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## Royal Justice and Religious Law: *Siyāsa* and Shari‘ah under the Mamluks

Current studies of the legal history of the Mamluk Empire (1250–1517) are, by and large, depressing narratives of decay and corruption. One finds denunciations—often in remarkably moralistic language—of the rigidity of Islamic law, the corruptibility of the jurists, and the incursion of arbitrary sultanic justice at the expense of the shari‘ah. In an influential monograph on law under the Bahri Mamluks (1250–1382), Nielsen states that:

It is hardly necessary to point out that only in limited fields did the provisions of the Shari‘a apply. Whatever criminal, fiscal and commercial provisions there existed were largely ignored. Shari‘a lawyers had themselves contributed to this state of affairs, for when at an early stage its provisions were being left behind by practical developments they had accepted and developed stratagems...which avoided the intent of the law. Later they had accepted the recognition merely of the theoretical validity of the Shari‘a and its symbolic supremacy...as being sufficient for the religious legitimacy of the state.<sup>1</sup>

According to Nielsen, the rigidity and impracticality of Islamic law led to the corruption of the legal establishment. This view is shared by almost all subsequent studies. Escovitz concludes that “many Chief Judges even compounded the difficulties of the Islamic community by adding their own varieties of corruption and fraud to the baser designs of the Mamluks.”<sup>2</sup> In a recent study of Ibn Khaldūn’s tenure as Maliki judge in Cairo, Morimoto remarks that “inevi-

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<sup>1</sup>Jørgen S. Nielsen, *Secular Justice in an Islamic State: Mazālim under the Bahri Mamlūks, 662/1264–789/1387* (Leiden, 1985), 95. Historians of the Ottoman Empire quote this passage in order to demonstrate the difference between the Ottoman legal system and those which preceded it. See Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany, 1994), 61.

<sup>2</sup>Joseph H. Escovitz, *The Office of Qāḍi al-Qudāt in Cairo under the Bahri Mamlūks* (Berlin, 1984), 261.

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tably, such an endeavor required him to take a scalpel to the degenerate world of Egypt's judiciary"<sup>3</sup> and that "in short, the *muftīs* were crooked lawyers."<sup>4</sup> The ideal theoretical law gave way not only to corruption, but also to arbitrary political power. L. Fernandes claims that rulers resorted to the *muftīs* whenever they wanted to legitimize action or behavior which would normally raise criticism, but ultimately "the Mamluk sultan listened to himself!"<sup>5</sup> The use of *mazālim* courts by the sultans is seen solely in terms of a tool of political legitimacy, rather than from a legal perspective.<sup>6</sup> Finally, in a study on the encroachment of military courts on the jurisdiction of the qadis, Robert Irwin concludes that while some may have tried to judge in equity, "their 'justice' and 'protection' will not have differed very much from that offered by Don Corleone."<sup>7</sup>

These moralizing, caricature-like accounts of the Mamluk legal system take as their point of departure Schacht's model of a rigid and idealized Islamic law. In his *An Introduction to Islamic Law*, Joseph Schacht depicts the classical legal system, which took form under the Abbasids during the ninth and tenth centuries, as one in which Islamic law "became increasingly rigid and set in its final mould...not altogether immutable, but the changes that did take place were concerned more with legal theory and the systematic superstructure than with positive law."<sup>8</sup> In this system, the interaction between theory and practice was an uneasy truce between religious scholars and rulers. The traditional Islamic ruler could not legislate, but the scholars "half sanctioned the regulations which the rulers in fact enacted, by insisting on the duty...of obedience to the established authorities."<sup>9</sup>

<sup>3</sup>Kosei Morimoto, "What Ibn Khaldūn Saw: The Judiciary of Mamluk Egypt," *Mamlūk Studies Review* 6 (2002): 113.

<sup>4</sup>Ibid., 123.

<sup>5</sup>Leonor E. Fernandes, "Between Qadis and Muftis: To Whom Does the Mamluk Sultan Listen?" *Mamlūk Studies Review* 6 (2002): 108.

<sup>6</sup>Albrecht Fuess, "*Zūlm* by *Mazālim*? The Political Implications of the Use of *Mazālim* Jurisdiction by the Mamluk Sultans," *Mamlūk Studies Review* 13, no. 1 (2009): 121–47.

<sup>7</sup>Robert Irwin, "The Privatization of 'Justice' under the Circassian Mamluks," *Mamlūk Studies Review* 6 (2002): 70. For another comparison of the late Mamluk political and judicial system with the Mafia, influenced by Irwin, see John L. Meloy, "The Privatization of Protection: Extortion and the State in the Circassian Mamluk Period," *Journal of the Economic and Social History of the Orient* 47, no. 2 (2004): 195–212, especially 207–10. Bernadette Martel-Thoumian similarly argues that the increasing jurisdiction of the Mamluk sultans was a result of the sale of judicial positions and mistrust in the judgment of qadis. See her "Pouvoir et justice sous les derniers sultans circassiens (872–922/1468–1516)," in *Continuity and Change in the Realms of Islam: Studies in Honour of Professor Urbain Vermeulen*, ed. Kristof D'Hulster and Jo Van Steenberg, *Orientalia Lovaniensia Analecta* 171 (Leuven, 2008), 454.

<sup>8</sup>J. Schacht, *An Introduction to Islamic Law* (Oxford, 1964), 75.

<sup>9</sup>Ibid., 84.

There are two fundamental problems here. First, over the last three decades the model articulated by Schacht (but ultimately derived from Weber) has been refuted by literary and documentary evidence attesting to the continued development and application of Islamic law. We now know that Islamic legal theory never closed the door of *ijtihād*, and there are by now quite a number of studies demonstrating actual, significant shifts in positive law.<sup>10</sup> Change occurred through an articulation of new doctrine in a *fatwā* or a commentary, superseding the older doctrine preserved in the canonical texts.<sup>11</sup> We also know now that Schacht underestimated the practical application of Islamic law, especially with regard to commercial contracts.<sup>12</sup> *Fatwās* were given in response to questions arising from real life, as shown by examples from within the Mamluk domains.<sup>13</sup> Changes introduced by Mamluk *muftīs* had implications for judicial practice.<sup>14</sup> Finally, the fourteenth-century archives of the Islamic court of Jerusalem, discovered in the 1980s, is a tangible testament both to the wide-ranging jurisdiction of Mamluk

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<sup>10</sup>Wael Hallaq, “Was the Gate of Ijtihad Closed?” *International Journal of Middle East Studies* 16, no. 1 (1984), 3–4; idem, “Murder in Cordoba: Ijtihād, Iftā’ and the Evolution of Substantive Law in Medieval Islam,” *Acta Orientalia* (Oslo) 55 (1994): 55–83; Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants’ Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London, 1987). The pioneering work of Wael Hallaq has now culminated in his magisterial work on the history of the shari’ah, which brings together a wide range of evidence for the continuous pervasive relevance of Islamic legal norms to pre-modern Muslim societies (Wael B. Hallaq, *Shari’ah: Theory, Practice, Transformations* [Cambridge, UK, 2009]).

<sup>11</sup>Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge, U.K., 2001); idem, “From Fatwas to *Furū*: Growth and Change in Islamic Substantive Law,” *Islamic Law and Society* 1 (Feb 1994): 17–56; Sami Zubaida, *Law and Power in the Islamic World* (London, 2003), 26–27.

<sup>12</sup>Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton, 1970).

<sup>13</sup>Nissreen Haram, “Use and Abuse of the Law: A *Muftī*’s Response,” in *Islamic Legal Interpretation: Muftīs and Their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Cambridge and London, 1996), 72–86; Seth Ward, “Sabbath Observance and Conversion to Islam in the 14th Century—A *Fatwā* by Taqī al-Dīn al-Subkī,” in *Proceedings of the Ninth World Congress of Jewish Studies*, Division B, vol. 1, *The History of the Jewish People from the Second Temple Period until the Middle Ages* (Jerusalem, 1986), 47–54; Denise Aigle, “The Mongol Invasions of Bilād al-Shām by Ghāzān Khān and Ibn Taymiyah’s Three ‘Anti-Mongol’ Fatwas,” *Mamlūk Studies Review* 11, no. 2 (2007): 89–120; D. S. Powers, *Law, Society, and Culture in the Maghrib, 1300–1500* (Cambridge, 2002).

<sup>14</sup>Lutz Wiederhold, “Blasphemy against the Prophet Muḥammad and his Companions (sabb al-rasūl, sabb al-ṣaḥābah): The Introduction of the Topic into Shāfi’i Legal Literature and Its Relevance for Legal Practice under Mamluk Rule,” *Journal of Semitic Studies* 32, no. 1 (1997): 39–70; Yossef Rapoport, “Ibn Taymiyya on Divorce Oaths,” in *The Mamluks in Egyptian and Syrian Politics and Society*, ed. Amalia Levanoni and Michael Winter (Leiden, 2004), 191–217. This is also noted by Fernandes, “Between Qadis and Muftis,” 101.

qadis, as well as the close link between actual judicial practice and the legal literature.<sup>15</sup>

A second problem is the dogmatic view of the Mamluk state as intruding into a pure, perfect sphere of Islamic law. According to the dominant paradigm, which has also been recently espoused by Wael Hallaq, the ideal form of Islamic law is independent of the state. The legal role of the state was merely to enforce the decisions of qadis, or limited to matters directly related to the machinery of government.<sup>16</sup> It follows that any intervention of the state in legislation or administration of the law is a corruption of the ideal shari‘ah. Schacht and Hallaq adopt this view even though they both recognize that the Ottoman Empire, the one Islamic state for which we have abundant legal records, exemplifies synergy between the ruler’s law and Islamic law. The Ottoman *kanun* added to the religious law in matters relating to public order, taxation, usury, and land tenure. Yet, at the same time, the *kanun* was accepted as an integral part of the legal culture required by the shari‘ah; the two complemented each other.<sup>17</sup> The whole administration of justice was based on the shari‘ah, the authority to administer justice was given to the qadi, and the office of the grand *mufti*, shaykh al-Islām, was responsible for assuring the observance of the sacred law in the state. While the Ottoman sultans issued positive laws in the form of the *kanun*, sultanic decrees were couched in the terms of Islamic law.<sup>18</sup>

For the Mamluk period, a first attempt to integrate sultanic authority into a legal framework, rather than an ethical or political one, was made by Kristen Stilt in her recent monograph on the Cairo *muhtasib* (market inspector).<sup>19</sup> Stilt dem-

<sup>15</sup>Christian Müller, “A Legal Instrument in the Service of People and Institutions: Endowments in Mamluk Jerusalem as Mirrored in the Ḥaram Documents,” *Mamlūk Studies Review* 12, no. 1 (2008): 173–91; idem, “Settling Litigation without Judgment: The Importance of a Hukm in Qadi Cases of Mamluk Jerusalem,” in *Dispensing Justice in Islam: Qadis and Their Judgements*, ed. Muhammad Khalid Masud, Rudolph Peters, and David S. Powers (Leiden and Boston, 2005), 47–70; Donald P. Little, “Documents Related to the Estates of a Merchant and His Wife in Late Fourteenth-Century Jerusalem,” *Mamlūk Studies Review* 2 (1998): 93–193; Wael Hallaq, “Model *Shurūt* Works and the Dialectic of Doctrine and Practice,” *Islamic Law and Society* 2, no. 2 (1995): 109–34.

<sup>16</sup>Hallaq, *Shari‘a*, 201–9.

<sup>17</sup>Ibid., 214–21.

<sup>18</sup>See also Colin Imber, *Ebu’s-Su‘ud: The Islamic Legal Tradition* (Edinburgh, 1997), 94–95, for a recent discussion of the Ottoman legal system in the sixteenth century. In standard accounts of the history of Islamic law, the Ottoman legal system is invariably seen as an exception. See Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfi* (Leiden, 1996). Interestingly, Schacht remarked that royal legislation through *kanun* is attested for the Mamluks too (Schacht, *An Introduction*, 91n). Schacht does not provide evidence to support this claim.

<sup>19</sup>Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (New York, 2011).

onstrates that the Mamluk *muhtasib* functioned in what she calls a *fiqh-siyāṣah* framework. By this she means that the sources of legal authority for the Mamluk *muhtasib* were, on the one hand, the manuals of legal doctrine, i.e., scholarly jurisprudence (*fiqh*); as well as, on the other hand, the legal authority of the sultan, i.e., the ruler's *siyāṣah*. The sultan's *siyāṣah* power did not come with an extensive body of literature, and there is little record of sultanic policies. But when matters involved broad public policy that transcended particular rules of doctrine, sultanic authority played a key role.<sup>20</sup> Examples are decrees forbidding women from public outings, levying of local taxes for the building of a dike, or investigating fraud.<sup>21</sup> Rulers also had extensive punitive powers, in the form of discretionary *ta'zīr*, especially for crimes that could not be proven because of the strict rules of procedure applied by qadis. Following Frank Vogel's work in a modern context, Stilt argues that the shari'ah often encompassed both *fiqh* and *siyāṣah*. Equating shari'ah with *fiqh*, and opposing them to a political or secular *siyāṣah*, creates the misperception that rulers did not have religious concerns or influence, and that the jurists did not engage in considerations of public welfare.<sup>22</sup>

In this article, I aim to take this argument further. First, I will argue here that this symbiotic relationship between Islamic law and Mamluk *siyāṣah* was subject to historical change over time. In the second half of the fourteenth century, and especially in the fifteenth century, we clearly see an expansion of the jurisdiction of royal courts and the courts of other military officers, especially the *ḥājib* (chamberlain) and the *dawādār*. The *mazālim* courts of the pre-Mamluk classical tradition, which normally focused on abuses of power, were now transformed into courts with wide jurisdiction, parallel to the shari'ah courts of the qadis. These new institutions were called *siyāṣah* courts, because of their emphasis on equity at the expense of the formalism of the shari'ah. It is important to emphasize that, unlike the public policy responsibilities of the *muhtasib*, as studied by Stilt, the *siyāṣah* courts of the fifteenth century had jurisdiction over cases that had little direct effect on public policy, such as reclamation of debts and matrimonial cases.

I will also hope to show that the evidence from the Mamluk era does not point to a corruption of an ideal and rigid Islamic law, but rather indicates a legal system in which the state takes an active role in adapting the sacred law, the shari'ah, to social practice. For many Mamluk jurists, the ruler's *siyāṣah shar'īyah*—governance according to Islamic law—is a requirement of the shari'ah, not an external intrusion. In this, the development of the Mamluk legal system has much in common with the later, more centralized and bureaucratized, Ottoman one. Under

<sup>20</sup>Ibid., 200–5.

<sup>21</sup>See examples in *ibid.*, 105, 187, 196.

<sup>22</sup>Ibid., 26, citing Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden, 2000), 171–72.

the Mamluks we can also identify the emergence of important antecedents to Ottoman institutions, such as the Royal Hall of Justice, the *Dār al-ʿAdl*, with its associated state-appointed *muftīs*. These developments have also wider implications for the political history of the Mamluk Sultanate.

In terms of chronology, I am suggesting three distinct stages in Mamluk legal history. The first stage begins with the appointment of four chief qadis in 1265, one for each legal school (*madhhab*), and the construction of a royal *Dār al-ʿAdl*. In this period, the jurisdiction of the royal and military courts is largely limited to penal law, areas of the law where the shariʿah’s strict evidentiary procedures often failed to secure conviction. Later, from around 1350, the jurisdiction of military officers, especially the chamberlains, expands significantly to include family law and debts. During this period the *Dār al-ʿAdl* is relocated outside of the Citadel and closer to the city (at least in Cairo), and a position of a dedicated *muftī Dār al-ʿAdl* is introduced. Despite initial objection from religious scholars to these infringements on the jurisdiction of the shariʿah, the expansion of the military-executive courts gathers pace over the course of the fifteenth century. Some religious scholars even come to accept them as beneficial and indeed integral elements in the application of Islamic law. Finally, the reigns of Qāyṭbāy (r. 1468–96) and Qānṣūh al-Ghawri (r. 1501–16) see a concentration of all jurisdiction in the hands of the sultans, who present themselves as champions of the shariʿah and openly dispute the formalistic doctrines of the judiciary.

## I

The foundation of the Mamluk sultanate was accompanied by one of the major legal reforms in the history of Islamic law. In 1265, shortly after assuming power, Baybars decided to appoint four chief qadis in Cairo, one from each of the Sunni schools of law, thereby adding Hanafi, Maliki, and Hanbali judges to the incumbent Shafiʿi. The judiciary of Damascus was similarly reformed the following year. Over the next century non-Shafiʿi chief qadis were appointed in other Mamluk towns and cities, including Aleppo, Tripoli, Hama, Safed, Jerusalem, and Gaza. The appointment of four chief qadis continued up to the Ottoman conquest.<sup>23</sup>

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<sup>23</sup>The following paragraphs summarize the arguments of my “Legal Diversity in the Age of Taqlid: The Four Chief Qāḍīs under the Mamluks,” *Islamic Law and Society* 10, no. 2 (2003): 210–28. For earlier accounts of the establishment of this quadruple judiciary, see E. Tyan, *Histoire de l’organisation judiciaire en pays d’Islam*, 2nd revised ed. (Leiden, 1960), 138–42; J. Escovitz, “The Establishment of Four Chief Judgeships in the Mamluk Empire,” *Journal of the American Oriental Society* 102 (1982): 529–31; J. Nielsen, “Sultan al-Zāhir Baybars and the Appointment of Four Chief Qāḍīs, 663/1265,” *Studia Islamica* 60 (1984): 167–76; S. Jackson, “The Primacy of Domestic Politics: Ibn Bint al-Aʿazz and the Establishment of the Four Chief Judgeships in Mamluk Egypt,” *Journal of the American Oriental Society* 115 (1995): 52–65.

The purpose of the new quadruple structure of the judiciary was to create a uniform yet flexible legal system. The need for predictable and stable legal rules was addressed by limiting qadis' discretion and promoting *taqlīd*, i.e., adherence to established school doctrine. The establishment of chief qadis from the four schools of law, on the other hand, allowed for flexibility and prevented the legal system from becoming too rigid. The quadruple judiciary enabled litigants, regardless of personal school affiliation, to choose from the doctrines of the four schools one that would suit their particular case.

Judges were expected to pass judgment in conformity with their legal schools, in order to avoid suspicion of impartiality. The Shafi'i jurist al-Fazārī, in response to a query sent from the royal encampment of Sultan Baybars in 662/1264, explains that "some of our colleagues prevent a judge who subscribes to one school of law from giving judgments according to another school, to avoid suspicion [of impartiality]. This rule is required by the administration of justice (*siyāsah*)...not by the Divine law (*shar'*)." <sup>24</sup> The regulation of qadis was explicit in appointment decrees, which instructed conformity to the dominant opinion of the school in order to guarantee predictability. This meant that a qadi was not allowed to go beyond the doctrine of the school to which he was appointed by the sultan. On the other hand, the introduction of a quadruple judicial system also allowed the state an active role in the legal system, through the selective use of the different doctrines of the four schools. By authorizing qadis from different schools to follow their doctrine on specified points of law, the state indirectly intervened in a variety of social and economic interactions.

This is clearly demonstrated in a royal decree appointing 'Alī ibn Munajjā 'Alā' al-Dīn al-Tanūkhī (d. 750/1349) as the Hanbali chief qadi of Damascus in 732/1332:

The people of Damascus are often in need of a judge from this [viz., the Hanbali] *madhhab* in most contracts of sale and lease, in sharecropping contracts of *muzāra'ah* and *musāqāh*, in settlements following damages caused by *force majeure* (*jawā'ih samāwīyah*) according to the principle of *lā darar wa-lā dirār*; in marrying off a male slave to a free woman with the permission of his master, in stipulating that a bride should not be re-located from her hometown, in dissolving the marriage of a husband who deserted his wife without maintenance, and in the sale of an irreparable and dilapidated endowment that is of no use to its beneficiaries. <sup>25</sup>

<sup>24</sup>Abd al-Raḥmān ibn al-Firkāh al-Fazārī, "Fatāwā," MS Chester Beatty 3360, fol. 107b.

<sup>25</sup>Al-Qalqashandī, *Ṣubḥ al-A'shā fī Ṣinā'at al-Inshā'* (Cairo, 1913–18), 12:57. For the qadi's biography, see al-Ṣafadī, *A'yān al-A'sr wa-A'wān al-Naṣr* (Beirut, 1998), 3:1285–86.

According to the decree, a Hanbali qadi is appointed because his school of law is the only one that can authorize some of the daily transactions made by the people of Damascus. The Hanbali school is the only one that allows sharecropping contracts in which the cultivator provides the seeds, while the other schools consider share-cropping contracts legal only if the proprietor provides the seeds.<sup>26</sup> Only the Hanbalis hold the seller liable for loss of crops due to *force majeure*, while the other schools maintain that the loss is incurred by the buyer.<sup>27</sup> Unlike other schools, the Hanbalis do not apply the concept of equality in marriage (*kafā'ah*) to difference in status between a slave and a free woman.<sup>28</sup> Only the Hanbalis assert the validity of stipulations in marriage contracts, including a stipulation that prohibits the husband from re-locating his wife.<sup>29</sup> The Hanbalis, together with the Malikis, allow for the dissolution of a marriage in case of desertion.<sup>30</sup> Similarly, only the Hanbalis permit the sale of a dilapidated endowment that is no longer reparable.<sup>31</sup> In sum, these opinions are, for the most part, held only by the Hanbalis, to the exclusion of the other schools.

Appointment decrees for Hanafi and Maliki chief qadis contain parallel guidelines. The Maliki chief qadi is enjoined to apply his school doctrine so as to allow an executor of a bequest to serve also as a guardian for the orphans of the deceased;<sup>32</sup> to permit the use of documentary evidence;<sup>33</sup> and, most importantly,

<sup>26</sup>Muwaffaq al-Dīn Ibn Qudāmah al-Maqdisī, *Al-Mughnī* (Beirut, 1984), 5:589–90 (no. 4142). See also Abū al-Walīd Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, ed. Mājid al-Ḥamawī (Beirut, 1995), 4:1392.

<sup>27</sup>Hanbali doctrine also limits the definition of *force majeure* to damages caused by natural disasters, exclusive of damages caused by human agency, such as theft (*Al-Mughnī*, 4:233–34 [nos. 2941–43]). The Malikis hold that the seller is liable only if more than a third of the crops are damaged (Ibn Rushd, *Bidāyat al-Mujtahid*, 3:1267–70).

<sup>28</sup>The Hanbali doctrine on this point is equivocal. The Hanbali jurist al-Khiraqī (d. 334/946) limited the criteria of equality in marriage (*kafā'ah*) to lineage and piety, while Ibn Qudāmah accepted all the additional criteria required by Hanafis and Shafi'is, including freedom (*Al-Mughnī*, 7:374–76 [nos. 5190–92]). Maliki doctrine, on the other hand, limits the criteria of *kafā'ah* even further, holding that only the piety of the groom should be taken into consideration (Y. Linant de Bellefondes, *Traité de droit musulman comparé* [Paris and Le Haye, 1965], 2:179).

<sup>29</sup>Ibn Rushd, *Bidāyat al-Mujtahid*, 3:1038.

<sup>30</sup>Ibn Qudāmah, *Al-Mughnī*, 8:247–48 (no. 6473).

<sup>31</sup>*Ibid.*, 6:250–52 (no. 4410).

<sup>32</sup>For the appointment decree, see Ibn Faḍl Allāh al-ʿUmarī, *Al-Taʿrīf bi-al-Muṣṭalaḥ al-Sharīf* (Cairo, 1894), 121. On the Maliki position see Ibn Qudāmah, *Al-Mughnī*, 7:392 (no. 5215); Ibn Rushd, *Bidāyat al-Mujtahid*, 3:955.

<sup>33</sup>On the Maliki position regarding documentary evidence, see W. Hallaq, “Qādis Communicating: Legal Change and the Law of Documentary Evidence,” *Al-Qanṭara* 20 (1999): 453ff.; E. Tyan, *Le notariat et le régime de la preuve par écrit dans le pratique du droit musulman* (Beirut, 1945), 76, 82–84; J. Wakin, *The Function of Documents in Islamic Law* (Albany, 1972), 8–9.



to facilitate the prosecution of heretics (*zanādiqah*). While the majority opinion in the other schools requires qadis to spare the lives of heretics who subsequently return to the fold of Islam, the Maliki doctrine requires the qadi to impose capital punishment in every case of proven heresy, regardless of subsequent repentance.<sup>34</sup> As many examples in the Mamluk chronicles show, cases of heresy were indeed regularly transferred to Maliki qadis to ensure that the death penalty was applied.<sup>35</sup> Appointment decrees for Mamluk *muḥtasibs* also contain a directive to follow Maliki law. As Kristen Stilt argues, this is because only the Malikis allow the ruler greater flexibility in the area of price-setting, and because the Malikis allowed rulers more flexibility in the application of discretionary *taʿzīr* punishment.<sup>36</sup>

Until the middle of the fourteenth century, the sultans or other military-executive officials exploited the differences between the doctrines of the different *madhhabs*. They did not usually directly intervene in the legal system, with two major exceptions concerning criminal law and *maẓālim* sessions. With regard to criminal law, some military officials, such as governors or police chiefs, had jurisdiction over criminal cases, such as theft and highway robbery, and they were competent to enforce the Quranic punishments for these offences (*ḥudūd*) or lesser punishments. This was a direct result of strict evidentiary requirements of the shariʿah judges, who required, for example, four eye-witnesses in cases of adultery. Ibn Taymīyah (d. 1326) explained the current division of jurisdiction between the qadi courts and the military-executive courts in the following way:

According to the practice (*ʿurf*) in our time, in the regions of Egypt and Syria it is the military authority that carries out the prescribed punishments for criminal offences (*ḥudūd*) which involve mutilation, such as the amputation of the thief's hand or the punishment of the highway robber and similar things. It may also happen that the military authority imposes a punishment that does not involve mutilation, such as, for example, the flogging of a thief. It is competent also in litigations (*mukhaṣamāt*), commercial contracts (?) (*muḍarabāt*), and "trials of suspicion" (*daʿawī al-tuham*) in which there are neither written documents (*kitāb*) nor witnesses. The of-

<sup>34</sup>Ibn Qudāmah, *Al-Mughnī*, 10:76–77 (no. 7088); Ibn Qayyim al-Jawzīyah, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-Ālamīn*, ed. Ṭāhā ʿAbd al-Raūf Saʿd (Beirut, 1964), 3:129–33. Note that the rule applies only to the category of heretics (*zanādiqah*), and not to the category of apostates (*murtaddūn*).

<sup>35</sup>Rapoport, "Legal Diversity," 223ff.

<sup>36</sup>Stilt, *Islamic Law*, 54.

fi ce of the qadi is competent in these matters if there are written documents and witnesses.<sup>37</sup>

According to Ibn Taymīyah's account of early fourteenth-century judicial practice, military courts had effective jurisdiction over criminal cases. In addition, they were also competent in "trials of suspicion," which did not depend on the claims of a private plaintiff, but were instigated by a governor or a *muhtasib* (market inspector) in order to protect public law and order. According to Ibn Taymīyah and other fourteenth-century Mamluk jurists, such trials had very relaxed laws of procedure, allowing for torture to be used in order to extract confessions from thieves and robbers.<sup>38</sup> Finally, the military courts had competence when standard forms of evidence, i.e., written documents or witnesses, were not available. It is clear from Ibn Taymīyah's account that the jurisdiction of the military courts was limited to these legal cases in which the qadis' formalistic attitude to proof and evidence prevented the application of justice.

A second channel of direct political intervention in the administration of justice was through the *mazālim* courts. Nielsen's study of actual cases brought before royal *mazālim* sessions in the thirteenth and fourteenth centuries, as reported in Mamluk chronicles, suggests that most of the *mazālim* sessions were concerned with usurpation of property, abuse of endowments by government officials, and disputes over *iqṭā'* (fief) allocation to soldiers. The royal *mazālim* sessions also heard cases of blasphemy, apparently because the death penalty (at least for this offence) required the consent of the sultan and all the chief qadis. Until the middle of the fourteenth century there is no evidence that the royal *mazālim* courts heard cases of family law or contracts, which appear to have been under the exclusive jurisdiction of qadi courts.<sup>39</sup>

The Islamic legal tradition delineates the legal procedure to be followed in *mazālim* sessions, and it is clear that the Mamluk *mazālim* was not arbitrary.<sup>40</sup> The *mazālim* panel, described in detail in administrative manuals, included the four chief qadis, who not only gave legal advice but sometimes issued judgments at the request of the sultan. In many cases, and in virtually all *waqf* cases, qadis were consulted. The jurists often disagreed among themselves, and the sultan and the amirs may have sided with one faction against the other, but the even-

<sup>37</sup>Taqī al-Dīn Ibn Taymīyah, *Al-Ḥisbah fī al-Islām*, ed. M. Mubārak (Beirut, 1967), 8–9; translated by Baber Johansen in "Signs as Evidence: the Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (2002): 184.

<sup>38</sup>Johansen, "Signs as Evidence," 185ff.

<sup>39</sup>Nielsen, *Secular Justice*, 41–47; See also Escovitz, "The Establishment," 137.

<sup>40</sup>Nielsen, *Secular Justice*, 17–33, 74–78.

tual result was based on shari‘ah reasoning, even if the jurists were not present.<sup>41</sup> Moreover, when a trial is reported in some detail, there is evidence of rules of procedure, such as the calling of witnesses, the taking of oaths, and presentation of documentary evidence.<sup>42</sup>

Significantly, Mamluk royal sessions of *mazālim* were held in a purpose-built Dār al-‘Adl (Hall of Justice), an Ayyubid innovation and a distinct Mamluk institution. The establishment of a Hall of Justice was introduced by the Ayyubid sultans, with the earliest known built in 1163 by Nūr al-Dīn ibn Zankī in Damascus, followed by another one in Aleppo in 1189. In Cairo, the Ayyubids built a Dār al-‘Adl in the citadel by 1207. Baybars, upon assuming power, built a new Dār al-‘Adl in 1262, in a location just under the Cairo Citadel. He personally presided in the Dār al-‘Adl sessions on Mondays and Thursdays, to inspect *mazālim* petitions and to review the troops.<sup>43</sup> These Halls of Justice were a new phenomenon in Islamic history, and Nasser Rabbat has linked them with the Islamic revival of the counter-Crusade, to which the rulers responded by offering royal justice as means of gaining legitimacy and popularity.<sup>44</sup> But, given Baybars’ cotemporary reform of the judiciary, it seems obvious that Baybars’ foundation of a new royal Hall of Justice also had important implications for the Mamluk legal system. In the context of legal history, the Dār al-‘Adl seems to reflect a formalization of royal justice and a greater emphasis on the judicial functions of the sultan. Baybars established both a new Dār al-‘Adl and a quadruple judiciary, and these two major developments marked a closer integration of the ruler in the administration of justice.

## II

Around 1350, the jurisdiction of *siyāsah* courts expanded substantially to include cases of debt and matrimonial litigation. This expansion in *siyāsah* jurisdiction was linked to a shift in the role of the *ḥājib*, or chamberlain. Under the Ayyubids and the early Mamluks the *ḥājib* was responsible for dealing with disputes among

<sup>41</sup>A point made by Carl F. Petry in his review of Nielsen’s book (review of *Secular Justice in an Islamic State: Mazālim under the Bahri Mamlūks, 662/1264–789/1387*, by Jørgen S. Nielsen, *Journal of the Economic and Social History of the Orient* 30 [1987]: 333–35).

<sup>42</sup>Despite this, Nielsen speculates that “it is safe to assume that the presentation of evidence in the *mazālim* court was not bound by any consideration other than expediency” (*Secular Justice*, 76).

<sup>43</sup>Nasser Rabbat, “The Ideological Significance of the Dār al-‘Adl in the Medieval Islamic Orient,” *International Journal of Middle Eastern Studies* 27 (1995): 3–28; Nielsen, *Secular Justice*, 15; Linda T. Darling, “Medieval Egyptian Society and the Concept of the Circle of Justice,” *Mamlūk Studies Review* 10, no. 2 (2006): 1–17.

<sup>44</sup>Rabbat, “The Ideological Significance,” 4, 19.

the amirs and the soldiers, with limited jurisdiction over government officials. As al-Maqrīzī explains, in the old days, the *ḥājib* could not overrule the court of a qadi, even with regard to government officials:

The judgment (*ḥukm*) of the chamberlain did not go beyond litigations among the soldiers, their disagreements over *iqṭāʿ*, and so forth. In the past, none of the chamberlains sat in judgment in shariʿah matters, such as cases of matrimony or debt, as all these matters were under the exclusive jurisdiction of the qadis of the shariʿah. It was always the case that one of the clerks or the tax-farmers (*dummān*), or any similar office-holder, would run away from the court of the chamberlain to the court of one of the qadis and take refuge in the judgment of the shariʿah, and nobody would then attempt to seize him from the qadi's court. Some of them would remain for months and years in the qadi's jail, safeguarding themselves from the chamberlains.<sup>45</sup>

But around 1350, the jurisdiction of the chamberlains expanded substantially at the expense of the courts of the qadis:

Then all of this changed. The title of chamberlain is nowadays given to a group of amirs who sit in judgment among the people... The chamberlain today gives judgments to the noble and the lowly, regardless of whether the judgment is according to the shariʿah or to what they call *siyāsah*, and if a qadi tries to seize a debtor from the court of the chamberlain he is unable to do so.<sup>46</sup>

Al-Maqrīzī traces the expansion in the jurisdiction of chamberlains to a case concerning commercial debt that occurred in Cairo in 1352–53:

In the days of Sultan al-Malik al-Ṣāliḥ Ṣāliḥ ibn Muḥammad ibn Qalāwūn, when the amir Sayf al-Dīn Jurjī was chamberlain, the sultan ordered him to take responsibility for the matter of creditors and settling their disputes with their debtors. Previously, it was not the practice of the chamberlains to sit in judgment on shariʿah matters. The reason for this was that a group of Persian merchants appeared before the sultan in the Dār al-ʿAdl in 752 [1352–53] and said that they had to flee their lands because of the injustice of the Mongols, and that the merchants in Cairo had bought from them

<sup>45</sup>Al-Maqrīzī, *Al-Mawāʿiẓ wa-al-Iʿtibār fī Dhikr al-Khiṭaṭ wa-al-Āthār*, ed. Ayman Fuʿād Sayyid (London, 2002), 3:713–14.

<sup>46</sup>Ibid., 3:714.

some merchandise, but used the sale price of the goods for other purposes [lit., ate the prices, *akalū athmānahā*]. Then the [Cairene] merchants established before the Hanafi qadi that they were unable to pay, and he put them in his prison and declared some of them bankrupt. The amir Jurjī was then ordered to release the debtors from the prison, and to deliver what they owed to the [Persian] merchants. The sultan also rebuked the chief qadi Jamāl al-Dīn ‘Abd Allāh al-Turkmānī al-Ḥanafī for his actions, and banned him from sitting in judgment among merchants and debtors. Jurjī then took the debtors out of prison and punished them until he delivered their property to the [Persian] merchants bit by bit. Since then, the chamberlains were allowed to sit in judgment over the people.<sup>47</sup>

According to al-Maqrīzī, the legal situation here was as follows: Persian merchants sold merchandise in Cairo, but the buyers, apparently local merchants, resold the goods without paying the sale price to the sellers. The buyers then went to a Hanafi qadi in order to be proclaimed bankrupt, so that they would not have to pay. The Persian merchants then complained to the sultan, who ordered the chamberlain to take over the case and overrule the judgment of the Hanafi qadi. Rather than imprisoning the debtors or declaring them bankrupt, the chamberlain punished them, presumably torturing them, until they disclosed the whereabouts of money that they were hiding. It was then handed over to the sellers (the Persian merchants). The sultan then decided to transfer the jurisdiction over cases of debt from the Hanafi qadis to the courts of the chamberlains.

In terms of legal doctrine, the problem here is that most schools of law allow debtors to escape payment once they are declared bankrupt. Only the Hanafis take a stricter position, allowing a debtor to claim bankruptcy only after a period of imprisonment.<sup>48</sup> This strict position was highlighted in appointment decrees of Hanafi chief qadis, who were entrusted with imprisoning a debtor who claims bankruptcy.<sup>49</sup> It therefore seems that due to this strict position, matters of debt were brought before Hanafi qadis, who, following the dominant view in their school, would not declare a debtor bankrupt until he spent some time in jail. This appears to be the law applied in this case. However, Hanafi law still provided the buyers (the local merchants) a way out of payment, since they were prepared to stay in the qadi’s jail until they would be declared bankrupt or until the Persian

<sup>47</sup>Ibid., 3:717–18. See also al-Maqrīzī, *Sulūk*, 2:863. This passage is also discussed by Irwin, “Privatization of Justice”; Escovitz, “The Establishment,” 100; J. Nielsen, “Maḏālim and Dār al-‘Adl under the Early Mamluks,” *The Muslim World* 66 (1976): 127.

<sup>48</sup>Ibn Qudāmah, *Al-Mughnī*, 4:529 [no. 3446], 543 [no. 3463]; Ibn Rushd, *Bidāyat al-Mujtahid*, 4:1451, 1466.

<sup>49</sup>See Ibn Faḍl Allāh al-‘Umarī, *Al-Ta‘rīf*, 119–20; al-Qalqashandī, *Ṣubḥ al-A‘shā*, 11:95, 200.

merchants moved on. The fact these were foreign merchants clearly had some relevance in the case, as they were in greater need of protection, compared to local merchants bound by networks of trust and reputation.<sup>50</sup>

In effect, the sultan intervened in order to plug what he regarded as a legal loophole. He undoubtedly believed that the debtors had the means to pay up for the goods they had bought, and that the formalism of the qadi would allow them to escape payment. It is also significant that this case highlights the limits of the quadruple shari'ah judiciary. This case was heard before a Hanafi qadi precisely because Hanafi doctrine was the most severe with regard to debtors. However, when even Hanafi doctrine was not seen to be sufficiently strict, the sultan responded by transferring the case to the court of the chamberlain, who applied what was in effect *siyāsah* justice. Whether or not the expansion of the chamberlain's jurisdiction was indeed triggered by this one case, al-Maqrīzī's account is instructive with regard to the way the jurisdiction of the chamberlain was expanded when the quadruple *madhhab* system was no longer deemed adequate.

The expansion in the jurisdiction of the chamberlain was followed by reforms of the institution of the Dār al-ʿAdl. During the early 1360s we first hear of the appointment of an official of the state called the *muftī Dār al-ʿAdl*, whose responsibilities appeared to be giving legal opinions to the ruler during the sessions of royal justice.<sup>51</sup> Until that time, the granting of legal opinions was not considered a state activity, and, while many of the individual *muftīs* were also qadis or other state officials, they were not acting as official, state-appointed *muftīs*. Among the first jurists appointed to the position were former chief qadis, such as the Hanafi Ibn al-Ṣā'igh (appointed in 765/1364) and the Shafi'i Taqī al-Dīn al-Subkī. By the beginning of the fifteenth century, the Dār al-ʿAdl in Cairo and the one in Damascus had four official *muftīs* each, while Aleppo had only a Hanafi and a Shafi'i.<sup>52</sup> The apparent similarity between the *muftī Dār al-ʿAdl* and the Ottoman shaykh al-Islām has already been noted.<sup>53</sup>

The appointment of an official *muftī Dār al-ʿAdl* was followed, at least in Cairo, by the relocation of the sessions of royal justice from the Dār al-ʿAdl to a new site. In 789/1387 Sultan Barqūq decided to receive petitions in the Royal Stables, further down the slope of the Citadel and closer to the residential quarters of Cairo. The functions of royal justice were thus separated from other official ceremonies that remained in the imposing Dār al-ʿAdl itself.<sup>54</sup> Ibn al-Furāt's account conveys

<sup>50</sup> A point suggested to me by James Baldwin.

<sup>51</sup> Nielsen, *Secular Justice*, 91–92; al-Qalqashandī, *Ṣubḥ al-Aʿshā*, 11:207.

<sup>52</sup> Nielsen, *Secular Justice*, 171–73.

<sup>53</sup> Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, "Introduction," in *Islamic Legal Interpretation*, 10; E. Tyan, "Fatwā," *Encyclopaedia of Islam*, 2nd edition.

<sup>54</sup> Nielsen, *Secular Justice*, 53–59; Fuess, "Zulm," 126; al-Maqrīzī, *Al-Mawā'iz*, 3:666.

how the sultan's direct involvement in administering justice was perceived as a radical break with the past. Specifically, for the first time, the sultan's Hall of Justice became a court of appeals heard against judgments made by either qadis or chamberlains:

At the end of the month of Ramaḍān it was announced by heralds in Cairo and Miṣr and their environs that whoever had been subject to injustice or had a complaint (*shakwā*) or a petition (*qiṣṣah*) could come on Sundays and Wednesdays to the royal stables. Al-Zāhir Barqūq started sitting in the stables on those days, accompanied by the *kātib al-sirr*, the *dawādār*, and *naqīb al-jaysh*. Whoever had a complaint or was subject to injustice could come before him in the stables. When someone came before him, the sultan asked whether he had already taken his affair before a qadi or a chamberlain (*ḥājib*). If the answer was no, the sultan had him beaten up and thrown out. But if he said yes, but that the magistrates had not satisfied him, he would be allowed to bring his adversary before the sultan and make an accusation against him, and the sultan would then personally pass judgment between them. This is something that we have never heard before regarding any king. The first time he sat in judgment was Monday, 23 Ramaḍān [789, 7 October 1387].<sup>55</sup>

The relocation of the Dār al-ʿAdl away from the Citadel and closer to the city completed a radical reconfiguration of the Mamluk legal system in the second half of the fourteenth century. It involved granting jurisdiction to chamberlains in commercial disputes (previously under the exclusive jurisdiction of qadis), creating a new position of *muftī Dār al-ʿAdl* as a legal advisor to military-executive magistrates, and positioning the sultan as a court of appeal against the decisions of both shariʿah and *siyāsah* magistrates. In doing that, he undertook a more direct responsibility for the administration of justice among the population at large. Al-Maqrīzī specifically comments that the purpose of the move to the stables was that the sultan would be able to pass judgment among the people (*lil-ḥukm bayna al-nās*).<sup>56</sup> While Baybars' intervention in the legal system was indirect, through the quadruple judiciary, Barqūq undertook a far more direct engagement with the administration of law and justice.

<sup>55</sup>Muḥammad ibn ʿAbd al-Raḥīm Ibn al-Furāt (1334 or 5–1405), *Tārīkh al-Duwal wa-al-Mulūk*, ed. Quṣṭanṭīn Zurayq and Najlā ʿIzz al-Dīn (Beirut, 1939), 17. See also the somewhat imprecise translation in Fuess, “Zulm,” 138.

<sup>56</sup>Al-Maqrīzī, *Al-Mawāʿiz*, 3:662.

### III

The legal reforms of the second half of the fourteenth century created an overlap of jurisdiction, and inevitable conflicts, between the *siyāsah* courts of the chamberlains and the shari‘ah courts of the qadis. Nielsen does not find any reference to cases brought to the chamberlain’s court during the period he studied (up to 1382),<sup>57</sup> but, as Robert Irwin rightly notes, the chronicles of the fifteenth century provide ample references to the justice offered by the chamberlains in commercial cases.<sup>58</sup> Attempts to re-introduce limitations on their jurisdiction were few and short-termed. In 823/1420, for example, a Hanafi qadi sent a messenger to the chief chamberlain, asking for a debtor held at his court. When the chamberlain refused to give up the prisoner, the Hanafi qadi, with the support of his Shafi‘i colleague, lodged a complaint with the sultan. Al-Mu‘ayyad Shaykh then ordered that *shar‘ī* debts, i.e., debts that fall under the jurisdiction of the shari‘ah, should only be brought before the qadis. The chamberlain and other amirs were dissatisfied, and indeed the edict was abolished two days later.<sup>59</sup> By the 1430s the chamberlains clearly had regained parallel jurisdiction in pursuing debtors. A royal edict of 833/1430, during an outbreak of the plague, instructed “qadis, chamberlains, and other officials” not to imprison debtors due to the widespread mortality.<sup>60</sup>

During the 1420s there is also clear evidence for the establishment of courts by other military officials, specifically the *dawādārs*.<sup>61</sup> Ibn Taghribirdī states that the first *dawādār* to pass judgment among the people, and to have orderlies (*nuqabā’*) at his door, was Qurqmās al-Sha‘bānī, around 824 or 825 (1421 or 1422).<sup>62</sup> A case from 826/1423 suggests that the *dawādārs* had acquired substantial judicial powers, and may have served as a court of appeal against the decisions of qadis. Ibn Ḥajar says that the grand *dawādār* Sūdūn min ‘Abd al-Raḥmān heard a case against a deputy qadi by the name of Jamāl al-Dīn al-Ṭanbadī, known as Ibn ‘Arab, who was alleged to have passed an improper judgment (*muḥākamah ghayr marḍīyah*). The *dawādār* ordered the Shafi‘i chief qadi to relieve this deputy from his post. In addition, the *dawādār* instructed the qadi to limit the number of deputies to no more than ten at any given time.<sup>63</sup>

<sup>57</sup>Nielsen, *Secular Justice*, 83–85, 133.

<sup>58</sup>Irwin, “Privatization of Justice.”

<sup>59</sup>Ibn Ḥajar al-‘Asqalānī, *Inbā‘ al-Ghumr bi-Abnā’ al-‘Umr*, ed. Ḥasan Ḥabashī (Cairo, 1969–), 3:219.

<sup>60</sup>Ibid., 3:419.

<sup>61</sup>See a brief discussion of the judicial responsibility of fourteenth-century *dawādārs* in Nielsen, *Secular Justice*, 92.

<sup>62</sup>Irwin, “Privatization of Justice,” 67; Abū al-Maḥāsīn Yūsuf Ibn Taghribirdī, *Al-Nujūm al-Zāhirah fī Mulūk Miṣr wa-al-Qāhirah*, ed. William Popper (Berkeley, 1909–36), 6:356; 7:255.

<sup>63</sup>Ibn Ḥajar, *Inbā‘ al-Ghumr*, 3:305.



Another case of conflict of jurisdictions attests to the continuous authority of military courts in matters of commercial transactions. In 856/1452, a Muslim brought suit before a Maliki qadi against a foreign Jewish merchant, who was said to be “from among the merchants of the Circassians.” The Muslim asked for a court order that would require the Jew to seek justice only through shari‘ah courts (*anna-hu lā yuṭālibuhu bi-ḥaqqihi illā min al-shar‘*). The qadi gave this injunction, but the Jewish merchant refused, saying that he would pursue his rights as he pleased. The qadi repeated the injunction through the translator, but the Jew did not hear (or obey), so the qadi had him beaten and imprisoned. Upon his release, the Jew complained to the sultan, who had the Maliki qadi brought before him. When the qadi protested that he only acted according to the shari‘ah, the sultan told him that the *siyāsah* “runs the same course as the shari‘ah” (*tajrī majrā al-shar‘*), and rebuked him for passing judgment with partiality and anger.<sup>64</sup> Like the case of the Persian merchants reported by al-Maqrīzī, this case similarly indicates royal protection for foreign merchants. It also explicitly articulates the sultan’s justification for the *siyāsah* courts: a parallel judiciary, which is as legitimate as that of the qadis, and one which ultimately derives its authority from the shari‘ah.

Not only foreign merchants, however, appealed to *siyāsah* justice in order to reclaim their debts. In a case dated 876/1471, the wife of the Shafi‘i chief qadi of Egypt filed a complaint against her husband with the *naqīb al-juyūsh*, head of the police. She claimed that she gave her husband a loan of 250 gold dinars, and that he refused to pay her back. Given the strict division of property between spouses, such disputes were not uncommon, although the wife is said to have been incited to bring the suit by her brother, a former chief qadi himself. The head of the police, acting without permission from the sultan, sent four orderlies (*naqībs*) to the qadi’s house. The orderlies, using intimidating language, brought him before the head of the police and then placed him under house arrest. Only at the intervention of the *kātib al-sirr*, Ibn Muzhir, did the wife agree to resolve the dispute under the shari‘ah.<sup>65</sup>

Furthermore, military-executive magistrates intervened in litigation between spouses, not only with regard to debts. As indicated by al-Maqrīzī, fifteenth-century chamberlains had acquired jurisdiction in matrimonial cases. In a case from Jerusalem, the family of a bride whose husband failed to consummate the mar-

<sup>64</sup>Irwin, “Privatization of Justice,” 67; Ibn Taghrībirdī, *Ḥawādith al-Duhūr fī Madā al-Ayyām wa-al-Shuhūr*, ed. W. Popper (Berkeley, 1930), 1:129.

<sup>65</sup>‘Alī ibn Dāwūd al-Jawharī al-Ṣayrafī, *Inbā’ al-Haṣr bi-Abnā’ al-‘Aṣr*, ed. Ḥasan Ḥabashī (Cairo, 1970), 365–66. On this woman and her economic activity as supervisor of a family endowment, see Muḥammad ibn ‘Abd al-Raḥmān al-Sakhāwī, *Al-Ḍaw’ al-Lāmi’ li-Ahl al-Qarn al-Tāsi’* (Cairo, 1934–36), 12:7.

riage (thereby depriving her of her rights to maintenance) complained to the amir Azbak al-Zāhirī, who was chief chamberlain in 868/1463–64. Azbak set a deadline for the consummation of the marriage, and threatened to issue a judicial divorce unless the groom complied.<sup>66</sup> In another case a husband complained before the grand *dawādār* Yashbak min Mahdī that one of the clerks in the bureau of escheats had seduced his wife. The man claimed that his marriage had collapsed as a result of this affair, that he had divorced his wife, and that the woman had now married her lover. The *dawādār* sent orderlies to bring the suspected couple from their home, and ultimately ruled that the couple should compensate the cuckolded husband with 1,000 dinars.<sup>67</sup> A contemporary legal opinion tells of a man who swore on pain of divorce that if his wife left home without his permission, he would complain about her to the military courts (*siyāsah*) and bring the police to arrest her.<sup>68</sup>

The authority of *siyāsah* magistrates was founded on popular notions of equity. For al-Qalqashandī, the chamberlain is responsible for establishing the rights of the oppressed, enforcing judgments, helping the weak, and judging by the laws of justice. He specifically equates the court of the chamberlain in his own time with the classical institution of *maẓālim*.<sup>69</sup> Some individual chamberlains did attempt to fulfill these roles. Sūdūn al-Zāhirī al-Maghribī (d. 843/1439–40), who acted as chamberlain in the first half of the fifteenth century, was ridiculed for being excessively concerned with the protection of the weak. Ibn Taghrībirdī claims that Sūdūn assumed that the weaker party is always in the right, and always suspected coercion on the part of the stronger party. So whenever a soldier and a peasant came before him, he would always favor the peasant and disparage the claims of the soldier. This would go on until the soldier would ask for a settlement (*muṣālahah*), or, if he had sufficient clout, would take his case somewhere else. The chamberlain's manner became so well known that the weak would come to seek him from afar.<sup>70</sup>

Chamberlains and other military-executive officials did not ignore the shari'ah. This meant a level of familiarity with Islamic law by *siyāsah* magistrates, and it is not surprising to find that several military officers indeed had training in Islamic law, or had shari'ah specialists in their courts. Timurbāy ibn 'Abd Allāh al-Shihābī (d. 798/1395–96), a chamberlain under Barqūq, is described as a pious man who loved scholarship and scholars, and who had learned Hanafi jurisprudence

<sup>66</sup> Al-Sakhāwī, *Al-Ḍaw'*, 1:12. See also *ibid.*, 2:271, for the biography of Azbak.

<sup>67</sup> Ibn al-Ṣayrafī, *Inbā' al-Ḥaṣr*, 124.

<sup>68</sup> Zakariyā al-Anṣārī, *Al-I'lām wa-al-Ihtimām bi-Jam' Fatāwā Shaykh al-Islām*, ed. Aḥmad 'Ubayd (Damascus, 1936), 246.

<sup>69</sup> Al-Qalqashandī, *Ṣubḥ al-A'shā*, 3:277. See also Nielsen, *Secular Justice*, 30.

<sup>70</sup> Ibn Taghrībirdī, *Nujūm*, 7:267; Irwin, "Privatization of Justice," 70.

with Ibn al-Furāt's father. During his tenure as chamberlain his judgments were based on thorough examination (*wa-ṣāra yuḥarriru fī aḥkāmihī*). Whenever he was in doubt regarding a legal question, he inquired of scholars.<sup>71</sup> Ibn Taghribirdī commends the justice enacted by military officials who had learned Hanafi law, including the future sultan al-Zāhir Ṭaṭar, who gave judgments in the Citadel as an amir.<sup>72</sup>

What made *siyāsah* magistrates so popular was that they were able to offer justice, not just law. Two final examples of conflicts between shari'ah and *siyāsah* illustrate this tension. One comes from a work by Tāj al-Dīn al-Subkī, dating to the 1360s, which describes the way military officers resolved cases of fornication. According to al-Subkī, one of the rules (*aḥkām*) set up by *wālīs* (police chiefs) is that a man who deflowered a woman and impregnated her was forced to marry her. They do so, al-Subkī explains, because they think that this is better for the child, who would otherwise carry the disgrace of fornication. This policy, explains al-Subkī, goes against the shari'ah, which rules that the child of fornication is not attached to the fornicator, and does not become his child. Yet, according to al-Subkī himself, the solution in the shari'ah is merely a fine, equal to the expected decrease in the bride's marriage gift (*mahr*).<sup>73</sup> The shari'ah, as attested by a leading jurist, offers a limited financial penalty through a restitution of the financial damage caused by the removal of virginity. The police chiefs, on the other hand, offered a more effective form of justice, with a view to the future benefit of the child.

A second example of a conflict between shari'ah law and *siyāsah* justice comes from the diary of Ibn al-Ṣayrafī, a late fifteenth-century Cairene deputy qadi and chronicler. The case has been translated and discussed by Carl Petry in another context, but, as it is a first-hand account of the actual workings of the interaction between shari'ah and *siyāsah*, it is also relevant here.<sup>74</sup> The account begins with a verbatim extract from a petition filed with the chief Hanafi qadi, Muḥibb al-Dīn Ibn al-Shiḥnah. The petitioner was the maternal aunt of a twelve-year-old girl, whose parents were absent from Cairo:

<sup>71</sup> Ibn al-Furāt, *Tārīkh*, 9:1:446; Nielsen, *Secular Justice*, 85.

<sup>72</sup> Ibn Taghribirdī, *Nujūm*, 6:484; Irwin, "Privatization of Justice," 69.

<sup>73</sup> Tāj al-Dīn al-Subkī, *Kitāb Mu'īd al-Ni'am wa-Mubīd al-Niqam*, ed. David Myhrman (London, 1908), 64.

<sup>74</sup> Ibn al-Ṣayrafī, *Inbā' al-Ḥaṣr*, 226–29. See the translation and analysis by C. Petry, "Conjugal Rights Versus Class Prerogatives: a Divorce Case in Mamlūk Cairo," in *Women in the Medieval Islamic World*, ed. Gavin R. G. Hambly (London, 1999), 227–40; and discussion in my *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge, 2005), 79–80. My interpretation of the text is substantially different from Petry's, both in its details and its overall significance. According to Petry, the case demonstrates the prerogatives of the military elite.

the slave, relative of such-and-such, who is a virgin adolescent girl, kisses the earth [before your feet] and states that she [the girl] is poor and weary of begging, and that her parents have been absent from Cairo and its environs for a period of more than three years. She asks that a noble permission would be granted to one of the deputy qadis to marry her off to someone who wishes to do so, for a fair marriage gift and for a suitable husband, as an act of charity towards her.

The maternal aunt's choice of a school of law was not random; only Hanafi doctrine allowed for the qadi to marry off a minor orphan.<sup>75</sup> The Hanafi qadi delegated this particular case to his deputy, our narrator Ibn al-Ṣayrafī himself, who then verified that the girl's parents were indeed absent, and married her off to a servant (*ghulām*) in the service of a royal mamluk. According to his account, he also inserted a clause forbidding the groom to consummate the marriage until the girl had attained puberty.

The marriage of this orphan girl, arranged by a Hanafi deputy qadi, ended in divorce and recrimination, and was subsequently, in 875/1470, the subject of complaint to the grand *dawādār*, who, as we have noted, may have acted as a court of appeal against decisions made by shari'ah qadis. While the events of the marriage were contested, it is clear that the marriage was consummated, and that the girl asked her husband for a divorce, which he granted only after demanding financial compensation from her maternal aunt. The aunt then raised an uproar in her Bulaq neighborhood, and the local people took the girl and went to the court of the grand *dawādār*, Yashbak min Maḥdī.

The *dawādār* ordered the servant (i.e., the groom) and his master, the royal mamluk, to come to his court. The master protested that his servant "...has done nothing that was not authorized by the qadi and the witnesses," and so the *dawādār* then summoned Ibn al-Ṣayrafī to explain his actions. The following exchange, as recorded by the deputy qadi himself, merits a verbatim quotation, as it encapsulates the contrast between the formalism of the shari'ah law and the popular, "common sense" notions of equity that guide *siyāsah* justice:

I [i.e., Ibn al-Ṣayrafī] entered, and stood before him.

He said to me: "O qadi, did you marry this girl to that man?"

I said, "Yes."

He said, "How come?"

<sup>75</sup>Ibn Qudāmah, *Al-Mughnī*, 7:382 (no. 5201); Ibn Rushd, *Bidāyat al-Mujtahid*, 3:944–46.

I said, “The person who appointed me as his deputy permitted me to do so by a comprehensive deposition in his own handwriting.”

He said, “Should this girl be married off?” indicating that she is young.

I said, “This is the law of my school [the Hanafi school], because the Prophet, pbuh, married ‘Ā’ishah, the mother of believers, may God be pleased with her, when she was nine years old.”

He said, “Do you equate this girl with that one [‘Ā’ishah], or this man with that man [the Prophet]?”

I said, “No, my lord. But the Prophet, pbuh, is our guide to religious law (*mashra’*) and we are his people, who follow his sunnah.”

He fell silent, ceasing to speak with me. Then he turned to the qadis and amirs attending the council, and said to them, “The qadi had this reply for me, and I have no further business with him, but only with the mamluk soldier and his servant.”

As Ibn al-Ṣayrafī is keen to point out, he had done nothing improper. He was authorized to marry off the girl, by permission of the Hanafi qadi who appointed him. He had ascertained, by sufficient legal evidence, that the girl’s parents were indeed not available to marry her off. The formalism of the qadi contrasts, however, with the perspective of the *dawādār*; for him, this was a case of a twelve-year-old girl being subjected to sexual intercourse and financial extortion, and it required an administration of *siyāsah* justice to protect the vulnerable and the defenseless. He summoned all the involved parties to another session in his court a few days later, and then had the husband flogged more than 100 times, and ordered him publicly humiliated across the city, “as an example to anyone who deflowers (*yaftah*) girls.” He also ordered a review of the financial aspects of the divorce settlement by the chief Hanafi qadi. As a result, the husband was to pay the girl four gold coins as her share of the marriage gift. It is important to note that the *dawādār*, despite his forceful intervention in the case, still regarded the settling of the monetary obligations of the husband as something that fell within the remit of shari‘ah, not *siyāsah*.

While the different approaches of the qadi and *dawādār* are clearly distinguished, the justification for the punishment meted out to the husband remains vague. Neither the procedure by which these allegations were proven, nor the exact crime committed by the servant, is explicitly cited. But Ibn al-Ṣayrafī has a remarkable addendum, noting that, “The retribution by the amir *dawādār*—may God protect him—originated from proper authority against the right people”

(*ṣadara min ahlihi fī maḥallihī*), as this soldier and his servant were well-known thugs who terrorized their neighborhood. Despite the way his own actions were subject to scrutiny and criticism by the *dawādār*, Ibn al-Ṣayrafī still does not hesitate to support the implementation of *siyāsah* justice.

#### IV

As this example shows, not all members of the judiciary objected to the expanded jurisdiction of the *siyāsah* courts, even if it came at the expense of the courts of the qadis. Admittedly, other jurists and religious scholars condemned *siyāsah* justice as a symptom of decay and corruption, sometimes in very harsh words. But other, more nuanced, approaches are evident in writings of the ulama. The problem with *siyāsah* justice was usually not that *siyāsah* is illegitimate per se, but that it was left in the hands of incompetent and corrupt officials. The principle of *siyāsah* was acceptable or even necessary, but without the guidance of the shari‘ah, it allowed significant room for abuse.

The first sustained account of *siyāsah* justice comes from the pen of Ibn Taymiyah, writing in the 1320s, i.e., before the great expansion in *siyāsah* jurisdiction. As the title of his important work “Al-Siyāsah al-Shar‘īyah” suggests, he attempted to resolve the duality between *siyāsah* courts and the qadi courts through a reform of the Islamic laws of proof and evidence, specifically advocating the use of circumstantial evidence in criminal cases.<sup>76</sup> This reform was required because the courts of the shari‘ah were too weak, and the *siyāsah* courts of the military officials too arbitrary. For Ibn Taymiyah, the qadis focus on the formalities of the law rather than its intent. The *siyāsah* magistrates, on the other hand, do not have recourse to the Quran and sunnah at all, but rely only on personal opinion, and this opens the way to corruption:

Those who claim to judge by divine law are in fact lacking in knowledge of the sunnah. So when they give judgments in many matters, they deprive people of their rights and fail to uphold criminal law (*‘aṭṭalu al-ḥudūd*), so that blood is shed, property is usurped illegally, and prohibited activities become accepted as licit. On the other hand, those who judge by *siyāsah* resort to a kind of personal opinion without reliance on the Quran and the sunnah. The best of them would pass judgments with no bias and seek justice, but

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<sup>76</sup>For a fuller discussion of Ibn Taymiyah’s position, see Johansen, “Signs as Evidence”; and my “Ibn Taymiyya’s Radical Legal Thought: Rationalism, Pluralism and the Primacy of Intention,” in *Ibn Taymiyya and His Times: Proceedings of a Conference Held at Princeton University, 8–10 April 2005*, ed. Y. Rapoport and Sh. Ahmad (Karachi, 2010), 191–226, esp. 211–12.

many are biased and give preference to the strong, those who give them bribes, and the like.<sup>77</sup>

Ibn Taymīyah does not in fact seek the abolition of *siyāsah* courts. Rather, he argues that the *siyāsah* of the ruler and Islamic law neither contradict nor compete with each other. Just rule is part and parcel of Islamic law, and if conflicts arise, it is only because Islamic law is understood too narrowly or because the rulers act unjustly. In this framework, the objective of political power should be the benefit of religion, and the improvement of the material well-being of the believers in those matters without which the religion cannot prosper—like the protection of property or the enforcement of a penal system. According to this view, the principles of good governance are religious principles on par with religious duties such as prayer and fasting, even though they are not necessarily part of the legal norms established by jurists; in fact, good governance take precedence over the non-binding juristic legal interpretation of non-fundamental legal points.

Ibn Taymīyah therefore calls for the incorporation of considerations of utility and political expediency within the norms of Islamic jurisprudence, and views the division of jurisdiction between qadis and other magistrates as a matter of expediency that is not enshrined in the law. All those who are in a position of authority—including rulers, governors, and market inspectors—participate in the implementation of Islamic law. In practical terms, this meant a reform in the Islamic laws of proof and evidence. Ibn Taymīyah's disciples argued that circumstantial evidence should play a much more prominent role in trial procedures. They viewed the role of the judge (whether a qadi or any other magistrate) not as an arbiter of conflicting claims, but as someone who is capable of establishing the truth by his ability to read signs and interpret them as proofs. In order to do so, judges should be able to read all the available signs—such as physical signs in things and property, known social hierarchies, prevailing customs—rather than depend solely on depositions of witnesses. Ibn Taymīyah, who, incidentally, was never employed by the state, nor was ever a qadi, supported a convergence of *siyāsah* and shari'ah justice through a relaxation of evidentiary procedures. In some respects, Ibn Taymīyah had presented a blueprint for the *siyāsah* justice that would subsequently emerge in the second half of the fourteenth century.

Other jurists reacted to *siyāsah* justice with strongly-worded opposition. Tāj al-Dīn al-Subkī, son of Taqī al-Dīn—himself the most prominent opponent of Ibn Taymīyah's religious reforms—presents a very different approach towards *siyāsah*. In "Mu'īd al-Ni'am," written in the 1360s, he calls on government officials to al-

<sup>77</sup>Ibn Taymīyah, *Majmū' Fatāwā Aḥmad ibn Taymīyah*, ed. 'Abd al-Raḥmān ibn Muḥammad ibn Qāsim al-Āṣimī wa-ibnuh Muḥammad (Beirut, 1997), 20:392–93. Translated by A. Bewley in Ibn Taymīyah, *The Madinan Way: the Soundness of the Basic Premises of the School of the People of Madina* (Norwich, 2000), 87.

ways rule by the shari‘ah. For those who tell the ruler that applying the shari‘ah is a sign of weakness, he warns of divine punishment.<sup>78</sup> In criminal cases, military officials are allowed to follow (taqlīd) the school of law that allows for the most severe discretionary punishment (ta‘zīr) and long imprisonments, as long as they are motivated by public interest and not by personal whim. In blasphemy cases, they are allowed to adopt the strict view recently put forward even by non-Maliki jurists.<sup>79</sup> But they are not allowed to go beyond the limits of the shari‘ah, by which al-Subkī means the doctrines set by the schools of law.

His most severe rebuke is reserved for the chamberlains, who, as we have seen, had their jurisdiction expanded substantially in the 1350s, a decade before the composition of the treatise:

We say: the chamberlain should refer all affairs to the shari‘ah, and should not think that the *siyāsah* brings any benefit. Rather, the *siyāsah* brings harm to the land and to the subjects and leads to chaos. The best interests of men are served by the laws handed down by their Creator, who knows best what brings them benefit and what brings them harm. The shari‘ah of our Prophet Muhammad (pbuh) guarantees all the benefits to humanity in this world and the next, and only harm comes when it is set aside. But whoever follows it finds that his days are good and calm...

If you like, look at the annals of the just and unjust kings and amirs, and see which of the two is more secure and which is longer lasting. I have observed these, and found that anyone who thought that he could better the world with his intellect, and rule the land through exercise of personal opinion and *siyāsah* (*bi-rayihi wa-siyāsatihi*), and go beyond the limits and warnings of God, had suffered ill fate, and his days were dark and troubled...

And as for someone who thinks that his affairs will not succeed if he does not shed blood with no just reason and if he does not beat innocent Muslims, let him know that he is a rebel, an ignoramus, a stupid ass, whose dominion will soon perish and whose fall is imminent...

If one of those asses says: “How should I know that? I am a Turkish simpleton (*āmmī*) who knows not the Book and the Sunnah.” Tell him that this would not help him with God. Ask someone who knows; otherwise you will come to the Day of Judgment with your adversaries, those you have beaten and punished, dragging you

<sup>78</sup>Al-Subkī, *Kitāb Mu‘īd al-Ni‘am*, 34.

<sup>79</sup>Ibid., 36–37.



over the mountains face-down. Then, no excuse will help you. If it is impossible for you to understand, then what business do you have in taking on this job? Leave it.<sup>80</sup>

Like Ibn Taymīyah, al-Subkī equates *siyāsah* with personal opinion. However, al-Subkī is unequivocal in his support for the formalities of the shari‘ah within the limits of the four-*madhhab* system.

Another strong condemnation of the *siyāsah* justice administered by the chamberlains is offered by al-Maqrīzī, writing in the 1420s. Al-Maqrīzī accuses the chamberlains of simple greed, saying that they have “no other purpose but to procure a daily income by the hands of the commander of the court guards (*ras nawbat al-nuqabā*’). Many of them have no *iqṭā*’ to support their rank, and they make their living solely from the litigation (*mazālim*) of God’s servants.” He labels the word *siyāsah* a “satanic term,” claiming, rather fancifully, that it is derived from the word “Yāsa,” the legal code of the Mongols:

The judgments of the chamberlains are called judgment of *siyāsah*, which is a satanic term. Most of our contemporaries who do not know its origin employ it carelessly, saying that when a matter does not accord with the judgments of the shari‘ah it must be according to the judgments of *siyāsah*. But while they take it lightly, it is a grave matter in the eyes of God, as I will explain, for this is a valuable section...

Our contemporaries are wrong regarding its origin, for it is a Mongol word. It was originally “*yāsah*,” and was mispronounced by the Egyptians, who prefixed the letter “s” to pronounce “*siyāsah*,” and then added the definite article, so that the ignorant think it is an Arabic word, but the truth is what I have just told you.<sup>81</sup>

As David Ayalon has shown, there is no evidence for the application of the Mongol Yāsa under the Mamluks.<sup>82</sup> Moreover, a close reading of al-Maqrīzī’s account actually reveals a principled acceptance of *siyāsah* justice as complementing shari‘ah, echoing the views of Ibn Taymīyah a century earlier. After labeling *siyāsah* a “Satanic term,” al-Maqrīzī then distinguishes between the correct, just *siyāsah*, which conforms to the shari‘ah, and its corruption at the hands of incompetent individuals:

<sup>80</sup>Ibid., 57–58.

<sup>81</sup>Al-Maqrīzī, *Al-Mawā‘iz*, 3:714–15.

<sup>82</sup>David Ayalon, “The Great Yāsa of Chingiz Khān: A Re-examination,” *Studia Islamica* 33 (1971): 97–140; 34 (1971): 151–80; 36 (1972): 113–58; 38 (1973): 107–56; Irwin, “Privatization of Justice,” 63.

You should know that people in our days, and since the beginning of the Turkish dynasty in Egypt and Syria, divide judgments into two categories: judgment of shari‘ah and judgment of *siyāsah*. The shari‘ah is those religious duties which God has set, such as prayer, fasting, pilgrimage, and the remainder of charitable deeds... [On the other hand], the term *siyāsah* is used to describe the law (*qānūn*) laid down for guarding morals (*ādāb*) and public interest and setting public affairs in order.

The *siyāsah* is of two kinds. One is the just *siyāsah* that extracts justice from the unjust sinner. This first kind is indeed part of the shari‘ah, known to some and unknown to others, and this *siyāsah shar‘īyah* has been the subject of many books. The other kind is the unjust *siyāsah*, forbidden by the shari‘ah.

Ibn Taghrībirdī, who repeats some of al-Maqrīzī’s observations mentioned above, also makes a similar distinction between just and unjust *siyāsah* in his annals for the years 861 and 863 (1456–57 and 1458–59). According to his account, in this period every junior officer set out his own court, and would hear litigations, using no rules of evidence but raw intimidation and coercion. The result, Ibn Taghrībirdī laments, was that merchants and artisans could not pursue their trades, as they had no legal protection. Robert Irwin rightly recognizes this as “privatization of justice.” However, Ibn Taghrībirdī is specifically concerned with the rough justice offered by junior officers. He is not objecting to *siyāsah* justice as such, nor to the justice offered by chamberlains or *dawādārs*. His concern is, more specifically, that the “authority of the magistrates of the shari‘ah and the *siyāsah* is set at naught by the power of the purchased mamluks (*julbān*) of the sultan Īnāl.”<sup>83</sup> Ibn Taghrībirdī groups together “the magistrates of the shari‘ah and the *siyāsah*,” in effect the qadis, chamberlains, and *dawādārs*, and regards them as the pillars of a just legal system which is being threatened by the junior officers.

The reaction of jurists and scholars to the administration of *siyāsah* ranged from complete rejection, through acceptance and accommodation, to outright celebration of its role in complementing the shari‘ah. An example of the latter attitude is the treatise “*Taḥrīr al-Sulūk fī Tadbīr al-Mulūk*,” composed for Qānṣūh al-Ghawrī by Abū al-Faḍl Muḥammad Ibn al-A‘raj (d. 925/1519), a minor religious scholar in Cairo.<sup>84</sup> Much of the work consists of verbatim quotations from the classical text by al-Māwardī. But the author precedes the traditional narrative by

<sup>83</sup>Ibn Taghrībirdī, *Nujūm*, 7:494; Irwin, “Privatization of Justice,” 68.

<sup>84</sup>Abū al-Faḍl Muḥammad Ibn al-A‘raj, *Taḥrīr al-Sulūk fī Tadbīr al-Mulūk*, ed. Fu‘ād ‘Abd al-Mun‘im (Alexandria, 1982). The work is discussed in Darling, “Medieval Egyptian Society and the Concept of the Circle of Justice.”

offering remarkable guidelines for the use of intimidation and physical violence in *siyāsah* courts. For him, this is what makes *siyāsah* necessary to complement the shari‘ah:

He [i.e., the *nāzir fī al-mazālim*] can examine crimes and grievances prior to any complaint; he can intimidate (*irhāb*) a suspect of injustice and crime before the crime has been proved by admission or by conclusive evidence. He can also stimulate (*al-ḥaml ‘alá*) a confession of the truth, and imprison culprits for injustices. He can use physical force to gain a confession after circumstantial evidence of a crime has appeared, and he can chastise a defendant who denies guilt after the truth has been confirmed by evidence. He can also coercively encourage the criminals to repent. The qadis do not have recourse to these forms of *siyāsah*: they cannot examine injustice and litigations before they were brought to their attention, only after; and they have no means to pass judgment in them, other than their own personal knowledge, a confession, or fair evidence (*bayyinah ‘adilah*).<sup>85</sup>

I do not believe that al-A‘raj was trying to gain royal favor by legitimizing torture and physical intimidation; given the prevalence and indispensability of *siyāsah* justice in fifteenth-century Mamluk society, this was hardly necessary. Al-A‘raj attempts here to address the lack of predictability in *siyāsah* justice, and to formally set out rules guiding *siyāsah* magistrates. These guidelines were most probably grounded in the actual praxis of *siyāsah* courts for more than a century, but here are incorporated into the juristic discourse.

## V

The final decades of the Mamluk Sultanate, under the reigns of the sultans Qāyrbāy (r. 1468–96) and Qānṣūh al-Ghawrī (r. 1501–16), represent an unprecedented degree of royal intervention in the administration of justice. Qāyrbāy and Qānṣūh did not see themselves as merely enforcers of Islamic law and justice, but also as its interpreters. They were, as Carl Petry aptly puts it, “champions of the shari‘ah” against the formalistic attitude of the qadis and the *muftīs*.<sup>86</sup> They opened the gates of their court to an increasing number of litigants, and dealt

<sup>85</sup>Ibn al-A‘raj, *Tahrīr al-Sulūk*, 38. Compare ‘Alī ibn Muḥammad al-Māwardī, *Al-Aḥkām al-Sultānīyah wa-al-Wilāyāt al-Dīnīyah* (Cairo, 1983), 71; *The Laws of Islamic Governance*, trans. Asadullah Yate (London, 1416/1996), 120. Elsewhere, Ibn al-A‘raj outlines the difference between the *siyāsah* of the amirs and the judgments passed by qadis (*Tahrīr al-Sulūk*, 57).

<sup>86</sup>Carl F. Petry, *Protectors or Praetorians?: The Last Mamlūk Sultans and Egypt’s Waning as a Great Power* (Albany, 1994), 198.

with an expanding range of civil cases. The sultans also settled disputes between the chief qadis by applying “common sense” interpretations. Finally, by the final years of Qānṣūh’s reign, he appeared ready to publicly overrule the interpretations of the qadis, not in the name of *siyāsah* but rather in the name of the correct application of the shari‘ah itself.

The above-mentioned deputy Ibn al-Ṣayrafī, who attended the bi-weekly court *mazālim* sessions of Qāyṭbāy, presents the sultan as impatient with the indeterminacy of the chief qadis.<sup>87</sup> In a case involving an endowment of a madrasah, when the founder’s stipulations and the alterations to the original structure were discussed, Qāyṭbāy rode to the building to see for himself.<sup>88</sup> In a legal dispute over the renovation of a synagogue in Jerusalem, Qāyṭbāy summoned qadis to review the case, but also expressed his own interpretation of the law, finally siding with the jurists who permitted the renovation.<sup>89</sup> In another case, the sultan acted as a court of appeal against the judgments of a qadi. After a divorcee had complained that her ex-husband, an ironsmith, refused to pay the remaining portion of her marriage gift, and that she had been refused justice by a Hanafi deputy, the sultan found the deputy guilty of bias.<sup>90</sup>

The royal dispensation of justice reached now a wider public through the building of a new Dār al-‘Adl. Fifteenth-century sultans followed Barqūq’s example and held sessions in the royal stables to adjudicate cases. Ibn Taghrībirdī reports this for Sultan Khushqadam in 871/1466, noting that in doing so he continued past traditions.<sup>91</sup> Qāyṭbāy appears to have gone further by experimenting with opening his *mazālim* sessions to the petitions of commoners. He then became convinced of the futility of such an approach when a woman came to complain that her husband had taken a second wife.<sup>92</sup> Like Sultan Barqūq a century earlier, Qāyṭbāy then attempted to control the crowds at his door by ordering that his court would only hear appeals against the decisions of lower magistrates.<sup>93</sup> The increasing demand for litigation to be brought before the royal court was recognized by Sultan Qānṣūh, who demolished the old Dār al-‘Adl and erected a new, more spacious building in 916/1511.<sup>94</sup> Qānṣūh, interestingly, also repeated earlier attempts to limit the power of lower *siyāsah* magistrates. In 910/1505 he banned

<sup>87</sup>Ibid., 199.

<sup>88</sup>Ibid., 204; Ibn al-Ṣayrafī, *Inbā’ al-Ḥaṣr*, 379–82.

<sup>89</sup>Donald P. Little, “Communal Strife in Late Mamlūk Jerusalem,” *Islamic Law and Society* 6, no. 1 (1999): 69–96.

<sup>90</sup>Ibn al-Ṣayrafī, *Inbā’ al-Ḥaṣr*, 153–56.

<sup>91</sup>Fuess, “Zulm,” 127, citing Ibn Taghrībirdī, *Nujūm*, 7:745.

<sup>92</sup>Petry, *Protectors*, 151–55; Ibn al-Ṣayrafī, *Inbā’ al-Ḥaṣr*, 391.

<sup>93</sup>Ibn al-Ṣayrafī, *Inbā’ al-Ḥaṣr*, 401.

<sup>94</sup>Petry, *Protectors*, 205.

all trials except those conducted according to the shari‘ah, and he did so again in 919/1513–14, after an outbreak of the plague. Predictably, the bans failed, as the *siyāsah* magistrates argued that ordinary litigants had no other way of securing their rights.<sup>95</sup>

In criminal cases Qāyṭbāy and Qānṣūh applied very severe punishments, often beyond the Quranic punishments (*ḥudūd*) of the shari‘ah.<sup>96</sup> Qānṣūh applied torture to a Jewish merchant, and refused to accept his conversion to Islam, in a display of royal, effective justice during one of his final public sessions on the racecourse (*mayḍān*).<sup>97</sup> Thieves were regularly condemned to death after suffering corporal punishment.<sup>98</sup> But a range of other public punishments were used. A slave who was convicted of stealing was beaten and then led by an earring in the nose like an animal.<sup>99</sup> The goriest public processions were reserved for Bedouin chiefs and highway robbers, who were marched through town after being amputated and blinded.<sup>100</sup> Female criminals were also led through town in humiliating processions, apparently an unprecedented form of punishment for women.<sup>101</sup> A survey of half a dozen cases of theft and forgery brought before the sultans found a variety of punishments, including amputation, public procession with bare heads, and jail sentences. There was no apparent codification, but, given that the offences are not clearly specified, this was not necessarily arbitrary justice.<sup>102</sup>

The severity of punishment in criminal cases, coupled with an active interpretation of the shari‘ah against the views of the legal practitioners, led to an outright conflict between the sultan and qadis during the final years of the sultanate. In this famous case, dated 919/1513, a Cairene religious scholar came home to find his wife in bed with another man, who was, incidentally, a deputy qadi.<sup>103</sup> The

<sup>95</sup> Irwin, “Privatization of Justice,” 69; Fuess, “Zulm,” 141; Ibn Iyās, *Badā‘i‘ al-Zuhūr fī Waqā‘i‘ al-Duhūr* (Istanbul, 1931), 4:76, 312, 230.

<sup>96</sup> Bernadette Martel-Thoumian, “Pouvoir et justice sous les derniers sultans circassiens (872–922/1468–1516),” 462.

<sup>97</sup> Fuess, “Zulm,” 128, citing Ibn Iyās, *Badā‘i‘*, 4:481. For another example of the direct intervention of Qānṣūh in a criminal case in 1515, see Carl F. Petry, “Disruptive ‘Others’ as Depicted in Chronicles of the Late Mamlūk Period,” in *The Historiography of Islamic Egypt (c. 950–1800)*, ed. H. Kennedy (Leiden, 2001), 183.

<sup>98</sup> Bernadette Martel-Thoumian, “Voleurs et assassins à Damas et au Caire (fin IXe/XVe–début Xe/XVIIe siècle),” *Annales islamologiques/Hawāliyat Islāmīyah* 35, no. 1 (2001): 193–240, esp. 235–39.

<sup>99</sup> Martel-Thoumian, “Pouvoir et justice,” 464ff.

<sup>100</sup> *Ibid.*, 465–66.

<sup>101</sup> *Ibid.*, 467. See Ibn Iyās, *Badā‘i‘*, 3:338, 4:72.

<sup>102</sup> Martel-Thoumian, “Pouvoir et justice,” 457–58.

<sup>103</sup> The following account is based on Ibn Iyās, *Badā‘i‘*, 4:340–50. A short version is given by the Syrian historian Ibn al-Ḥimṣī, *Hawādith al-Zamān wa-Wafayāt al-Shuyūkh wa-al-Aqrān* (Sayda, 1999), 2:252. See also the summary in Petry, *Protectors*, 149–51; Fuess, “Zulm,” 133; and in Rapo-

husband complained to the court of the chamberlain, and the latter gave orders that the two adulterers should be beaten severely, fined, and led through the city on donkeys, facing backwards. Sultan Qānṣūh, however, was dissatisfied with the leniency of the punishment. He blamed the qadis for appointing fornicating deputies, and demanded that the adulterers be punished in the way prescribed by Islamic law, i.e., by stoning. It was an unusual order; no stoning had taken place for many years, and apparently never during Qānṣūh's long years in power. But, while the sultan, representing secular authority, was pushing for an Islamic punishment, several jurists issued a *fatwá* against a death sentence, arguing that the fornicator had in the meantime retracted his confession. In an overt struggle over the right to interpret the law of the land, the jurists argued that the sultan was bound to act according to the Islamic law of evidence; execution would be a criminal offence, and the sultan liable for the blood money. At this point the sultan told them off as senseless fools, and dismissed all four chief qadis, paralyzing all legal and economic activity in Cairo for three days. He ordered that the two lovers be hanged, facing each other at the gate to the house of one of the jurists who objected to the death sentence. Their bodies remained on the gallows for two days, until the sultan gave permission to bury them.

## VI

The final years of the Mamluk Sultanate witnessed a direct competition over the interpretation of the shari'ah between the sultan and the jurists. It was the culmination of a continuous rise in the state's control over the legal system, which started with the appointment of the four chief qadis by Baybars in 1265. During this early period of Mamluk rule, the quadruple shari'ah system allowed the state, in co-operation with the qadis, to pick and choose from the doctrines of the legal schools in order to promote social objectives. However, by the middle of the fourteenth century, the jurisdiction of the *siyāsah* magistrates, and specifically the chamberlain, was enhanced to include the redemption of debts, often by torture, and certain categories of matrimonial disputes. The expansion of *siyāsah* jurisdiction was designed to offer legal solutions that went beyond the doctrines of the Sunni schools of law. By and large, *siyāsah* justice was perceived as a necessary complement to the shari'ah, as it plugged loopholes in the schools' doctrines. *Siyāsah* magistrates believed that their justice was a necessary prerequisite for the implementation of the shari'ah, and not in opposition to it. This expansion in *siyāsah* jurisdiction, particularly in relation to the redemption of debts, bears

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port, "Women and Gender in Mamluk Society: An Overview," *Mamlūk Studies Review* 11, no. 2 (2007): 1–47.

striking similarity to the expansion of the jurisdiction of the English chancery in these same decades.<sup>104</sup>

The expanding role of the sultan in the administration of justice manifested itself in the increasing size and importance of Dār al-ʿAdl, an Ayyubid innovation which became a distinctly Mamluk symbol of sovereignty. The first Mamluk hall of justice was built by Baybars in 1262, and subsequent ones were both larger and closer to the Cairene urban population which they served. In the second half of the fourteenth century the institution also acquired its independent legal advisors, the *muftīs* of Dār al-ʿAdl. During the final decades of the Sultanate, Qāyṭbāy and Qānṣūh went further than any of their predecessors in centralizing the administration of law in their own hands, and often questioned the interpretation of the shariʿah by their qadis. In these final years the tension between the *siyāsah*, grounded in notions of equity but open to arbitrary implementation, and the formalistic and ineffective shariʿah, came to a head. It is only the Ottomans who would resolve this tension by enforcing a unified *kanun* based on the shariʿah.

The implications of this historical approach to the legal history of the Mamluk Sultanate are far-reaching, not only for the Sultanate itself, but for the entire narrative of the history of Islamic law. Wael Hallaq recently argued that the ruler’s intervention in the legal sphere was minimal, limited to administrative regulation that mostly pertained to the regime’s machinery of government. Thus, according to Hallaq, the civilian population was subject to the shariʿah, while the government’s servants were subject to a more coercive code of the sultan; a dual system, where the rulers were subject to a different law from the ruled.<sup>105</sup> However, as we have seen, the evidence of the Mamluk period shows otherwise. There is ample evidence that the Mamluk *ḥājib* and other military officers sat in justice over all segments of the urban population from the middle of the fourteenth century until the demise of the Mamluk dynasty. There was no dual system of justice, one for the elite and one for the commoners. In fact, such a dual system would have impinged on the overarching superiority of the shariʿah, which is shown by Hallaq to be the hallmark of Islamic societies. The *siyāsah* of the sultans and the amirs was necessary for the continuous application of shariʿah norms; the expansion of the *siyāsah* jurisdiction set out to bolster the shariʿah rather than defeat it.

This fits with a much wider pattern in Muslim societies of the late Middle Ages and the Early Modern period. As said above, the Ottoman *kanun* added to

<sup>104</sup>Robert C. Palmer, *English Law in the Age of the Black Death, 1348–1381: A Transformation of Governance and Law* (Chapel Hill, NC, 1993).

<sup>105</sup>Hallaq relies on secondary literature regarding the legal history of the Mamluk Sultanate, and gets some of the facts wrong. In his discussion of the Mamluk *siyāsah* court he claims that the Mamluk *ḥājib* did not have any jurisdiction over the civilian population (*Shariʿa*, 201), save rare exceptions at the end of the thirteenth century (*ibid.*, 209).

the religious law in matters relating to public order, taxation, usury, and land tenure. Rather than viewing government intervention as an exception, it seems that, at least from the middle of the fourteenth century, rulers intervened quite heavily in legislating, modifying, and applying the shari‘ah. We should forsake the long-held paradigm that views the state as essentially external to Islamic law, a paradigm that makes no sense at all for legal historians of other civilizations.<sup>106</sup> Rather, the evidence of the Mamluk legal system—the most highly developed system of Islamic law in the Middle Ages—shows that the *siyāsah* of the state was not only an integral and legitimate element of the shari‘ah, but also an increasingly central one.

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<sup>106</sup>Miriam Hoexter, “*Qāḍī, Muftī* and Ruler: Their Roles in the Development of Islamic Law,” in *Law, Custom, and Statute in the Muslim World: Studies in Honor of Aharon Layish*, ed. Ron Shaham (Leiden, 2006), 67–86; Ido Shahaar, “Legal Pluralism and the Study of Shari‘a Courts,” *Islamic Law and Society* 15, no. 1 (2008): 112–41.