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The Hanafi View of Siyasa and Sharia between Idealism and Realism: Al-Hasiri's Conception of Temporal and Religious Politics: (Siyasa ad-diniyya al-'uzma and siyasa al-hissiyya al-'uzma)

İdealizm ile Gerçekçilik Arasında Hanefî Siyaset ve Şeriat Görüşü: Hasîrî'nin Hissî ve Dinî Siyaset Anlayışı: (Siyasa ad-diniyye al-'uzma ve siyasa al-hissiyye al-'uzma)

Mürteza Bedir[1]

[1]**Corresponding author/Sorumlu yazar:** **Mürteza Bedir (Prof. Dr.),** Istanbul University Faculty of Theology, Department of Islamic Law, Istanbul, Turkey
E-mail: mbedir@istanbul.edu.tr
ORCID: 0000-0003-4692-5781

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ABSTRACT

Politics or siyasa as used in classical legal terminology has multiple senses. First, siyasa was understood by the Hanafi and other jurists as an aggravated law (shar' mughallaz), usually used in the context of punishment that requires a stronger stance. However, it is well known that this usage was not the only one; in another usage the word denotes rulings issued by the sovereign and his official representatives for the practice of governance or statecraft. From the second use of this term stems yet another, third meaning. This is the more familiar usage in terms of politics more generally or political theory. The use of the term in this sense had already been adopted by al-Farabi and others when translating Greek writings on political theory. It can be argued that ahkam as-sultaniyya or as-siyasa ash-shar'iyya-type works combine three senses of this term. The Hanafi jurists kept the word siyasa to mean a heavy punishment to be inflicted by the ruler, and they were not greatly interested in developing a political theory. The very absence of political theory in this school seems to be significant, although they naturally had ideas on justice ('adala) and criticized the rulers on the basis of them. One rare mention of siyasa as politics or political philosophy in the Hanafi legal tradition in the classical period is in one of the authoritative fatawa works of this school: al-Havi of al-Hasiri. The work of Hasiri is very insightful into Hanafi political theory. Hasiri is an exception because his work strangely openly talks about siyasa. Siyasa is legitimized through a state-of-nature/survival argument, necessary in itself.

Keywords: Siyasa, sharia, al-hasiri, al-havi of al-hasiri

ÖZ

Klasik hukuk terminolojisinde siyaset kelimesinin birden çok anlamı vardır. Siyaset, Hanefi ve diğer mezhep hukukçuları tarafından, cezai konularda daha sağlam bir duruş gerektiren ağırlaştırılmış bir kanun (şer'-i mugallaz)

olarak anlaşılmıştır. Bu mananın yanında hükümdar ve onun resmî temsilcileri tarafından yapılan yönetişimi veya devlet idaresi uygulaması için verilen kararları ifade eden bir başka anlamı da vardır. Bir üçüncü anlamıda politikadır ki bu anlam siyaset teorisi açısından daha tanıdık kullanımdır. Fârâbî ve diğerleri, bu kelimeyi bu anlamıyla, siyaset teorisi üzerine Yunan metinlerini çevirirken zaten kullanmışlardı. el-Ahkâmü's-Sultâniyye veya Siyâset-i Şerʿiyye tipi eserlerde bu terimin üç anlamının toplandığı söylenebilir. Hanefî hukukçular ise bir siyaset teorisi geliştirmekle pek ilgilenmemişlerdir. Tabii olarak adalet üzerine fikirlere sahip olmalarına ve yöneticileri bu temelde eleştirmelerine rağmen Hanefî mezhebinde siyaset teorisinin yokluğu önem arz etmektedir. Hasîrî'nin el-Hâvî isimli eseri klasik dönem Hanefî hukuk geleneğinde siyaset ya da siyaset felsefesinden bahseden önemli bir fetvâ eseridir. Hasîrî'nin çalışması Hanefî siyaset teorisini çok iyi yansıtır, bu bakımdan bir istisnadır. Siyaset, doğa durumu/hayatta kalma argümanı üzerinden meşruiyet kazanmış ve gerekliliği kabul edilmiştir.

Anahtar Kelimeler: Siyaset, şeriat, hasîrî, hâvî

Meanings of Siyasa in Classical Legal Literature

In the title of this essay, the words "temporal" and "religious" are used to describe another term that also deserves some explanation. Politics or *siyasa* as used in classical legal terminology has multiple senses. First, siyasa was understood by the Hanafi and other jurists as an aggravated law (*shar' mughallaz*), usually used in the context of punishment that requires a stronger stance:[1] However, as is well known, this usage was not the only one; in another usage, the word denotes rulings issued by the sovereign and his official representatives for the practice of governance or statecraft. Al-Maqrizi (d. 845/1442), a Mamluk historian and scholar, was probably the first person who defined *siyasa* in this second sense. There he defined *siyasa* as a type of statute or as a kind of ruling: "siyasa is a *qanun* promulgated to observe etiquette, interests, and regulation of properties (*al-qanun al-mawdu' li-ri'aya al-adab, wa'l-masalih wa'n-tizam al-amwal*)".[2]

It is not clear which of the two meanings came first. The classical texts use both of them. In the context of penal law, most jurists typically used the word *siyasa* in the section of *ta'zir,* discretionary punishment. The jurists debated whether *siyasa* is synonymous with the word *ta'zir*. The Hanafi jurists used them interchangeably, even Ibn Nujaym and Ibn 'Abidin expressly stated that they are synonyms,[3] though there seem to be nuances between them. For instance, while *ta'zir* refers to any punishment falling outside the *hadd* and *qisas* and therefore left to the discretion of the ruler, *siyasa* usually denotes severe *ta'zir* punishments executable only by the imam.[4] Whenever jurists talk about aggravation in punishment they use *siyasa* while *ta'zir* usually refers simply to punishment outside the specified punishments irrespective of whether it is heavy or not.

Ibn Nujaym, a sixteenth-century Egyptian Hanafi jurist, defined *siyasa* as "an act of an official/judge (al-hakim) based on a benefit he sees, even though there is no particular proof about that action".[5] They mark the siyasa judgment by claiming "the imam does it"; they do not say "the judge does it". From this, it is apparent that the judge has no right to issue ruling based on siyasa. This usage of Ibn Nujaym seems to combine two meanings of this term found in Islamic literature, namely the legal use of this term in the sense of aggravated punishment and the general use in the sense of statecraft.

In fact, the second meaning of siyasa is related to the former meaning of the ruler's discretionary power to inflict a heavy punishment. It was probably assumed that the right

1 Abu'l-Hasan Ali b. Khalil Al-Tarablusi, *Mu'in al-hukkam fi ma yataraddad bayn al-khasmayn min al-ahkam* (Cairo: Bulaq, 1300), 164.

2 Taqiy al-din Ahmad b. 'Ali b. 'Abd al-Kadir Al-Maqrizi, *al-Mawa'iz wa'l-i'tibar fi zikri'l-khitat wa'l-athar*, ed. Muḥammad Zaynahum and Madīḥah al-Sharqāwī (Cairo: Maktabah al-Madbulī, 1998), 3/ 82.

3 Muhammad b. Amin Ibn 'Abidin, *Hashiyah Radd al-muhtar 'ala al-Durr al-mukhtar sharh Tanwir al-absar*, ed. 'Adil Ahmad 'Abd al-Mawjud and 'Ali Muhammed (Riyad: Dar 'alam al-kutub, 1423/2003), 6/19-20.

4 Zayn al-din b. Ibrahim Ibn Nujaym, *al-Bahr al-ra'iq sharh Kanz el-daka'iq*, ed. Zakariyya al-'Umayrat (Beirut: Dar al-kutub al-'ilmiyyah, 1418/1997), 5/ 27.

5 Ibn Nujaym, *al-Bahr al-ra'iq*, 5/18.

of the ruler to inflict punishment was not so different from his other powers and perhaps exemplifies the practice of statecraft.

From the second use of this term stems yet another, third meaning. This is the more familiar usage in terms of politics more generally or political theory. Al-Farabi and others had already used the term in this sense when translating Greek writings on political theory.[6] It can be argued that *ahkam as-sultaniyya* or *as-siyasa ash-shar'iyya*-type works combine three senses of this term.

Al-Ahkam as-Sultaniyya, *as-Siyasa ash-shar'iyya*, *al-Kharaj*, and the other books like them, however, seem to fall under the category of advice literature rather than that of law, even though they were penned by jurists such as al-Mawardi, Ibn Taymiyya and Abu Yusuf, because they address rulers rather than judges. In other words, they were not the type of legal manuals used in the court of law like other fiqh texts, though as advice literature, like the *siyasatnamas*, they may have had some relevance.

Siyasa in Hanafi Legal Literature

In the classical Hanafi legal literature, apart from *K. Kharaj* of Abu Yusuf, there seems to be no independent/separate works focusing on *siyasa* in the first and second senses, let alone the third sense. Al-Tarsusi (d. 758/1357) who lived and worked as chief judge in the Mamluk era was perhaps the first one who dealt with the issue in his monograph, *Tuhfa at-Turk*,[7] which seems to have been prompted by the interest of Mamluk authors in *siyasa*. In Ottoman times a translation of Ibn Taymiyya's work was made by Aşık Çelebi;[8] Dede Söngi's *Siyasetname (as-Siyasah al-Shar'iyyah)* and Çivizade's *ar-Risalah fi at-Ta'zir* and many similar works confined themselves to the strictly legal usage of *siyasa,* namely, discretionary power of aggravating punishments. Other famous Hanafi jurists such as al-Sarakhsi, al-Pazdawi, Ibn al-Humam, Ibn an-Nujaym and the likes, in their legal compendiums, never talked about *siyasa* in the general sense i.e. *siyasa* as politics/political philosophy, or the *siyasa*/discretionary power of the Sultan outside penal law. However Ibn Nujaym, who wrote in post-Mamluk times and therefore largely reflected Mamluk literature in this respect, gave the above definition, which seems to cover realms beyond penal law; however he was still far from talking about *siyasa* as politics, but was only talking about *siyasa* as the discretionary power of the ruler. Ibn 'Abidin seems to be the only pre-modern jurist who had a small section in his famous *Hashiyah* on the topic of *imamah*, or the issues of political theory usually discussed in theological works.[9]

6 See for example, Abu Nasr al-Farabi*, Ihsa' al-'ulum*, ed. Ali Bu Malham (Beirut: Dar wa Maktabah al-Hilal, 1996), 80.

7 Najm al-din Ibrahim b. Ali al-Tarsusi, *Tuhfah al-Turk fi ma yajib an yu'mal fi'l-mulk*, ed. Ridwan al-Sayyid (Beiruth: Dar al-Tali'ah, 1413/1992).

8 See for its transliterated version, Aşık Çelebi, *Mi'racü'l-eyale: Aşık Çelebi'nin Siyasetnamesi*, prepared by M. Usame Onuş, Abdurrahman Bulut and Ahmet Çelik (Istanbul: Türkiye Yazma Eserler Kurumu Başkanlığı Yayınları, 2018).

9 In fact Haskafi the author of the base text induced him to open that section; see Ibn 'Abidin, *Hashiyah*, 2/ 276.

Throughout their long history the Hanafi jurists kept the word *siyasa* to mean heavy punishment to be inflicted by the ruler and were not very interested in developing a political theory. The very absence of political theory in this school seems to be significant, although they naturally had ideas on justice (‘*adala*) and criticized the rulers on the basis of them. Sarakhsi for example was jailed for over ten years for his criticism of a ruler.[10] Besides, the theological school of Maturidis, which was exclusively Hanafi, like its Ash‘arite counterpart, dealt with political theory to the extent we see in their theological tradition. The standard kalam works due to their concern for theory and because of the political claims of Shi‘a, Khawarij and Mu‘tazila usually devoted a separate space to the issue of imamah/khilafah where several political theories were discussed.[11] To refute Shi’ite claims of a divinely ordained imam the Sunnis opted for the choice (*ikhtiyar*) of the community as a means of appointing the highest ruler of the community. They do not consider the imam to be a person who is responsible for promulgating religion. However the Sunni theory accepts that the Caliph is the heir of the Prophet, though they then confine this to the True Four Caliphs, whereas the Caliphs after them are nominal Caliphs who were devoid of many fundamental tenets of the true Caliphate.[12] The Maturidis largely agreed with the Sunni theory of Khilafah including the condition of being from the tribe of Quraish.[13] Like the majority of Muslim theologians they insist that the existence of a ruler is of necessity based on *shar‘* (revelation) rather than ‘*aql* (reason). In other words they saw the highest imam as indispensable to the extent that no one is allowed to depose him even if he is not just or devoid of other conditions.[14] The concept of necessity seems to force them to accept the legitimacy of any ruler irrespective of his qualifications, as long as he upholds the Shari‘ah; thus, for example, abandoning the conditions of *ijtihad*, *taqwa*, or uprightness (*‘adala*) and so on, was justified by necessity.[15] Even for Sadr ash-Shari‘ah (d. 747/1347) the condition of an imam’s being of a Quraishite descent was abandoned because of necessity, probably because the political situation after the Ababsids did not leave space for a political leader of Quraish descent.[16] Maturidi already in early fourth/tenth century tried to capture the reason behind the condition of being from the Quraish-tribe by saying that what was appropriate according to Islamic principles is that the one who has the best qualities according to Islamic standards should be the head of the community.[17] But the hadith

10 See Muhammed Hamidullah, “Serahsi”, *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2009), 36/ 544-547.

11 See for example, Ali b. Muhammad al-Sayyid al-Sharif al-Jurjani, *Sharh al-Mawaqif*, ed. Mahmud ‘Umar al-Dimyati (Beirut: Dar al-kutub al-‘ilmiyyah, 1419/1998), 8/ 276; Mas‘ud b. ‘Umar Sa‘d al-din al-Taftazani, *Sharh al-Maqasid*, ed. ‘Abd al-Rahman ‘Umayrah (Beiruth: ‘Alam al-kutub, 1419/1998), 5/ 232.

12 ‘Ubayd Allah ‘Umar b. Mas‘ud Sadr al-Shari‘ah al-Thani, *Sharh Ta‘dil al-‘ulum*, (Leipzig: Leipzig University Library, Islamic Manuscripts, Cod. Arab. 043), 207a.

13 Sadr al-Shari‘ah, *Sharh Ta‘dil al-‘ulum* (Islamic Manuscripts, Cod. Arab. 043), 207a.

14 Sadr al-Shari‘ah, *Sharh Ta‘dil al-‘ulum*, (Islamic Manuscripts, Cod. Arab. 043), 206b.

15 Sadr al-Shari‘ah, *Sharh Ta‘dil al-‘ulum*, (Islamic Manuscripts, Cod. Arab. 043), 207a.

16 Sadr al-Shari‘ah, *Sharh Ta‘dil al-‘ulum*, (Islamic Manuscripts, Cod. Arab. 043), 207a.

17

and subsequent consensus of the community established the Quraish condition as a shari'ah rule. He argued that there must be rationale/explanation behind this rule, which, according to him, is that the Quraish was selected by God due to the inherent evil of politics; only certain selected people might be able to overcome the temptations of politics and to carry this heavy burden with responsibility.[18]

Theological views, as we all know, led to the emergence of a quasi-legal literature on public law; the reason for this development is explained by famous 14th century theologian-jurist at-Taftazani (d. 792/1390), who in his *Sharh al-Maqasid*, a very influential philosophy-theology work, stated that the issue of imamah is not in fact a part of the science of kalam, as it is not just a matter of belief/creed but of actions (*'amal*), which is the subject matter of fiqh.[19]

Siyasa in the works of al-Hasiri

The Hanafi approach to extra shari'ah rules did not produce the concept of *as-siyasa ash-shar'iyya or ahkam as-sultaniyya*, although it shared some of the ideas proposing a theory of the Caliphate in the Ash'ari tradition, especially when they were related to the boundaries of Sunnism. Apart from that, they seemed to have regarded talking about the laws of the sultan as irrelevant as far as fiqh is concerned. One rare mention of siyasa as politics or political philosophy in the Hanafi legal tradition in the classical period is in one of the authoritative fatawa works of this school: *al-Havi* of al-Hasiri. Al-Hasiri probably lived in the first half of the 6th/12th century (as he quotes the Fatawa of his teacher Najm ad-din 'Umar an-Nasafi died in 537/1142.[20] In some of the biographical notes found in the margins of the copies of his *al-Hawi*, it is said that he was a pupil of Sarakhsi and died in the year 500/1106-7, which seems incorrect, given the Nasafi quotations).

Al-Hasiri's *Fatawa* falls within the genre of *waqi'at*, a literature aiming to collect the opinions of the *mashayikh* (later authorities of law) in order to develop and expand the school doctrine by bringing new elements into it as well as to facilitate training of the future-muftis.[21] Unlike the usual fatawa or waqi'at texts, he, in his introduction, gives interesting information on the roles of the jurists, judges and rulers, which enables us to see the perception by the 12th century Bukharan Hanafi jurists of politics and law. Since his primary aim in this introduction is to illustrate the legal education of a mufti-mujtahid he also gives details of legal education of the time. His bias for the mufti is obvious as he places him at the center of his view of social/political order.[22]

18 Abu Mansur Muhammad b. Muhammad Al-Maturidi, *Ta'wilat al-Qur'an,* ed. Murteza Bedir, (Istanbul: Mizan Yayınları, 2007), 13/ 305.

19 Sa'd al-din al-Taftazani, *Sharh al-Maqasid*, 5/ 232-233.

20 Mahmud b. Ibrahim b. Anush al-Bukhari Al-Hasiri, *al-Hawi fi'l-Fatawa*, (Istanbul: Suleymaniye Library, Hekimoğlu Collection, no: 402), 2b.

21 See on *Waqi'at* opinions and literature, Murteza Bedir, *Buhara Hukuk Okulu: 10.-13. Yüzyıllar Orta Asya Vakıf Hukuku Bağlamında Bir İnceleme* (*Bukharan Law School: An Analysis on 10th-13th Centuries Central Asian Waqf Law*) (İstanbul: İSAM Yayınları, 2014), esp. Chapter 2.

22 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402),1b-2a.

Before embarking upon two types of great experiential politics and great religious politics, Hasiri provides a theoretical background for his distinction of two kinds of siyasa. According to him, the most basic need of a human being is survival (*baqa'*), which depends on food, clothes and shelter. The survival of the human race is in turn through procreation. Survival can only be realized through verbal dispositions and acts, which are called *al-mu'amalat*, that is through law; similarly the survival in the hereafter can be obtained only through words and deeds, which are called *'Ibadat* (worship). However, since it is hardly possible for a single person to get hold of and realize all means (asbab) of these two situations, the whole of humanity must undertake attainment of all means; thus human needs are intertwined and complicated, a situation which requires the existence of exchange and interaction among mankind. This in turn increases the need for the actions of taking and giving away, pulling back and forth, from which confrontations, fighting and oppositions stem. Hasiri interprets this as disintegration and degeneration in religion (*fasad fi'd-din*), because it leads to the interruption of the means of survival (*asbab al-baqa'*) which he already identified as the ultimate wisdom coming from Allah.[23]

It is therefore necessary for mankind to have a checker/preventer to stop degeneration and to guide humanity to uprightness and rectitude (*as-salah*), which is nothing but the God-given faculty of reason ('aql). He says:

"Human beings are blind and the rational faculty is their guiding stick. However, though many blind people use their stick with their right or left hand, they do not reach the place they want and go astray, not because they do not use the stick but because they are not careful enough due to the strength of their desires; so the rational faculty leads only a few people to uprightness while the majority go astray."[24]

Thus Hasiri first places pure law (both *'ibadat* and *mu'amalat*) in the context of the necessity of human survival, then grounds practical law in a social setting where mankind needs checks and balances which are in principle provided by rational faculty. This is in line with the Hanafi understanding of law. Though theoretically it is based on rational premises, in practice it must be based on the norms promulgated by shari'ah. However, since common people seldom use reason to combat personal weaknesses and temptations there is a further need to control people. The *siyasa* that is politics in the sense of ordering social life is therefore necessary. Here the ultimate criterion of *siyasa* comes from the prophetic foundation; God sent the prophets to hold the hands of the blind. He says:

"They brought the straight religion and the upright way of truth with promises and threats (*al-wa'd wa'l-wa'id*). **This is the great religious politics (*as-siyasa al-'uzma ad-diniyya*);** the distinguished people (*al-khawass*) accepted it because they recognized the truth in it. On the other hand, the common people, due to their concern for the immediate world and seeing the hereafter as too remote to be real, ignored and disregarded it. Consequently, the Subduer (*al-*

23 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402),1b.
24 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402),1b.

Qahhar) brought forth the kings with swords, whips and prisons. This is **the great experiential politics (*as-siyasa al-'uzma al-hissiyya*)**, thereby the common people were frightened, restrained and subdued; so they sought the more lenient politics and hence preferred what was brought by the master of shari'ah and dreaded what was brought by kings and sultans."[25]

This elitist reading of *siyasa* seems to be in line with the traditional view of consensus being that of not the whole ummah but of scholars. What is interesting here is that in Hasiri's view Prophetic laws are more lenient and just while the sultanic laws are harsh, thus causing people to lean towards the prophetic laws and seek refuge in the shari'ah. Whether this is the view of ordinary people is not our concern here; the distinction between prophetic and sultanic rules/*siyasa*/politics seen by Hasiri resembles the rule of law. The juristic perception of *siyasa* throughout Islamic history regarded sultanic laws outside the proper law, here prophetic law, and usually associated it with the breach of the rule of law.

Hasiri completes his picture by giving the **judges** a middle role between these two types of *siyasa*. He says: "they should look with one eye to the religious politics and make it prevail and with their other eye to experiential politics and explain it." This balance, according to Hasiri, will make things right. In his words: "thus affairs get upright, righteousness becomes visible and degeneration/disintegration fade away".[26]

Since the main purpose of Hasiri in this book was to define and elaborate the role of the **mufti,** he concludes his political theory by highlighting what he calls "the greatest principle (*al-asl al-a'zam*) of rectifying the affairs": This is the Master of Religion, namely God, then His Prophet. The Master of Religion appointed agents to represent Himself, i.e. the **muftis** who made themselves ready to know what the Master of Religion spoke and did; they discharged themselves of everything in order to look after what they were commanded to do and to avoid what was prohibited. The greatest principle brings the whole political theory within the sphere of Religion but unlike the theological accounts which regard the Caliph/Imam as the successor of the Prophet, Hasiri identifies 'Ulema to be the representative of the Master of Religion. It should be noted that in the Hanafi tradition beginning with Abu Hanifah almost all the legal authorities, the great jurists, including al-Hasiri were called Imam, and some were even called the Sun of the Imams (*Shams al-a'immah*) or were given other venerated names, almost all of which carried the name 'al-imam'.[27] It seems that the Hanafi jurists saw not the Caliphs but the fuqaha' as the real successors of the Prophet. The Caliphs once enjoyed being the true successors as in the case of the first Caliphs and in the case of 'Umar b. 'Abd al-'aziz. But the more we are separated from the origins of Islam the more the jurists gained the status of Imam at the expense of the rulers.

25 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402), 1b.

26 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402), 1b.

27 It is no coincidance that all the founding figures of the schools of law were known as *al-a'imma al-arba'a* (the four leaders); the Hanafi school knew the founding figures of the school as '*al-aimma al-thalatha* (the three leaders)'.

That Mufti as a successor does not mean that he is the ultimate authority in politics; that is why al-Hasiri felt it necessary to curb that implication by stressing the fact that the Master of Religion enjoined upon the muftis to obey and follow the kings for the sake of politics (*sahib ad-din amarahum bi't-tiba' al-muluk siyasatan*). At the same time, he ordered the kings to follow their fatwa for the sake of Religion, because the kings might indulge in worldly desires and are prone to fall into temptation. As a representative or authorized agent of the kings the Master of Religion also instructed the judges not to close their eyes to fatwa in order to reach the desired truth. According to al-Hasiri, theoretically speaking the mufti occupies the highest status in normative order because he has a firm footing in Sharia'ah.[28] Thus, despite the separation between temporal and religious politics the ultimate authority remains in the hands of the representatives of the Prophet, namely the muftis or the ulema.

Privatization of Islamic Law

Apart from the limited Maturidi interest and partial engagements of the jurists, like al-Hasiri, the Hanafis did not write a single piece on political theory in the classical period let alone *al-Ahkam as-sultaniyya* sort of texts. The reason behind this disinterest can be explained by the nature of fiqh, as reflected by furu' al-fiqh. Against the prevailing opinion among the Islamists that shari'ah is all-embracing, that is, it covers all aspects of law, it is my contention in this paper that shari'ah in the traditional fiqhi sense is largely limited to civil or private law while the law of state or public law largely remained outside the direct interest of the fuqaha'. With Abu Yusuf's appointment to the office of the chief of the judges (*qadi al-qudat*) it was tacitly approved by the 'Ulema that while public legal acts can be undertaken by the ruler, the law in the sense of fiqh should be decided by the fuqaha'. It was related that when Abu Yusuf was appointed as a chief judge he commissioned his best student Muhammad b. Hasan ash-Shaybani to write a handbook, hence he wrote *al-Jami' as-saghir*. Afterwards Abu Yusuf always carried it with him despite his eminence. The great Hanafi masters then made this manual a requirement for the appointment of judges.[29] This book was a summary of Shaybani's vast treatises later brought together under the title of *al-Asl* or *al-Mabsut*. This and other contemporary books were taken as a model for legal works by all the schools of law and hence the scope of fiqh was defined by them. When we look at the chapters of these treatises they usually consist of two broad categories: *'Ibadat* (one-fourth of the fiqh books) and *Mu'amalat* (three-fourth of it). The latter is then further divided into the following general headings:

1. Familial relations (family law) including wills and inheritance, which comprises one fourth of the fiqh books.
2. Daily transactions including the laws of obligations and property (almost one-fourth of the whole)

28 Al-Hasiri, *al-Hawi fi'l-Fatawa* (Hekimoğlu Collection, no: 402), 2a.

29 Haji Khalifa Katip Çelebi, *Kashf al-zunun 'an-asami al-kutub wa'l-funun*, ed. Şerefettin Yaltkaya and Kilisli Rıfat Bilge (Ankara: Milli Eğitim Bakanlığı, 1941),1/561-564.

3. Criminal law which covers retaliation (*qisas*) and hadd punishments with a slight reference to the discretionary power of the ruler to mete out punishments (*ta'zir*).
4. Law of procedure
5. Law of Nations including war and the status of non-Muslims in Muslim lands and land law. This and the previous two sections together comprise the remaining one-fourth of the fiqh books.

As can be seen, apart from the *'Ibadat* section which has little to do with the law in the strict sense, the fiqh works devote half of their space to two major topics, financial transactions and familial relations, and only one-third deals with what we call public law today. Even in this part not all the themes of public law are covered; for instance, there is no section in the fiqh books on constitutional and administrative laws, the area directly related to our topic of siyasa. Besides, as contemporary research has shown, these parts of the fiqh books were subject to administrative intervention more frequently than other parts. For instance, land law, penal law, and the law of wars as expounded by the jurists in these sections had been supplanted by administrative decrees, hence less developed when compared with the private law sections of the fiqh works, i.e. the sections on familial and financial obligations. Due to the limited coverage of Islamic penal law, the jurists left the punishment of most of the crimes to the discretion of the rulers. The hadd penalties too were almost rendered irrelevant in the history of Islamic law; for instance, the penal and land laws of Ottomans were largely governed by Qanun and the jurists had to concede this . In sum, the advancement of legal themes through the science of fiqh was largely confined to the private law sections of fiqh. Although some of the public law issues continued to be developed by the jurists, the rulers were entrusted to govern a major part of them.

The question of whether the Muslim jurists were forced by historical circumstances to limit themselves to private law or whether Islamic law from the beginning was already a civil law needs to be answered, but it is not our concern now. What matters for now is that without taking this issue on board, namely the distinction between the private and public law realms, one would not fully grasp the attitude of the fuqaha' to siyasa.

In Islamic legal discourse, two alternative approaches seemed to have emerged as far as the limit of the shari'a is concerned. On the one hand a group of scholars, especially the Shafi'i jurists, argued that siyasa is no different from the shariah.[30] The shari'ah as expounded by the fuqaha' represents the totality of law; the rulers have no right outside the shari'ah. This approach was best represented by an anecdote involving Nur ad-din az-Zangi and his Shafi'i master. According to Islamic procedural law, without having a proper trial and qadi judgment one cannot be punished; circumstantial evidence is not acceptable according to Islamic procedural rules. When in Zangid times in Northern Iraq public order was threatened

30 For a general overview of the term of siyasa and shari'a in the classical Islamic legal literature, see Ovamir Anjum, *Politics, Law and Community: The Taymiyyan Moment* (Cambridge: Cambridge University Press, 2012), esp. first and second chapters.

by the culprits/criminals, people came together and urged the respected scholar and teacher of Sultan Nur ad-din to write to the Sultan who was against the siyasa punishments, to get permission to apply to siyasa, namely heavy deterring punishments beyond shari'a limits. He hesitantly accepted and wrote to the Sultan arguing that if a crime were committed in a desert where no witnesses were present, what would happen? Is the culprit left to go free? Sultan answered by saying that in promulgating his laws God knows everything even the possibility of a crime in a desert.[31] Clearly, the aim of the Shafi'i scholars was to protect the rule of law and prevent the rulers from breaching the law in the name of siyasa. However, the other approach, represented by some other Shafi'is, Hanafis, Malikis, and Hanbalis, insisted that siyasa is a legitimate form of action since there is a vast area of law which was not covered by the law embodied in the fiqh texts, and therefore needed extra enactments through siyasa. Qarafi even argued that no school of law, not even the Shafi'is, rejected the possibility of the laws outside fiqh.[32] Many of the Shafi'i jurists, like al-Mawardi, al-Juwayni, already theorized a political theory opening the space for laws outside the shari'ah. Much has already been said about the motives of al-Mawardi and his successors, but one thing was certain, namely, he was talking outside the realm of proper fiqh. It seems that his intention was to fill the gap created by traditional fiqh especially in the public law sphere, though this "new" fiqh never reached the level of fiqh proper.

The proponents of siyasa then disagreed upon the definition of laws outside the fiqh, i.e. whether they are to be defined as laws of the shari'ah or not. Three jurists of the Hanbali school, Ibn al-'Aqil, Ibn Taymiyya, and Ibn al-Qayyim, and many of the post-classical jurists who followed their suit designated enactments outside the fiqh-reasoning as part of the shari'ah and called it *al-siyasah al-shar'iyyah*.[33] They identified two types of shari'ah, one positive and the other negative. The positive shari'ah consists of the rules embodied in the *furu' al-fiqh* of the schools of law which are based on fiqhi reasoning, while the negative shari'ah presents the rules of law enacted outside fiqh-reasoning. These are negative because their validity is not posited on the basis of fiqh reasoning but on their being concomitant with shari'a (*ma wafaqah al-shar'*);[34] in other words, these commonsensical rules are legitimated by their not being in conflict with the shari'ah.

Ibn al-Qayyim's manifesto in *I'lam al-muwaqqi'in* best represents this approach. He, after categorically rejecting the claims that *siyasa* is not a legitimate form of enactment in Islam, appealed to common sense and insisted that everything that brings about justice is part of shari'ah even if it is not based on fiqh-reasoning. He then proceeded to define more specifically

31 David Ayalon, "The Great Yasa of Chingiz Khan: A Re-examination (C2)", *Studia Islamica*, 38 (1973), 124-125.

32 Abu'l-Vafa Ibrahim b. Muhammad al-Ya'muri Ibn Farhun, *Tabsirah al-hukkam fi usul al-aqdiyah wa manahij al-ahkam*, ed. Jamal A. Marashli (Riyad: Dar 'alam al-kutub, 1423/2003), 2/125.

33 The term *al-siyasah al-sahr'iyyah* was first coined by *Ibn Taymiyya* in his famous book titled as such. For the concept and Ibn Taymiyya's book see, Ovamir Anjum, *Politics, Law and Community*.

34 Muhammad b. Abu Bakr Ibn al-Qayyim al-Jawziyyah, *al-Turuq al-hukmiyyah fi al-siyasah al-shar'iyyah*, ed. Na'if Ahmad al-Hamad (Makkah: Dar 'alam al-Fawa'id, 1428), 2/ 29.

the positive content of these extra-fiqh rules. Here he turns to fiqh/usul-al-fiqh reasoning by appealing to the totality of the shari'ah promulgated by the Prophet. According to him, no realm of law was left by the Prophet without laws, and the *as-siyasa ash-shar'iyya* is not in fact the rules enacted by the rulers but must be defined, as his teacher/mentor illustrated in his famous *as-Siyasa ash-shar'iyya*, by reference to the Qur'an and Sunnah.[35] So according to *as-siyasa ash-shar'iyya* theory, the laws outside the doctrines of the schools of law are part of shari'ah, not only because they are based on common sense but also because they are positively, albeit not entirely, supported by the Qur'an and Sunnah.

Many modern Islamists claim that Islamic Law includes siyasa (politics/public law). This claim first of all acknowledges the existence of siyasa and then it brings siyasa under the scrutiny of the Law. This combination is made possible by the work of some post-classical Hanbali jurists, such as Ibn Qayyim, who worked to bring siyasa under the control of shariah. They achieved this by arguing that political rulings based on practical reasoning (siyasa) are legitimate as long as they do not conflict with established rules based on fiqh-reasoning (shariah). This negative *as-siyasa ash-shariah* is legitimized by being based on 1) practical reason and 2) the Quran and Sunnah.

Here the important point to note is the tendency of Hanbali scholars to explicitly tame, disenchant, and make politics subject to an explicit normative critique (the Quran and Sunnah). The possibility of normative critique posited here are the requirements that-- 1) Siyasa be compatible with the Quran and Sunnah's understanding of justice and 2) Siyasa's compatibility/coexistence with Shariah proper.

This Hanbali tendency should be distinguished from Shaf'i jurists, such as Mawardi, who tried to deny the existence of siyasa altogether. Here the story of Nur al-din Zangi is instructive. Zangi's teacher and the siysatname literature produced by Shaf'i jurists tried to remove siyasa as a legitimate source of law.

However, both of these positions on the relationship between siyasa and shari'a are very different from those of the Hanafi jurists. For the vast majority of Hanafi legal history, jurists were careful to keep the law separate from siyasa. The law in the Hanafi sense was always seen as mostly a private affair and very few jurists even commented on public law or political philosophy. At the same time, the Hanafis acknowledged the existence of siyasa but saw it as being outside of their jurisdiction. This self-imposed privatized limitation, coupled with a sort of blank check for another type of siyasa ruling, indicates a very interesting political theory.

Here the work of Hasiri is very insightful into Hanafi political theory. Hasiri is an exception because, strangely, his work talks openly about siyasa. There he exposes a sort of realism inherent in the Hanafi school. Siyasa is legitimized through a state-of-nature/survival argument, necessary in itself. This realist understanding of siyasa can explain why Hanafi jurists did not think it important for them to control siyasah. It is not something that is known through the

35 On this see, Ovamir Anjum, *Politics, Law and Community.*

law, subject to normative critique like shariah. Rather it is a sort of balancing art coordinated between the mufti and the sultan. This approach is grounded in realism and survival.

APPENDIX

I translated the relevant part of the introduction of *al-Hawi*. I also included the facsimile copy of the Arabic original as well as the modern edited version of it.

Abu 'l-Mahamid Mahmud b. Ibrahim b. Anush al-Hasiri, *el-Hawi fi'l-fatawa*, Istanbul, Suleymaniye Library, Şehit Ali Paşa Collection, no: 1018:

Introduction:

The Master, the judge, the great imam, the lord of the judges, the sincere friend of the imams Abu 'l-Mahamid Mahmud b. Ibrahim b. Anush al-Hasiri said:

After presenting praise and eulogy to God and after praying for and saluting His Messenger:

There is nothing more precious than in indulging in the science of fiqh, due to the existence of the benefits of two worlds in it. The survival of a human being in this world depends upon food, clothing shelter, and accommodation. The survival of the human genus is through procreation (istilad). Normally this can be achieved only through the words and deeds (*aqwal and af'al*), which are called al-Mu'amalat (transactions). The desired promised survival in the abode of the hereafter can also be obtained only through words and deeds, which are called *'Ibadat* (worship).

However, it is hardly possible for a single person to grasp and to realize all means (asbab) of these two situations. On the contrary, the whole of humanity undertakes attainment of all means. This is because needs get intertwined and complicated, and taking and giving away, pulling back and forth and loosenings abound and increase, from which killings, beatings, and confrontations are derived. This is disintegration and degeneration in religion (fasad fi'd-din), because it leads to the interruption of the means of survival (asbab al-baqa') which is the ultimate wisdom coming from Allah. It is, therefore, necessary for mankind to have a preventer who will stop degeneration and a carrier who will carry them to uprightness and rectitude (as-salah). As a result, the Omniscient and Omni-knower, Who is Omnipotent, installed and placed in them the faculty of rationality ('aql), which is a preventer, a collector and a carrier. For human beings are blind and their rational faculty is their guiding stick. However, though many blind people use their stick with their right or left hand, they do not reach the place they want to go to and go astray, not because they do not use a stick but because they are not careful enough due to the strength of their desires; so the rational faculty leads only a few people to uprightness while the majority go astray.

Thus the One who has ultimate grace –the almighty- sent messengers and prophets (ar-rusul wa'l-anbiya') who are like the one holding the hand of the blind. They brought straight religion and the upright way of truth with promises and threats (al-wa'd wa'l-wa'id). **This is the great religious politics (as-siyasah al-'uzma ad-diniyyah);** the distinguished people

(*al-khawass*) accepted it because they recognized the truth in the promised thing as certainly coming. On the other hand, the common people, due to their concern for the immediate world and seeing the hereafter as too remote to be real, ignored and disregarded it. Consequently, the Subduer (al-Qahhar) brought forth the kings with swords, whips, and prisons. This is **the great perceptible politics (as-siyasah al-'uzma al-hissiyyah)**, thereby the common people were frightened, restrained, and subdued; so they sought the more lenient politics, hence preferred what was brought by the master of shari'ah and dreaded what was brought by kings and sultans.

Then the Merciful instituted **judges** who look with one eye to religious politics and make it clear and with another eye to sensory politics and explain it. Thus the affairs became upright, righteousness became visible and degeneration/disintegration faded away.

The greatest principle (*al-asl al-a'zam*) in rectifying these affairs is the Master of religion, who appointed agents to represent himself. These are the muftis who made themselves ready to know what the Master of religion spoke and did; they discharged themselves from everything in order to look after what they were commanded to do and to avoid what they were prohibited from doing.

Then the Master of religion enjoined upon them to obey and follow the kings for the sake of politics (*sahib ad-din amarahum bi't-tiba' al-muluk siyasatan*). He ordered the kings to follow their fatwa for the sake of religion because the kings are prone to indulge in worldly desires and follow their temptations. He instructed the qadi (judge) not to close his eye to a fatwa in order to reach the desired truth. Given this state of affairs, the mufti occupies the highest status by grasping truth with a firm hand.[36]

36 Referring to Qur'anic verse, 2/256: There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah is Hearer, Knower.

بسم الله الرحمن الرحيم
قال الشيخ القاضي الإمام الأجلّ عين القضاة صفيّ الأئمة أبو المحامد محمود بن إبراهيم بن آنوش الحصيري البخاري رحمه الله

وبعدَ الحمدِ والشُّكرِ لله تعالى والثناء عليه والصلاة على رسوله محمد والسلام عليه، فلا شيء أجلّ من الخوض في علم الفقه لما فيه من مصالح الدارين. لأن بقاء الآدميّ في الدنيا بالغذاء والملبوس والكِنّ والمَسْكَن، وبقاء جنسه بالاستيلاد. وذلك لا يحصل عادةً إلا بالأقوال والأفعال وهي المسماة بالمعاملات؛ والبقاء في دار الآخرة على ما يُراد لا يَحصُل أيضا وعداً إلا بالأقوال والأفعال وهي المسماة بالعبادات.

ولكن لا يكاد يتهيأ لِواحدٍ من بني آدم تَهيُّأ جميعِ أسباب الأمرين والقيام به، بل يقوم[37] كلّ الخلق بتحصيل كلّ الأسباب. فحينئذ يتشبك الحوائج ويكثر الأخذ والإعطاء والتجاذب والإرخاء. فينبعث منها التقاول والتضارب والتقاتل، وهو الفساد في الدين, لما فيه من الإفضاء إلى قطع أسباب البقاء الذي هو الحكمة البالغة من الله عز وجل. فلا بد لهم من مانعٍ يَمنعهم عن الفساد وحاملٍ يَحملهم على الصلاح. فرَكَّب العليمُ الخبير جلّت قدرته العقلَ فيهم فهو المانع الجامع الحامل. لأن الخلق عُميانٌ، والعقلَ عصاً لهم. لكن كم من أعمى أرسل العصا يمنة ويسرة وتجاوز المطلوب وتخطأ المرهوب، لا من جهة العصا، لكن لقلّة المبالاة بقوّة الهواء فصَلُح بالعقل الأقلُّ وتجاوز الأكثرُ.

فبعث اللطيف جلّ وعزّ الرُّسل والأنبياء الذين هم كآخذ اليد للعميان، وأتَوْا بالدّين القويم والصِّراط المستقيم مع الوعد والوعيد، **وهي السياسة العظمى الدينية.** فانقاد لهم الخواصّ لرؤيتهم الموعود حقاً آتياً وتغافل العوامّ لرؤيتهم العاجل قريباً والآجل بعيداً. وأخرج القهّارُ الملوكَ بالسيوف والسياط والمحابس. **وهي السياسة العظمى الحسية.**

ففزع العوامّ وتَحرّجوا وتَذلّلوا فطَلَبوا ما هو أخفّ سياسةً رغبةً منهم فيما أتَى به صاحب الشرع ورهبةً عما أتَى به الملوك والسلاطين. فوضع الرحيم القضاة لينظروا بإحدى عينَيْهم إلى السَياسة الدينيّة وأظهروها وبالأخرى إلى السياسة الحسيّة وبَيَّنوها. فاستقام الأمر وبدا الصلاح واضمحلّ الفساد.

فصار الأصل الأعظم في تسوية هذه الأمور صاحبُ الدين، فأناب لنفسه نُوّاباً، وهم المفتُون الذين هَيَّئوا أنْفسَهم لمعرفة ما نَطَق وعَمل به صاحبُ الين، وفَرَّغوا أبدانَهم للنّظر فيما أُمِروا به ونُهُوا عنه. لأن صاحب الدين أمَرهم باتّباع الملوك سياسةً، وأمَر الملوكَ باتّباع فتواهم ديانةً، لاشتغال الملوك بشهوات الدنيا واتّباعهم أمرَ الهوى. وأمَر القاضيَ حتّى لا يُغْمِض عينه عن الفتيا ليصل به إلى الحقّ الذي هو المُبْتَغَى، فحينئذٍ حصل المفتي في الدرجة العليا مستمسكاً بالعروة الوُثْقى.

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