Dear Colleagues, Ladies and Gentlemen,

It is an honour for me to participate in this august gathering of scholars of Islamic law. I am indeed grateful for this opportunity to present some ideas about the doctrine of siyāsa, a subject of great importance, which needs more attention than it has received. My presentation this morning is only a preliminary outline of a project on which I have begun working. The purpose of this presentation is to invite your comments and questions that would help me to clarify these ideas further.

I am particularly emboldened in this venture by Wael Hallaq who has finally opened the gate of ijtihād to the study of Islamic legal theories, which the muqallidūn (followers) of “Imam” Joseph Schacht had closed a few decades ago. It provides an ‘āmmī (layman) such as me with the opportunity to raise a few questions.

Islamic law scholars have generally treated siyāsa and shari‘a as mutually exclusive terms, referring to non-religious and religious laws respectively and stressing on a wider gap between them, than it may actually be. This gap is often explained as a difference between shari‘a as theory and siyāsa as practice. This approach has obscured the understanding of the actual working of Islamic law. In this paper, I shall develop my argument in two parts. First part refers to the problematics of the study of siyāsa with reference to Islamic law, and the second part reviews the developments in the doctrine of siyāsa in the history of Islamic law.
1 Problematics

Reducing the complex history of Islamic law to a simple dichotomy between theory and practice has raised several problems for the study of Islamic law. First, it belittles the significance of the actual working of law, namely as applied in the court judgements and state legislation. They are often dismissed as deviations from theory. Thus study of Islamic law has been restricted to the study of *fiqh*, or the texts of Islamic law written mostly by the jurists. Still, it is generally claimed that Islamic law, which refers to *fiqh* or *shart'a*, is not law in the proper sense. It is only a jurist’s law. Of course it is. If proper law is what is practiced in courts and what is legislated by a state, then that should be the focus of our study. In that sense study of *siyāsa* becomes very significant. Only recently, scholars have begun paying attention to the study of Islamic law in practice, e.g. *fatawa* (jurists’ opinions on the actual legal issues), *ahkām* (court judgments) and *siyāsāt* (issues relating to governance). It must be noted, however, that in the recent publications, *siyāsa* is still studied more in the framework of political philosophy, than that of Islamic law.

Second, the dichotomy of *siyāsa* and *shart’a* recognizes only two types of courts: *qādī* (general) courts applying *fiqh*, and *mażalim* (complaints) applying *siyāsa*. In fact, there were more than these two courts administering justice and settling disputes. For instance *hisba* (market and public morality), *ahdāth*, *shura*, *kōrwāl* (police) and *diwān* (revenue and taxes) also worked as law courts. They differed in their jurisdictions, procedural laws and interpretative approaches. Besides, there were other avenues to settle disputes, for instance tribal courts and guilds. In Mughal India, for instance, there was an extensive networks of *qādī* courts, according to the historians of legal institutions in India. Nevertheless, the largest part of the population lived in villages who were governed by *panchāyat* local laws, some times even probably administered by Hindu heads of the village. June Starr has noted a similar state with reference to the Ottoman system.

Recently, Jörg Fisch observed, “There was probably never an Islamic state in which the administration of criminal justice was guided solely by *shart’a*. Judicial practice was always based to a greater or lesser extent on other laws, derived from custom, the sovereign decision of the ruler or even – despite its prohibition in theory – a kind of legislation.”

It is important to note that Islamic law is not only found in the *fiqh* texts but also in different manuals of rules that show how Islamic law interacted and negotiated in different overlapping systems. *Siyāsa* played a very significant role in keeping these various systems together.

Third, it is often claimed that *fiqh* is a comprehensive system of law. I guess the term comprehensive is used to explain the enigmatic element of ‘ibādāt (religious rituals) in *fiqh*, which is not a subject matter of “proper” law. It is nevertheless misleading. *Fiqh* may appear comprehensive, but a greater and significant part of legal subject matter is not included in *fiqh*. For instance, the questions relating to the election (or appointment) of a ruler, the *imām* or Caliph, his qualifications, duties etc. were not discussed in the *fiqh* books. They were discussed under the subject of *imāma* in the *kālam* literature, a subject dealing with the beliefs and eschatology. When jurists wrote on these issues they composed their works in separate books, independent of *fiqh* text. Similarly, administrative laws, and fiscal laws also grew outside the regular corpus of *fiqh*.

Modern studies of Islamic law have also concluded that the *shart’a* criminal law (*hudūd*) is incomplete and mild. It covers only a few crimes, most offences out of its scope. The jurists developed *ta‘zīr* to fill the gaps.

Fourth, compared with *siyāsa*, *shart’a* is characterized as rigid and immutable. In fact, *shart’a* and *siyāsa* both have been constantly interacting with different legal and social practices. Islamic family law provides eloquent evidence for *fiqh’s* interaction with social laws and customs. Numerous local practices relating questions of maintenance, dower, dowry, property, conjugal home, custody of children etc., were incorporated into *fiqh*. The question of *kafā‘a* illustrates very significantly how *fiqh* adopted the question of social status as an important criterion for the validity of marriage.
Fifth, presenting *fiqh* as the only expression of Islamic law curtails the very wide spectrum of the concept of law in Islam. *Fiqh* was one of the several answers to the questions about how to live as a good Muslim. Similarly, *siyāsa* is also not a monolithic doctrine. There were different answers to the question of what is good governance. Besides jurists, the philosophers, men of literature and the state administrators also attempted to formulate their views on *siyāsa*. Naturally, points of view on *siyāsa* are as diverse as on *shart’a*.

These are some of the issues that render the dichotomy of theory and practice approach to the study of Islamic law questionable. Besides the study of court cases and farman and regulations issued by the rulers, the discussion of laws and legal concepts in literature other than *fiqh* is also important for the understanding of Islamic law. This has led me to study *siyāsa* as a concept and a principle of law in Islam. Since a dialogue on this subject between the *fuqaha*’ and other Muslim intellectuals already exists, the study promises to be fruitful.

In his study of the criminal law in colonial India, Jörg Fisch disagreed with Schacht’s description because “the religious law was also part of the practice.”

2 The doctrine of *siyāsa* in Islamic law

The semantics of the usage of *siyāsa* in Islamic literature vary quite widely. Between training a horse and punishing the criminal, *siyāsa* finally emerged as a technical term meaning art of governance. In Islamic law it gradually came to mean rulers’ discretion in the application of *fiqh*. A more general reading of the Islamic literature reveals a broader concept. *Siyāsa* is more like a public policy, a ground norm and an overlapping principle that kept the pluralist system of laws operating in the Muslim societies. It filled the gaps and softened the protruding rough edges of different laws.

I shall explain this point by a general overview of the developments of the doctrine of *siyāsa*, especially with reference to the debates on the subject in the history of Islamic law. Significantly, the doctrine surfaced usually at the times of political crisis in Islamic history.

2.1 Al-Shāf‘ī (d. 820): *siyāsa* as ruler’s discretion

The doctrine seems to gain prominence first in late eighth century when in order to distinguish themselves from their predecessors the Omayyads, the Abbasid caliphs posed themselves as founders of an Islamic polity. According to Ibn Sa’d (d. 845), the second Abbasid caliph, Mansūr (754 -775), decided to enforce *al-Muwatta*’, compiled by Mālik ibn Anas (d. 796), the founder of the Malikite school, as the law of the caliphate. If we believe the historians and the biographical literature, the *fuqaha*’ resisted that attempt. Was it because the *fuqaha*’ regarded *fiqh* or *shart’a* as a religious matter and opposed rulers’ interference in religion? Does that imply separation of church and state? Or, was it because the *fuqaha*’ believed in the legal pluralism?

Schacht rejects the story of Mansūr’s wish of adopting *al-Muwatta*’ as fictitious. He, nevertheless, remarked that early Abbasid caliphate was “a period of recognition and appreciation of the canon law” and that in view of the wide ranging difference of opinion among the jurists, “there was a practical interest in pointing out a ‘smoothed path’” (the literal meaning of *muwatta*’). Apparently, the question of “canonical” law is entirely misplaced. Neither the Caliphs were interested in adopting *fiqh* as law of the Caliphate, nor the jurists were writing *fiqh* texts for the caliphs to adopt them. The jurists were writing these books for the *qiitifs* as source books. They were never meant to be binding. It was left to the discretion of the *qādis* to accept, choose or refine the views given in those books. The *fiqh* books themselves preserved the proverbial diversity of views on legal issues that existed in the madhab (law school) literature.

Ibn al-Muqaffa’ (d. 756), secretary at the court of Caliph Mansur, certainly proposed uniformity of laws in the Caliphate. He was extremely worried about the conflicting judgements in the courts. In his eyes it led to confusion and chaos. He pleaded the Caliph to
intervene because he had the right, as an imām, to legislate. In Ibn al-Muqaffa’s discourse, siyāsah meant good governance. He also called the Caliph to exercise ra’y (discretion), that had the same meaning as the later term ijtiḥād.

Ibn al-Muqaffa noted two extreme views on this point. One view claimed that the Caliph had the right to obedience even if his commands were contrary to shari’a. The other view held that the Caliph’s commands must be disregarded when they were contrary to shari’a. He rejected both as extreme views and dangerous trends. In his view, ra’y was operative only in the absence of clear Texts, it was not in conflict. Only the imām had the right to exercise ra’y.

In order to fully understand the context of the debate we must compare Ibn al-Muqaffa’s views with those of Ibn Qutayba (d. 889). Ibn Qutayba was also a secretary to the Caliph’s court and a non-Arab. Unlike Ibn al-Muqaffa, Ibn Qutayba was opposed to ra’y and a champion of Ḥadīth movement. Ibn Qutayba regarded ra’y movement as a threat to the Islamic polity. The influence of Ra’y movement on Abbasid caliphs had given rise to Mu’tazila, a group of Muslim theologians who believed in the primacy of Reason and Justice as Islamic fundamental principles, next to that of the Unity of God. The Ḥadīth movement opposed it as a non-Arab (shu’ubiyya, local culture) cultural invasion and a threat to Islam. Joint efforts by the Ash’ari theologians, who rose in opposition to the Mu’tazila, the Shafi’ite jurists, and the Hanbalite Ḥadīth movement finally succeeded in eliminating the movements for ra’y and reason. Ibn Qutayba symbolized that triumph. He wrote several books in defence of Ḥadīth; in refutation of shuʿābī and a political history of early Islam. Al-Shāfi‘i developed a juridical theology that later came to be accepted as usūl al-fiqh (principles of jurisprudence).

Al-Shāfi‘i developed a thesis that the society should be governed by the Qurʾān and hikma (wisdom), the latter being Sunni. He rejected any siyāsah that did not accord with the Qurʾān and sunna. This view, as we shall see soon, came to be debated among the Hanbalite jurists themselves.

Al-Shāfi‘i’s legal theory (usūf) rejected discretion (ra’y) and arbitrary opinion in the application of Islamic law. Instead, he proposed a methodology of analogical reasoning (qiyās) in the absence of clear ruling in the texts. In his Kitāb al-Umm, al-Shāfi‘i vigorously attacked the diversity of views among the jurists and argued that they conflicted with the sunna of the Prophet. Consequently, al-Shāfi‘i limited the right of the Caliph (wali’ al-amr) by subjecting it to qiyās. By implication, he included the jurists in the category of the people of authority.

Al-Shāfi‘i did not allow the ruler to hear the cases relating to the rights of God, e.g. the cases of theft and adultery. In case of highway robbery involving murder and robbery the ruler had the discretion in the penalties for murder, but he could not interfere in the offence of theft, the former was right of God, the latter was the right of the people.

It is significant to note how the jurists differed in identifying the rights of God and people and in the rulers’ jurisdiction from this perspective. This point became more central in the development of the doctrine of siyāsah. Apparently the doctrine came to be more refined in later fiqh literature, as the political authority became more powerful as well as complex.

2.2 Al-Māwardī (d. 1058), al-Ghazālī (d. 1111) and Ibn ‘Aqīl (d. 1119): siyāsah as public interest

The second period of crisis came in the tenth century with the emergence of the institution of Sultan, beside the Caliph under the Buwayhids (945-1053) and the Saljuqs (1054-1194). The real power and authority vested then in Sultan, rather than in Caliph. The power of the Sultan was based on sheer force. The Shafi’ite jurists like al-Māwardī and al-Ghazālī described this phenomenon under the name of istīlā’ (dominance) and qaḥr (force) and approved it as a legitimate ground for political power. Since the Saljuq Sultans championed Sunni orthodoxy and the unity of Umma against the Shi’i Buwayhids and the Fatimids, the Sunni jurists found it necessary to support them. The
principle of *ikhtiyār* (selection or election) which was considered so far the only legitimate source of power, was replaced by the doctrine of *istiżā‘* and public interest in view of the impending schism and anarchy.

Abū'l-Ḥasan ‘Alī al-Mā′wārī, a qādī under the Abbasid Caliphs al-Qādir (991-1031) and al-Qā‘im (1031-74), who strived for the restoration of Sunni orthodoxy against the Shi‘ī Buwayhid Sultans. Both Caliphs sent al-Mā‘wārī on diplomatic missions to the Buwayhids. Al-Mā‘wārī wrote *al-Ahkām al-sultānīyya*, explaining the rules of political authority according to Islamic law. One can see here an assimilation of administrative and public law practices into *fiqh*. There is an attempt to bring state under the domain of religion. Al-Mā‘wārī describes *siyāsah* as a function of *imām* entrusted to him by God. He defines *imām* as a successor to the Prophet to look after the management” (*siyāsah*) of the worldly affairs and the protection of religious matters. Although both religious and worldly affairs were under the care of the *imām*, yet while he had a free hand in the worldly affairs, in religious matters, his duty was only to protect them, or to keep the status quo. Al-Mā‘wārī also uses another pair of terms as the duties of the *imām*: *siyāsat al-umma* and *hirāsat al-milla*, *milla* signifying the religious aspect of the Muslim society while the *umma* the political or mundane.

This distinction goes back to al-Shāfī‘ī’s explanation between the rights of God and the rights of man to which we have referred above. Al-Shāfī‘ī did not allow the Caliph to hear the cases relating to the rights of God. Al-Mā‘wārī, on the other hand, allows the ruler to hear these cases and make demands on the judges. He allowed the ruler because they were according to him *qawānīn al-siyāsah* and were necessarily related to the protection of the community, the basic duty of the *imām*. Al-Mā‘wārī also made a distinction between two types of procedural laws: *nazar al-qādī*, regular cases governed by the procedural laws elaborated by the *fuqaha‘* and *nazar al-mazālim*, the complaint cases against the state officials where extraordinary procedures of torture, evidence etc. were allowed. For al-Ghazālī, *siyāsah* in this context came to mean pragmatism. He defines *siyāsah* on the patterns of Muslim philosophers who followed Aristotelian concept of Politics. He says, *siyāsah* refers to social organization and cooperation with reference to economic resources and their control. Al-Ghazālī assimilated the concept of *siyāsah* by recognizing different levels of *siyāsah*, in which the *siyāsah* of the ‘ulama’ and *fuqaha‘* stands side by side with the *siyāsah* of the rulers. He stresses the importance of the *siyāsah* for the Ulam, explaining that it is not a religious science in the first category but it is instrumental in the matters which are complementary to religion. Like the above mentioned Shāfī‘ī jurists, the Hanbalite jurist Ibn ‘Aqīl (d.1119) was also looking for a role of *siyāsah* in Islamic law. He raised the question whether *siyāsah* was possible independent of *sharī‘a*. He refers to three trends in his days. The theologian philosophers (*al-hukamā‘* al-ilmā‘īyyūn) opted for *hikma*, suspending the *sharī‘a*. The jurists (*al-futūrī*, the wise) subjected reason to the *sharī‘a*, governing worldly affairs and even in such affairs of management (*siyāsah*) where no text of the *shar‘* was available. Ibn ‘Aqīl stated that in matters of governance operation by *siyāsah* *sharī‘yya* was allowed. It is control (*hazm*) and power and a ruler must have a discretion in this matter. Referring to al-Shāfī‘ī, who argued that *siyāsah* was allowed only if accorded with *sharī‘a*, Ibn ‘Aqīl responded that *siyāsah* actually aimed for people’s welfare and protected them from chaos (*fusad*), even though it was not formulated exactly as the Prophet formulated it and even though it was not part of the revealed text. Ibn ‘Aqīl argued that al-Shāfī‘ī was correct if saying “according to *sharī‘a*” he meant that which did not contradict the proclamation of *sharī‘a*. If he meant that *siyāsah* was allowed only in accordance with what the *sharī‘a* expressly stated, he was wrong. It also falsified the companions of the Prophet. The pious Caliphs dealt with cases of murder and representation their own discretion because there was no explicit *sunna*. The experts of the *sunna* also did not raise any objection against those actions.

Uthman compiled an official copy of the Qur‘ān and ordered that all other copies be burnt. There was no *sunna* to justify this action of burning of Masahif but the Companions supported his action because
they trusted that it was in the best interest of the umma.\textsuperscript{34}

Al-Mawardi’s association of the doctrine of siyāsa with *maslaha* (public interest) facilitated later jurists to assimilate the doctrine of siyāsa into *shari’a*.

2.3 Ibn Taymiyya (d. 1328), Ibn Qayyim (d. 1350): *siyāsa* as discipline

The third period of crisis relates to the Mongol invasion and destruction of Islamic polity and society. From the literature in this period it appears that law and order was the central issue in the problems of governance. The definition of *siyāsa* by Ibn al-Taqita (b.1262), the celebrated historian and statesman, in his work on statecraft and history, reflects this concern. He wrote, “*siyāsa* is the chief resource of the king, on which he relies to prevent bloodshed, defend chastity, prevent evil, subjugate evildoers and forestall misdeeds which lead to sedition and disturbance”.\textsuperscript{35}

The Egyptian Malikite jurist Shihāb al-Dīn al-Qarafi’s (d. 1285) *al-Ihkām fi Tamyīz al-Fatāwā ‘an al-Aḥkām wa-Taṣarrufāt al-Qādī wa’l-Imām* \textsuperscript{36} also marks a need for clear demarcation between the functions of *qādī*, *imām* and a *mufti*. He distinguished between the two by separating religious from legal matters on the basis of their enforceability by the court. Both Fatwa and Hukm were binding but in different senses. He limited the legal matters to those relating to the worldly interests. ‘*bādāt* and matters decided by *imām*’ were not open to the discretion of the *qādī* or *imām*. He also defined the boundaries between the *qādī* and the *imām*. The *imām* had authority (hukm) in matters where the opinions of the jurists were divided and no consensus existed. While *qādī* was responsible to *imām*, the *mufti* was to God alone.\textsuperscript{37} Qarafi, in this way provided the ruler the right to control the juridical diversity but his distinction between the authority of *mufti* and *qādī* posed limits on the functions of a *qādī* as well.

The Hanbalite jurist, Ibn Taymiyya reopened the debate on the *siyāsa*, also relating it to the need of discipline and order. He believed that this discipline could be achieved best by assimilating the practice of *siyāsa* into *shari’a*. Ibn Taymiyya’s construction of *siyāsa shar’iyya* must be studied against the socio-political background of that period as clearly reflected in his *fatāwā*.

One of the issues in this period was about the punishment of miscreants who disrupted law and order, although they had not committed murder. The jurists allowed death sentence in such cases only if murder was committed. Ibn Taymiyya, on the other hand, allowed the ruler to award death sentence for *a’wina* (supporters), *zalama* (transgressors) and *su’at* (conspirators) in periods of disruption (fatāratāt) because they were trying to spread anarchy in the land (*sā’un fi’l-ard fasād*), miscreants, and conspirators.\textsuperscript{38}

Ibn Taymiyya insisted that *siyāsa* must be governed by the *shari’a*. He believed in the necessity of state on religious grounds, because the institutions of *jihād*, *hajj*, Friday, ‘*id* and *hadd* (penalties) could not be established without the force of a state. The administration of justice (‘adl) was not possible without the authority of the state.\textsuperscript{39} He stressed that separation of religion (shar’i) from state was not possible because that corrupted the social conditions (*ahwal al-nas*).\textsuperscript{40}

It is significant to note that in Ibn Taymiyya’s *al-siyāsa al-shar’iyya* the ruler gained more liberty than allowed by the other jurists. While Ibn Taymiyya insisted on a Just *siyāsa*, he allowed the ruler a wider authority in penalties in addition to those prescribed by *shari’a*. He explained, “If a penalty (administered by the ruler) was not fixed by the *shari’a*, it would be allowed as *ta’zir*. The ruler had the right to exercise *ijihād* in such matters. The ruler (for instance) may sentence a defaulter to prison, and award corporal punishment until he pays the due.”\textsuperscript{41} Regarding the penalties for rebels and highway robbers, the three schools of Islamic law, namely the Shafi’ites, Hanbalites and the Hanafites prescribed the punishment of crucifixion if the rebels had committed murder and robbery both. In case of murder without robbery, they ruled death sentence, in case of robbery without murder cutting of hand and feet, and in case of only public harassment, without murder or robbery the culprits were to be extradited. Ibn Taymiyya adds another view of the jurists at this point suggesting that
the ruler had the right of discretion (ijtihad) in these matters. He could put a person to death even if he had not committed murder, if the ruler finds the death sentence in the public interest (masla).42

In case of offences where punishment was not fixed, the ruler could award punishments by way of ta'zir, discipline and deterrence. If the offences were frequent he could increase the level of punishments.43 Majority of jurists disallowed the ruler the right to ijtihad, if he had no knowledge of the Qur'an and the sunna. On the contrary, Ibn Taymiyya argued that the knowledge of the Qur'an and the sunna was essential for the rulers, but if the ruler had no time to study or lacked the skill to do so, he must rely on persons in whose knowledge and piety he trusted.44

Ibn Taymiyya did not believe in distinguishing between the authority of different courts. He was asked whether the corporal punishment (siyasa) or prison for the accused was in accordance with shari'a. He replied that there was no distinction among the cases tried by different officials, whether they were called qadi, wala ahdath, or wala ma'zulim, they were only technical terms.45

The doctrine of al-siyasa al-shar'iyya allowed Ibn Taymiyya to go further than other jurists before him in allowing the right of siyasa to the ruler. One of the issues related to the blasphemy against the Prophet Muhammad. Ibn Taymiyya allowed the ruler to award the ultimate penalty of death to the offender. This came to be known as the judgement of al-qatl siyasatan (death sentence in public interest).46

Agreeing with Ibn Taymiyya, Ibn Qayyim maintained that just siyasa completed the shari'a, rather, it was indeed shari'a. It was only a difference of terminology. Ibn Qayyim's argument allowed ruler's discretion in the name of justice and shari'a. It also affected the identification of the sphere of the rights of God and men and ruler's jurisdiction.

2.4 Ibn Nujaym (d. 1562): siyasa as balance

The fourth period of crisis emerged in the period of the empires. The rulers in the Empire system were far more powerful than the Sultans and the Caliphs. The rulers could issue their own laws in the form of qanun in the Ottoman Empire and a'tın in Mughal India, in addition to shari'a, sometimes even contrary to fiqh. Fiqh became increasingly restricted to personal and religious matters, while the penal laws, laws of the royal court, fiscal laws and administration were governed by qanun and a'tın. To contradistinguish it from shari'a, the new laws were also called 'urf and siyasa. In this period, siyasa predominantly came to be seen as a public policy keeping balance between different systems of law and governance.

Taqi al-Din al-Maqrizi (d. 1441) traces this new legal development to the introduction of the yasa customs of the Mongols. In a chapter on the "rules of siyasa", al-Maqrizi explains that after the Turkish rule in Egypt, two types of law began operating, shari'a dealt with religious matters such as prayer, Hajj, fasting and other pious acts, qanun governed the matters relating public interest and management of properties. He mentions qanun as an instance of siyasa. According to al-Maqrizi, the Mongol rulers introduced their own customs (yasa) in Egypt and Syria. Sultan Qalä'un instituted the office of hajib in 1345 parallel to the office of chief qadi. The qadi's jurisdiction was limited to personal and religious matters such as disputes between husband and wife, and trust properties. The hajib dealt with financial disputes, revenues, fiefs and other related matters. The disputes among the traders in the market, which had been hitherto under the jurisdiction of
the qādīs, were also entrusted to the hājib. Al-Maqrīzi explains that the traders brought charges of corruption to the Sultan against the chief qādī Jamāl al-Dīn ‘Abd Allāh al-Turkamānī. The Sultan extended the hājib’s jurisdiction also to deal with these matters.

In Mughal India also, the office of mīr-i ‘adl was introduced with the same objective. The Mughals were also conscious of the fact that the views of the jurists were divided on almost every legal matter. Emperor Akbar (1556-1605) asked the ‘ulamā’ at his court to prepare a document (mahdar), assigning the Emperor the right of discretion in the application of Islamic law. Akbar, however, could not succeed. Later, Awrangzēbh Ālamgīr (1618-1707) tried to solve the problem of juridical diversity in Hanafite laws by compiling the Fatāwā Ālamgīrī. We shall return to it shortly. Let us resume our discussion of al-Maqrīzī’s analysis of the term siyāsā.

Al-Maqrīzī defines siyāsā in the following words: “The root of siyāsā in Arabic language is s-w-s, which literally means managing an affair or nature of a thing. As a technical term, siyāsā means seeking the welfare of the people by leading them to the way of success in this and other world. The siyāsā of the Prophets focused on everyone, high and low and in spiritual and mundane matters, the siyāsā of the rulers concerned mundane matters of everyone, the siyāsā of the ‘ulamā’ dealt only with the spiritual matters, but not for every one.” He then analyses the types of siyāsā saying that it could be just and oppressive. The just is the same as al-siyāsā al-shar‘iyya. Several books had been written on the subject. The second type, namely the oppressive siyāsā is opposed to shar‘iyya.

One may disagree with al-Maqrīzī’s etymological explanations of siyāsā by associating it with yasa but his definition and analysis of the term siyāsā had a great impact on later jurist thinking. Later jurists and lexicographers mostly cite al-Maqrīzī’s definition of the term, often without mentioning his name. Ibn Nujaym (d. 1562), a Hanafite jurist of Ottoman Egypt, reproduced al-Maqrīzī’s definition and analysis of the term, saying that he could not find a definition of the term in the Hanafite jurist texts. He observed that obviously for the jurists siyāsā meant an action by the ruler on grounds of what constitutes a public interest in his opinion without citing any specific scriptural text. We find Ibn Nujaym employing this argument in his discussion of some cases of hudūd.

In fiqh texts, murder and injury are usually discussed as qīsās offences and are treated as cases of the rights of men. It means that the heirs of the murdered person have the right to inflict the punishment, accept compensation or forgive the offender. Ibn Nujaym argued that the crime of murder was a crime of qīsās as well as of hadd. In a case of the murder of an innocent person, Ibn Nujaym ruled that the ruler had the discretion to award death sentence even if the heirs decided to pardon the murderer, because this punishment would be by way of hadd. He refers to earlier Hanafite authorities for precedents. In the case of a person who terrifies the people repeatedly by using sword, al-Nasafi (d. 1310) had allowed death sentence by the ruler. Mulīā Miskīn al-Harawī (d. 1408) explained that since this person had tried to disrupt the law and order, his evil must be removed by sentencing him to death. Ibn Nujaym sums up this discussion saying that those jurists justified an extraordinary measure on grounds of siyāsā. The same principle could be applied to other similar cases.

A similar role for the doctrine of siyāsā was allowed in the offence of adultery. The original Hanafite ruling recommended the punishment of one hundred lashes and stoning to death. Ibn Nujaym noted that the later jurists allowed the ruler to exile the person in exceptional cases in public interest. This was on grounds of ta’zīr and siyāsā. He adds that only the ruler had that discretion. He cites a later Hanafite jurist Sīghnaqī (d. 1300), the author of a commentary on al-Marghūbīnī’s (d. 1197) al-Hidāya, saying that prison was better than exile. Ibn Nujaym comments that the jurists use the term siyāsā to define ruler’s action in terms of public interest.

In Mughal India, the emperor Awrangzēbh Ālamgīr (1618-1707) patronized the preparation of a Hanafite compendium of laws, known as Fatāwā Hindīyya and Fatāwā Ālamgīrīyya. This digest of Hanafite law spreading into several volumes served two objectives. Firstly it was a codified Hanafite law for the muftīs and qādīs. Second, it was a measure to control the diversity of juristic opinions in the Hanafite
school. It laid down the better known views of Hanafite jurist, authenticated by the Emperor’s committee of jurists. It must be clear that it was not meant to be a code of law for the Empire. We have argued elsewhere that the penal laws issued officially by the emperor did not correspond with the text of the Fatāwā ‘Alamgīrī. It was an Emperor’s initiative to negotiate a balance in the conflicting jurist law.

The fatāwā struck this balance in several distinct ways. It localized shart‘a in Indian environment. For instance it allowed bowing before the King as a mark of respect. The fatāwā prescribed four levels of ta‘zīr punishment for the people of four different social status. (1) For the nobles, ‘ulama’ and the sāda (the descendents of the Prophet), mere public announcement of the offence was sufficient punishment. (2) For the state officials and the landlords, in addition to public announcement additional humiliation of dragging them to the court was enough. (3) The middle classes (awsāf) could be publicly denounced and imprisoned for the same offences. (4) The lower classes (khasīs and kamīn; need corporal punishment in addition to the punishments mentioned above.62

The fatāwā defined ta‘zīr as the residual powers of the Ruler in criminal laws. The ta‘zīr is defined as a punishment for offences that do not belong to hudūd. They are in the jurisdiction of the ruler. According to the fatāwā, the crimes under ta‘zīr relate either to the rights of God or to the rights of a person. In order to simplify, we may describe the first type as offences against public interest and the second type as offences against private interests. The first type of ta‘zīr is ruler’s obligation, the second is his right. The book explains the reason for this distinction, saying that although both types belong to the ruler’s authority, the punishment in the second type of ta‘zīr offences could not be administered without ruler’s authorization. In the first type of cases, for instance robbery, extortion, terror, oppression etc. anyone could take the initiative to kill the offenders.63

In cases of hudūd crimes also the fatāwā allows more discretion to the ruler. The fatāwā allows the use of torture in case of a person accused of theft, if he denies the charge yet the ruler is inclined to believe otherwise.64 In this discussion the term siyāsā has not been used, nor there is a reference to al-Maqrīzī’s text. Nevertheless, the ruler’s discretion in case of robbery is justified in the same terms as Ibn Nujaym did. The fatāwā rules that if robbers killed someone, even though they did not rob the person of his property, the ruler was obliged to award death sentence even if the heirs of the victim decided to pardon.65

It is quite interesting to compare this situation with the debate in the early British rule in India on the questions of ruler’s discretion in amending the Hanafite penal laws with reference to the doctrine of siyāsā.

2.5 Modern debates: siyāsā as politics

The Islamic doctrine of siyāsā faced new challenges in the modern period. The crisis began in the eighteenth century when Warren Hastings, the British governor of Bengal from 1771 to 1785, turned to the doctrine for the legitimacy of his “reforms” of shari‘a laws. He was not satisfied with the Islamic law of penalties; they were too lenient to deal effectively with the rebels. But the question was how to reform them and what would be the source of legality?

Banerje 66 explains that the origins of the British legal authority were two-fold: British crown and Mughal. The British Crown had no sovereignty rights in India except in Bombay, which it received from Portugal. Mughals had no control on Bengal after the defeat in Buxer in 1765. Shah ‘Ālam was a protégé of the British. Until 1772 a distinction was made between civil (dhwānt) and criminal law on the basis of the firman of Shah ‘Ālam, the Mughal emperor. Civil matters in Bengal were under British control, but they had no jurisdiction in criminal law. In order to overcome this problem the British reorganized the court system. In case of dacoity, Hastings wanted to introduce severe punishments. The charter of George II (1753) provided the reservation of their own laws to the natives of India. Hastings’ Regulating Act (1772) also reserved the native law.67

Warren Hastings, found it expedient to look for a solution in
Islamic law. In 1772 he assumed the title Nawwab Governor General Hastings to claim prerogatives of a Muslim ruler on grounds of the doctrine of *siyāsa*. This measure was necessitated by the peculiar law and order situation in India. Hastings wanted to deal severely with miscreants and robbers, often a term for rebels and opponents to the British rule. The *qādīs*, who adhered mostly to the Hanafite law, did not support the Governor.

In his letter of 10 July 1773, Hastings “remarked upon the refusal of the courts acting in accordance with the Mahomedan law to pass sentence of death on dacoits unless murder had accompanied the robbery.” He recalled that custom recognized the sovereign’s right to interpose in special cases to strengthen the efficiency of the law (*siyāsa*); and proposed that a general order or commission should be obtained from the Nazim, authorizing that the penalties prescribed in 1772 should be inflicted on professed and notorious robbers...

Hastings justified changes on the basis of emergency. He argued that although the proposed punishments were not reconcilable with the spirit of the British constitution. But, Bengal had not yet attained the same perfection as the British people had. Hastings resorted to the doctrine of *siyāsa*, the right of the ruler to interfere and thus to the accustomed extraordinary justice of the Islamic State. Hastings particularly wanted to abolish Islamic legal distinctions between the cases of murder on the basis of the instrument of murder, the right of pardon, and *qiṣās*, the right of the heirs to execute the criminal. Muslim judges refused to pass sentence of death on dacoits unless the robbery committed by them has been attended with murder.

Harington explained Muslim *qādīs’* reluctance to support the Governor saying, “The Muhummudan law is founded on the most lenient principles, and an abhorrence of bloodshed. This often obliges the sovereign to impose, and by his mandate to correct the imperfection of the sentence, to prevent the guilty from escaping the impunity, and to strike at the root of such disorders as the law will reach.”

George Rankin noted the influence of the doctrine of *siyāsa* in the administration of criminal laws even after Warren Hastings. He wrote, “The doctrine of *siyāsat* played a great part under the Regulations. It is described by Jonathan Duncan as a ‘corrective or supplementary doctrine’ which is well known and admitted in the practice of the courts of Bengal as being acknowledged to be a power vested in the Sultan Hakim, or ruler for the time being, whereby a criminal may for almost any atrocious act be lawfully or regularly put to death if the ruler aforesaid shall “seesuut” – or in the exercise of his discretionary coercive authority as entrusted to him for the public good – think fit to command it.”

Rankin goes on, “From the sanction which it gave to cruel punishments the Mahomedan law seems almost unspeakably severe. Yet the claim could be made for it officially that ‘As a system the Mahomedan criminal law is mild; for though some of the principles it sanctions be barbarous and cruel yet not only is the infliction of them rarely rendered compulsory on the magistrate, but the law seems to have been framed with more care to provide for the escape of criminals than to found conviction on sufficient evidence and to secure the adequate punishment of offenders.’

According to Rankin, in Islamic law, “There was the right of *siyāsat* (seesuut, seesuut) or exemplary punishment inflicted by the sovereign for the protection of the public interest: in cases of a heinous and special nature the punishment might be equal to or even greater than that prescribed the law of kisas or had.”

The influence of the doctrine of *siyāsa* continued in the Regulation LIII of 1803. “The Law dealt with three types of *ta’zir*: (a) crime not within *hadd* or *kisas*, (b) crimes within these categories but not so treated because of technical insufficiency of proof or because of special exception or scrupulous distinction (*shoobah*), (c) heinous crimes requiring exemplary punishment at the sovereign’s discretion for the protection of the public (*siyāsat*).”

Jörg Fisch, argues that the regulation put all three types together to integrate judicial power and “pretending that *siyāsa* belonged to the judiciary delegates” of the “sovereign authority.” It could be delegated but not as part of extraordinary powers of the judge. The British incorporated *siyāsa* into the ordinary justice, similar to *ta’zir*. The traditional distinction became consequently invalid.
The doctrine of *siyāsa* could no longer be used as a basis of legality for law reforms. The colonial quest for the right to sovereignty therefore shifted to other venues. One of the most significant among them was legality on the basis of conquest. The Charter Bill 1813 declared sovereignty of the Crown.

Dealing with criminal laws within Islamic law was, however, still a problem for the British. In 1825, the law officers of the Nizamat Adalat were asked whether a fatwa providing for capital punishment was possible if murder was not proved. They answered: “According to all the received authorities, on which law opinions are given, a fatwa of death by *Seasut* could not be pronounced on any but a murderer, though there are authorities extant, in which, treating of the abstract power of government, the right of extirpating evil-doers, generally, was mentioned.”

The British officials stressed on introduction of English law in India. William Hunter (1861) argued that in the eyes of Muslims India was a *dar al-harb* where according to Hanafites Islamic law was no longer obligatory for them. He even managed to collect a number of *fatāwā* by the Indian Muslim jurists declaring India as *dar al-harb*. Halhed gave the example of Roman law on foreign subjects: toleration in matters of religion, adoption of such original institutes of the country, as do not clash with the laws or interests of the conqueror. Galloway argued that Criminal law based on *shari’a* was imposed by Muslims by the right of conquest. The same justification was available for the imposition of English law. Consequently, a new Indian Penal law began to develop. It was no longer relied on the doctrine of *siyāsa*.

In this process of secularization of criminal laws, *shari’a* was increasingly personalized. The process affected deeply the concept of *siyāsa* (*siyāsat* in Ottoman Turkish, Persian and Urdu). It was no longer associated with penalties because it was delinked from criminal law. The semantic emphasis shifted to public interest, administration, policy and political affairs. The term came to be used more frequently for politics.

Literature on *siyāsa* has grown abundantly. Modern Muslim jurists have been fascinated by the various aspects of the doctrine of *siyāsa*. To some jurists, the contrastive position of *siyāsa* with *shari’a* has provided grounds for separation between religion and politics. The *siyāsa* was mundane (*dunyawi*) and the traditional ‘ulama’ avoided participation in politics. It took them sometimes to form political parties and to join political activities. The politics, largely remained a secular activity in the nineteenth and early twentieth century. Later, when some religious groups came into politics, they argued that there was no separation between religion and politics in Islam. They mostly referred to Ibn Taymiyya’s *siyāsa shar’iyya*.

Scholars like Rifā’a al-Ṭaḥtāwī (d. 1873) translated “loi, règlement” as *siyāsa* in his Arabic translation of the French constitution of 1830. During the colonial period, *shari’a* was reduced to personal religious rights. After the independence, the Muslim governments introduced further reforms in Islamic personal laws. The traditional groups protested against these reforms. The doctrine of *siyāsa* reappeared in the discussion. Those in favour of reforms invoked the principle of *ijtihād* arguing for the right of state to legislate. Those in opposition referred frequently to Ibn Taymiyya’s *al-siyāsa al-shar’iyya*. The doctrine of *siyāsa* in these debates acquired renewed emphasis on concepts like *ijtihād* and *maslaha* in its semantic repertoire. In this process *shari’a* came to be distinguished from *fiqh*, jurist law, to be defined in more abstract and universal terms. ‘Abd al-Wahhāb Khallāf, an Egyptian jurist, for instance, defined *siyāsa* as “management of public affairs in an Islamic state with a view to securing public welfare and removal of harm in such a way that it did not transgress the limits imposed by *shari’a* and did not violate its universal principles, even though it may not in complete conformity with the statements of the leading jurists (*al-a’imma al-mujtahidūn*.”

Ahmad Fathī al-Bahnāsī, another Egyptian jurist, still views *siyāsa* as synonymous with *τα’zīr* as he refers to the traditional definition of *al-siyāsa al-shar’iyya* as an allowance for the rulers to take action where public interest so demands provided it is not contrary to the principles of religion and that there is no specific evidence supporting it.
Abū 'Abd al-Fattāh 'Ali ibn Hajj, the Algerian jurist, maintains a distinction between ordinary siyāsā and siyāsā sharʿiyya, arguing that siyāsā sharʿiyya must be in consonance with shariʿa. In his discussion siyāsā sharʿiyya is defined more and more as political affairs (ḥukm al-imāma, dealing with matters relating to governance). He refers to al-Qarāfī, for this distinction. Since siyāsā sharʿiyya originated with Prophet Muhammad, two aspects of siyāsā were combined in his person: tablīgh and imāma. The rules of siyāsā relating to tablīgh are universal and immutable. The rules relating to imāma, on the other hand, are subject to change. The difference among the jurists stems from their different understanding of the rulings of the Prophet, was a particular ruling given by him as a matter of tablīgh or as siyāsā sharʿiyya. For instance, jiḥād is a ruling stemming from his function of tablīgh, it cannot be amended or abolished. Peace and pacts are siyāsā rulings; they may change in different situation.86

Abū 'Abd al-Fattāh finds it difficult to regulate the relativity of siyāsā. The only solution he recommends is that the ruler (imām) must be religiously committed, knowledgeable and sincere.87

The doctrine of siyāsā in Islamic law allowed a powerful role to the ruler, but it could not develop it into an institution. The modern nation-state replaced the personal concept of governance, and bestowed upon the institution of state complete sovereignty as embodiment of the nation. This developed posed new questions to the doctrine of siyāsā. Who has the sovereignty? The Islamists rejected the idea of the sovereignty of the people. They believe that the sovereignty belongs to God. The question then was who has the power of discretion in matters of public interest. It is generally suggested that the solution to the dilemma lies in the principle that a state is allowed to legislate in matters where shariʿa was silent. This debate has increasingly expanded the scope of shariʿa as well as that of siyāsā sharʿiyya.

3 Conclusion

This brief and sketchy survey of the development of the doctrine of siyāsā in Islamic law shows that duality of siyāsā and shariʿa as a tension between theory and practice is over exaggerated. The tension appeared in the early history of Islam, but gradually the Muslim jurists found ways to accommodate siyāsā into Islamic law. Since the majority of recent studies deal with the early period of Islamic law they found this tension in the period and concluded that it was an essential feature.

Other scholars tend to limit the doctrine of siyāsā to penalties and criminal law. It is apparently because in Islamic legal texts discussions of siyāsā are mostly connected with punishments. Studied in depth one does not fail to notice that the real issue is the legislative right of the ruler. Legality of ruler’s discretion was justified on grounds of public interest (maslaha). This association brought siyāsā and maslaha closer to each other and paved the way for inner dynamism within Islamic legal reasoning.

I would like to conclude that the doctrine of siyāsā points to a plurality, rather than duality of laws in Islam. Siyāsā operated as a balancing principle to allow a smooth operation of these different systems.

NOTES


14 Fisch 1983, p. 20, n. 45.

15 Ibn Manẓūr, *Līsān al-ʿArab*, Qum (Iran), 1405 H., vol. 6, p. 108. After explaining the various meanings, Ibn Manẓūr concludes that the horse trainer trains the animal and the ruler leads his subjects.

16 Buṭrus al-Bustānī, *Muḥī al-Muhīt. Qarnūs mutawāwwal li-l-lagha al-ʿarabiyya*, Beirut: Maktabat Lubnān, 1993, vol. 1, p. 1026, defines siyāsā as “seeking improvement in the affairs of the people by guiding them to ways of success.” *Siyāsā madāniyya*, the political economy, is to plan the economy in general on the principles of justice. It is a branch of practical philosophy, called by different names such as *ʿilm al-stiyāsā, siyāsāt al-mulūk*, and *al-hikma al-madāniyya*.

17 Ibn Ṣuyutī (d. 1563), defines it as follows: “siyāsā refers to the action taken by a ruler in view of a public interest in his opinion in a certain matter even though he found no textual evidence to support his action”, see *al-Bahr al-Rāʾīq*, Cairo: Dār al-Kutub al-ʿArabiyya al-Kubrā, n.d.


26 MUHAMMAD KHALID MASUD


27 Al-Māwardī, al-Akhkhām al-Sultāniyya, p. 3.

28 Al-Māwardī, al-Akhkhām al-Sultāniyya, p. 31.


31 Al-Ghazālī, Iḥyā‘, vol. 1, p. 11.


33 Ibn Qayyim cites Ibn ‘Aqīl’s statement in I‘lam, Ibn Qayyim 1968, 4:372, under the title Ikhtilif al-‘ulama’ fi l-‘amal bi l-siyāsa but does not refer to al-Shāfi‘ī there.


37 See Muhammad Khalid Masud, Shatibi’s Philosophy of Islamic Law, Islamabad: Islamic research Institute, 1995, p. 57.


40 Ibn Taymiyya 1971, p. 189.

41 Ibn Taymiyya 1971, p. 57.

42 Ibn Taymiyya 1971, p. 93.

43 Ibn Taymiyya 1971, p. 132.

44 Ibn Taymiyya 1971, p. 182.


46 Al-Bahnasī 1983, p. 82, citing Ibn Taymiyya, al-Sārim al-Masā’il.

47 Ibn Qayyim 1953, p. 5.


54 Ibid.


57 Ibn Nujaym, al-Bahr, p. 70.


60 Ibn Nujaym, al-Bahr, p. 10.

(Harvard University, Boston, 5 May 2000).


63 *Fatwa* ‘Alamgir, 3:297.


65 *Fatwa* ‘Alamgir, 3:330. Presently the Arabic text is not available to me. It is possible that the translator has used the term *hadd* for *siyasa*. He uses the phrase "death by way of lawful *hadd.*" Other texts use the phrase "death by way of *siyasa*" in the same case.


68 Jain 1982.


70 Fisch 1983, p. 33

71 Harington 1:302 ff., cited in Fisch 1983, p. 34.


76 Rankin 1946, p. 166.

77 Rankin 1946, p. 177.

78 Fisch 1983, p. 67


85 Al-Bahnāsī 1983, p. 25.


87 Ibid., p. 127.