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THE DOCTRINE OF *SIYĀSA* IN ISLAMIC LAW

Muhammad Khalid Masud
(ISIM, Leiden)

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 *sharī'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 *sharī'a* as theory and *siyāsa* as practice.[1] 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 [2] 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 *sharī'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. *fatāwā* (jurists' opinions on the actual legal issues),[3] *aḥkām* (court judgments)[4] and *siyāsāt* (issues relating to governance).[5] 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 *sharī'a* recognizes only two types of courts: *qāḍī* (general) courts applying *fiqh*, and *maẓālim* (complaints) applying *siyāsa*.[6] In fact, there were more than these two courts administering justice and settling disputes. For instance *ḥisba* (market and public morality), *aḥdāth*, *shurṭa*, *kōtwāl* (police) and *dīwān* (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 *qāḍī* courts, according to the historians of legal institutions in India.[7] 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.[8] June Starr has noted a similar state with reference to the Ottoman system.[9]

Recently, Jörg Fisch observed, "There was probably never an Islamic state in which the administration of criminal justice was guided solely by *sharī'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."[10]

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 *kalām* 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.[11] Similarly, administrative laws, and fiscal laws also grew outside the regular corpus of *fiqh*.[12]

Modern studies of Islamic law have also concluded that the *sharī'a* criminal law (*ḥudūd*) 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*, *sharī'a* is characterized as rigid and immutable. In fact, *sharī'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*.[13] Naturally, points of view on *siyāsa* are as diverse as on *sharī'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 farmans 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 *fuqahā'* 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."[14]

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,[15] *siyāsa* finally emerged as a technical term meaning art of governance.[16] In Islamic law it gradually came to mean as rulers' discretion in the application of *fiqh*.[17] 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-Shāfi'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, Manṣūr (754 -775), decided to enforce *al-Muwaṭṭa'*, 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 *fuqahā'* resisted that attempt.[18] Was it because the *fuqahā'* regarded *fiqh* or *sharī'a* as a religious matter and opposed rulers' interference in religion? Does that imply separation of church and state? Or, was it because the *fuqahā'* believed in the legal pluralism?

Schacht rejects the story of Manṣūr's wish of adopting *al-Muwaṭṭa'* 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 *muwaṭṭa'*).[19] 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 *qāḍīs* as source books. They were never meant to be binding. It was left to the discretion of the *qāḍīs* 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 *madhhab* (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, *siyāsa* meant good governance. He also called the Caliph to exercise *ra'y* (discretion), that had the same meaning as the later term *ijtihād*.

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 *sharī'a*. The other view held that the Caliph's commands must be disregarded when they were contrary to *sharī'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*.[20]

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'ūbiyya*, 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 Ḥadith 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*,[21] in refutation of *shu'ūbī*[22] and a political history of early Islam.[23] al-Shāfi'ī developed a juridical theology that later came to be accepted as *uṣūl al-fiqh* (principles of jurisprudence).

Al-Shāfi'ī developed a thesis that the society should be governed by the Qur'ān and *ḥikma* (wisdom), the latter being Sunni.[24] He rejected any *siyāsa* that did not accord with the Qur'ān and *sunna*.[25] This view, as we shall see soon, came to be debated among the Hanbalite jurists themselves.

Al-Shāfi'ī's legal theory (*uṣul*) 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'ī vigorously attacked the diversity of views among the jurists and argued that they conflicted with the *sunna* of the Prophet. Consequently, al-Shāfi'ī limited the right of the Caliph (*walī al-amr*) by subjecting it to *qiyās*. By implication, he included the jurists in the category of the people of authority.

Al-Shāfi'ī 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 thef,[26] 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 *siyāsa*. 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): *siyāsa* 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 *qahr* (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 Shī'ī 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 *istīlā'* and public interest in view of the impending schism and anarchy.

Abū'l-Ḥasan 'Alī al-Māwardī, a *qāḍī* under the Abbasid Caliphs al-Qādir (991-1031) and al-Qā'im (1031-74), who strived for the restoration of Sunni orthodoxy against the Shī'ī Buwayhid Sultans. Both Caliphs sent al-Māwardī on diplomatic missions to the Buwayhids. Al-Māwardī wrote *al-Aḥkām al-sulṭāniyya*, 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-Māwardī describes *siyāsa* as a function of *imām* entrusted to him by God.[27] He defines *imām* as a successor to the Prophet to look after the management" (*siyāsa*) 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-Māwardī also uses another pair of terms as the duties of the *imām*: *siyāsat al-umma* and *ḥirāsat al-milla*, *milla* signifying the religious aspect of the Muslim society while the *umma* the political or mundane.

This distinction goes back to al-Shāfi'ī's explanation between the rights of God and the rights of man to which we have referred above. Al-Shāfi'ī did not allow the Caliph to hear the cases relating to the rights of God. Al-Māwardī, 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-siyāsa* and were necessarily related to the protection of the community, the basic duty of the *imām*. Al-Māwardī also made a distinction between two types of procedural laws: *naẓar al-qāḍī*, regular cases governed by the procedural laws elaborated by the *fuqahā'* and *naẓar al-maẓālim*, the complaint cases against the state officials where extraordinary procedures of torture, evidence etc. were allowed.[28]

For al-Ghazālī, *siyāsa* in this context came to mean pragmatism.

He defines *siyāsa* on the patterns of Muslim philosophers who followed Aristotalian concept of Politics. He says, *siyāsa* refers to social organization and cooperation with reference to economic resources and their control.[29] al-Ghazālī assimilated the concept of *siyāsa* by recognizing different levels of *siyāsa*, in which the *siyāsa* of the *'ulamā'* and *fuqahā'* stands side by side with the *siyāsa* of the rulers. He stresses the importance of the *siyāsa* for the Ulam,[30] explaining that it is not a religious science in the first category but it is instrumental in the matters which are complementary to religion.[31]

Like the above mentioned Shafi'ite jurists, the Hanbalite jurist Ibn 'Aqīl (d.1119) was also looking for a role of *siyāsa* in Islamic law. He raised the question whether *siyāsa* was possible independent of *sharī'a*. He refers to three trends in his days. The theologian philosophers (*al-ḥukamā' al-ilāhiyyūn*) opted for *ḥikma*, suspending the *sharī'a*. The jurists (*al-fuṭanā'*, the wise) subjected reason to the *sharī'a*, governing worldly affairs and even in such affairs of management (*siyāsāt*) where no text of the *shar'* was available.[32]

Ibn 'Aqīl stated that in matters of governance operation by *siyāsa shar'iyya* was allowed. It is control (*ḥazm*) and power and a ruler must have a discretion in this matter. Referring to al-Shāfi'ī [33] who argued that *siyāsa* was allowed only if accorded with *sharī'a*, Ibn 'Aqīl responded that *siyāsa* actually aimed for people's welfare and protected them from chaos (*fasād*), 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-Shāfi'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 *siyāsa* 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*.[34]

Al-Māwardī's association of the doctrine of *siyāsa* with *maṣlaḥa* (public interest) facilitated later jurists to assimilate the doctrine of *siyāsa* into *sharī'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-Tiqtiqa (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"[35]

The Egyptian Malikite jurist Shihāb al-Dīn al-Qarāfī's (d. 1285) *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa-Taṣarrufāt al-Qāḍī wa'l-Imām* [36] also marks a need for clear demarcation between the functions of *qāḍī*, *imām* and a *muftī*. 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. *'Ibādāt* and matters decided by *ijmā'* were not open to the discretion of the *qāḍī* or *imām*. He also defined the boundaries between the *qāḍī* and the *imām*. The *imām* had authority (*ḥukm*) in matters where the opinions of the jurists were divided and no consensus existed. While *qāḍī* was responsible to *imām*, the *muftī* was to God alone[37] Qarāfī, in this way provided the ruler the right to control the juridical diversity but his distinction between the authority of *muftī* and *qāḍī* posed limits on the functions of a *qāḍī* 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 *sharī'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), *ẓalama* (transgressors) and *su'at* (conspirators) in periods of disruption (*fatarāt*) because they were trying to spread anarchy in the land (*sā'ūn fī'l-arḍ fasād*), miscreants, and conspirators.[38]

Ibn Taymiyya insisted that *siyāsa* must be governed by the *sharī'a*. He believed in the necessity of state on religious grounds, because the institutions of *jihād*, *ḥajj*, Friday, *'īd* and *ḥudūd* (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.[39] He stressed that separation of religion (*sharī'a*) from state was not possible because that corrupted the social conditions (*aḥwal al-nās*).[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 *sharī'a*. He explained, "If a penalty (administered by the ruler) was not fixed by the *sharī'a*, it would be allowed as *ta'zīr*. The ruler had the right to exercise *ijtihād* in such matters. The ruler (for instance) may sentence a defaulter to prison, and award corporal punishment until he pays the due.[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 cruxification 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 (*ijtihād*) 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 (*maṣlaḥa*).[42]

In case of offences where punishment was not fixed, the ruler could award punishments by way of *ta'zīr*, 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 *ijtihād*, if he had no knowledge of the Qur'ān and the *sunna*. On the contrary, Ibn Taymiyya argued that the knowledge of the Qur'ān 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 (*siyāsa*) or prison for the accused was in accordance with *sharī'a*. He replied that there was no distinction among the cases tried by different officials, whether they were called *qāḍī*, *walī aḥdāth*, or *walī maẓālim*, they were only technical terms.[45]

The doctrine of *al-siyāsa al-shar'iyya* allowed Ibn Taymiyya to go further than other jurists before him in allowing the right of *siyāsa* to the ruler. One of the issues related to the blasphemy against the Prophet Muḥammad. 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 siyāsatan* (death sentence in public interest).[46]

Ibn Qayyim largely supported Ibn Taymiyya, but he tried to develop a synthesis between the ideas of Ibn Aqil and Ibn Taymiyya. Ibn Qayyim was in favour of Ibn 'Aqīl's idea of *siyāsa* being independent of *sharī'a*. He explained that *siyāsa* could be unjust or just.[47] In *siyāsa*, the rulers have acted either expanding (*ifrāṭ*) or restricting (*tafrīṭ*) the role of *sharī'a* in the state affairs. Some time they restricted the penalties of *sharī'a*,[48] causing misunderstanding of the true meaning of *sharī'a* and its actual application. When the rulers saw that they could not administer without adding something to what they understood as *sharī'a*, they invented the laws of *siyāsa* to organize general interests. It only led to evil.[49]

Agreeing with Ibn Taymiyya, Ibn Qayyim maintained that just *siyāsa* completed the *sharī'a*, rather, it was indeed *sharī'a*. It was only a difference of terminology[50] Ibn Qayyim's argument allowed ruler's discretion in the name of justice and *sharī'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): *siyāsa* 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 *qānūn* (in the Ottoman Empire) and *ā'īn* (in Mughal India), in addition to *sharī'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 *qānūn* and *ā'īn*. To contradistinguish it from *sharī'a*, the new laws were also called *'urf* and *siyāsa*. In this period, *siyāsa* predominantly came to be seen as a public policy keeping balance between different systems of law and governance.

Taqī al-Dīn al-Maqrīzī (d. 1441) traces this new legal development to the introduction of the *yasa* customs of the Mongols.[51] In a chapter on the "rules of *siyāsa*", al-Maqrīzī explains that after the Turkish rule in Egypt, two types of law began operating, *sharī'a* dealt with religious matters such as prayer, Hajj, fasting and other pious acts, *qānūn* governed the matters relating public interest and management of properties. He mentions *qānūn* as an instance of *siyāsa*. According to al-Maqrīzī, the Mongol rulers introduced their own customs (*yasa*) in Egypt and Syria. Sultan Qalā'ūn instituted the office of *ḥājib* in 1345 parallel to the office of chief *qāḍī*. The *qāḍī*'s jurisdiction was limited to personal and religious matters such as disputes between husband and wife, and trust properties. The *ḥājib* 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 *qāḍī*s, were also entrusted to the *ḥājib*. Al-Maqrīzī explains that the traders brought charges of corruption to the Sultan against the chief *qāḍī* Jamāl al-Dīn 'Abd Allāh al-Turkamānī. The Sultan extended the *ḥājib*'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 (*maḥḍar*), assigning the Emperor the right of discretion in the application of Islamic law. Akbar, however, could not succeed.[52] Later, Awrangzēb '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 *siyāsa*.

Al-Maqrīzī defines *siyāsa* in the following words: "The root of *siyāsa* in Arabic language is *s-w-s*, which literally means managing an affair or nature of a thing. As a technical term, *siyāsa* means seeking the welfare of the people by leading them to the way of success in this and other world. The *siyāsa* of the Prophets focused on everyone, high and low and in spiritual and mundane matters, the *siyāsa* of the rulers concerned mundane matters of everyone, the *siyāsa* of the *'ulamā'* dealt only with the spiritual matters, but not for every one."[53] He then analyses the types of *siyāsa* saying that it could be just and oppressive. The just is the same as *al-siyāsa al-shar'iyya*. Several books had been written on the subject. The second type, namely the oppressive *siyāsa* is opposed to *shari'a*.[54]

One may disagree with al-Maqrīzī's etymological explanations of *siyāsa* by associating it with *yasa* but his definition and analysis of the term *siyāsa* 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.[55]

Ibn Nujaym (d. 1562), a Hanafite jurist of Ottoman Egypt, reproduced al-Maqrīzī's definition and analysis of the term,[56] saying that he could not find a definition of the term in the Hanafite jurist texts. He observed that obviously for the jurists *siyāsa* meant an action by

the ruler on grounds of what constitutes a public interest in his opinion without citing any specific scriptural text.[57] We find Ibn Nujaym employing this argument in his discussion of some cases of *ḥudūd*.

In *fiqh* texts, murder and injury are usually discussed as *qiṣāṣ* 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 *qiṣāṣ*as well as of *ḥadd*. 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 *ḥadd*.[58] He refers to earlier Hanafite authorities for precedents. In the case of a person who terrifies the people repeatedly by using sword, al-Nasafī (d. 1310) had allowed death sentence by the ruler. Mullā 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 *siyāsa*. The same principle could be applied to other similar cases.[59]

A similar role for the doctrine of *siyāsa* 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 *siyāsa*. He adds that only the ruler had that discretion. He cites a later Hanafite jurist Sighnaqi (d. 1300), the author of a commentary on al-Marghīnānī's (d. 1197) *al-Hidāya*, saying that prison was better than exile. Ibn Nujaym comments that the jurists use the term *siyāsa* to define ruler's action in terms of public interest.[60]

In Mughal India, the emperor Awrangzēb 'Ālamgīr (1618-1707) patronized the preparation of a Hanafite compendium of laws, known as *Fatāwā Hindiyya* and *Fatāwā 'Ālamgīriyya*. This digest of Hanafite law spreading into several volumes served two objectives. Firstly it was a codified Hanafite law for the *muftī*s and *qāḍī*s. 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 'Ālamgīrī*.[61] 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 *sharī'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, *'ulamā'* 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 (*awsāṭ*) 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 *ḥudūd*. 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 *ḥudūd* 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 *siyāsa* 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 *siyāsa*.

2.5 Modern debates: *siyāsa* as politics

The Islamic doctrine of *siyāsa* 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 *sharī'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 (*dīwānī*) and criminal law on the basis of the *firmān* 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*.[68] 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 *qāḍīs*, 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 Nāẓim, authorizing that the penalties prescribed in 1772 should be inflicted on professed and notorious robbers...[69]

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.[70] 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.[71] 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 *qiṣāṣ*, 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.[72] Harington explained Muslim *qāḍīs*' 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."[73]

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 "*seasutun*" – or in the exercise of his discretionary coercive authority as entrusted to him for the public good – think fit to command it."[74]

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."[75]

According to Rankin, in Islamic law, "There was the right of *siyāsat* (*seeasut*, *seesut*) 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."[76]

The influence of the doctrine of *siyāsa* continued in the Regulation LIII of 1803. "The Law dealt with three types of *ta'zīr*: (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 (*siyasat*)."[77]

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'zīr*. The traditional distinction became consequently invalid.[78]

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."[79]

The British officials stressed on introduction of English law in India. William Hunter (1861) argued that in the eyes of Muslims India was a *dār al-ḥarb* 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 *dār al-ḥarb*.[80] 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.[81] Galloway argued that Criminal law based on *sharī'a* was imposed by Muslims by the right of conquest. The same justification was available for the imposition of English law.[82] 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, *sharī'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 *sharī'a* has provided grounds for separation between religion and politics. The *siyāsa* was mundane (*dunyawī*) and the traditional *'ulamā'* 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-Ṭahṭāwī (d. 1873) translated "loi, règlement" as *siyāsa* in his Arabic translation of the French constitution of 1830.[83] During the colonial period, *sharī'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 *maṣlaḥa* in its semantic repertoire. In this process *sharī'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 *sharī'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*).[84]

Aḥmad Fatḥī al-Bahnasī, another Egyptian jurist, still views *siyāsa* as synonymous with *ta'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.[85]

Abū 'Abd al-Fattāḥ 'Alī ibn Ḥajj, the Algerian jurist, maintains a distinction between ordinary *siyāsa* and *siyāsa shar'iyya*, arguing that *siyāsa shar'iyya* must be in consonance with *sharī'a*. In his discussion *siyāsa shar'iyya* 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 *siyāsa shar'iyya* originated with Prophet Muḥammad, two aspects of *siyāsa* were combined in his person: *tablīgh* and *imāma*. The rules of *siyāsa* 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 *siyāsa shar'iyya*. For instance, *jihād* is a ruling stemming from his function of *tablīgh*, it cannot be amended or abolished. Peace and pacts are *siyāsa* rulings; they may change in different situation.[86]

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

The doctrine of *siyāsa* 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 *siyāsa*. 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 *sharī'a* was silent. This debate has increasingly expanded the scope of *sharī'a* as well as that of *siyāsa shar'iyya*.

3 Conclusion

This brief and sketchy survey of the development of the doctrine of

siyāsa in Islamic law shows that duality of *siyāsa* and *sharī'a* 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 *siyāsa* 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 *siyāsa* to penalties and criminal law. It is apparently because in Islamic legal texts discussions of *siyāsa* 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 (*maṣlaḥa*). This association brought *siyāsa* and *maṣlaḥa* closer to each other and paved the way for inner dynamism within Islamic legal reasoning.

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

NOTES

1 Joseph Schacht, *Introduction to Islamic Law*, Oxford: Clarendon, 1966, pp. 76 ff.

2 Emile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, Leiden: Brill, 1960, pp. 433-616; Schacht 1966, pp. 50-56, 62, 84f.

3 See for instance, Muhammad Khalid Masud, Brinkley Messick and David Powers (eds), *Islamic Legal Interpretation: The Muftis and their Fatwas*, Harvard, Cambridge, Mass., 1996; P.S. van Koningsveld and M. Tahtah, *Leven als moslim in Europa: de Fatwa's van Khalil El-Moumni, imam van de Nasr-moskee in Rotterdam*, Gent: Centrum voor Islam in Europa (C.I.E.), 1998; Nico Kaptein, *The Muhimmat al-nafā'is: a bilingual Meccan fatwā collection for Indonesian Muslims from the end of the nineteenth century*, Jakarta: INIS, 1997; Aly Abd el-Gaphar Fatoum, *Der Einfluss des islamischen*

Rechtsgutachtens (Fatwa) auf die aegyptische Rechtspraxis: am Beispiel des Musikhoerens, Frankfurt am Main (etc.): Peter Lang, 1994.

4 George Makdisi, "The *Sharī'a* Court Records of Ottoman Cairo and Other Resources for the Study of Islamic Law," *American Research Center in Egypt Newsletter* No 114, 1981, pp. 3-10; Henry Toledano, *Judicial practice and family law in Morocco: the chapter on marriage from Sijilmasi's al-'Amal al-Muṭlaq*, Boulder, CO: Columbia University Press, 1981; June Starr, *Law as Metaphor. From Islamic courts to the palace of justice*, Albany, N.Y.: State University of New York Press, 1992; J.S. Nielsen, *Secular justice in an Islamic State. Mazalim under the Bahri Mamluks*, Istanbul: Nederlands Historisch-Archaeologisch Instituut, 1985, pp. 104-109.

5 Bernard Lewis, "*Siyāsa*", in A.H. Green (ed.), *In Quest of an Islamic Humanism. Arabic and Islamic studies in memory of Mohamed al-Nowaihi*, Cairo: American University in Cairo Press, 1984, pp. 3-14; Fawzi M. Najjar, "*Siyāsa* in Islamic political philosophy", in M.E. Marmura (ed.), *Islamic Theology and Philosophy. Studies in honor of George F. Hourani*, Albany: State University of New York Press, 1984, pp. 92-110; Aziz al-Azmeh, *Islams and Modernities*, London: Verso, 1996.

6 Emile Tyan, "Judicial Organization" in Majid Khadduri (ed.), *Law in the Middle East*, 1, Washington: Middle East Institute, 1955, pp. 198-207.

7 See for instance, M.B. Ahmad, *The Judicial System of the Mughal Empire*, Karachi: Pakistan Historical Society, 1978.

8 M. P. Jain, *Outlines of Indian Legal History* (available to me in Urdu translation *Anwār al-yaqīn: Hindūstān kī qānūnī tārīkh*, New Delhi: Taraqqi Urdu Bureau, 1982).

9 June Starr, *Law as Metaphor. From Islamic courts to the palace of justice*, Albany, N.Y.: State University of New York Press, 1992.

10 Jörg Fisch, *Cheap Lives and Dear Limbs. The British transformation of the Bengal criminal law, 1769-1817*, Wiesbaden: F. Steiner, 1983, p. 19.

11 See for instance the following books written by jurists are independent treatises on the subject: al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, Cairo: Waṭan, 1298 H.; Muḥammad Abū Ya'lā ibn al-Ḥusayn al-Ḥanbali al-Farrā' (d. 458 H.), *al- Aḥkām al-Sulṭāniyya*, Cairo: Muṣṭafā al-Bābī

al-Ḥalabī, 1938; al-Ghazālī, *Naṣīḥat al-Mulūk: al-Ghazālī's Book of Counsel for Kings*, transl. F.R.C. Bagley, London: Oxford University Press, 1964.

12 See for instance Abū Yūsuf, *Kitāb al-Kharāj*, transl. and provided with an introduction and notes by A. Ben Shemesh, Leiden: Brill, 1969, and Abū 'Ubayd al-Qāsim Ibn Sallām al-Harawī, *Kitāb al-Amwāl*, Beirut: Dār al-Shurūq, 1989.

13 The following are a few examples: Muḥammad ibn al-Maqdisī, *al-Siyāsa al-:āẓima al-Mardiyya*; Lisān al-Dīn Ibn al-Khaṭīb, *al-Siyāsa al-Madaniyya*; Abū Dalf Qāsim ibn 'Īsā al-Baghdādi al-Wazīr (d. 841 H.), *Siyāsat al-Muluk*; Fuat Sezgin, *Geschichte des arabischen Schriftums*, vol. 2, Leiden: Brill, 1975, p. 632; Tāj al-Dīn Abū Muḥammad 'Abd Allāh ibn 'Umar al-Sarakhsī (d. 640 H.), *al-Siyāsa al-Mulūkiyya*; Ibn Taymiyya, *al-Siyāsa al-Shar'iyya fī Iṣlāḥ al-Rā'ī wa'l-Ra'iyya*, Cairo: al-Sha'b, 1971; Abū Naṣr al-Farad (d. 339 H.), *al-Siyāsa al-Madaniyya*; Shams al-Dīn Muḥammad ibn Abī Ṭālib al-Dimashqī (d. 737 H.), *al-Siyāsa fī 'Ilm al-Firāsa*, Cairo: 1914.

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

15 Ibn Manẓūr, *Lisān al-'Arab*, 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, *Muḥīṭ al-Muḥīṭ. Qāmūs muṭawwal li'l-lugha al-'arabiyya*, Beirut: Maktabat Lubnān, 1993, vol. 1, p. 1026, defines *siyāsa* as "seeking improvement in the affairs of the people by guiding them to ways of success." *Siyāsa madaniyya*, 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 *'ilm al-siyāsa*, *siyāsat al-mulk*, and *al-ḥikma al-madaniyya*.

17 Ibn Nujaym (d. 1563), defines it as follows: "*siyāsa* 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-Baḥr al-Rā'iq*, Cairo: Dār al-Kutub al-'Arabiyya al-Kubrā, n.d.

18 Joseph Schacht regards this and other similar reports by al-Ṭabarī and al-Suyūṭī fictitious. See J. Schacht, "Mālik ibn Anas", in *E.I.*², Leiden: Brill, 1991, vol. 6, p. 262.

19 *Ibid.*, pp. 262-265.

20 K. S. Ann, *State and Government in Medieval Islam*, Oxford: Oxford University Press, 1981, p. 52.
21 G. Lecomte, "Ibn Ḳutayba", *E.I.²*, vol. 3, Leiden: Brill, 1986, pp.844-847.
22 Ibn Qutayba, *Kitāb al-'Arab aw al-Radd 'alā l-Shu'ūbiyya*, in Kurd 'Alī, *Rasā'il al-Balāgha*, Cairo: Lajnat al-Ta'līf wa'l-Tarjama, 1954, pp. 344-377.
23 Ibn Qutayba, *al-Imāma wa'l-Siyāsa*, Algiers: al-Dār al-Qawmiyya, n.d.
24 Al-Shāfi'ī, *Kitāb al-Umm*, Cairo: al-Dār al-Miṣriyya, n.d., vol. 1, p. 7.
25 Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyya*, Cairo: al-Maṭba'a al-Muḥammadiyya, 1953, p.13. In his other work *I'lām al-Muwaqqi'in*, Cairo: Maktabat al-Kulliyya al-Azhariyya, 1968, vol. 4, p. 372, Ibn Qayyim refers to the same statement but without reference to Shāfi'ī. We have not found this statement in *Kitāb al-Umm*.
26 Al-Shāfi'ī, *Kitāb al-Umm*, Cairo: al-Hay'a al-Miṣriyya al-'Āmma, 1987, vol. 6, p. 51.
27 Al-Māwardī, *al-Ahḥkām al-Sulṭāniyya*, p. 3.
28 Al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, p. 31.
29 Al-Ghazālī, *Iḥyā' 'Ulūm al-Dīn*, Cairo: Maktaba wa-Maṭba'at al-Mashhad al-Ḥusaynī, ca. 1970, vol. 1, pp. 10-11.
30 Ibid., p. 11.
31 Al-Ghazālī, *Iḥyā'*, vol. 1, p. 15.
32 Ibn 'Aqīl, *Kitāb al-Funūn*, ed. George Makdisi, Beirut: Dār al-Mashriq, 1970, vol. 1, p. 289,
33 Ibn Qayyim cites Ibn 'Aqīl's statement in *I'lām*, Ibn Qayyim 1968, 4:372, under the title *Ikhtilāf al-'ulamā' fī'l-'amal bi'l-siyāsa* but does not refer to al-Shāfi'ī there.
34 Ibn Qayyim 1953, 13. He cites three examples by the three caliphs who acted without reference to *sunna*: 'Umar expelling Naṣr ibn Ḥajjāj, 'Uthmān burning the *maṣāḥif*, 'Alī burning the *zanādiqa* (heretics) alive.
35 *Al-Fakhrī*, ed. Derenbourg, 30, English transl. Whitting, 20, cited in I. R. Netton, "*Siyāsa*", in *E.I.²*, Leiden: Brill, 1997, vol. 9, p. 694.
36 Shihāb al-Dīn al-Qarāfī, *al-Iḥhkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa-Taṣarrufāt al-Qāḍī wa'l-Imām*, Aleppo: al-Maṭbū'āt al-Islāmiyya, 1967.

37 See Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law*, Islamabad: Islamic research Institute, 1995, p. 57.
38 Aḥmad Fatḥī al-Bahnasī, *al-Siyāsa al-Jinā'iyya fī l-Sharī'a al-Islāmiyya*, Beirut: Dār al-Shurūq 1983, p. 83, citing al-Nasafī, *Risālat Aḥkām al-Siyāsa*.
39 Ibn Taymiyya, *al-Siyāsa al-Shar'iyya*, 1971, p. 184.
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.
45 Ibn Qayyim 1953, p. 92.
46 Al-Bahnasī 1983, p. 82, citing Ibn Taymiyya, *al-Ṣārim al-Maslūl*.
47 Ibn Qayyim, 1953, p. 5.
48 Ibn Qayyim 1968, p. 372.
49 Ibn Qayyim, 1968, p. 372.
50 Ibn Qayyim 1953, p. 14.
51 Maqrīzī, *al-Mawā'iẓ wa'l-I'tibār fī Dhikr al-Khiṭaṭ wa'l-Āthār*, Cairo, 1934, vol.2, p. 220.
52 See Muhammad Khalid Masud, "Official Recognition of the Hanafite School of Law in the Indian Sub-continent", paper presented at the Third International Conference on Islamic Legal Studies: The Madhhab (Harvard University, Boston, 5 May 2000).
53 Maqrīzī, *al-Mawā'iẓ*, vol. 2, p. 220.
54 Ibid.
55 For instance, al-Maqrīzī's definition and analysis are reproduced in *Muḥīṭ al-Muḥīṭ*; *Kulliyyāt Abī l-Baqā'*; *Jāmi' al-Rumūz*, *Kashshāf Iṣṭilāḥāt al-Funūn*, Tehran, 1967, vol. 1, p. 664; and Hājjī Khalīfa, *Kashf al-Ẓunūn*, Mecca: al-Fayṣaliyya, n.d., vol. 1, p. 14.
56 Ibn Nujaym, *al-Baḥr al-Rā'iq*, Cairo: Dār al-Kutub al-'Arabiyya al-Kubrā, n.d., vol. 5, p. 70.
57 Ibn Nujaym, *al-Baḥr*, p. 70
58 Ibn Nujaym, *al-Baḥr*, 5:67.
59 Ibn Nujaym, *al-Baḥr*, p. 69.
60 Ibn Nujaym, *al-Baḥr*, p. 10.
61 See Muhammad Khalid Masud, "Official Recognition of the Hanafite School of Law in the Indian Sub-continent", paper at the Third International Conference on Islamic Legal Studies: The Madhhab

(Harvard University, Boston, 5 May 2000).

62 *Fatāwā 'Ālamgīrī*, Urdu translation by Amīr 'Alī, Delhi: Hamid and Company, n.d. (reprint of Nawilkashore, Lucknow edition), vol. 3, p.298.

63 *Fatāwā 'Ālamgīrī*, 3:297.

64 *Fatāwā 'Ālamgīrī*, 3:307.

65 *Fatāwā 'Ālamgīrī*, 3:330. Presently the Arabic text is not available to me. It is possible that the translator has used the term *ḥadd* for *siyāsa*. He uses the phrase "death by way of lawful *ḥadd*." Other texts use the phrase "death by way of *siyāsa*" in the same case.

66 A.C. Banerje, *English Law in India*, Delhi: Abinav, 1984.

67 Standish Grove Grady, *A Manual of the Mahommedan Law of inheritance and contract, comprising the doctrines of the Soonee and Sheea schools, and based upon the text of Sir W. H. Macnaghten's Principles and precedents, together with the decisions of the Privy Council and high courts of the presidencies in India*, London: W. H. Allen, 1869, p. xxxiii.

68 Jain 1982.

69 *Parliament Papers*, 1831-2, vol. xii, p. 696, cited in George Claus Rankin, *Background to Indian Law*, Cambridge: The University Press, 1946, p. 169.

70 Fisch 1983, p. 33

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

72 Harington 1:305, cited in Fisch 1983, p. 35.

73 Harington 1:305, cited in Fisch 1983, p. 35.

74 "Observations", par. 64, cited by George Claus Rankin, *Background to Indian Law*, Cambridge: The University Press, 1946.

75 *Parliament Papers*, 1831-2, vol., xii, p. 696 cited by Rankin 1946, p. 166.

76 Rankin 1946, p. 166.

77 Rankin 1946, p. 177.

78 Fisch 1983, p. 67

79 1825 Chundoo Kundoo p. 418f., Fisch 1983, 112. See Peacock CJ judgement in R. v. Khyroollah, 1866, 6 W.R. 21, 23 (Cr. R.) expressing doubt whether futwa of death by *siyasat* could be pronounced on anyone not a murderer, cf. Beaufort's Digest, p. 155, para 849.

80 See Muhammad Khalid Masud, "The World of Shah Abdul Aziz

(1746-1824)", in Jamal Malik (ed.), *Perspectives of Mutual Encounters in South Asian History 1760-1860*, Leiden: Brill, 2000, pp. 298-314.

81 Nathaniel Brassey Halhed, *A Code of Gentoo Laws, or Ordinations of the Pundits, from a Persian Translation*, London: 1776, Preface.

82 Preface to James Fitzjames Stephen, *A Digest of the Criminal Law (Indictable Offences)*, London: Sweet & Maxwell etc., 1947.

83 Netton, 1997, p. 694.

84 Cited by Abū 'Abd al-Fattāḥ 'Alī ibn Ḥajj, *al-Irshād wa'l-Nuṣuḥ fī Bayān Aḥkām al-Ridda wa'l-Ṣulḥ*, Algiers: al-Jabha al-Islamiyya li'l-Inqādh, 1995, p. 126.

85 Al-Bahnasī 1983, p. 25.

86 Abū 'Abd al-Fattāḥ, *al-Irshād*, pp. 127-8.

87 *Ibid.*, p. 127.