanding of Sudanese society and indirectly

75 MacMichael, Sudan Political, *supra* note 44, at 3.
76 *Id.*
77 *Id.*
78 SAD 532/15, 18.
79 SAD 532/15, 18.
80 Benton and Ford, *supra* note 33, at 8–11.
81 *Id.* at 13.

influenced colonial law-making while he forged relationships with local leaders. This gave him insights beyond codified law, influencing his later legal reforms. His publications in journals like *Sudan Notes and Records* disseminated his insights into local customs and values. Diaries and correspondences reveal extensive communication with figures such as the Kabbabish Sheikh and Ali al-Tum (a powerful Sudanese political and religious figure),[82] and high-ranking British officials including Slatin Pasha and Bonham Carter.[83] This demonstrates MacMichael's crucial role as a cultural intermediary, bridging the gap between British officials and Sudanese leaders from his early career as a middle-ranking officer.

The establishment of relations and inspection of rural customs were aimed at gathering information, but MacMichael's reports often reveal him searching for solutions beyond strict British codes, prioritizing workable approaches within the specific context of Sudan. This focus on practicality echoes aspects of legal systems that emphasize achieving solutions that fit local needs.

MacMichael's insights, reflected in his correspondences and reports, were valued by his superiors, particularly Slatin Pasha, due to his deep understanding of Sudanese society.[84] His inspections and local connections significantly influenced his published and unpublished works, shaping his advocacy for a balance between local customs and flexible legal principles within Sudan. Crucially, his understanding and interpretation of customary practices helped shape his vision for applying and

82 SAD.585/5/27; SAD.585/9/23; SAD.585/9/1791911; SAD.585/10/23; SAD.585/10/29.

83 SAD.578/4/43–45; SAD.578/4/52–54; SAD.585/4/332; SAD.585/8/176; SAD.585/9/59; SAD.585/10/186; SAD.585/11/12; SAD.585/12/10; SAD.585/12/19; SAD.585/12/27; SAD.585/12/30; SAD.585/12/32; SAD.585/12/41; SAD.585/12/46; SAD.585/12/47; SAD.403/6/1–13; SAD.585/2/33;, SAD.585/6/176; SAD.585/6/180; SAD.585/7/130; SAD.585/8/65; SAD.585/8/93; SAD.585/8/147; SAD.585/8/155; SAD.585/9/42; SAD.585/9/46; SAD.585/10/38; SAD.585/11/52; SAD.578/4/66–68; SAD.578/4/73, SAD.585/7/50; SAD.585/8/155; SAD.585/9/125; SAD.585/11/11; SAD.585/11/82; SAD.585/12/7; SAD.585/12/19; SAD.585/12/24; SAD.585/12/46.

84 "Letter from R. von Slatin to MacMichael regarding thoughts on Ali al-Tum, 1909 Mar 26–1914 May 5," SAD.403/6/4.

incorporating elements of these legal traditions within the context of British criminal law in Sudan. His writings provide valuable sources for understanding this process of legal adaptation, drawing heavily from his on-the-ground experiences, especially his early work in Kordofan, from 1905 to 1912.[85]

To understand the evolution of MacMichael's thought and its impact on colonial policy, it is essential to examine his formative years in Kordofan. Starting in 1905, his daily routines, interactions, and reports from the region offer a granular view of how he navigated the complexities of Sudanese society and shaped his vision for legal reform.

MacMichael's interest in court cases can be traced back to his first tour of duty as deputy inspector in Khartoum, to which he was appointed on September 19, 1905.[86] His main activities in Khartoum consisted of attending courts, which he described as "only mean[ing] that he sits in a room with the governor or civil judge",[87] office work, inspections in the town, receiving complaints,[88] socializing at the club, and playing games such as cricket and squash.[89]

One of the most striking aspects of his correspondence, even privately with his relatives, is his keen interest in observing the judicial proceedings. As he describes, the most common cases were assault and house breaks for which the accused were acquitted. He was observing the cases mostly about land ownership and disputes in the court of civil justice, and helping the civil judge.[90] He visited places near Khartoum, such as Omdurman, to observe both the courts and everyday life of Sudanese people.[91]

After spending two months in Khartoum, he was appointed deputy inspector to Kordofan Province upon his request

85 MacMichael, Sudan Political, *supra* note 44, at 15.

86 The Sudan Gazette, October 1, 1905, SAD 586/5/34.

87 MacMichael to his parents, October 25, 1905, SAD 578/4/35.

88 SAD 585/4/1–383, January 14, 1906.

89 SAD 578/4/36, MacMichael to his parents, October 25, 1905.

90 SAD 578/4/46–48, the arrival of the wives of British officials, King's Day celebrations and listening to cases at the Court of Civil Justice, November 10, 1905.

91 SAD 678/4/43, MacMichael to his parents on different dates in 1905.

in December 1905.[92] MacMichael's interest in court cases continued during his time as deputy inspector in Kordofan. Upon his arrival in El-Obeid on January 10, 1906, MacMichael commenced his duties at the *mudīriyya* in the inspector's office.[93] In El-Obeid he was taking plaints in the court, [94] working on civil and criminal cases,[95] such as theft, kidnapping, rape, slavery, embezzlement, tax evasion, assisting in concealment, malicious prosecution, and bribery.[96]

The cases that MacMichael tried and attended were the subject of his annual reports to his superior which contained observations not only about courts and cases but also about local customs and traditions. His annual reports were then incorporated into the provincial reports which were sent first to *mudīr*s, then to the governor-general. Therefore, middle-ranking British inspectors, who seemed to have no effect on colonial law, indirectly had a say over the new vernacular law emerging in Sudan.

MacMichael's original reports have not been found in either the British or Sudanese National Archives; however, their content can be located in published and unpublished work, especially his writings in the *Sudan Notes and Records*. These reports are the sources used to analyze MacMichael's position and influence on Sudanese criminal law making.

The 1906 governor-general's report notes that Sudan's judiciary system in 1906 was in its infancy and needed to be developed.[97] On the other hand, in J. R. O'Connell's report as governor of Kordofan where MacMichael was inspector, it is stated that the crimes of violence were restricted to a comparatively small proportion of the population.[98] O'Connell mentions only a few cases

92 SAD.586/5/33.

93 SAD.585/4/10–11, MacMichael's personal diary, January 10–11, 1906.

94 SAD.585/4/14, MacMichael's personal diary, January 14, 1906.

95 SAD.585/4/15, MacMichael's personal diary, January 15, 1906.

96 SAD 585/4/66; SAD 585/4/84; SAD 585/4/115; SAD 585/4/123; SAD 585/4/130; SAD 585/4/137; SAD 585/4/140; SAD 585/4/148; SAD 585/4/188; SAD 585/4/189; SAD 585/4/191; SAD 585/4/192; SAD 585/4/193; SAD 585/4/210; SAD 585/4/245; SAD 585/4/287; SAD 585/4/311.

97 FO 407/170, "Further Correspondence Respecting Affairs in Soudan and Africa, January to June 1907."

98 *J.R. O'Connell's Annual Report of Kordofan Province, 1906*, *in* Reports on the Finances, Administration and Condition of the Sudan 1906, 700.

in the report and confirms that in 1906, the law was efficient and sufficient in Kordofan.[99] This detailed report includes a wealth of information about Kordofan, including the condition of the people, education, finance, hospitals, prisons, labor, and loans. It also provides an overview of the judiciary situation in the region.[100] The report includes minor local news about the subdistricts, thanks to reports prepared by the inspectors in the provinces. This report provides a more comprehensive view of the situation not only in Kordofan but in all of Sudan. It can deepen our understanding of the incorporation of vernacular law and Islamic law in the British criminal administration in Sudan.

In 1907, after passing his Arabic and law exams with distinction,[101] MacMichael was granted the powers of a first class magistrate under the Code of Criminal Procedure.[102] He continued to preside over cases in Court Kordofan, including those related to disobedience, unlawful assembly, theft, bodily injury, false charges, abetting, embezzlement, murder, malicious prosecution, and brawling.[103]

Within his 1907 annual report of Kordofan, MacMichael registered all the cases he tried. The governor-general's report sent from Eldon Gorst, the consul-general of Egypt to the British foreign secretary, Sir Edward Grey, mentioned the need for a more satisfactory Court of Appeal in Sudan and proposed constituting a High Court in Khartoum comprising two judges.[104] The report of 1907, like that of 1906, contains precise information about the number of cases tried in Sudan during the entire year.[105]

99 *Id.*

100 *Id.*

101 SAD 586/5/34, "C. S. C. R.R./161," Sudan Government Order, [n.d.] 1907, 471–72.

102 Sudan Times, March 18, 1907; SAD 586/5/34;

103 SAD 585/5/16; SAD 585/5/17; SAD 585/5/25; SAD 585/5/27; SAD 585/5/31; SAD 585/5/40; SAD 585/5/41; SAD 585/5/42; 117; SAD 585/5/123; SAD 585/5/139; SAD 585/5/183.

104 *From Sir Reginald Wingate to Sir Eldon Gorst*, *in* Report on the Finances, Administration and Condition of the Sudan 1907, 23.

105 "From the interesting report supplied by the legal Secretary, Mr. Bonham Carter, it appears that 310 orders were made in civil executions during 1907 for a total amount of £E 3,555, and that the sum recovered was £E 2,112, or about 59 per cent., which is considered satisfactory. The crime statistics show that there were 912

Unlike the former report, the governor-general's report of 1907 has the subtitle "Remarks on British Civilian Inspectors." It explains that there were twenty-seven officials in Sudan who were assigned to provinces to write detailed reports, and engage in certain judiciary duties and land registrations in addition to ordinary provincial duties.[106] The report explicitly states that:

> The Governors of Provinces continue to render satisfactory reports on these gentlemen, who are steadily rendering themselves more and more useful, and who by keen interest in and devotion to their work amply justify the system under which they were selected for service in this country…
>
> A considerable knowledge of Law is required for the constant criminal and judicial work which is so essential [for the Deputy Inspectors that] every official should personally carry out himself. Such work provides the best means of gaining that understanding and appreciation of the social problems of the country which to some extent underlie all successful administration.[107]

This emphasis on understanding local law suggests the need for flexibility that mirrors a pragmatic and adaptive approach in legal application. Inspectors like MacMichael, through their reports, became advisors on how to adapt British codes to Sudanese realities. Although not mentioned in the text, this requirement affected their reports and helped the legal secretary of Sudan to develop existing law in some areas. Based on the annual report of Kordofan for 1907, MacMichael's knowledge of Sudanese law was notable.[108] The governor of Kordofan's report to the center reflected that MacMichael's trials on slavery cases—with

convictions before non-summary courts in 1907 . . ."; "The death sentence was carried out in then cases." See Report on the Finances, Administration and Condition of the Sudan 1907, 23.

106 Report on the Finances, Administration and Condition of the Sudan 1907, 137.

107 *From Sir Reginald*, *supra* note 104, at 138–39.

108 *W. Lloyd's Annual Report of Kordofan Province, 1907*, in Report on the Finances, Administration and Condition of the Sudan 1907, 326–27.

the other inspectors—were an issue to be solved promptly.[109] In addition to annual province reports, the legal secretary's annual report provides even more detailed information about the exact number of cases tried in each province.[110] This implies that inspectors were most likely sending reports to the Legal Secretary Department as well.

The governor-general's emphasis on building relationships with local leaders and his directive to document and interpret local customs were directly served by the meticulous collection of case details and the requirement that inspectors gain a deep understanding of customary and Islamic legal elements.[111] This strategy aimed to create a legal system that, although rooted in British principles, incorporated elements that would appear "acceptable" to the Sudanese population. The governor-general's 1910 report demonstrates his belief that, at least to some degree, this goal had been achieved.[112]

During 1908 and 1909, MacMichael presided over a wide range of cases, from theft and bribery to murder and slave trading.[113] His case records contributed to annual reports, offering insights that directly informed policy shifts, such as the 1908 ordinances addressing "vernacular law."[114] MacMichael's own experiences, reflected in Kordofan's 1909 report, highlighted

109 *Id.* at 331.

110 *Annual Report of Legal Department, 1907*, *in* Report on the Finances, Administration and Condition of the Sudan 1907, 627–50.

111 MacMichael, Anglo-Egyptian, *supra* note 31, at 73–74; Report on the Finances, Administration and Condition of the Sudan 1899, 55; Report on the Finances, Administration and Condition of the Sudan 1906, 742.

112 Wingate to Mitchell Innes re the judicial system developed in the Sudan, August 1–31, 1910, SAD.297/2/37–39.

113 SAD 585/6/6; SAD 585/6/7; SAD 585/6/19; SAD 585/6/24; SAD 585/6/42; SAD 585/6/118; SAD 585/6/121; SAD 585/6/122; SAD 585/6/126; SAD 585/6/132; SAD 585/6/136; SAD 585/6/137; SAD 585/6/178; SAD 585/7/14; SAD 585/7/17; SAD 585/7/20; SAD 585/7/22; SAD 585/7/23; SAD 585/7/24; SAD 585/7/25; SAD 585/7/29; SAD 585/7/33; SAD 585/7/40; SAD 585/7/163; SAD 585/7/165; SAD 585/7/171; SAD 585/7/172; SAD 585/7/173; SAD 585/7/180; SAD 585/7/184.

114 *From Sir Eldon Gorst to Sir Edward Grey*, *in* Report on the Finances, Administration and Condition of the Sudan 1907, 26–27; *From Sir Eldon Gorst to Sir Edward Grey*, *in* Report on the Finances, Administration and Condition of the Sudan 1908, 23–24.

legal complexities surrounding trade and contracts—difficulties that these ordinances likely sought to address.[115]

The importance of inspectors' reports in shaping Sudanese law was further solidified in 1910 with the enactment of the governor-general's council ordinance. This ordinance reserved the inspector-general's presence in the council to assist the governor-general in the discharge legislative and executive powers.[116] This shift increased the inspectors' influence, demonstrating that men like MacMichael did not just enforce law but influenced its evolution through their insights into the clash between customs and colonial law. Their on-the-ground experience became a crucial source for adapting British codes. This process highlights the practical, outcome-focused approach that characterized colonial legal adaptation within Sudan.

The Annual Report of Kordofan for 1911 declares the establishment of a Slavery Repression Department in the province.[117] This is consistent with the reports and journals of MacMichael, who had consistently emphasized that slavery was a critical problem that he frequently addressed in court.[118] There is no doubt that this department was established in response to the need identified by inspectors in the subprovinces. This development underscores the influence of middlemen, not only on the practice of law but also, at times, on the shaping of formal legislation. The establishment of the Slavery Repression Department in Kordofan in 1911 was a significant event in the province's history. It marked the culmination of years of efforts by British officials to suppress the slave trade, which had been a major problem in the region for centuries. The department was tasked with investigating reports of slavery, rescuing enslaved people, and bringing slave traders to justice. The middlemen played a key role in opening this department. They were the ones who

115 *From R. V. Seville, Governor of Kordofan Province, to Sir Reginald Wingate, in Annual Report of Kordofan, 1909*, in Report on the Finances, Administration and Condition of the Sudan 1909, 745.

116 *Memorandum from Sir Reginald Wingate to Sir Eldon Gorst*, *in* Report on the Finances, Administration and Condition of the Sudan 1910, 130.

117 *Annual Report of Kordofan, 1911*, in Report on the Finances, Administration and Condition of the Sudan 1911, 171.

118 See SAD 585/9/1–191 for the slavery cases MacMichael tried and commented on in 1911.

informed British officials about the slave trade and helped them to track down slave traders.

When MacMichael was relocated to Khartoum as senior inspector in 1913, his correspondence with high-ranking British officials and influential locals gave way to face-to-face interactions, a pattern that continued in 1914.[119] MacMichael maintained close contact with high-ranking British officers from the beginning of his assignment in Sudan to submit reports, confer about cases, and exchange information when needed. This close contact with British officials gave MacMichael a great deal of influence over the making of laws in Sudan, as he was able to shape these officials' opinions and influence their decisions.

For instance, Slatin Pasha, the inspector-general of Sudan, had a great impact on law-making for the sake of his duty. As stipulated in his job description, he was supposed to "acquaint himself fully with the Laws, Ordinances, and Orders of the Sudan Government and to make any remarks on them to the Governor General that he considers advisable."[120] This gave him a great deal of influence over the making of laws in Sudan, as he was able to identify potential problems with existing laws and suggest changes. In a letter to MacMichael, Slatin Pasha writes, "I always appreciate your views and take them into consideration."[121] In all of their correspondence from 1909 to 1914, it can be observed that Slatin is either asking for advice on a local administrative matter or a court case on which MacMichael would have information or authority.[122] This suggests that Slatin Pasha relied heavily on MacMichael's expertise and experience, and that he valued MacMichael's opinion on a wide range of matters.

119 SAD 585/11/11; SAD 585/11/12; SAD 585/11/13; SAD 585/11/47; SAD 585/11/77; SAD 585/12/7; SAD 585/12/10; SAD 585/12/19; SAD 585/12/24; SAD 585/12/27; SAD 585/12/30; SAD 585/12/32; SAD 585/12/41; SAD 585/12/46; SAD 585/12/47; SAD 585/12/60.

120 MacMichael, The Sudan, *supra* note 45, at 78.

121 SAD 403/6/4

122 SAD.403/6/1–13.

III Colonial Control Through Adaptive Law

The surge in *diya* cases adjudicated by British judges during the "period of reaction"[123] following the 1924 revolution, from 1925 to 1936, raises questions about the timing of this legal shift. Marked by Sudanese resistance, which reached a violent climax in the revolution, this period led the British to adopt a more cautious approach to governance.[124] Their response was designed to solidify control—isolating the Sudanese from Egyptian influence, replacing Egyptian staff with Northern Sudanese personnel, and reemphasizing "traditional" power structures through indirect rule and expanded authority for tribal leaders.[125] The appearance of *diya* in British criminal courts within this context is unlikely to be coincidental. Instead, it strongly suggests a calculated strategy by the colonial administration. *Diya*, with its roots in Islamic jurisprudence, likely became a tool to appease local leaders, maintain social order, and solidify British control amidst rising tensions. This use of *diya* highlights the inherent complexities of colonial rule, often forcing a clash between legal ideals and realities on the ground. The incorporation of *diya* into Sudanese courts reveals a fundamental tension: the dissonance between the intended function of a codified British penal system and the realities encountered in practice.

This section concerns specific cases where British judges applied *diya* despite its legal ambiguity. This practice exemplifies a necessary deviation from rigid legalism, driven largely by the middle-ranking officials' on-the-ground actions. Faced with the inadequacy of codified law in addressing the nuances

123 The concept of a "period of reaction" to describe the political climate in Sudan after the 1924 revolution is borrowed from the work of M. W. Daly and P. M. Holt. See M. W. Daly and P. M. Holt, A History of the Sudan: From the Coming of Islam to the Present Day 136–42 (1979).

124 For more information about the 1924 revolution, see Mohammed Nuri El-Amin, *Britain, The 1924 Sudanese Uprising, and the Impact of Egypt on the Sudan*, 19 The International Journal of African Historical Studies 235–60 (1986); Elena Vezzadini, Lost Nationalism: Revolution, Memory and Anti-Colonial Resistance in Sudan (2015); Mark Fathi Massoud, Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan 49 (2013).

125 Heather J. J. Sharkey, Living with Colonialism: Nationalism and Culture in the Anglo-Egyptian Sudan 49, 71, 81 (2003).

of Sudanese society, inspectors and judges became agents of adaptation. Their reports, case records, and interactions with local leaders reveal how they navigated the conflict between British directives and deeply rooted customary practices, including the use of *diya*. This section explores their role in upholding colonial authority while finding solutions that, though not always in strict adherence to the code, demonstrated a pragmatic and adaptable approach characteristic of effective colonial legal administration.

A revealing glimpse into the potential manipulation of *diya* for colonial control emerges in a letter the British official Thomas Richard Hornby Owen penned between 1928 and 1930.[126] He describes a violent brawl erupting during a traditional game, resulting in a death. Owen's dismissive account reveals his colonial disdain but, more importantly, it suggests a pragmatic approach to justice. His primary concern seems to lie in avoiding a "major court" inquiry. He advocates for swift resolution through *diya*, regardless of the intent behind the killing. This prioritization of expediency over careful consideration of traditional legal customs foreshadows a pattern where the colonial administration could selectively use *diya*, a concept rooted in Islamic jurisprudence, as a tool of social control, rather than a means of achieving true justice. This signals a broader shift away from respecting the nuances of customary practices toward their manipulation to serve colonial interests.

The 1934 report issued by Chief Justice Howell Owen, a provincial inspector (a role later known as assistant district commissioner), illuminates the calculated transformation of *diya* by the British colonial administration.[127] While acknowledging *diya* as a traditional practice, the report strictly delineates the circumstances under which it would be permissible.[128] This selective application, notably its exclusion from "detribalized communities or towns" and cases of clear murder, contradicts

126 Letters home from Owen as A.D.C. Geteina and Ed Dueim, White Nile Province, July 1–19, 1928, SAD.414/2/19–21.

127 "Note on the trial of witchcraft cases," issued by Howell Owen Chief Justice, with accompanying note on the payment of "blood money" (*diya*) in the Sudan May 5, 1934, SAD.624/2/3–5.

128 SAD.624/2/5.

the broader principles of *diya* within Islamic jurisprudence. This reveals a calculated approach to manipulating customary law, a pattern consistent with the broader colonial tendency to reinvent traditions. The British focus on control, rather than the restorative aims of *diya*, demonstrates how Islamic legal concepts were molded to align with colonial interests. This undermined *diya*'s traditional role in achieving restorative justice.

The 1936 letter from James Gordon Stewart Macphail, the district commissioner of Malakal, Upper Nile Province to the district commissioner of Zeraf Island sheds light on the complex interplay between traditional custom, colonial authority, and the distortion of *diya* for maintaining control.[129] While framed as the resolution of a "blood-money" case, the document unveils a process of negotiation and manipulation heavily influenced by colonial officials. The acceptance by the Shilluk (a Nilotic ethnic group inhabiting the White Nile region of South Sudan) of fewer cattle, [130] the debate over the size of a bull, and Macphail's role as the ultimate arbiter underscore how *diya* became less a strict application of Islamic law and more a bargaining tool. This case suggests that *diya* was co-opted into the colonial system, primarily serving their vested interest in fostering intertribal relations and preventing conflict.

Furthermore, the exchange between Macphail and the Zeraf Island district commissioner reveals a network of inter-reporting and influence among middlemen. This collaborative process of negotiation and adjustment further demonstrates how *diya* became less a strict application of Islamic law and more a malleable tool within the broader framework of colonial control.

The transformation of *diya* is evident in a note by another assistant district commissioner, Paul Philip Howell, titled "Notes on Dinka Social Structure and Laws from Tonj File

129 Macphail to D.C. Zeraf Island on the payment of cattle to the Shilluk as blood money, November 7, 1936,

SAD.762/3/34.

130 SAD.68/10/1–230; Papers, notes and correspondence on the Shilluk collected by Howell for research purposes (many originate from the Sudan Political Service and some from the Jonglei Investigation Team). Most of the papers seem to relate to Shilluk law and custom though other subjects are also dealt with.

66A."[131] It outlines attempts to standardize blood-money payments, with modifications based on the weapon used and other factors.[132] This formalization contradicts *diya*'s traditional adaptability in Islamic law, where specific amounts would not be predetermined. Crucially, the note acknowledges the "elasticity" of the payment rules. This malleability in the hands of colonial officials transformed *diya* from a means of restorative justice rooted in Islamic principles into a potential instrument for controlling disputes and maintaining colonial order.

The 1941 Darfur case starkly reveals the challenges middlemen might face when navigating the intersection of formal and customary legal systems regarding *diya*.[133] The British colonial court's acquittal of the Beni Helba man directly clashes with the Fellata tribe's traditional right to demand compensation.[134] The central tension stems from the power imbalance inherent in the colonial situation. The British inspector's initial dismissal of customary law and subsequent threats to the chief highlight this dynamic and likely fueled the tribe's defiance. This case underscores the need for middlemen to possess not only exceptional negotiation skills and a deep understanding of both legal systems, but also a keen awareness of how power dynamics stemming from colonialism might shape responses and complicate the process of reaching a resolution.

In his "Notes on the Baqqarah," Howell explores the complex relationship between homicide and *diya* within the Baqqarah tribe.[135] While blood feuds were historically part of their culture, he notes that incidents of homicide were less frequent in modern times, and did not typically escalate into prolonged conflict. Traditional agreements to assist in *diya* payments

131 *Notes on Dinka Social Structure and Laws* from Tonj file 66A, *in* Dinka, General Information File, vol 1, Compiled by Howell during Service among the Ngok Dinka, Kordofan and Comprising Copies and Extracts from District Files, Bahr al-Ghazal/Equatoria and Upper Nile Provinces, SAD.767/8/5–45

132 "Blood Money," SAD.767/8/14.

133 Jacqueline H. Wilson, Blood Money in Sudan And Beyond: Restorative Justice or Face-Saving Measure? 94 (Ph.D. dissertation, Georgetown University, 2014).

134 *Id.*

135 "Notes on the Baqqarah for Western Kordofan District Handbook, by Howell: Vol 2: Messiriyyah." October 30, 1948, SAD.768/7/1–84.

provided insights into tribal social structures, but these alliances were fluid and ever-changing. The duty to avenge a death was separate from the obligation to pay *diya*, and even close family groups could temporarily break agreements depending on the political situation. Howell illustrates this dynamic using a 1947 incident where an assassination sparked a temporary feud between groups. The case illustrates the intricate social and political factors involved in *diya* agreements. Middlemen likely need a deep grasp of these dynamics to successfully mediate *diya* settlements. They needed to be aware of shifting alliances, the potential for temporary breaks in agreements, and the separation between avenging and paying compensation.

These complexities highlight the profound challenges faced by middlemen in navigating the conflicting demands of colonial control and the realities of Sudanese legal practices. While the colonial administration sought centralized control, on-the-ground realities necessitated a pragmatic, often contradictory, approach.

The case studies examined here reveal how *diya*, a concept rooted in Islamic jurisprudence, was selectively adapted and manipulated by the British colonial administration. This distortion of customary law highlights the inherent contradictions of colonial governance. While attempting to impose a codified and centralized legal system, British officials ultimately relied on the pragmatic intervention of middlemen to bridge the gap between theory and practice. This reliance, while born out of necessity, created a system where customary practices were malleable, often bent to serve colonial interests.

IV Conclusion

Inspectors as British middle-ranking men were pivotal in implementing policies from Khartoum. Their roles as observers and meticulous note-takers fed information back to the central government, facilitating further standardization attempts. Yet, paradoxically, inspectors themselves were forced to deviate from those central directives, revealing the limits of colonial power and the need for adaptability in diverse regions.

While directly linking MacMichael to the specific inclusion of *diya* in the courts is difficult, his experiences shaped the broader legal landscape. His engagement with customary practices and interpretations of local law contributed to a deeper, albeit flawed, understanding among British officials. This shift made the adaptation of elements like *diya* not only possible but seemingly necessary for navigating the complexities of Sudanese society.

A key pitfall was the tendency of British officials to codify customary laws, including those of the Dinka. This attempt at rigid control undermined the flexibility inherent in traditional systems and often led to misinterpretations or distortions, perpetuating misunderstandings.

The British legal system in Sudan, while designed to be a codified and centralized one, unintentionally created space for a pragmatic approach that bore certain resemblances to how flexible legal concepts could be applied within certain Islamic legal frameworks. Middlemen, operating within this system, played a pivotal role in bridging the gap between British law and local realities. Their actions, however, were ultimately driven by the exigencies of colonial control, not by the principles of justice which are inseparable from Islamic legal concepts.

This invocation of flexible legal approaches highlights a fundamental misunderstanding and manipulation of how legal systems can be adapted responsibly to promote equitable outcomes. While flexibility is possible within Islamic jurisprudence, it remains grounded in broader principles. In contrast, the British use of *diya* was often less about justice and more about expediency. Their selective application of *diya* to appease certain groups, its codification that undermined its inherent flexibility, and the prioritization of colonial order over traditional understandings of justice all illustrate how their pragmatic approach ultimately distorted legal practices for self-serving purposes.

The use of Islamic elements, even with its distortion through this pragmatic colonial approach, underscores the complex evolution of law under colonialism. Notably, these practices, despite their influence, did not become codified. This

highlights the limits of British power and the ultimate resilience of traditional legal systems that continued to exist, albeit in modified forms, alongside the imposed colonial structure. The long term consequences of this distortion on Sudanese legal development would be a valuable direction for future studies.

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

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Abstract

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

Siyāsa Sharʿiyya in Pre-Modern Contexts

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

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

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

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

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

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

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

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

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

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

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

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

11 Q 4:58–59.

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

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

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

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

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

15 *Id.* at 84.

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

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

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

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

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

17 *Id.* at 20:392.

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

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

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

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

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

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

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

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

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

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

24 *Id.*

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

Late Mamlūk and Ottoman *Siyāsa Sharʿiyya*

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

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

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

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

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

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

26 *Id.* at 2:116.

27 *Id.* at 2:116–17.

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

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

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

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

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

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

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

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

35 *Id.*

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

Twentieth-Century *Siyāsa Sharʿiyya*

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

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

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

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

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

The *ʿUlamāʾ* in the Legal and Educational Reform

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

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

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

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

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

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

42 Shalaqānī, *supra* note 40, at 82.

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

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

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

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

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

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

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

46 Aḥmad Amīn, Ḥayātī 70 (1978).

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

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

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

50 Khallāf, *supra* note 3, at 1–2.

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

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

Siyāsa Sharʿiyya: Redefining the Boundaries

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

51 *Id.* at 2.

52 Imām, *supra* note 37, at 1:16–20.

53 *Id.* at 1:20.

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

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

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

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

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

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

Public Benefit: Reimagining its Place in the Legal Epistemology

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

59 *Id.* at 14.

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

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

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

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

Legal Reasoning Reconsidered: Its Redefinition and Relocation

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

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

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

64 *Id.* at 13–14.

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

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

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

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

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

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

Analysis

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

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

72 *Id.* at 47.

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

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

73 *Id.* at 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83 Marāghī, *supra* note 74, at 40.

84 *Id.*

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

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

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

85 *Id.* at 19–20.

86 *Id.* at 23.

87 *Id.* at 25.

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

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

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

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

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

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

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

92 *Id.* at 48.

93 *Id.* at 48–49.

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

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

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

Conclusion

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

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

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

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

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

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

101 See also Andrew March. He refers to Ayoub's book, in which Ayoub argues that "late Ḥanafī jurisprudence expanded the established jurisdiction of siyāsa to endorse a legislative role for the sultan." March contends that Ayoub's book primarily supports the view that Islamic law is "jurist-centered," rather than acknowledging direct sultanic involvement. Andrew F. March, *Review of Law, Empire, And The Sultan: Ottoman Imperial Authority And Late Ḥanafī Jurisprudence*, 70 American Journal Of Comparative Law 646–50 (2022); Ayoub, *supra* note 100, at 28. March at p. 5.

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

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

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

Conjuring Sovereignty: How the "Constitution" of Medina Became an Oracle of Modern Statehood

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Abstract

Although the legal institutions of postcolonial Egypt and much of the Arab world had been reconstituted along the lines of Napoleonic civil code in the 1940s, Islamic political discourse remained encumbered by claims in which the nation, the umma, was defined by faith rather than territorial boundaries, and lacked a notion of secular citizenship and sovereignty. South Asian scholar Hamidullah's apologetic recasting of the Ṣaḥīfat al-Madīnā in the 1930s as the "world's first written constitution" may have handed Egyptian Islamic reformists like the Islamic reformist and lawyer Salim El-Awa the solution to this problem. Wildly successful, El-Awa's strategically ahistorical reading in Sadat's Egypt pitted the purportedly liberal Prophetic politics against a constrictive juristic tradition. The resulting discourse made the Ṣaḥīfa available to anyone who wished to get past the structural incompatibility between Islamic politico-legal tradition and the territorially constituted nation-state. Besides disarticulating the relationship between Islamic law and politics, the Ṣaḥīfa may have performed another unintended function. As a treaty that placed no limits on a sovereign's power, now elevated as the true Islamic constitution that had been obscured by later tradition, it became something of a modern oracle, providing the perfect instrument of legitimation to the modern Arab authoritarian states looking to deploy Islam but to bypass the tradition of Islamic jurisprudence.

Keywords: Sahifa of Medina, constitution, Muhammad Hamidullah, Salim El-Awa, citizenship, territoriality, modern state, secularization, Jews of Medina, Islamic state, Abdallah Bin Bayya, authoritarianism

Introduction[1]

> *"We have no doubt that the rulings pertaining to the treatment of the Jews in the Constitution of Medina are the standard against which the various juristic opinions must be judged; whichever of them agree with these rulings we accept them, else we throw them aside."—Salim El-Awa*[2]

> *"Fully in power" in his society when the Ṣaḥīfa was written, the Prophet "never asked them to abandon their polytheism for monotheism, but only demanded their loyalty to the state."—Rāshid al-Ghannūshī, 2012*[3]

> *"The state of Medina extended citizenship to include non-Muslims according to the Constitution of Medina, for the Jewish tribes were considered along with the believing Immigrants and Helpers 'a single community to the exclusion of all other people'."—Rāshid al-Ghannūshī, 2015*[4]

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2 Muḥammad Salīm al-ʿAwwā, Fī'l-niẓām al-siyāsī lil-dawla al-islāmiyya 56 (2nd ed., 1427/2006); all the subsequent references are to this edition except when indicated otherwise. This text was originally published in 1975, and the English translation was published as Muhammad S. El-Awa, On the Political System of the Islamic State (1980). This particular comment is not found in the original 1975 edition of the text, which will be indicated as ʿAwwā, Niẓām (1975).

3 Rāshid al-Ghannūshī, al-Dīmuqarāṭiyya wa-ḥuqūq al-insān fī'l-Islām 185 (2012).

4 Rāshid al-Ghannūshī, al-Muwāṭana: naḥwa taʾṣīl li-mafāhīm muʿāṣira 52 (2016).

In the first third of his 2008 monograph *The Fall and Rise of the Islamic State*, American constitutional lawyer and Harvard professor Noah Feldman depicts in glowing terms what he calls the "classical Islamic constitution." The monograph, it should be noted, was published a few years before the phrase "Islamic state" was to enter infamy as the label adopted by the terrorist outfit that grew up in Iraq under the US occupation. Feldman's argument is well known to historians of Islam. The copious Sunni political discourse on the caliphate, its prime importance as a singularly important obligation, its historical evolution, theological grounds, conditions, powers, and limits lie at the heart of Islamic political literature. One persistent concern of this literature is to articulate limits on the authority of the ruler: he was neither infallible, nor the best or most pious by virtue of this office, and had the function of upholding the divine law. Furthermore, although this part was never formally institutionalized and seldom actualized, he had to be among the most knowledgeable and pious, and constrained in his powers over public treasury, earning a stipend ideally no more than that of an average Muslim. The caliph (or *amīr al-muʾminīn*) ruled the *umma* of the believers in the footsteps of the Prophet Muḥammad, inheriting his political but not religious authority. Notwithstanding the pervasive Western stereotype of the "oriental despot," the powers of the caliph–sultan were very far from absolute in theory or practice.[5] If constitutions are meant to limit the powers of the ruler and underpin rule of law, the unwritten classical Islamic constitution can boast a long and meaningful life over the course of an extremely eventful millennium in the lands of Islam, ending with the rise of modernizing reforms in mid-nineteenth-century Istanbul. None of this, however, would be familiar to a reader of modern Muslim political discourse, to whom Islamic constitutionalism has come to mean something entirely different. The classical Islamic constitution spoke to the believing community and its ruler, and treated temporal regional rulers (who would adopt titles such as *amīr*, *sulṭān* or *malik*) as merely deputies of the proper caliph. The caliph ruled

5 Noah Feldman, The Fall and Rise of the Islamic State 31, 34 (2008).

not a territorially defined state but a religiously defined community, the *umma*, which included its *dhimmī*s or non-Muslim ward-communities.

The modern nation-state, in contrast, stands in a subversive relation vis-à-vis religious traditions, as a growing number of scholars have argued. Far from being a neutral instrument of governance, the state is secular and secularizing. Notably, it secularizes not by separating religion from politics, but by defining and continually redefining religious doctrine itself to render it usable for the state's own purposes.

This study examines this contention through the case of a remarkable recent transformation in Islamic tradition, that of the *Ṣaḥīfat al-Madīna*, also known as *kitāb* or *wathīqa* (henceforward, the *Ṣaḥīfa*) of Medina, from a relatively obscure treaty of the Prophet Muḥammad with his followers and the Jews of Medina to the centerpiece of Islamic political imagination and the fount, as indicated in the epigraph above, of all proper Islamic public norms. It thus offers an opportunity to reflect on how and why traditions adjust themselves to the dictates of the state, how they are reopened for rereading and misreading, and in what ways interest or prejudice rather than robust scholarship might decide the course of a tradition. Finally, by shedding light on the key moments of intervention, formation, and contestation, it asks whether excavating this process might offer some hope against manipulation of tradition, and the cynical view that tradition is merely accumulated manipulation.

In the opening decades of the twenty-first century, the Arab Islamic discourse, be it pro- or anti-reform, revolutionary or counter-revolutionary, Salafī or Sūfī, seems unanimous that the document containing the declaration by the Prophet Muḥammad of the terms of the believers' mutual solidarity and their relationship with the Medinan Jews was a "constitution." Its leading champions further argue that laid the foundation for a (i) religiously pluralist, (ii) citizenship-based, and (iii) territorially defined constitutional order.

A comparison of two translations of the first two clauses is sufficient to serve as the motivation for this study. The Arabic original is as follows:

هذا كتاب من محمد النبي بين المؤمنين والمسلمين من قريش ويثرب ومن تبعهم فلحق بهم وجاهد معهم

إنهم أمة واحدة من دون الناس[6]

The following is my rendering (Ibn Isḥāq's version is taken as the default text, Abū ʿUbayd's variations are indicated in angular brackets, and my explanations are inserted within parentheses; the section numbering here and throughout this article follows that of Hamidullah's, for which, see below):

> §1. This is a *kitāb* (writ, prescript) from Muḥammad <the Messenger of Allah> between the *muʾminūn* (Believers) and *muslimūn* (Muslims) of the Quraysh and Yathrib (the original name of Medina) and those who join them, <settle with them,> and make *jihād* (armed struggle) alongside them.
>
> §2. They are one people (*umma*) to the exclusion of all other people.[7]

It is noteworthy that the followers of the Prophet are labeled as "Believers" and "Muslims," which is consistent with the Qurʾānic use of these terms, as in Q 49:14–17; Believers refers to the fully committed devotees, whereas Muslims appears to be a catchall term inclusive of the new converts from among the bedouins around Medina who had not yet fully mastered the requirements of faith.

Contrast this with the translation given in the English rendering of the Emirates-backed Mauritanian politician and

6 The text survives only in two sources, Ibn Isḥāq and Abū ʿUbayd. The juxtaposition of the Arabic texts is given in Michael Lecker, The "Constitution of Medina": Muḥammad's First Legal Document 27 (2004).

7 Ovamir Anjum, The "Constitution" of Medina: Translation, Commentary, and Meaning Today (2021), https://yaqeeninstitute.org/read/paper/the-constitution-of-medina-translation-commentary-and-meaning-today. For reference, here is Michael Lecker's rendering of Ibn Isḥāq: "This is a compact from Muḥammad the Prophet between the mu'minūn and muslimūn of Quraysh and Yathrib and those who join them as clients, attach themselves to them and fight the holy war with them. They form one people to the exclusion of others." *Lecker*, *supra* note 6, at 32.

scholar Abdallah Bin Bayya's Arabic publication *The Path to Peace*, with commentary seamlessly added in the title of each clause as well as in parentheses:[8]

> Article 1 Constitutional Document
>
> This is a constitutional document given by Muhammad (Peace be upon him), the Prophet (Messenger of God).
>
> Article 2 Constitutional Subjects of the State
>
> (This shall be a pact) between the Muslims of Quraysh, the people of Yathrib (the Citizens of Medina) and those who shall follow them and become attached to them (politically) and fight along with them. (All these communities shall be the constitutional subjects of the state.)
>
> Article 3 Formation of the Constitutional Nationality
>
> The aforementioned communities shall formulate a Constitutional Unity as distinct from (other) people.

To say that the modern rendering takes a few licenses would be an understatement. The very parties to the pact have been altered, as is the stated purpose of the pact. It is no longer "between the Believers and Muslims and those who join them and struggle (*jihād*) for religion alongside them," but the Muslims on the one hand and the people, even "citizens," of Medina. These two parties are thereby said to form a "Constitutional Unity."

Needless to say, in the original text, there is no such entity as the "people of Yathrib." The original lends itself to two readings, one in which the Believers and Muslims and those who join them in their struggle are one party, and what follows are their mutual obligations. A less obvious but grammatically

8 Abdallah Bin Bayya, The Path to Peace 259ff (2022); the translators reproduce here the translation by Muhammad Tahir-ul-Qadri, The Constitution of Medina: 63 Constitutional Articles (2012). This particular translation does not even pretend to scholarly rigor, nor engage with the original Arabic text and issues of versions and authenticity, and begins the translation as "Article 1: This is a constitutional document given by Muhammad," thus choosing to render *kitāb* (script) as "constitutional document" from the outset.

plausible reading could be one that envisions two parties, the Believers and Muslims on the one hand, and those who join their struggle in the future on the other. Since no such difference between the original participants to the faith and newcomers to it is evidenced in the rest of the document, the first meaning appears to be preferable. In neither case is there any reference to "the people of Yathrib."

This is not merely an instance of an incompetent translation or accidental misreading, but the result of a history of accumulating ideological developments in which the entire range of data readily available to the Muslim scholarly tradition about the early life in Medina in the Qurʾān, *ḥadīth*, and *sīra* materials are disregarded and contradicted in service of a politically charged reading. This translation merely reflects the ideological contents of contemporary Arabic scholarship. The aim of the present study is to excavate the roots of this reading of the *Ṣaḥīfa* that has come to define modern apologetic Muslim political thought. Lest we dismiss the subject of this study under the impression that religious texts are often creatively redeployed to fit all sorts of purposes, I note, nevertheless, that careful reading of and debates about the authenticity and meaning of the Prophet's words has been and remains the bread and butter of Islamic scholarship. Not so in this case.

Through a history of the reception of the *Ṣaḥīfa* in postcolonial Arab states, this study investigates how a particular ahistorical reading initially came to be adopted by certain state-centered Islamic reformers in Anwar Sadat's Egypt, the decade when the Islamic political sentiment was on the rise, and Islam was being used to replace Gamel Abdel Nasser's Arab nationalism as the ideological prop for the state. In the subsequent decades, this misreading has become the basis of a wholesale reinterpretation of the Prophet's political life and increasingly fantastical construal of Islamic political norms. In the most recent phase of this saga, this revisionist discourse has been picked up by the counterrevolutionary forces in the employ of the Gulf monarchies existentially threatened by the events of the Arab Spring and who have conscripted the *Ṣaḥīfa* discourse, ironically, as an instrument of thoroughgoing authoritarianism.

What is the *Ṣaḥīfa* of Medina?

That a compact of some sort existed between the Prophet and the Jews of Medina is agreed upon by all scholars, modern and premodern. Most historians and *ḥadīth* scholars further grant the authenticity of the specific recension of the *Ṣaḥīfa* as recorded in the works of Ibn Hishām (d. 218/833)—the editor of a longer *sīra* work by Ibn Isḥāq (d. 150/767)—and Abū ʿUbayd al-Qāsim b. Sallām (d. 224/838). This confidence is based in strong circumstantial evidence, notwithstanding the weakness in its chain of narration, lack of documentary evidence, and the usual difficulties with textual integrity.[9] To modern scholars the *Ṣaḥīfa* has been an enigmatic document, and nearly everything about it remains debatable: its unity (does it comprise one, two, or many distinct compacts?), its date and stages of writing (whether it was composed before or after the Battle of Badr in 2/624), its mode of preservation (as it lacks an authentic chain of narration), its numerous archaic terms and phrases, which inspire confidence in its authenticity, but the precise meaning of which remains elusive (e.g., does it prohibit the Jews from exiting Medina without the Prophet's permission, or from making war without his permission?), the identity of the groups that are named in it (why are the three main Jewish tribes of Medina, Qaynuqāʿ, Naḍīr, and Qurayẓa not named in it?), its redundancy (why are some groups incorporated twice?), and its eventual fate.

Most scholars agree that the *Ṣaḥīfa* comprises two different treaties, one being a declaration of rights among the Believers (sections 1 through 23), and the second (sections 24 onward) as a truce (*muwādaʿa*; literally, cessation of hostilities) with the Jews of Medina. The second of these was likely reduced to writing either before the Battle of Badr, which occurred during the ninth month of 2 AH (March 624) or, more likely, in early 3 AH (June–July 624) a few months after Badr, as I have argued elsewhere.[10] In addition to Muslim scholars writing in Arabic

9 For a discussion of authenticity, see Anjum, *supra* note 7; for Patricia Crone's comments on the relative values of the two texts, see Lecker, *supra* note 6, at 191, n.198.

10 Anjum, *supra* note 7.

or other Islamicate languages, the *Ṣaḥīfa* has been studied by numerous modern Western scholars. The most comprehensive record and evaluation of the Western studies can be found in Michael Lecker's aforementioned monograph, which remains the most thorough academic work on the subject. Lecker's study is particularly helpful as it meticulously juxtaposes the two extant versions of the texts by Ibn Isḥāq and Abū ʿUbayd, compares several earlier Western translations and studies of the text, and investigates each clause of the document against the available contemporary textual data from early Islam, and has been instrumental in my own translation and study.

Lecker, concerned with the text rather than its modern reception, takes it for granted that the label "constitution" is a misnomer,[11] and instead argues that the compact with the Jews was in fact a *muwāda ʿa*, a temporary truce, as both of its original reporters label it.[12] My study of the document arrives at the same conclusion as Lecker's, namely, that this document cannot be labeled a *constitution*, if by constitution is meant an authoritative document that constitutes a political unit and lists the rights and duties of the ruler and the ruled. My case can be briefly recapitulated here in the following six points:

(i) The Prophet did not possess sovereignty, or anything approaching monopoly over legitimate violence, in the period when the *Ṣaḥīfa* could have been composed.

(ii) It is labeled in the sources that report it as a *muwāda ʿa,* a truce, which suggests its temporal nature, although no time limit is explicitly mentioned in it. Its intertextual reading with the Qurʾān, the most authoritative contemporaneous source we possess, also strongly suggests its temporally limited nature.

(iii) There is no definitive evidence that it encompassed all of Medina's inhabitants or the Jews, and there are reasons to think otherwise. It is possible that other compacts, written or unwritten, were made with other groups.

11 Lecker, *supra* note 6, at 1.

12 *Id.* at 27, 204–5.

(iv) There can be no doubt that as a document, it was subordinate to the Qurʾān, liable to be replaced by its new revelations, which were proclaimed piecemeal as divine commentary that guided an active mission in which the Prophet and the Believers struggled to secure the Jews' conversion to his religion, or at least their peaceful coexistence, both of which aims were resisted by the majority of the Jews, who tried to collaborate with his Meccan foes.[13] This struggle is confirmed in the opening lines of the *Ṣaḥīfa*.

(v) These Qurʾānic passages also persistently warn the Believers against taking the Jews and other nonbelievers as their allies on pain of punishment in both this world and the next. Read carefully, the terms of the *Ṣaḥīfa* treat the two communities differently, with a different set of expectations, in keeping with the Qurʾānic message. The Believers and Muslims are to make *jihād* alongside the Prophet and obey him in all matters, whereas the Jews' obligations are limited to maintaining peace, contributing to shared defense, and not seeking alliance with the Meccans and other enemies of the Muslims. These different expectations do not suggest full parity. The Jews, in short, were not deemed as part of the Muslim *umma* in theory and were actively hostile to it in fact.

(vi) Last, but not least, the *Ṣaḥīfa* cannot be likened to a constitution as it remained a relatively obscure document, and, to the best of my knowledge, is not known to have been invoked as a document in any subsequent occasions, including the conflicts between Muslim and Jews where a constitutional reference would be warranted.[14]

13 The Qurʾān, being our best historical source of the period, comments at length on this relationship in particular in Sūra 4, al-Nisāʾ, and Sūra 5, al-Māʾida. The tradition has it that Sūra 4 was revealed in the early Medinan period when the *Ṣaḥīfa* was written. This conclusion is strengthened by its themes and further corroborated by the fact that some of the clauses of the *Ṣaḥīfa* closely resemble its verses (e.g. clause 23 and Q 4:59). This background is discussed at length in Anjum, *supra* note 7.

14 *Id.*

Before we turn to the history of its reception, it is useful to mention the most confusing and controversial clause of the *Ṣaḥīfa,* which elicited some puzzled remarks by the early and medieval commentators and has fueled modern revisionist imagination. The most popular is Ibn Isḥāq's version of clause 25, which reads, "The Jews of Banū ʿAwf are an *umma* alongside (*maʿa*) the Believers." In Abū ʿUbayd, the clause reads that the Jews are "an *umma* from (*min*) the Believers." This version has furnished the greatest opportunity for modern readings. But the confusion is alleviated when we appreciate the scarce and uncertain path of the preservation of the text. Some of the main recensions of the phrase are as follows: The Jews (i) "are an *umma* alongside" / (ii) "are an *umma* from" / (iii) "are secure from" / (iv) "have *dhimma* protection from" the Believers. After an elaborate comparison, Lecker argues for (iii) as being the most plausible reading.[15] What further strengthens Lecker's reading is that this clause is followed by clauses 26–35, each of which adds a new group as a party to clause 25, thus: "The Jews of Banū So-and-so receive the same rights as the Jews of Banū ʿAwf." This would, strictly speaking, suggest that each of these eleven or so Jewish groups is an *umma* unto itself. This, although linguistically plausible, would be an odd meaning. This suggests that the original combination is not *umma-min* or *umma-maʿa* but, as Lecker has suggested, *amana-min*, "are secure from." Furthermore, since Banū ʿAwf and the other clans named were known Arab clans of Medina, "the Jews of" these clans must refer not to an independent Jewish community but to the Jews affiliated with the named Arab clans.

Be that as it may, there is no denying that the *Ṣaḥīfa* imagines the Medinan Jews as forming part of a Medinan political unit held together by a common defense treaty, under the authority of God and the Prophet. It does so in a way that foreshadows the *dhimma* contract that was mentioned in Sūrat al-Tawba (Q 9:29) believed to have been revealed around 9/630–31, a few years after the *Ṣaḥīfa* was concluded.[16] It further evidences a gener-

15 Lecker, *supra* note 6 at 136–43.

16 For a more detailed treatment, see David Warren and Christine Gilmore, *One Nation under God: Yusuf al-Qaradawi's Changing Fiqh of Citizenship in the Light of the Islamic Legal Tradition*, 8 Contemporary Islam 217, 228–31 (2014).

ous contractual relationship based in cooperation on matters of shared interests that the Prophet was willing to countenance with those who rejected his message. In this respect, the *Ṣaḥīfa* can be best seen as an early prototype of the *dhimma* contract that eventually became part of Islamic law and remained in place in nearly all Muslim societies until the modern period. The chief differences being that, first, in contrast to the *Ṣaḥīfa*, which tolerated the polytheist (*mushrik*) Arabs, the final *dhimma* contract as finalized in Sūra al-Tawba (Q 9:1) precluded them, and second, it demilitarized the People of the Book (*ahl al-kitāb*). That is, instead of demanding participation in defense as the *Ṣaḥīfa* does, the late Medinan law imposed a poll tax (*jizya*) on them.

Let us turn now to the modern Muslim reception of the *Ṣaḥīfa*.

Hamidullah: *Ṣaḥīfa* as a Constitution in Islamic Apologetics

Muḥammad Ḥamīdullāh (henceforth, Hamidullah) (1908–2002), the prodigious scholar who hailed from Hyderabad, Deccan and spent his life in research and writing in Paris, was to my knowledge the first scholar in modern history to offer this peculiar interpretation of the *Ṣaḥīfa* of Medina, in his 1941 publication (based on an Arabic lecture delivered in 1937),[17] claiming in the very title of his treatise that the *Ṣaḥīfa* was the first written constitution in the world.[18] To support his claim, which was admittedly a minor part of his erudite if brief study, he distinguished between "ordinary laws" and a constitution, between written and unwritten constitutions, and, finally, between just any treaty and "an authoritative constitution of a State" issued by the sovereign of the country. It is all these features together that made this document exceptional.[19]

17 This is listed in Michael Lecker's bibliography as *Aqdam dustūr musajjal fī'l-ʿālam: wathīqa nabawiyya muhimma*, in 1 Islamic Scholars Conference 98 (1937), with no information on the location, and I do not have access to it.

18 *Muhammad Hamidullah, The First Written Constitution in the World* (3rd ed., 1975).

19 *Id.* at 5–6.

Being a lover of "order and unity," the Prophet established "a central public institution for seeking justice," in place of the tribal vendetta system. Employing characteristically modern statist language, Hamidullah noted that through this treaty the Prophet "secured the highest judicial, legislative and executive powers for himself."[20] Hamidullah insisted, however, that the Prophet's absolute authority differed from that of worldly autocrats in that "materialism had no part to play here,"[21] echoing the critique Muslims had often leveled against the West, namely, that it had sacrificed its spirituality at the altar of material progress, whereas the "East" (of which Islam was a part) had remained spiritual. Hamidullah's observations presupposed that the Prophet's motives were selfless and his conduct infallible, for he was directly constrained by the Ever-living God who watched his every move.

As a serious historian, Hamidullah did not shy away from asking historical questions, such as "how the non-believing sections of the population could agree to invest a newcomer and a stranger at that time with so much authority within a few weeks of his arrival?"[22] Similarly, Hamidullah was ambivalent about the nature of the status accorded to the Jews in the *Ṣaḥīfa*. On the one hand, based on an expansive reading of clauses 16 ("Whoever of the Jews follows us shall have help and parity") and 25 ("the Jews are a community *alongside/from among/afforded protection by*[23] the Believers") he remarked that "The Jews have been given equal political and cultural rights with the Muslims in the clearest terms."[24] Yet, based on clauses 37, 44, and 45, he concluded: "In reality it was a military alliance, which was made with the Jews . . . it has been made quite clear that they shall

20 *Id.*

21 *Id*. at 11.

22 *Id.* at 12–13. Hamidullah further notes: The total population of Medina at this time would have been around ten thousand, to which the Jews contributed nearly a half, in which the number of Muslims including the Medinan converts "hardly exceeded a few hundred" (*Id.* at 8). Once the *Ṣaḥīfa* becomes "canonized" as the cornerstone of Islamic political thought, this kind of critical historical questioning disappears altogether from later Muslim readers of the *Ṣaḥīfa*.

23 See Anjum, *supra* note 7 for an explanation of these three readings, and why the last one is the most likely.

24 Hamidullah, *supra* note 18, at 21.

have to fight against all those people against whom the Muslims will have to fight; and shall be in peace with whomsoever the Muslims may be in peace, and shall take an equal part in the defence of Madinah."[25] Referring to clause 36, he writes that the Jews' "joining the forces with the Muslims in an expedition [outside Medina] would have been with the permission of the Prophet" and:

> Although Jews were given internal autonomy, they did not share in the foreign policy of the newly constituted City-State, in spite of the fact that the Jews formed the second largest single community on the arrive of the Prophet in Madinah.[26]

Hamidullah does not seem to detect the contradiction between his two observations: how could the Jews be said to have enjoyed equal political rights when they have no part in governance, being governed by a man whose claim to being God's Prophet they refused to acknowledge, whose preaching fundamentally challenged their religious claims, and whose "foreign" policy, designed to advance his divine mission, they could not even negotiate, let alone halt?

Although far more attentive to fact and evidence than the later deployments of the *Ṣaḥīfa* that we explore shortly, Hamidullah at times gives in to fantastic claims, such as the following: "With the collaboration of all, a political system was inaugurated in Madinah, which made that city in later times the metropolis of an extensive and powerful empire extending over three continents of Asia, Africa and Europe, without any difficulty and without any abrogation of this original Constitutional Act."[27] This is a surprising claim given that many of the clauses of this *Ṣaḥīfa* were abrogated by the later Qurʾānic commands, as acknowledged by even many apologetic commentators (see below), and within two to four years of its writing the three main

25 *Id*. at 21.
26 *Id*. at 22, 24.
27 *Id*. at 23.

tribes of the Jews had been sent into exile or executed for violating their deal with the Muslims.

Before the *Ṣaḥīfa*-centered revival of Islamic political discourse in the late 1970's, two influential trends had prevailed. One defended Islam's political relevance against ʿAlī ʿAbd al-Rāziq's call for secularism and was spearheaded by the leading ulama of the Muslim world for decades. The other, which may be labelled the Qutbist trend, was more revolutionary and modern and offered a radical critique of the wholesale secularization of Muslim societies. Alongside these two main strands, there were the erudite but less known contributions by Muslim academics and ulama who offered historically sensitive readings of Islamic texts, including the *Ṣaḥīfa*.

Perhaps the best example of such disciplined scholarship is a 1969 article by the celebrated Iraqi historian Ṣāliḥ Aḥmad al-ʿAlī, educated at Cairo and Oxford universities. He studied the *Ṣaḥīfa* as part of the Prophet's administrative organization of Medina.[28] The idea that the *Ṣaḥīfa* is a constitution (*dustūr*) does not seem to have reached ʿAlī, who does wonder, as a historian would, about how to classify this document, and suggests that perhaps should be labeled merely a declaration (*iʿlān*),[29] and proceeds to juxtapose its content against the relevant verses in the Qurʾān.[30] He further observes that, even though the *Ṣaḥīfa* does not insist on excluding the Arab polytheists, neither does it grant them the same status or rights, declaring that "A Believer shall not be killed for an unbeliever, nor shall an unbeliever be aided against a Believer" (clause 14).[31] ʿAlī concludes that the establishment of justice, a judicial order, was the primary concern of this document, as a result of which it guaranteed "freedom of work and organization."[32] ʿAli's reading, as we note in the last statement, is not without the aspiration to draw modern

28 Ṣāliḥ Aḥmad al-ʿAlī, *Tanẓīmāt al-rasūl al-idāriyya fī'l-Madīna*, 17 Majalla al-majmaʿ al-ʿilmī al-ʿirāqī 50 (1969/1388). The issue is available online at: https://archive.alsharekh.org/MagazinePages/MagazineBook/The_IRAQ_Academy/mogalad_17/mogalad_17/index.html.

29 *Id*. at 51.

30 *Id*. at 53.

31 *Id*. at 59.

32 *Id*. at 60, 66.

lessons from the *Ṣaḥīfa*, and accords the city imagined in this treaty some attributes of a centralized state. It is nevertheless historically sensitive, concerned to place the document within its context, and up-front about the limited function of the document.

El-Awa: The *Ṣaḥīfa* as an Oracle for the Nation-State

Some four decades after the groundbreaking claim by Hamidullah that labelled the *Ṣaḥīfa* "the first written constitution in the world," we witness this claim revived by an Egyptian lawyer, Muḥammad Salīm al-ʿAwwā (anglicized as El-Awa), whose seminal text on Islamic political system *Fī al-niẓām al-siyāsī lil-dawla al-islāmiyya* ("On the Political System of the Islamic State") appeared in 1975. The study is centered around the *Ṣaḥīfa*, whose text is cited directly from Hamidullah's work, although Hamidullah's insights and questioning are never engaged with, and the *Ṣaḥīfa* is fatefully taken for granted as a *dustūr*, with a note that "many researchers" label it as such. This suggests that Hamidullah's reading had caught on in El-Awa's time and others too had used the term, although I have not been able to ascertain any such writers.[33]

El-Awa's monograph is a theoretically sophisticated study in conversation with the growing reformist scholarship on early Islam. The instant popularity of his study is evinced by the fact that five of its editions had been printed by 1981. The eighth edition appeared in 2006. The additions and corrections in each of the editions evidence the author's active engagement in the political discourse of the time and continued development of his ideas. El-Awa's reading quickly became the dominant one in Islamic reformist circles, pervading most subsequent writing on Islamic political thought in the decades that followed.

From an almost obscure treatise marginal to centuries of Islamic political reflection, El-Awa's contribution turned the

33 El-Awa references Hamidullah's collection of the Prophet's contracts Majmūʿa al-wathāʾiq al-siyāsiyya (ʿAwwā, Niẓām (1975), *supra* note 2, at 27; ʿAwwā, Niẓām (2006), *supra* note 2, at 49). El-Awa's Egyptian teacher in the field, Ḍiyāʾ al-Dīn al-Rayyis, a leading scholar whose wrote two important texts on Islamic political thought, never mentioned the *Ṣaḥīfa*.

Ṣaḥīfa into the cornerstone of an Islamic political order, a development that can be called a small intellectual revolution. The *Ṣaḥīfa*-as-*dustūr* became the central theme of the reformist Islamic political thought, it inevitably cross-fertilized with the two aforementioned anti-secularism strands, the traditionalist discourse affirming the inextricability of religion and politics in the legal and theological traditions, and the revolutionary Qutbist discourse that offered a sociopolitical critique.

In the eighth (2006) edition, El-Awa's preface begins with the claim that "the first Islamic state in Medina is considered the earliest form of a state in human history," insofar as it comprised the material elements of a state, people, land, and authority under the rule of law. It boasted an unprecedented concept of legitimacy (*sharʿiyya*) in which the state is subject to the legislative authority of divine revelation, and notwithstanding the many subsequent developments that were less than wholesome, rule of law remained a feature of Muslim governance throughout history.[34] El-Awa fails to note that the crucial element of this system, namely, law's authority over the ruler, however, is hardly evident in the *Ṣaḥīfa*, for the ruler in this case was God's mouthpiece, the very source of the law. It was only after the Prophet's death that the principle of the supremacy of God and His Prophet's command over the community's ruler could be formalized, as indeed it was by the first successor of the Prophet, Abū Bakr, who declared it in his inaugural address: "Obey me so long as I obey God and if I disobey Him you have no duty to obey me."[35]

El-Awa casually acknowledges here the significance of Abu Bakr's condition to the constitutive formation of the first and ideal Islamic state. But this addition is anything but marginal; it is a fundamental transformation that is by no means anticipated in the *Ṣaḥīfa*. To this crucial omission, we shall return presently.

The subsequent chapters of El-Awa's text trace the development of key Islamic political concepts. More specifically, the original edition consisted of four sections, The first covers

34 ʿAwwā, Niẓām (2006), *supra* note 2, at 22.

35 *Id*. at 24.

the rise of the Islamic state against the backdrop of pre-Islamic Arab traditions, culminating in the Prophet's flight to Medina and the creation of the "constitution." The second addresses the development of political institutions and ideas under the Rashidun caliphs until the first civil war. The third explains the purpose of governance in Islam, and the fourth Islamic values in politics and governance.

The 2006 edition is more than double the size of the original text and, apart from the additions and emendations that are found throughout the text, the fourth section is expanded from forty pages in the original to about a hundred, and a fifth additional section entitled "Contemporary Islamic State" features new material concerned with reconciling Islamic tradition with contemporary conditions. This includes discussions on accommodating non-Muslim citizens, the constitution of Islamic Iran, and the progression of political ideas through the twentieth century from the original ideas of Jamāl al-Din al-Afghānī to El-Awa's own "moderate" Islamic political party, Ḥizb al-Wasaṭ.

El-Awa seems to have been aware that the concept of territorial sovereignty was the key contribution of his book. In his preface to the 2006 edition El-Awa identifies three factors that justify calling the early Medinan community a state (*dawla*): first, a territory where the Muslims felt secure and in whose general welfare they were economically and otherwise invested; second, a social consciousness toward a shared goal; and third, political authority. Although exaggerated and packaged anachronistically, these observations are not entirely baseless. But El-Awa's ambition is loftier. Already in the original 1975 edition, the anachronistic imposition of modern state concepts is fully developed:

> The nation (*shaʿb*) in this very first Islamic state is not limited to the believers alone, but the polytheists of Medina as well as its Jews (see clauses 20 and 25) as well, and therefore, the element of territory (Medina) accorded the right of citizenship to each and every part of the society.[36]

36 ʿAwwā, Niẓām (1975), *supra* note 2, at 32.

Unlike Hamidullah and ʿAlī's careful historical analyses, both of which recognized the limits of the Prophet's control over Medina and the nature of the deal made with the Jews, the late-century Arab reformist authors starting with El-Awa evince an increasingly aggressive ideological subversion of the text, starting with a hasty imputation of political sovereignty to the early Medinan community and endow the *Ṣaḥīfa* with nearly all the features desired by the modern nation-state. In fact, El-Awa's text appears to have been an improvement over some enthusiasts who went so far as to suggest that the Prophet had acquired political authority already in Mecca.[37] El-Awa, notwithstanding, makes numerous compelling observations about the *Ṣaḥīfa*, not all of which are compromised by anachronism and deserve to be studied in their own right. This article limits its investigation, however, to his contentions about citizenship and territoriality.

Territoriality as a concept, El-Awa is aware, is needed to ground his claim of the notion of citizenship in early Medina. Although he notes that the *Ṣaḥīfa* begins by defining the *umma*, the believing community, yet fixes his attention on a concept that the *Ṣaḥīfa* does not name, *al-muwāṭana*, the modern Arabic word that Rifāʿa al-Ṭahṭāwī had employed over a century earlier to translate the French notion of citizenship.[38] This "right," El-Awa insists, was based on residence within Medina, not religion, as it was extended to the pagans as well as the Jews.[39] To this end, he invokes a verse in Sūrat al-Anfāl, which speaks of the Battle of Badr and would have been revealed immediate after it, stating that the Muslims who had not yet immigrated to Medina did not share the alliance (*walāya*), because they were not resident of Medina:

> And those who have believed and not yet immigrated have no claim of *walāya* on you until they immigrate; if, however, they ask for help in religion, you must aid

37 E.g., this claim is made by Ẓāfir al-Qasimī, and questioned by El-Awa. ʿAwwā, Niẓām (2006), *supra* note 2, at 46.

38 Muṣṭafā Riyāḍ, *al-Tarjama wa-bināʾ al-dawla al-ḥadītha fī Miṣr: al-Ṭahṭāwī mutarjiman*, 38 Alif Journal of Comparative Poetics 185 (April, 2018).

39 ʿAwwā, Niẓām (2006), *supra* note 2, at 55.

> them, except against a people with whom you have a treaty. . . (Q 8:72; my translation).

Walāya (alliance, loyalty; each party to this alliance being a *walī*, pl. *awliyāʾ*) is a multivalent term in the Qurʾān. The verse is of interest to the revisionists because it connects alliance to immigration rather than to faith alone. Its meaning is complicated by the very next verse ("And the unbelievers are each other's allies, and if ye do not also do the same, there will be great tumult and mischief in the land"). A straightforward reading would be that alliance requires true faith, which in this scenario required immigration as well, but the reformists suggest, instead, that alliance, now equated to citizenship, is a function of the secular act of belonging to the land.[40] This reading contradicts the frequent Qurʾānic insistence on limiting alliance to the Believers and denying it to other religious groups (Q 5:51, 9:71, etc.).[41] More pertinently, El-Awa does not attend to the rudimentary difficulties in his equation of *walāya* with the modern concept of territorial citizenship.

In El-Awa's scheme, the Believers who failed to migrate did not obtain *walāya*, which is citizenship, whereas the Jews and the pagans obtain this citizenship by virtue of their residence, referencing also Ibn Isḥāq's version of the aforementioned clause 25, "the Jews are a community (*umma) alongside* the Believers."[42] To name a silent relationship is not necessarily

40 The notion of *walāya* in Q 8:72 that is denied to the Muslims who failed to migrate is incomprehensible without attending to the details of the migration, which are found in the Qurʾān, *ḥadīth*, and biographical sources. In fact, Q 8:72 is similar to Q 4:89 in wording, but the latter verse adds a key piece of information: those who failed to migrate to Medina were hypocrites who threatened the Medinan community, and were not merely to be left alone, but hunted down: "They wish you would disbelieve as they disbelieved so you would be alike. So do not take from among them allies until they emigrate for the cause of Allah. But if they turn away, then seize them and kill them wherever you find them and take not from among them any ally or helper" (Q 4:89). This investigation, nevertheless, is beyond our scope here. It is employed here merely to point out the conceptual difficulty in El-Awa's use of the verse to establish citizenship rights for the non-Muslim inhabitants of Medina.

41 The prohibition of taking nonbelievers as *awliyāʾ* appears in numerous verses, to name only the most explicit ones: Q 3:28, 3:175, 4:139, 4:144, 5:51, 5:57, and 5:81.

42 ʿAwwā, Niẓām (2006), *supra* note 2, at 55.

a case of distortion; it could simply be an attempt to draw attention to a neglected concept. But this questionable insertion becomes the axis along with the *Ṣaḥīfa* is now understood, and therefore merits some scrutiny. El-Awa and, to my knowledge, all champions of the view that the *Ṣaḥīfa* guarantees religiously pluralist citizenship have yet to reconcile their proposed understanding to the more definite and explicit opening clauses that define the belonging solely on faith and *jihād*, let alone the Qurʾānic verses that make the same points emphatically.

As in the quotation in the epigraph, the Tunisian leader Rashid al-Ghannoushi alters the meaning of the *Ṣaḥīfa* even more daringly by inserting "the Jews" alongside the Believers in the first two clauses. The incoherence of claiming faith-independent citizenship is evinced by other parts of the *Ṣaḥīfa* such as clause 14 (that no Believer shall be killed for an unbeliever),[43] as pointed out by Ṣāliḥ al-ʿAlī above, not to mention the fact that the *umma* is defined both in the *Ṣaḥīfa* and the Qurʾān by its religious mission. The Qurʾān explicitly establishes its laws (such as those pertaining to homicide, inheritance, marriage, etc.) based on the individuals' status as Believers. How could equal *walāya*, whether understood in its historical sense as tribal alliance or anachronistically as citizenship, have been granted to those who opposed the very purpose of this "state"?

The tension between the notion of the *umma* and the newfangled notion of *muwāṭana* (territorial citizenship) is evident within El-Awa's text. A few paragraphs after the above claim, El-Awa mentions the clause 17 that prohibits any Believer to make peace, without the consent of other Believers, with "the enemies of the *umma*," without explaining this conceptual switch from territory to the believing *umma*, and how this exclusive loyalty could be based on two frequently conflicting identifiers, territorial citizenship and faith.[44]

Another conclusion the author derives from the *Ṣaḥīfa* is the imperative of "justice and equality" among all citizens. Although the Qurʾān declares itself to be the epitome of justice, it also frequently avers that there is no worse injustice than to

43 See clause 14 and its discussion in Anjum, *supra* note 7.

44 ʿAwwā, Niẓām (2006) *supra* note 2, at 58–59.

ascribe partners to God. El-Awa seamlessly imputes onto the *Ṣaḥīfa* the modern idea of "equality" (*musāwāt*), again a non-Qurʾānic concept that has come to define modern Muslim adoption of equal citizenship. In doing so, he fails to differentiate between modern secular equality before the state and the kind of legal fairness relevant in a faith-based polity where multiple faith communities coexist. El-Awa's desire to create a political and a legal sphere where faith differences do not matter cannot be faulted, but we are concerned only with his reading of these aspirations into the *Ṣaḥīfa*. This is all the more remarkable since El-Awa continues to insist that "the Qurʾān and the Sunnah" organize the lives of the citizens, including non-Muslims, in this Islamic state. Not only does El-Awa fail to confront the obvious difficulties of this dual system of belonging, he dismisses, as shown in the epigraph, the tradition of Islamic jurisprudence that attempted to negotiate precisely these complexities.

In short, in El-Awa's proposal the *umma* as a religious mission coexists halcyonically with territorial, faith-independent citizenship. El-Awa is cautious not to press his claim too far, and this incoherence does not quite yet turn into egregious contradiction in his text. Later scholars in this tradition have been even less careful.

Huwaydi: *Ṣaḥīfa* as the Alternative to *Fiqh*

One obvious resolution of the tensions evident in El-Awa's account appears among his Egyptian associates like the journalist Fahmī Huwaydī, whose 1985 book[45] boldly sets aside traditional jurisprudence for having effectively failed in upholding the equal rights of the non-Muslims that had been apparently self-evident in the Qurʾān and the *Ṣaḥīfa* of Medina. Labeled "the new Islamists" by an admiring American scholar, Raymond Baker, Huwaydī and his like reject classical *fiqh* as having failed the universal and self-evident ideals of human rights that

45 Fahmī Huwaydī, Muwāṭinūn lā dhimmiyyūn: mawqiʿ ghayr al-muslimīn fī mujtamaʿ al-muslimīn (4th ed., 2005); for a detailed study of this text and its context, see Ovamir Anjum, *Dhimmi Citizens: Non-Muslims in the New Islamist Discourse*, 2 ReOrient 31 (2016).

Islam had brought "fourteen hundred years ago," well before they were discovered by European Enlightenment. Even the recent reform-minded jurists like the South Asian Abū al-Aʿlā al-Mawdūdi (d. 1979), who advocated a religious "theo-democracy" and reserved seats for non-Muslim members in the parliament to be voted in by their co-religionists, is found to be too medieval.[46] Religious difference cannot have any effect on one's political standing, say the "new Islamists."

Fahmī Huwaydī and other "new Islamists" may be best understood as conservative nationalist republicans, with Islam seen as a part of national heritage (*turāth*). With Islam abstracted into heritage and a few general goals or the *maqāṣid*, their political ideal appears to be a secular nation-state and a public sphere whose parameters are determined by conservative national discourse rather than religious dicta.

Abdelwahab Elmessiri, a notable intellectual who famously opposed total secularism but made room for a soft secularism, stated this claim most clearly by summing up popular Egyptian scholar Muḥammad al-Ghazālī's position on the matter:

> *Dhimmis*, in wise of political and national identity, become Muslims, with the same rights and duties, even if they remain in their persons (that is, in private), on their own creed, rites, and personal status.[47]

Elmessiri notes that intellectuals (*mufakkirūn*) such as Fahmī Huwaydī, Louay Safi, and El-Awa interpret the *Ṣaḥīfa* of Medina to grant non-Muslims "complete citizenship" (*al-muwāṭana al-kāmila*).[48] The *umma* is thus shifted from its theological and religious basis, as defined in the *Ṣaḥīfa* and the Qurʾān, to the usual cultural, linguistic, and historical bases of the nation. Islam, on this view, is not understood primarily as a salvific revelation, but as a civilizational project, one in which nonbelievers

46 Huwaydī, *supra* note 45, at 126.

47 ʿAbd al-Wahhāb al-Mīssirī, Mawsūʿa al-yahūd wa'l-yahūdiyya wa'l-ṣahyūniyya vol. 2, ch. 1 (n.d.); digitized version: 11:39.

48 *Id*. at 11:40.

can be involved so long as they accept the terms and interests of the larger Muslim civilizational identity.[49]

Qaradawi: *Ṣaḥīfa* as Reformed *Fiqh*

There is no better evidence of the remarkable *Ṣaḥīfa*-induced shift than the writings of the most influential Muslim scholar of the last half century and a champion of reformed jurisprudence, Yūsuf al-Qaraḍāwī (d. 2022). Existing literature has begun to explore the shifts in the writings of the late-twentieth-century Arab Islamic reformists of various strands vaguely identified as the moderates, often failing to distinguish among them, but none has focused on the *Ṣaḥīfa* as the site of this tectonic shift, let alone identifying the precise source and nature of the tension.[50] His 1977 treatise on the rights of non-Muslims, written before the *Ṣaḥīfa* became the mainstay of Islamic political imagination, offers a confident defense of a reformist, capacious, but still traditionally grounded interpretation of the *dhimma* as the social contract relevant to the non-Muslims in an Islamic state. It also recruits historical evidence to show that the *dhimmī*s enjoyed honorable and protected life, especially when compared with the status of religious minorities in medieval Christendom.[51] The most notable feature of the text is that, while teeming with references to texts from the Prophet's teachings, Qurʾānic verses, and jurisprudence, the text never mentions the *Ṣaḥīfa* of Medina.

49 This sentiment is shared by many Christian Arabs like Palestinian Christian intellectual Azmi Beshara who declares allegiance to Christianity as his personal faith but Islam as his civilization. American historian of Islamic law of Christian background Wael Hallaq advocates Islamic law as an ethical alternative to modernity and declares the modern nation state incompatible with Islam. See Wael Hallaq, The Impossible State (2013).

50 Apart from Raymond Baker mentioned above, Rachel Scott, The Challenge of Political Islam: Non-Muslims and the Egyptian State 122 (2010), has explored the development of "fiqh" of equal citizenship among Muslim Brotherhood and other reformists intellectuals. David Warren and Christine Gilmore (*supra* note 16) have identified the shift in the discourse of Yūsuf al-Qaraḍāwī around 2010 while highlighting the increasingly acute tension in his thought between adhering to tradition and modern concepts.

51 Yūsuf al-Qaraḍāwī, Ghayr al-muslimīn fī al-mujtamaʿ al-islāmī (1413/1992); the author notes in his online biography that the book was originally published in 1977.

This treatise, therefore, represents a useful "before image" of Islamic political discourse.

For a perfect "after image", consider Qaraḍāwī's 2008 treatise on the same subject, unsurprisingly centered on the *Ṣaḥīfa* of Medina. Here Qaraḍāwī states, "It is clear that the Charter (*wathīqa*) of Medina gives *umma* a meaning that is made up of four components," and goes on to name religious, political, geographic, and social senses of the word *umma*.[52] Qaraḍāwī goes further than El-Awa in trying to reconcile the *Ṣaḥīfa* with the notion of *dhimma* found in the Qurʾān and jurisprudence, stating in an apologetic vein that whereas Muslims pay for this citizenship with their taxes and with their lives (insofar as they are its soldiers), non-Muslims only pay taxes.

We find this proliferation of the *Ṣaḥīfa* discourse not only among the pioneering authors like El-Awa and Qaraḍāwī, but also where Quentin Skinner of the Cambridge School of intellectual history would advise us to look: the ordinary, unexceptional discourses that reflect the ordinary understanding and practice.[53] One such work is Aḥmad al-Shuʿaybī's treatise *Wathīqat al-Madīna* (2006),[54] which offers a somewhat traditional, scripturalist interpretation that refuses to see a contradiction or even a notable development between the new *Ṣaḥīfa* discourse and the traditional rules that he presents alongside each other. A writer of Yemeni origin educated in Tunis, Aḥmad al-Shuʿaybī draws

52 Yūsuf al-Qaraḍāwī, al-Waṭan wa'l-muwāṭana fī ḍawʾ al-uṣūl al-ʿaqadiyya wa'l-maqāṣid al-sharʿiyya 19–21 (2010). The text gives no date and publication information, but I rely here on David Warren's dating. It is available for download at Qaradawi's website https://www.al-qaradawi.net/node/5069 (accessed 2/17/2022). The text uses the awkward phrase *al-maʿnā al-jughrāfī lil-umma*, but by "geographic" (*jughrāfī*) he perhaps means territorial. He notes that "territory is the basis of political and national identity in modern time" (*Id*. at 20–21). Predictably, he invokes Q 8:72 to differentiate between religious and political meanings of belonging. It is not uncommon for Qaraḍāwī to seek to mediate between seemingly contradictory ideas, and whether this classification of religious, political, and geographic notions of the umma is coherent is beyond the scope of this essay. It is noteworthy that this newfangled classification of the umma is claimed to have been introduced by Qaraḍāwī's student and research assistant Muḥammad al-Mukhtār al-Shinqīṭī, as explained by Warren and Gilmore, *supra* note 16, at 228.

53 Quentin Skinner, The Foundations of Modern Political Thought: The Renaissance x–xii (2002).

54 Aḥmad Qāʾid Muḥammad al-Shuʿaybī, Wathīqat al-Madīna: al-maḍmūn wa'l-dalāla (1426/2006).

on a plethora of Arabic books on the subject that had appeared since El-Awa's pioneering text. Featuring a foreword by a Syrian resident of Qatar, under the shade of the school of "moderation" (*wasaṭiyya*) associated with the Egyptian "global mufti" Qaraḍāwī, the book is published by Qatar's ministry of religious endowments—in a series called *Kitāb al-Ummah*; the text is remarkable in the international conditions of its production. And yet, it presents a defense of territorial citizenship with little explicit attention to the global Muslim community or the regime of postcolonial nation-states bequeathed by colonialism. Aimed at advancing the civilizational imperative and the spirit of reformism and moderation, beginning with an epigraph featuring a Qurʾānic verse that emphasizes peaceful co-existence with non-Muslims (Q 60:8), the text seeks to advance the typical reformist theses, shoring up the claims made by El-Awa with scriptural references. Yet it also accentuates the limitations of its project. The state (*dawla*) is defined as "an *umma* that has unity of language, ethnicity, and religion on a territory."[55] Whereas El-Awa had recognized that in the lifetime of the Prophet there were no strictly *political* theories, given the Prophet's religious status,[56] our author erases any conceptual difference between the Prophet's mission and modern politics. El-Awa had noted the wisdom of the *Ṣaḥīfa* in tolerating the pre-existing tribal norms that were deemed inoffensive, Shuʿaybī declares that "a new society far and away from tribal norms" had now been established.[57] El-Awa had tried to define citizenship through the writings of an Arab-Islamic theorist,[58] thus potentially distancing himself from the charge of hastily imposing modern Western norms onto early Islam. Our author does not shy away from pulling out the definition of citizenship from *Encyclopaedia Britannica* (the assumption being that Western references provide timeless categories), defining it as the relationship between individuals and the state,

55 *Id*. at 55.

56 ʿAwwā, Niẓām (1975), *supra* note 2, at 36.

57 Shuʿaybi, *supra* note 54, at 61.

58 For instance, El-Awa frequently draws on the works of Muḥammad Ṭāhā Badawī, a prolific mid-century Egyptian political theorist sympathetic to Muslim Brotherhood whose writings sought to bridge the gap between traditional Muslim and modern state concepts.

before imputing it to the *Ṣaḥīfa*.[59] The conceptual slippage in the making for three decades is now complete. In a later section, the author does consider the question of the relationship of individuals to groups,[60] but without recognizing his slippage from the "group contract" implied in the *Ṣaḥīfa*'s contract with the Jewish groups as clients of their Arab clans to modern individual citizenship. The ground for citizenship in the *Ṣaḥīfa*, we are told, were two, faith and residence. The Jews are citizens of the Islamic state because of their residence, whereas Muslims who do not inhabit the land are required to migrate to claim the citizenship.[61] The same Qurʾānic verse (Q 8:72) that El-Awa had invoked merely to show that the Muslims who had chosen not to migrate were not part of the *walāʾ* (solidarity alliance) of the Islamic state, now serves as the foundation of territorial citizenship without comment.

As if by the authority of sheer will and repetition, participants in the new *Ṣaḥīfa* discourse paper over crucial ruptures between early Islam and imported modern concepts. This is precisely what the *Ṣaḥīfa* discourse has allowed modern Islamic political thought to do: replace a thousand-year-long juristic discourse of profound depth, nuance, and detail with an oracle that readily translates into modern concepts. An oracle it is, for it stands on its own authority, its meanings being what its first discoverers assign to it, without constraints of past scholarship and debate. All other norms are relegated all to a footnote.

It should be noted that what is being argued here is not that the reformist authors discussed here are secularists in disguise or mere servants of the agenda of the modern state. In highly authoritarian and oppressive environments, such ambiguities could be seen as merely a survival mechanism. Those who resolve the ambiguity in favor of the nation-state, such as Huwaydī departing notably from Islamic tradition in contrast to those like Qaraḍāwī who ground their authority primarily in the tradition they wish to reform. Western scholarship has continued to lump them as "Islamists," a label as unhelpful as the

59 Shuʿaybi, *supra* note 54, at 62–63.
60 *Id*. at 91–98.
61 *Id*. at 67.

now fashionable "post-Islamism". Had they not been lumped together by the repressive states and the synoptic Western gaze, the methodological rift between the state-centered, secularizing reformists and the reformers within the Islamic tradition was as evident in the 1970s as it is now. Predictably, that rift becomes clearer when the proverbial rubber hits the road and the reformists are compelled to spell out their programs in real political situations.

Ghannūshī: *Ṣaḥīfa* for Secular Liberalism

By the time the Arab uprisings were underway in 2011, the state-centered reformers had long succeeded in normalizing and lionizing the *Ṣaḥīfa* as a one-stop-shop for Islamic political norms pertaining to the territorial nation-state and citizenship. It was now understood as a pioneering constitution in the world that fantastically resolved the logical tension between equal, territorially defined citizenship and religious plurality on the one hand and on the other a political existence defined by Islam's law and religious mission—which reformist writers continued to profess. The next chapter of this saga was to be written in countries further to the west in North Africa.

Like Fahmī Huwaydī and at about the same time, the leader of the Tunisian version of Muslim Brotherhood, Ennahda (al-Nahḍa) Party, Rāshid al-Ghannūshī offered his reading of the *Ṣaḥīfa*.[62] In his mostly derivative discourses, delivered as Friday sermons and later compiled as a book, he draws on his Egyptian colleagues and other contemporary authors, but with an even more impatient accommodation of national politics. In one sermon, for instance, he quotes a leading contemporary Muslim jurist ʿAbd al-Karīm Zīdān to the effect that *dhimma* is comparable to modern citizenship, leaving the reader with the misleading implication that for Zīdān the two were identical, against the jurist's clear assertion to the opposite effect. More candid and

62 Rāshid al-Ghannūshī, Ḥuqūq al-muwāṭana 65 (1986). The text is a compilation of Friday sermons delivered in 1984, and as such, meager in scholarly discussions and references. Among the few references is Aḥmad Kamāl Abū 'l-Majd's presentation at a conference entitled "Arab Nationalism and Islam" (1981).

combative, Fahmī Huwaydī had noted and summarily dismissed Zīdān's careful reasoning in which the jurists had affirmed an essential difference between the two types of belonging based on Islamic juristic tradition.[63] Huwaydī had similarly dismissed the South Asian thinker and reformist Abū al-Aʿlā al-Mawdūdī, who had paid greater attention to the needs of the modern state than traditional Arab jurists like Zīdān and proposed to accommodate non-Muslims within a parliamentary system as special-status minorities. Huwaydī had offered two lines of argument against those who sought to sustain any faith-based difference: first, the (in)famous clause 25 from the *Ṣaḥīfa*, "Jews are an *umma* with [*maʿa*] the Believers," which he had taken to imply full citizenship, and second, he had mockingly reminded them that they lived in the twentieth century.[64] Without irony, he declared that "the lands of Muslims must belong to Muslims as well as non-Muslims without one dominating the other, for [referring to Q 49:13] there is no superiority of one man over another except in piety and righteous deeds."[65] The Qurʾānic meritocracy and difference grounded in faith and piety presented little difficulty to Huwaydī, for true piety was now rethought in terms of loyalty to society and state.

Ghannūshī seemed even less prepared to recognize the aspects of the *Ṣaḥīfa* or the classical *fiqh* that challenged his conclusions. An activist and politician rather than a scholar, he cherry-picked scriptural texts and juristic discussions that appear to support his purpose. Apart from Huwaydī, Ghannūshī's intellectual debt, suggested both by references and substantive affinity, seem to have been to other Sadat-era statist writers like Aḥmad Kamāl Abū 'l-Majd (another one of Baker's "new Islamists"), who similarly inhabited a space between Arab nationalism and Islamic reformism and advocated full secularization of citizenship under an ever thinner Islamic veneer.

A quarter of a century later, in a book published in 2012, one year after the Tunisian revolution, Ghannūshī offered a slightly more developed take on the *Ṣaḥīfa*. Written during the

63 ʿAbd al-Karīm Zīdān, Aḥkām ahl al-dhimma wa'l-mustaʾminīn fī dār al-Islām 66 (1988).

64 Huwaydī, *supra* note 45, at 126.

65 *Id*.

short-lived triumph of the Arab Spring in Tunisia, this text firmly recasts the *Ṣaḥīfa* in the spirit of the new Tunisia that the author envisioned. The *Ṣaḥīfa*, he wrote, was a constitution that formed the backbone of an Islamic political order, one in which legitimacy was earned by "a triumphant majority" to found a new society, whereby "the founder of the state, directed by his Lord, laid the foundations of an exemplary civilizational and social nucleus, guided by a world-embracing religion (*dīn munfatiḥ ʿalā 'l-ʿālam*) that could encompass all creeds, cultures, and races within its vision."[66] It is only fitting for a religion that came "to honor human beings with intellect and freedom" to acknowledge the religious and ethnic diversity of human beings and seek to organize them.[67] After a swift and awkward acknowledgment that the *Ṣaḥīfa* declares the Muslims "a community to the exclusion of all people," our author quickly makes the move that has become routine since El-Awa, namely, to invoke Q 8:72 to make the point that the state thus established was territorial, for those Muslims who did not migrate were not the recipients of the alliance. The phrase "a religiously pluralist society" peppers every few lines. "Fully in power" in his society when the *Ṣaḥīfa* was written, the Prophet "never asked them to abandon their polytheism for monotheism, but only demanded their loyalty to the state."[68] It is this effectively secularized depiction of the state of the Prophet in Medina which left people to freely choose whatever religious they wanted that forms the foundation of a "modern civil society with political [and religious] pluralism." At times Ghannūshī seems to suggest that the Prophet Muḥammad's true aim would have been to establish a modern-day Scandinavian-style social democracy: "Citizenship and loyalty to the state are the [sole] foundations of rights and duties."[69]

This sits uncomfortably with the half-hearted acknowledgments of certain "religious" clauses, usually inserted without comment, such as that "every disagreement should be turned to Allah and His Messenger" and that "The Qurʾān and the Sunnah

66 Ghannūshī, al-Dīmuqarāṭiyya, *supra* note 3, at 183.
67 *Id*. at 184.
68 *Id*. at 185.
69 *Id*.

are the authorities or references (*marjaʿiyya*) of legislation."[70] Yet, whereas the deniers of the same Qurʾān and the Sunnah are equal citizens, "the *Ṣaḥīfa* forbids any alliance with the enemies of the state."[71] Surprisingly for someone who draws heavily on liberal ideas, Ghannūshī never considers the possibility that someone upholding "the Qurʾān and the Sunnah" may simultaneously and precisely for that reason be among "the enemies of the state".

The contradictions of theory tend to work themselves out in practice. Andrew March's recent study observes how Ghannūshī's reading of the *Ṣaḥīfa* shifted further in the aftermath of the Arab Spring:

> But the post-2011 writings go even further in stressing that the lesson of Medina for postrevolutionary Tunisia is that Islamic governance was founded originally in circumstances of radical pluralism, precisely where a shared will or purpose among "citizens" could not be assumed. Ghannūshī writes that the first written constitution in Islam (if not the world), the *ṣaḥīfah*, codified an essentially pluralistic political formation, and that "we [Muslims] are lucky that our first state was a pluralist state." In a later essay, he reiterates that the founding of Medina provides Muslims with the authoritative example of founding a pluralistic political order, with citizenship (not religion) as the fundamental principle of rights and duties.[72]

As with others, but now with unironic obviousness, the state is the source and the end of all loyalty. More precisely, the national *umma*, the sovereign people inhabiting the territory that has, as in Hobbesian myth, handed its power to the state, is the formal source of authority.[73] The *umma* is now a secular nation: the residents of the state are part of it, whereas those believers who

70 *Id*. at 186.

71 *Id*.

72 Andrew March, The Caliphate of Man 212–13 (2019).

73 I owe this insight to Andrew March, whose careful reading of a draft of this paper generated many improvements and corrections.

do not live within its boundaries have no rights or politically meaningful ties. All this has been achieved through the fantastical powers of the *Ṣaḥīfa* of Medina.

Once freed of constraints of any scholarly tradition and discipline, the oracle proves defenseless against being used in diametrically arbitrary ways. It is to one such twist that we now turn.

Bin Bayya: *Ṣaḥīfa* for Secular Authoritarianism

So far, the *Ṣaḥīfa* had been twisted beyond recognition by the reformists in their quest for modern, accountable politics: for justifying a territorial state and ambivalently secular citizenship. However, both El-Awa and Ghannūshī seem to have foreseen the difficulty inherent in the *Ṣaḥīfa*, namely, the absence of any limits on the sovereign's power, any reference to consultation (*shūrā*), and any participation of the "citizens."[74] Already, unlike the deep and complex moral universe of the Qurʾān, the Sunnah, and classical Islamic jurisprudence, the *Ṣaḥīfa* as the oracle that trumps all other sources had become available for new and unpredictable uses. These possibilities, it should be reiterated, did not arise necessarily from any features of the *Ṣaḥīfa* itself, but from its anachronistic and selective reading.

Among the possibilities inherent in the *Ṣaḥīfa*, given the absence of any limits on the sovereign's powers, was justification for authoritarianism. The perfect moment for this rudimentary realization came in the aftermath of the Arab Spring, when Abdullah Bin Bayya (b. 1935), a Mauritanian politician and Mālikī jurist who was much in debt of the largesse of United Arab Emirate's ambitious ruling class, picked up where the reformists had left off and, on his Gulf patrons' behalf, turned it against them. The authority of the Prophet's fabled Medinan State is handed this time not to a liberal constitutional order but to the ambitious strongmen of Gulf monarchies without stipulating any participation or accountability in return.

74 See, for instance, Ghannūshī, al-Dīmuqarāṭiyya, *supra* note 3, at 187; he writes that the *Ṣaḥīfa* did not encompass all of the values and concepts of the Islamic state leaving out in particular the concept of *shūrā* (consultation).

In his publication titled *Saḥīfat al-Madīna*, based on his keynote speech, published alongside the much publicized "Marrakesh Declaration," Bin Bayya rehashes all the reformist themes pertaining to the *Ṣaḥīfa*, but with crucial additions and strategic omissions.[75] By way of addition, he makes four distinctive claims. First, since the Prophet was expelled from Mecca for saying "My Lord is Allah"—for his religious belief—his first purpose in the *Ṣaḥīfa* was to guarantee religious freedom. Second, the *Ṣaḥīfa* seeks to establish a religiously pluralist society, "granting its individuals same rights and duties" as "one nation" (*umma wāḥida*).[76] Third, the *Ṣaḥīfa* is not preceded or accompanied by any violence. Fourth, it has no concept of a majority or a minority.

Each of these statements is more or less untrue, and untrue in a far stronger sense than El-Awa's original claims are ahistorical. Our scholars from an earlier era of Muslim scholarship—a Hamidullah or an ʿAlī—might observe that the Prophet was not expelled because he privately worshipped Allah, but because he declared "There is no god but Allah," that the Meccan gods are false idols, and that he will not stop preaching his message at any cost. El-Awa's book, in fact, starts by giving a sophisticated account of the Meccan struggle, explaining how the Prophet would seek material and military assistance from the Arab tribes during the annual pilgrimage, visited the neighboring town of Ṭāʾif in that pursuit, and ultimately agreed to migrate to Medina when its leaders embraced Islam and promised to defend his mission with their lives.[77] None of this, of course, would be news to Bin Bayya.

In this own redeployment of the *Ṣaḥīfa*, Bin Bayya omits all the contextual information given in El-Awa's and other reformist works, including later developments after the *Ṣaḥīfa* that would help make sense of its meaning. The Prophet preached that Meccan polytheism was based in false claims and demanded a new order based in his being the one true God's sole spokesperson, which flies in the face of Bin Bayya's declaration that

75 Notes on the opening page declare that it was published for the well-known Marrakesh Conference held on 25–27 January 2016.

76 ʿAbd Allāh b. Bayya, Ṣaḥīfa al-Madīna 26 (2016).

77 ʿAwwā, Niẓām (2006), *supra* note 2, at 45.

the Prophet's primary purpose was to secure or guarantee religious freedom. Rather, the Prophet had preached to the Jews and the pagan Arabs, and sought their aid quite explicitly in the *Ṣaḥīfa* in defending Medina while simultaneously he waged a comprehensive campaign against the Meccans, including an economic boycott and interception of caravans, in retaliation for their opposition to his call and their persecution of his followers, as explained in the Qurʾān (Q 22:39–41).

Both Hamidullah and ʿAlī had denied the notion that the *Ṣaḥīfa* grants the Jews and the pagans the same rights and duties as it does the Believers; even the reformists, including Qaraḍāwī as noted above, recognized key differences among the parties to the *Ṣaḥīfa* as regards their respective rights and duties. Bin Bayya's neglect of the clauses of the *Ṣaḥīfa* such as that "No Believer shall be killed in retaliation for an unbeliever" and "The Believers are one *umma* to the exclusion of all others", to name only a couple, follows the pattern of more and more egregious misreadings. It is comparable to Ghannūshī's in his most recent writings (reproduced in the epigraph), in which he alters not just the meaning but the text itself, inserting Jews alongside the Believers in the very first clause, thus turning the entire document on its head.

Equally surprising is Bin Bayya's third point of non-violence, for the *Ṣaḥīfa* is most likely written right after the Battle of Badr, and certainly after the verses commanding armed defense were revealed (Q 22:39–41). In fact, according to one *ḥadīth* report, it was written the day after the execution of the Jewish-Arab leader Kaʿb b. al-Ashraf, the man who had sought to ally with the Meccans against the Believers.[78]

The fourth and final observation by Bin Bayya might be the most significant. It is a rudimentary fact that the concepts of majority and minority are absent from the *Ṣaḥīfa* of Medina; it was a declaration of truce between Medinan clans, not a democratic manifesto. Numbers of citizens are irrelevant to the question of political authority in the absence of modern concepts of popular sovereignty, citizenship, and democracy. But

78 For a discussion of the incident and the *ḥadīth* reports, see Anjum, *supra* note 7.

to Bin Bayya and his patrons, this absence takes on new significance, and presents an opportunity. It is the sovereign people who in theory grant sovereignty to the ruler. Bin Bayya denies the notions of majority and minority not because sovereignty is exercised by the Believers regardless of their numbers, but because in the states he seeks to justify and the order he seeks to theorize, people are subjects, not citizens. The ruler claims sovereignty without limits and accountability in the same way that the *Ṣaḥīfa* claims it for God and the Prophet.[79] All citizens are equal precisely because there are no citizens; no one has the right to protest, publicly complain, or hold the ruler accountable, let alone participate in governance.

As in the case of the reformists, the key nemesis against which Bin Bayya's political thought is presumably constructed is religious ignorance and militancy. For reformist jurists like Qaraḍāwī, who had been writing on the subject for some three decades before Bin Bayya took it up, religious extremism, terrorism, and violence had been in part a result of state oppression, colonialism, and religious misunderstanding, and in part instigated or carried out by the state security as a tactic to divide and rule. In Bin Bayya's discourse, religious militancy is treated as the primary cause.[80] Bin Bayya takes as political truth the prov-

79 He acknowledges elsewhere that sovereignty belongs to God, but explains that the people are epistemically incapable of knowing and perhaps even understanding the facts needed to make good political decisions, they have no right to interfere in governance. For this last claim see: Bin Bayya's booklet The Exercise of Islamic Juristic Reasoning by Ascertaining the Ratio Legis: The Jurisprudence of Contemporary and Future Context (2015), contextualized at length in Rezart Beka, The Jurisprudence of Reality (Fiqh al-Wāqiʿ) in Contemporary Islamic Thought: A Comparative Study of the Discourse of Yūsuf Al-Qaraḍāwī (d. 2022), Nāṣir Al-ʿUmar (b. 1952), and Abdullah Bin Bayyah (b. 1935) 471–78 (2022) (Ph.D. dissertation, Georgetown University).

80 Bin Bayya's published texts effectively explain and addresses the myriad types of political violence, notwithstanding occasional competing claims about social, economic, and other causes of political violence that appear in some of his published literature. For instance, in a speech delivered in 2007 at an OIC (Organization of Islamic Cooperation) conference in Jeddah, later translated as The Culture of Terrorism: Tenets and Treatments (USA: Sandala, 2014), an analysis of terrorism is presented, where one finds general statements such that terrorism is the result of "several factors" that are "compounded and not simple" (*Id*. at 5), citing a Canadian study that cites four causes (personal, religious framing, political—lack of democracy is positively associated with terrorism and poverty), but a few paragraphs later it is

erb that Muslim jurists often repeated as hyperbole: "Better sixty years of tyranny than one night of anarchy," a reality in which any public protest is seen as a gateway to anarchy and terrorism.

Otherwise an unimaginative copy of the reformist discourse, Bin Bayya's agenda betrays two striking absences. Both Islam as a public religion and any form of political accountability are categorically absent. In his opposition to political Islam, Bin Bayya erases both politics and Islam: all that's left is the ruler's will unconstrained either by any religious institution or training (in contrast to Iran's Ayatollahs, for instance, who are presumably guided by extensive religious training and credentials, Bin Bayya stipulates none), any political institutional constraint (because "the Arabs are not mature enough for democracy"), or

proclaimed, "The terrorism currently manifest in the Islamic world stems from distorted thought, an education system in crisis, and a mistaken understanding of Islam" (*Id*. at 9). Even when injustice is mentioned as the main cause of terrorism in passing, the causes of that injustice are omitted, and in contrast to Qaraḍāwī's even-handed treatment, the rulers are given no share of the blame (*Id*. at 7). These pre-Arab-Spring ruminations are systematically omitted in his writings produced after the onset of counter-revolution in 2013. In the analysis offered in Bin Bayya's pamphlet Ṣaḥīfa, the reformist discourse is selectively copied and pasted from the writings of precisely the same scholars whose demand for justice and constraint on the powers of the ruling class is considered a source of terrorism. Bin Bayya's discourse produced formally at the behest of the Gulf rulers diverges from that of his erstwhile senior and mentor Qaraḍāwī, whose ties to another Gulf monarchy are obvious, but who blames terrorism on despotic governments, complicit clerics, and foreign imperialism (e.g., in Qaraḍāwī's seminal al-Ṣaḥwa al-Islāmiyya bayna al-juḥūd wa'l-taṭarruf, translated as Islamic Awakening between Rejection and Extremism [2007]). For Bin Bayya, religious corruption becomes effectively the singular cause. For an alternative analysis, see David Warren, Rivals in the Gulf: Yusuf al-Qaradawi, Abdullah Bin Bayyah, and the Qatar-UAE Contest Over the Arab Spring and the Gulf Crisis 81–108 (2021). Warren sees Bin Bayya as moved not by helpless submission to the rulers, but an act of claim-making on behalf of the ulama, whom he believes are the solution to this problem. "If the cause of violence [is] 'religious' militancy, then the solution is suitably muftis who, importantly, are empowered by the state" (*Id*. at 81–82). He further argues that even though the rise of the nation-state in Muslim societies has profoundly destabilized the ulama's role, for Bin Bayya the solution is yet more state involvement in religious life (*Id*. at 103–4). Warren argues that Bin Bayya's justification for utter submission to the ruler, as strange as it might sound, is based on the argument that only the ruler can know how best to rule, and cannot be advised at all (*Id*. at 89). Warren discusses Bin Bayya's "Orwellian freedom" by highlighting his argument that, while people have rights to accountable governments, those rights are seemingly deferred forever "for the sake of peace." Warren's attempt to give theoretical coherence to Bin Bayya's Orwellian ideas is insightful, even though I am not persuaded that what underlies these rather extreme conclusions is theory.

by any other mechanism. Effectively, submission to the ruler's unconstrained and inscrutable will is the only guarantee, we are told, of peace and freedom.[81]

The unique notion of freedom (*ḥurriyya*) is notable here, for it is neither the negative freedom of liberal individualism, nor the positive freedom of a perfectionist regime that embodies and teaches virtue; it is the Orwellian freedom that an expatriate enjoys in a Gulf monarchy: freedom to be useful to the ruling elite and follow whatever cult or faith one wishes so long as the ruler does not perceive it as a threat. A direct implication of Bin Bayya's political "orthodoxy" is that if the ruler in his inscrutable wisdom comes to see anything as a threat, that freedom must be relinquished without right to resist or protest. It is only in this Hobbesian fashion that this reading of the *Ṣaḥīfa* can be treated as a call to peace, a peace that must replace any reciprocal demand for justice and relinquish any freedom that the ruler deems threatening. All "citizens" are equal insofar as they must equally cede their freedoms, demand for justice, and any hope to hold the rulers as well as their benefactors accountable in any fashion, except perhaps in an afterlife.

Conclusion

Contemporary intellectual historians have long debated as to who deserves the credit (or blame) for the direction of contemporary Islam, and all actors ranging from the state, Islamists, reformists, cultural elite including the ulama, to the popular sentiment, have been suggested. The dominant cultural discourses in the West continue to prefer cultural and doctrinal explanations: it is Islamic dogma that prefigures the blueprint of Muslim politics.[82] Nathan Brown broke new ground by emphasizing the importance of the elite culture in shaping the state as well as the popular imagination.[83] Jakob Skovgaard-Petersen too emphasized the role of a specific elite group, the ulama: "In their

81 ʿAbd Allāh b. Bayya, *supra* note 76, at 29, 30.

82 See, for example, Emanuel Sivan, Radical Islam: Medieval Theology and Modern Politics (1990).

83 Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 Law and Society Review 103 (1995).

endeavour to serve the state, uphold the authority of high ʿulamā and fight godlessness and secularization, the State Muftis were contributing to a reformulation of Islam as simple, rational, just and easily applicable—a vision of Islam that has been highly influential in the 20th century."[84] Gregory Starrett argued that the state politicized and objectified Islam through mass education policies; the British used it to socialize the population against political revolt, ʿAbd al-Nasir to justify scientific socialism, and Sadat to argue that the state (and not the Islamist opposition) possessed an authoritative claim to religious legitimacy."[85] Robert D. Lee handed the authority back to religion as a set of independently existing discourses, but noted that religion responds to the state's need and weakness and the state is compelled to exploit the religious discourse.[86] Aaron Rock-Singer's recent work sees "state-sponsored and Islamist educational efforts as two sides of the same coin" and that "the driving force behind the bifurcation of religious education in Egypt's Islamic Revival was not the incommensurability of Statist and Islamist calls for religious change, but rather their shared adoption of the Ministry of Education-sponsored Modernist vision of education as a prime motor of social change."[87] From the postcolonial state, the cultural elite within and outside the formal institutions, the Islamic reformist movements (Islamists), to popular religion at large, all factors have been held responsible for Egypt's (and the Muslim world's) religious state.

The present study adds a new dimension to these explanations, the crucial role of innovative reasoning in Islamic doctrine, including strategic (mis)readings that offer useful possibilities and lend themselves to political deployment, that shapes the fundamental doctrine that the various players—as in the case of the *Ṣaḥīfa*, first the reformist and then the Statist elites—may then put to use in various, even diametrically opposed, ways. It

84 Jakob Skovgaard-Petersen, Defining Islam for the Egyptian State: Muftis and Fatwas of Dār al-Iftā 29 (1997).

85 Gregory Starrett, Putting Islam to Work 62, 77–86 (1998).

86 Robert D. Lee, Religion and Politics in the Middle East: Identity, Ideology, Institutions, and Attitudes (2010).

87 Aaron Rock-Singer, Practicing Islam in Egypt: Print Media and Islamic Revival 77 (2019).

straddles two bodies of scholarship, textual and historical study of the *Ṣaḥīfa*, and intellectual history of contemporary Islamic reformist trends, and has implications for the theoretical approaches that have provided frames for examining secularism and its entanglement with the modern nation-state. It offers a way to probe whether, and if so how, the set of interpretative resources within a tradition exercises its agency vis-à-vis external pressures. By identifying the *Ṣaḥīfa* discourse as a key transformation in contemporary Islamic political thought, it offers a way to interrogate and concretize the theses put forth by theorists like Talal Asad, Wael Hallaq, and others who see the modern state as necessarily secularizing. Its finding not only confirms this suspicion, but also probes it through falsifiable claims open to the investigative work of intellectual history.

Far from definitive on the roots and diversity of contemporary Islamic political thought, this study invites further inquiries. If it is the case that the *Ṣaḥīfa* discourse helped normalize the idea of a territorially defined Islamic state among the moderates, we may ask how it informed the Islamic political discourse in the wake of the 2011 Arab uprisings. We continue to witness two highly divergent and ahistorical uses of the *Ṣaḥīfa* discourse. Both projects share with the original revisionist reading the desire to smuggle territoriality into Islamic political thought as the marker of sovereignty, thus making Islam fully available to the state. Another path of inquiry is to explore the larger implications of the claim that Islam's true political and constitutional teachings are best expressed in a hitherto obscure document, not in the historical Muslim scholarly understanding. It is worth asking whether the *Ṣaḥīfa* might not have accomplished in a more subtle fashion what the Sudanese Maḥmūd Muḥammad Ṭāhā had proposed in his "Second Message of Islam" and his disciple Abdullahi Ahmed An-Naʿim continues to propose in calls for thoroughgoing political secularization.[88] Such a reading, it

88 Ṭāhā was declared a heretic and executed in Sudan in 1985 for effectively rejecting the Medinan Qurʾān. For his disciple Abdullahi Ahmed An-Naʿim's description and defense of this thesis, see Islam and the Secular State: Negotiating the Future of Shariʿa 2, 124, 284 (2008). An-Naʿim, too, otherwise total secularist, surprisingly asserts that "the polity of Medina during the time of the Prophet is of course an inspiring model of the sort of values Muslims should strive for in

should be noted, has by no means been the reformists' intention, nor is this possibility explicit in the reformist writings which often read the *Ṣaḥīfa* with more or less careful attention to the developments during the later Medinan and the Rashidun caliphate periods. Coexisting uncomfortably with other discourses, this potential seems to become fully deployed only when the political need arises. A related theoretical puzzle is worth ruminating over: Does historical scholarship matter? If scholarly errors, expedient or sincere, in the reading of history or doctrine can be pointed out, can the seemingly inexorable powers of the modern state be tamed?

This study does not argue that authoritarianism in the Arab or the Muslim world is caused by Islamic doctrine or scriptural hermeneutics. The elites in postcolonial Muslim states hardly need Islamic teaching to justify their politics. But the power of ideology lies not only in inspiring policies, but equally in justifying them. At a time when the autocrats face tough competition from Islamically framed mass opposition, the religious flavoring afforded by the *Ṣaḥīfa* may have performed the crucial function of managing popular Islamic sentiment, as suggested by some empirical evidence.[89] Some scholars, such as

self-governance, transparency, and accountability" (*Id*. at 280), ignoring the rudimentary fact that there was no earthly objection possible to the Prophet, and it is only with Abū Bakr, the first caliph, that the idea of the ruler as accountable to the people became conceivable and was in fact instated.

89 For a summary of scholarship on Middle Eastern authoritarianism, see Eva Bellin, *The Robustness of Authoritarianism in the Middle East: Exceptionalism in Comparative Perspective*, 36 Comparative Politics 152–53 (2004). She notes that the general factors that strengthen coercive structures are common to other authoritarian regions are patrimonialism in state structures and low level of popular mobilization, aggravated in MENA region by two further factors, an abundance of rent and Western security (not to mention economic and ideological) concerns. Even beyond these, MENA suffers from low national solidarity, low elite commitment to democracy, low GNP, and absence of Impartial and effective state institutions. However, "The dramatic transition to democracy that swept Sub-Saharan Africa and Eastern Europe in the 1990s drew attention to the important role popular mobilization can play in bringing down authoritarian regimes" (*Id*. at 152). In the wake of the 2011 uprisings, Bellin observed that many of the earlier observations of the analysts were confirmed, "the trajectory of the Arab Spring highlights an empirical novelty for the Arab world, namely, the manifestation of huge, cross-class popular protest in the name of political change, as well as a new factor that abetted the materialization of this phenomenon-the spread of social media. See Eva Bellin, *Reconsidering the Robustness of Authoritarianism in the Middle East Lessons from the Arab Spring*, 44 Comparative

David Warren, have argued that the use of the *Ṣaḥīfa* has been only a spectacle for the Western elite in an effort by the ambitious states to furnish bargaining chips in thwarting any potential international pressure to reform or democratize.[90] What is also the case, however, is that the specific substance of the spectacle was directed at the domestic audience whose potential the Arab Spring had demonstrated and whose ideas have been shaped by the Islamic Awakening (*Ṣaḥwa*) discourses of the last few decades. As Eva Bellin, expert on MENA authoritarianism, wrote in 2012, "If anything, the Arab Spring has demonstrated the importance of regional effects and the power of positive example in stimulating political re-imagination."[91] In other words, the authoritarian elite have every reason to fear a repeat of these events and, given the sustained and demonstrated power of Islamic frames, invest in a counterrevolutionary religious ideology. The *Ṣaḥīfa* discourse, ironically, has lent itself to precisely that ideology. To stem the tide of a fierce demand for accountability by the standards of Islam, the veneer of an authentic Prophetic constitution, built up to high heaven by the reformists themselves, has provided the perfect defense. Furthermore, the valorization of the *Ṣaḥīfa* into the world's first constitution speaks deeply to Muslims' affection for the Prophet, making a critical rejoinder a potentially impious if not heretical enterprise.

The manipulation of Islamic discursive tradition has long-term consequences for the Islamic world and the world at large. Reformist scholars like El-Awa and Qaraḍāwī seem to have been invested in solving the chronic problems of the deficit of political legitimacy, enduring authoritarianism and repression,

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Politics 142–43 (2012). She further noted that the latter will no doubt be "a game changer for the longevity of authoritarian regimes around the world from now on" (*Id*.). She also wisely curbed her enthusiasm by cautioning that "Only a minority of countries that jettisoned authoritarian regimes between 1974 and 1999 had developed into stable democracies by the turn of the century" (*Id*. at 143).

90 David Warren, personal communication, but also see his recent monograph, David Warren, Rivals in the Gulf (2021), which explains the UAE's effort to build a "state-brand" (*Id*. at 8–9, 107, 116–17) and a way of demonstrating to foreign powers (the US) that they are an essential ally in "reforming Islam from within" (*Id*. at 109) by sponsoring figures like Bin Bayya, and should thus be protected from internal calls for democracy.

91 Bellin, *Reconsidering*, *supra* note 89, at 144.

socioeconomic inequality, and foreign exploitation of the Muslim world. Once a voice for social justice, anticolonialism, and an Islamic modernity, the tropes of moderate political Islam, as evidenced in the *Ṣaḥīfa* discourse, have now also become a weapon in the hands of the authoritarian elites. This has been an important and ignored chapter in the long and continued battle for the soul of modern Islam.

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