



Islamic Law Beyond Fiqh (700-1000 C.E.)

Mohammed Allehbi, Ph.D, Research Fellow at the Oxford Centre for Islamic Studies

Introduction I

- Between eleventh and twelfth century, Muslim rulers, viziers, military-elites, secretaries, and judges (e.g. **al-Māwardī (d. 1058)** and **Abū Yaʿlā (d. 1066)**) declared that ***siyāsa*** (governmental law) and not ***fiqh*** (jurisprudential law) was a source of law for crucial courts, such as the ***shurṭa*** (administration of criminal justice) and ***maẓālim*** (court of redress)
- Examining ***siyāsa*** through a ***fiqh*-centric lens**, historians of Islamic Law, such as **Émile Tyan**, have contended that these courts of law were extra-legal, arbitrary, and rooted in political expediency.
- I argue that ***siyāsa*** is both a branch of Islamic law **and** far more sophisticated than previously thought. It is made up of **military-bureaucratic norms, rationales, procedures**, and governmental discretionary authority.
- The study of this subject is significant because ***siyāsa*** represents the legacy of **Islamic legal pluralism (e.g. *Kanūn* and Modern Laws)**.

Introduction II

- This talk discusses **the first three chapters of my book manuscript, “The Making of Criminal Justice in Early Islam”**, which covers the **foundation of criminal justice and governmental law** within the formative and classical periods (700-1200)
- In these **three chapters**, I analyze the development of governmental law throughout three distinct eras as rulers, secretaries, and viziers defined this rubric of governmental law.
 - **The Late Umayyad Period (700-750)** marks the period in which the military-administrative foundations of governmental law represented by the Caliph/Imam’s discretionary judgment were first established by secretaries.
 - **The Abbasid Imperial Era (750-945)** is a transitional period from **caliphal discretionary judgement** to new political-legal frameworks, such as ***mulk, hukm, sultan, tadbir, and siyāsa.***
 - **During the Early Buyid Period (934-983), *siyāsa*** finally became formulated as a **governmental law** distinct from ***fiqh/sunna.***
- I argue that ***siyāsa* emerged** as caliphs, governors, viziers, and secretaries sought to legitimize diverse *non-fiqh* **military-administrative actions, late antique precedents, and jurisdictions** as legitimate under the **law**.

Methodological Issues with the Sources

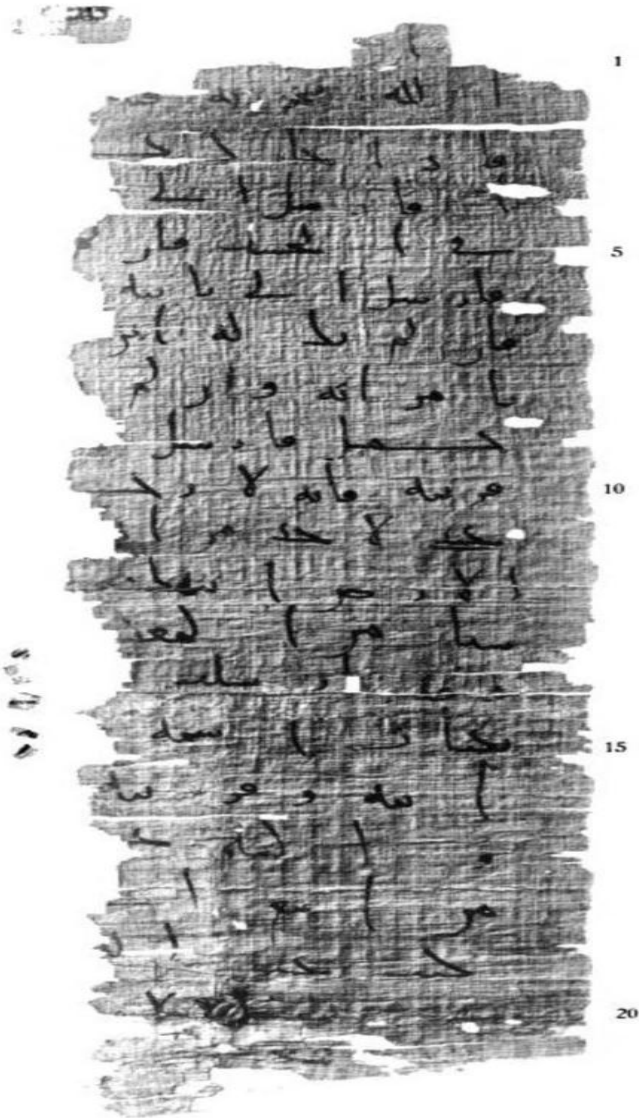
- The **pre-Ottoman archives** of the courts of law did not **survive**.
- Literary narratives written centuries after the Umayyad and early Abbasid periods **are rife with embellishments**.
- ***Fiqh* (jurisprudential treatises)** are steeped in **legal idealism** rather than historical-legal realities.
- Moreover, the majority of literary narratives, ***fiqh***, and ***Adab al-Qāḍi*** do not offer a clear understanding on the **legal dimensions or rationale** behinds these court procedures.
- I trace the **administrative-military genealogy** through writings of rulers and military-bureaucratic officials who dealt with the practical application of this law: **Egyptian papyri, governmental epistles, mirrors for princes, administrative manuals, and investiture diplomas**.

Petitions, Translations, and Epistles



- A new **scribal class** (*kuttab*) of non-Arabs, non-Muslims and Muslims, emerged to develop an **administrative language of governance and law** to support Umayyad rule.
- According to our oldest records from **Egyptian papyri**, secretaries **adapted Roman legal procedures** into an early Islamic-Arabic milieu.
- They "translated" **late antique political writings**, namely the ***Letter of Tansar***, ***The Testament of Ardashīr***, and **Epistolary Novel** (letters between Pseudo-Alexander the Great and Aristotle), from Middle Persian, Koine **Greek**, and **Syriac to Arabic**.
 - Know that ***mulk*** (Kingship) and ***dīn*** (Religion) are twin brothers. (***The Testament of Ardashīr***)
- From this political-administrative wellspring, the secretaries elucidated and legitimized **political-legal procedures** in "administrative law."

Nr. IV (1/2 natürl. Größe).

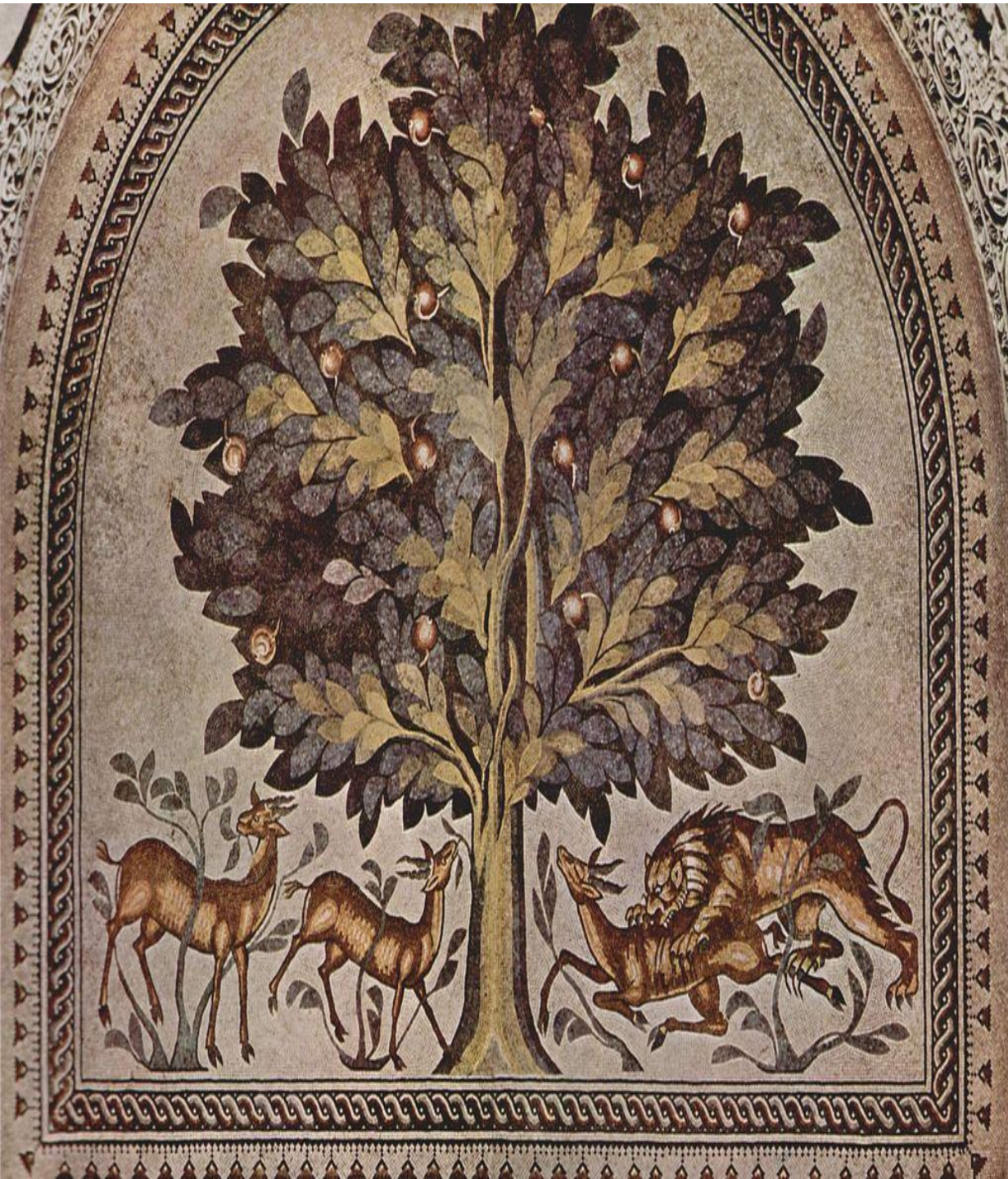


An Adaption of Roman-Legal Procedures as Papyri

The governor Qurra b. Sharīk (d. 714) writes to his pagarch, Basil in 709

1. May God disgrace him.
2. If this letter reaches you,
3. send him to me.
4. If you cannot find him
5. send me his son or sons.
6. If he has no son, send me his wife. If he has no dependents, send me the head of his village.
7. For I will not tolerate license from any of the peasants to transgress or commit.
8. any acts of disobedience.
- 9 I have sent to various districts
10. *bi-kitabāt* (with notices) of his name
11. and the name of his father and village.
12. written by the Slave of God
13. The month of Rabīʿ the 1st in the Year 708-709]

[Translated by Mohammed Allehbi from Carl H. Becker, *Papyri Schott-Reinhardt I* [Veröffentlichungen aus der Heidelberger Papyrussammlung, volume III] (Heidelberg: C. Winter, 1906), no. 4, l:76-80]



The Father of Arabic political prose

- ‘**Abd al-Ḥamīd b. Yaḥyā al-Kātib** (d. 132/750) was the last head of **Umayyad chancery**
- He composed the **first Arabic mirrors for princes, a letter to secretary, governments letters** which elucidated caliphal authority in law
- He conceived of the secretaries as "ears", "eyes", and "hands" of the kings (caliphs) and governors.
- He wrote these **epistles** as Imperial Islamic society shifted from a **tribal milieu to cosmopolitan one**.

‘Abd al-Ḥamīd b. Yaḥyā’s Passages on the Crown Prince and the *Shurṭa*

It should be for your *ṣāḥib al-shurṭa*, or any of your *umarā*’ (commanders) you have favored to oversee the case, to have the final say. He is the one appointed over the members of the court, the listener of their assertions, and the examiner of their counsels. Then, he should finalize with you what has been raised before him concerning the case, in order for you to dictate back to him your command, and to direct him based on your views without this being made apparent to the common people. If he was mistaken, he would be deemed ignorant, or if out of neglect, he acted in the matter as a victim of deception, so the rebel achieved his aim and the oppressed was punished, or if your deputy hastened to enforce an exemplary punishment upon him, then this mistake will not be attributed to you, nor his excess will be ascribed to you. You are devoid of blame in it.

Moreover, he should not act on anything under his inspection or attempt to arrest anyone he comes across at night, nor should he punish anyone condemned by him or release anyone with his absolvment who has not demonstrated his innocence and soundness of his action until he brings the matter to you and finalizes his case with you based on a sincere and just approach and *yaqīni-l-khabar* (the validity of the information).

[Translated by Mohammed Allehbi from Iḥsān ‘Abbās, ‘*Abd al-Ḥamīd b. Yaḥyā*, 225-226.]

‘Abd al-Ḥamīd b. Yaḥyā’s Passages on the Qāḍī

Furthermore, know that the office of the judge [*qaḍāʾ*] enjoys in God’s sight an importance exceeding all other jurisdictions, and there is no one of his stature among the governing authorities because of the binding judgments and enforcement of the *ḥudūd* [prescribed penalties] that come by his hand. Therefore, the one appointed over the office of the judge should be from the rank and file among the most excellent in belief, virtuousness, fairness, understanding, dignity, modesty, piety, and insight into various methods of the judgeship and its duties. He has been seasoned by age, experience has made him capable, and matters have made him proficient. He is not one who puts on airs in the exercise of authority, occupies the position through a stroke of luck, or has the audacity to be partial in rulings and curry favors in judgment.

He is given mastery in the decree of God over His subjects, execution of his judgments over His creation, acting by *Sunnat Allah* (way of God), in His *sharāʾiʿ* (laws), and enforcing His *ḥudūd* and obligations. Know that he is from your army and soldiers, like your governing authorities. In that position, his rulings and his judgements are imposed on them, so know whoever you have entrusted with the office of judge and rely on him in it, God willing.

[Translated by Mohammed Allehbi from Iḥsān ‘Abbās, ‘Abd al-Ḥamīd b. Yaḥyā, 245-6.]

Law according to ‘Abd al-Ḥamīd b. Yaḥyā al-Kātib

- ‘Abd al-Ḥamid collated and rationalized the military-legal dynamics of his day through an administrative lens.
- *The* governor and *ṣāhib al-shurṭa's* legal judgements and activities were based on the discretionary judgement of the caliph, high military rank, and an inquisitorial approach.
- The *qāḍī* (judge)'s methodological approach adhered to Quran, *sunna*, and *sharīa*
- Based on the papyri and ‘Abd al-Ḥamid's epistles, non-*fiqh*, military-administrative procedures remained the norm for high-priority, government spheres, such as criminal justice or matters of public order.

A Legal Revolution

- As attested by the **early Abbasid official Ibn Muqaffa' (d. 756 or 759)**, the **judiciary** was increasingly derived from the ***ulamā'*** (religious scholarly classes) who emerged with the rise of cities in Iraq.
- **Ibn Muqaffa' (d. 756 or 759)** warns in a letter, *Risāla fi 'l-Ṣaḥāba* (Epistle on the Caliph's privy), to the Abbasid caliph al-Manṣūr (r. 136-58/754–775) that the **ascendancy** of the '***ulamā'*** challenged the discretionary judgement **of the caliph as law**, which he elucidates as:

When we maintain that obedience should be given to Imams on certain things and not others, this view is based on discretion, administration, and authority that God has left in the hands of the Imams. No one else has the authority or is entitled obedience in waging war, amassing, collecting, and distributing wealth, employing and dismissals, and judging according to discretion where there is no existing precedent for enforcing the prescribed penalties and ordinances according to the book (Qur'ān) and the *sunna* (religious tradition), deceiving the enemy, taking tributes and booty for Muslims, and financially providing on their behalf.

[Translated by Mohammed Allehbi from 'Abdallāh b. al-Muqaffa', "Risālah fī al-Ṣaḥābah", in *Rasā'il al-bulaghā'*, 123.]

- In his ***Kitāb al-Kharāj* (Book of Taxation)**, the first Muslim Chief judge **Abū Yūsuf (d. 182)** attempts to reform these administrative legal systems, particularly criminal justice, by aligning it with ***fiqh***.
- Two Branch of Law: **Government Authority Vs Religious Knowledge.**

Military-Administrative Bureaucratic Law in Action

- The most significant administrative manuals are the *Kitāb al-Kharāj wa-Ṣināʿat al-Kitāba*, written by the high-finance official Qudāma b. Jaʿfar (d. after 320/932); the Abbasid secretary Ibn Wahb (d. After 945)'s *al-Burhān fī wujūh al-bayān*; and finally, the most detailed and significant treatise, *Siyāsat al-Mulūk*, composed by an anonymous early tenth-century Abbasid.
- Ibn Wahb elucidates distinct evidentiary procedures of the judge, the **ṣāhib al-maẓālim**, and the **ṣāhib al-shurṭa**, as ones based on their **ḥukm (jurisdiction)**.
 - The judge relies on witness testimony, the **ṣāhib al-maẓālim interviews elites**, and **ṣāhib al-shurṭa uses reasonable suspicion and interrogations**.
- According to the ***Siyāsat al-Mulūk***, the **ṣāhib al-shurṭa** and vizier serving as the **ṣāhib al-maẓālim** need to rely on spies and informants to acquire information as evidence for their administrations of justice.
- **Petitions** submitted to the **maẓālim** and **shurṭa court** represented a **unique juridical process**.

Petitions to the Military-Bureaucratic Courts I

Petitions to the *Mazālim*

He [the *ṣāhib dīwān al-mazālim*] is to collect all petitions and submit them to the caliph on each Friday. If the caliph presides over the people, and was one who had endurance to contemplate the petition and issue the rescript, he will do so, unless the overseer of the *mazālim* attached to the petition a note which he has to examine in its entirety in the dossier. So, the caliph inscribes a rescript on the back of the petition as required by the ruling. And when the session over which the caliph or his deputy presided ends, he is to gather all the petitions divided into groups, enter the groups in the *dīwān*, and note down the names of those who submitted the petitions and record the responses on the petitions. The petitions should then be returned to them [the plaintiffs], so that no trick or forgery can enter into the notes [on the petition]. For if the plaintiff returns one, two, three times or more, his entire case is recorded in one place, so that, if a request is made to produce the case from the *dīwān al-mazālim*, his entire dossier will be found in proper order and in its entirety in one place, and the chief of the *dīwān* can produce it without trouble.

[Qudāma b. Jaʿfar, *Kitāb al-kharāj*, 63-64, Additions made by Mohammed Allehbi, and translated by Maaïke van Berkel in *Abbasid Mazālim between Theory and Practice*, 234.]

Petitions to the Military-Bureaucratic Courts II

Petitions to the *Shurṭa*

The *ṣahib al-shurṭa* should appoint a commander for the administration of each of the districts, one with a lack of avarice who is well versed in the *aḥkām* (ordinances) of the *shurṭa*. This district commander should appoint an *arīḍ* (military clerk) to write the *qīṣaṣ* (petitions) submitted to him, on any details that the petitioners submitted, and which commander of the watch brought the petitions. The *ṣahib al-shurṭa* should compile every day everything gathered from these petitions, which were submitted to him every Friday from the military clerks of all the districts and send them to the one above him such as an *Amīr* or the *Imām*. So, the governing authority will write a rescript under the mention of each man based on the judgment rendered for his case from discipline, imprisonment, release, or the enforcement of a prescribed penalty if it is signed by an *Imām*. The *ṣahib al-shurṭa* should make copies of the dossiers, petitions, and rescripts, and what documents were issued by the *Imām* in the applying of a prescribed penalty or the inflicting of a talion, in the *dīwān al-shurṭa*. Likewise, the documents that are issued from the reconciliation between the litigants and a settlement from a claim.

[Translated by Mohammed Allehbi from Abū al-Ḥusayn Ishāq b. Ibrāhīm al-Kātib, *al-Burhān fī Wujūh al-Bayān*, 400.]

Sources of Military-Administrative Bureaucratic Law

- **Ibn Wahb** declares that his legal knowledge is based entirely on **senior members of the bureaucracy**.
- ***Siyāsat al-Mulūk*** defines the sources of legal regulations for the vizier and *ṣāḥib al-shurṭa*: **administrative notebooks on conduct and administration of past *mulūk* (rulers), commanders of the *shurṭa*, and viziers.**
- **Qudāma b. Jaʿfar** refers to the *ʿilm al-siyāsa* (**the science of governance**) as formulated by knowledge and perspectives of state officials and their *tadbīr* (administration).
- With the decline of the **caliph as a source of law**, *siyāsa* was ready to encompass all these **military-administrative rationales and procedures**.

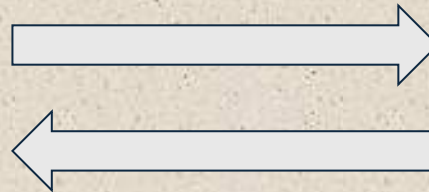
***Ra'y (discretionary judgement)
of the caliph***



***Tadbir al-Khilāfa (Administration
of the Caliphate)***



Sulṭān (governing authority)



**The Testament of Ardashīr: *mulk*
(Kingship)/ *dīn* (religion)**



***Siyāsāt al-mulk (Policy of
Kingship) or siyāsāt al-mulūk
(Policies of Kings)/ *sharī'a*
(Sacred law)***



***Sulṭān (governing authority) or
ḍabṭ (control of law)/ *sharī'a*
(Islamic Law) or *dīn* (Religion)***



***aḥkām al-siyāsa (Ordinances of
Governmental Law)/ *sunna* or
*sharī'a****

Age of *siyāsa*

- Under the Buyids, *siyāsa* became a collective term for the methods of governance, military practices for curbing a rebellion, and justifications for criminal punishments .
- The Buyid-era litterateur and courtier Abū Ḥayyān al-Tawḥīdī (d. 414/1023) observes that the *aḥkāṃ al-siyāsa* (ordinances of governance) were distinct from the *sunan al-dīn* (religious traditions).
- Al-Tanūkhī (d. 384/994) relates a literary tradition highlighting that a scribe of the *shurṭa* needs to be well-versed in “ talion (*qiṣāṣ*), prescribed penalties (*ḥudūd*), wounds (*jirāḥāt*), assaults (*muwāthibāt*), and procedures (***siyāsāt***).
- ***Siyāsa*** won out over other rubrics like *mulk* (Kingship), *tadbir* (administration) and *sulṭān* (governing authority), due to **its versatility and historical circumstances**.
- ***Siyāsa* (Governance)** could be applied to **anyone with political authority**. Governance has always existed **before and after Islam**.

Conclusion

- The emergence of *siyāsa* as a legal source shows the intertwining of late antique continuity, military power, and administrative creativity.
- The military-administrative genealogy of *siyāsa* offers a unique history of law outside jurisprudence.
- **Rulers, secretaries and military** elites acted as legal actors and theorists alongside judges and jurists.
- Understanding that *siyāsa* played a critical role in the formation of Islamic law.