Universiteit Leiden
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The Bey, the mufti and the scattered pearls : Shari'a and political leadership in Tunisia's Age of Reform -1800-1864

Haven, Elisabeth Cornelia van der

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CHAPTER ONE

Risāla fī-'l-Siyāsāt al-Sharʿiyya (Treatise on Governance in Accordance with God's law) by Abū ʿAbd Allāh Muḥammad Ibn Ḥusayn Bayram (1716-1800).

Introduction

> *Ideas such as those of ʿAbduh were 'in the air' in the last quarter of the nineteenth century. We find similar groups of reformers in all the more advanced of the Muslim countries, and perhaps it is too simple to explain them in terms of the influence of al-Afghani and ʿAbduh. It could be said as an alternative, that* [the Journal] *Al-ʿUrwa al-Wuthqa*[1] *could only have had its influence because there were already little groups of Muslims thinking on the lines which it made popular. In Tunis such a group existed among the associates and followers of Khayr al-Din…*

wrote Hourani in his *Arabic Thougt in the Liberal Age.*[2] Khayr al-Dīn (d. 1889) was indeed an eloquent spokesman for a group of Tunisian intellectuals advocating innovation and reform within an Islamic context.
In his *Aqwam al-masālik fī maʿarifāt aḥwāl al-mamālik* (The Surest Path to the Knowledge of Conditions of Kingdoms) Khayr al-Dīn shows the Tunisian *ʿulamā',* that to adopt a more flexible attitude towards the changing conditions of Muslim society, is in accordance with the spirit and purpose of the *sharīʿa,* the law of Islam.

To demonstrate the rightness of his ideas Khayr al-Dīn refers to an interpretation of the law which he seems to have derived from the later Ḥanbalī jurists, supposes Hourani, 'although the channels by which it came to him are not clear.' One of the channels at least is clear: Khayr al-Dīn's quotations can be found in the *Risāla fī-'l-Siyāsāt al-Sharʿiyya*, written in 1800. Its author is Abū ʿAbd Allāh Muḥammad Ibn Ḥusayn Bayram:

> He who leafs through the *Risāla* of the master of Ḥanafī *shaykhs* and the source of fatwas in Tunisia – one whose commentaries and interpretations are still to be relied on – *Shaykh* Sidi Muḥammad Bayram I, will find corroboration of what we have mentioned.[3]

Treatises like the one of the Tunisian mufti Bayram belong to a classical genre in the history of Muslim jurisprudence. They define the relation between the authority of the political ruler and the law of Islam, the *sharīʿa.* Through the ages quite a few of these political treatises were composed, Ibn Taymiyya's (1236-1328) work with the same title is well-known, as is the work of his pupil, Ibn Qayyim al-Jawziyya's (1292-1350) *Ṭuruq al-Hikmiyya fī-'l-Siyāsāt al-Sharʿiyya*. Dede Efendi's (d. 975/1567) *Risāla fī al-Siyāsāt al-Sharʿiyya* was a work much consulted

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[1] *Sūra* 2: 256: '…the most firm handle, unbreaking.'

[2] A. Hourani, *Arabic Thought in the Liberal Age 1798-1939*. Cambridge (University Press), 1983, 92.

[3] L.C. Brown, *The Surest Path. The Political Treatise of a Nineteenth-Century Statesman*. A Translation of the Introduction to 'The Surest Path to Knowledge Concerning the Conditions of Countries' by Khayr al-Din al-Tunisi. Cambridge, Mass. (Harvard University Press) 1967, 125.

in Ottoman times. Perhaps less well-known is a small treatise with the same title composed by the Hafṣīd sultan Abū Zakariyāʾ (1236-1249) for his son and heir apparent.[4]
The most important author in this field, however, is the eleventh-century judge from Baṣra, al-Māwardī, who in his work *Al-Aḥkām al-Sulṭāniyya w'al-Wilāyāt al-Dīniyya*, gives a very detailed description of the office of a head of state. We find him quoted − indirectly − many times in Bayram's work.

The authors all describe in detail the discretionary powers of the sultan, the king or − in the Tunisian case − the Bey in their role as head of state (*imām* or *wālī*) and in their role as judge (*ḥākim*), to overrule the carefully constructed *fiqh* edifice of procedure and take the measures they deemed necessary, even though no textual support in Qurʾān and Sunna could be found for these measures.

For instance, an important chapter in the *Risāla* consists of an enumeration of differences of jurisdiction of the *wālī* and those of the *qāḍī*, the s*harīʿa* judge in this respect. To mention just one of the eleven points listed: 'Whereas in a law suit the *wālī* may rely on information acquired through his personal network of informants, the *qāḍī* can only employ statements of qualified witnesses, men of integrity'.[5] This example shows that whereas the *qāḍī* was bound by the strict s*harīʿa* rules, to the Bey wider authorities were granted if the public interest so requested.

In fact, the jurisdiction of the *sharīʿa* judge, the *qāḍī*, was only very limited, certainly in matters of procedure and *sharīʿa* courts never attained a status of supreme authority.[6] In criminal law, for instance, the *qāḍī*'s jurisdiction only covered the six offences for which specific punishments were described in the Qurʾān, the so-called *ḥudūd* offenses, i.e. illicit sexual relations, slanderous allegations of unchastity, theft, wine drinking, armed robbery and apostasy. The *qāḍī's* jurisdiction did not include general regulations for the maintenance of order in the public domain, measures to be taken against rebellious uproar, protection of the people against the abuse of government officials or, to name another example, illegal practices in the market, swindling, fraud or improper manufacturing of food and all those other smaller and greater offences of which examples abound in Bayram's treatise. Least of all was the *sharīʿa* judge equipped to accommodate newly arising circumstances in a changing society.

In all Muslim countries a range of other jurisdictions developed over the centuries, for instance that of the market inspector who had legal authority in the markets and on the streets, the head of the guilds of craftsmen who had authority in the guilds' own affairs, is another example. These different jurisdictions were held in one hand, not by the *sharīʿa* judge, but by the head of state who had in this respect an overarching function, giving him an almost absolute power.

Treatises on *siyāsa sharʿiyya* defy the claim, made by Muslim fundamentalist movements, that the s*harīʿa* provides for all aspects of life and society. History would prove that the *sharīʿa* never had this all-inclusive function in Muslim communities.

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[4] R. Brunschvig, *La Berbérie Orientale sous les Hafsides, des origines à la fin du XVe siècle*. II, 329-332. Paris (Librairie d'Amérique et d'Orient – Adrien Maisonneuve) 1947, 401.

[5] *Risāla*, 5. Appendix A, 125.

[6] N.J. Coulson, *A History of Islamic Law.* Edinburgh (At the University Press), 1991, 121.

Tension prevailed between the 'ideal' and the 'real' on all levels of the judicial practice and in the administration in general. The 'ideal' of the *ʿulamā'*[7] to be able to link solutions to problems of law and government with God's divinely desired order, i.e. to find textual support and justification for them in the Qur'ān or in the Sunna of the Prophet. And, the 'real' of the realities of political life with its ever changing circumstances and developments about which those two important sources were silent.

So, in my view, Hallaq overlooks an important segment of Islam's judicial practice in pre-modern times when he states that 'the four most important juristic roles that dominated Islamic legal culture, [were] the *qāḍī*, the mufti, the author-jurist and the professor'[8]. I have found in my Tunisian research that the role of the *Bey* in the judicial process was significant and concordant with Schacht's words that 'this *siyāsa* is the expression of the full judicial power which the sovereign had retained from the Umayyad period onwards and which he can exercise whenever he thinks fit.'[9] There is a clear discrepancy between the ideal of an all encompassing *sharīʿa* and the historic realities of Muslim governments in the past.

This same discrepancy existed in the eighteenth century Tunisia, the historical context of Bayram's treatise, where the jurisdiction of the *qāḍī* found its limits in the competitive jurisdictions of the Bey and the officials appointed by him, for instance the provincial governors. Ben Achour states in his study on this period that 'Les ʿulamā' étaient loin de monopoliser l'activité judicaire.'[10]

So, in the Tunisian situation it was the Bey who filled the gap between the 'real' and the 'ideal' and initiated

> the action through which people are brought close to well-being and kept away from corruption, even though rules for this practice were not laid down by the Prophet and no Revelation [concerning these rules] came down,

as the first definition of the *siyāsa sharʿiyya* concept is formulated in Bayram's *Risāla*, quoting the eleventh-century jurist from Baghdad, Ibn ʿAqīl.[11]

It fell upon legal scholars such as Bayram to indicate what was legally possible in the ruler's political domain (*siyāsa*) and a *Risāla fī-'l-Siyāsāt al-Sharʿiyya*, a treatise on governance in accordance with God's Law, presented a means to this end. It was also an expression of the premise that rules should not be blindly applied and that there should be an awareness of changing circumstances (*ikhtilāf al-zamān*). The concept of *siyāsa sharʿiyya* is a recurring theme in

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[7] I employ the term *ʿulamā'* for all scholars having had, in the Tunisian context, a higher Zaytūna education, without making a distinction between them and the *fuqahā'*, the specialists in legal science.

[8] W.B. Hallaq, ' The Author-Jurist and Legal Change in traditional Islamic Law.' In: *Recht van de Islam* 18, 2001, 32.

[9] J. Schacht, *An Introduction to Islamic Law.* Oxford (At the Clarendon Press), 1964, 54.

[10] M. El-Aziz Ben Achour, *'Les 'Ulamā' à Tunis aux XVIIIe et XIXe siècles*. Thèse de Doctorat de troisième cycle. Tunis, 1977, 151.

[11] *Risāla,* 2. Muḥammad b. ʿAqīl, Ḥanbalī jurist and theologian, from Baghdad (1040-1119). Appendix A, 122.

the world of Islam, emanating, in particular, in times of political crises[12] when the need was felt to define anew the ruler's position.

Bayram wrote his treatise in 1800. This date provides an important cue in assessing the work's objective and relevance. The treatise, written in the very late years of the eighteenth century, is an exponent of the reign of the fifth Ḥusaynīd ruler, Ḥammūda Pācha (1782-1814). His years in office can be viewed either way as a culmination of a process of centralization and consolidation started by his predecessors, or as a first venture into a change of modes of governance.
The treatise might be reflecting a political reality needing wider authorities for its politics of centralization, or a political reality that looked ahead and had a precognition of changes to come. In the following decades the role of the political ruler would come under scrutiny and be the subject of discussion. In a number of Muslim countries attempts would be made at a codification of the law, to curb the almost absolute power of the head of state and to define his function in the context of a constitution. In Egypt, for instance, the nineteenth century was a period of legislation and institutionalization that articulated the change in the relationship between the state and its subjects.[13]

As we have seen, the *Risāla* was later made expedient to Khayr al-Dīn's political pursuits, presenting an example of how a classical text was made to further a reformist purpose. To Khayr al-Dīn and his *Aqwam al-masālik fī maʿarifāt aḥwāl al-mamālik* we will turn in the last chapter of this book.

This chapter will serve, first of all, to assess the importance of Bayram's treatise in its own time, and to arrive at answers to the question mentioned above by exploring its historical and political context: was the need to compose the treatise dictated by the need to give to the Bey 'une justification pour recourir à la violence' as is suggested by Ben Achour, or does the careful description of the role of the head of state point into the direction of a defining the limits of the head of state's maneuvering space in his judicial practice, a codification 'avant la lettre'? Was there in the Tunisian context at the time any particular event that offered an incentive? What prompted Bayram to define - anew - the head of state's position and mandate?

The manuscript of the *Risāla fī-'l-Siyāsāt al-Sharʿiyya* was copied several times in nineteenth century' Tunisia. It was published in a shortened version in Cairo in 1886.[14] Recently it was the subject of study by the Tunisian scholar Muḥammad Ṣāliḥ al-ʿAslī.[15] It was not, however, until now translated[16] and analyzed in the context of further developments in Muslim thought in nineteenth-century Tunisia as proposed above.

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[12] M.K.Masud, 'The Doctrine of *Siyāsa* in Islamic Law.' *Recht van de Islam* 18 (2001), 5.

[13] R. Peters, 'State, Law and Society in Nineteenth-Century Egypt.' *Die Welt des Islams 39*, 1999, 267.

[14] *Nubdha fī baʿḍ al-qawā'id al-sharʿiyya*. Cairo (Impr. Al-ʿIlāmiyya) 1886.

[15] M.S. Al-ʿAṣlī, *Risāla fī-'l-Siyāsāt al-Sharʿiyya. Taḥqīq wa al-Taʿlīq*. Dubay (Markaz Jamiʿa al-Mājid). 2002.

[16] For my translation I had the privilege of using the copy in manuscript (no. 464: fiqh Ḥanafī) from the library of the late Mālikī *shaykh al-Islām* Muḥammad aṭ-Ṭāhir Ben Achour (1879-1973) in La Marsa.

I. *The Historical Context of the Risāla and its Author*

Introduction

Tunisia's eighteenth century reflects in a poignant manner the two main constituting factors of its history: the influences from the Mediterranean Sea and those of the North African main land. The riches Tunisia's assembled at sea in the seventeenth century through its maritime activities created the conditions for a return to the deep-seated Ḥafsīd layers of its Ifriqiyyan urban civilization, a Ḥafsīd Renaissance.[17]

At the onset of the sixteenth century Merinīd Morocco, Mamluk Egypt and Ḥafsīd Ifriqiyya had been three still independent Muslim empires dominating the Arab Mediterranean. As from 1519 the Ottomans started to absorb into their realm parts of those last two empires. They were in Algiers in 1519 and in Tripoli in 1551; they liberated Tunis from the Spaniards and their Ḥafsīd vassals in 1574 and stayed there – *de jure* – until 1957. From then on the Regency of Tunis, as the West European nations used to call it, and its hinterland was no longer in Maghribi hands, but for the first time in its history ruled by 'men from overseas'. Though ruling Tunisia with the Ottoman Sultan's consent, the new rulers did not come from the Ottoman bureaucracy: they were 'Turcs naturels' or 'Turcs de nations'[18] and came from whatever province of the vast Ottoman Empire or from some small island in the Mediterranean. Often they were renegades, captured Christians who had became Muslim, 'certains n'étaient musulmans que de fraîche date.'[19]

After 1574, when the two great world powers had left the scene, Tunisia took full advantage of its naval capacities and its relative independence from Istanbul. The ongoing small battle war provided the rulers in Tunis with the incentive for two different kinds of marine activity: trade and piracy. They proved to be successful in both.

Piracy was – on the European side – ideologically supported by the view that North Africa, when still in Byzantine hands, had been Christian land, and had to be regained. Tunisians found their justification in the noble enterprise of fighting the Infidel. In a notary act, written for the well-known Tunisian Djellouli family, in the eighteenth century, we read: 'Les terres ont été acquisés avec les revenues du commerce et de la course contre les Infidèles.'[20]

Unless special treatises stipulated otherwise (in most cases for a certain period only) the normal relationship between Christian and Muslim countries was one of war. Within these circumstances the capture of prisoners [of war] at sea or in enemy territory was allowed. Licenses were granted against payment by head of states to the piracy ships, giving them thereby permission to sell the captured as slaves. [21] An important part of the – Tunisian -

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[17] A. Laroui, *L'histoire du Maghreb. Un essai de synthèse*. Paris (Maspero) 1970, 245.

[18] Revault, *Palais et Demeures de Tunis (XVIe et XVIIe siècles).* Paris (Editions de Centre National de la Recherche Scientifique) 1971, 11.

[19] A. Abdesselem, *Les Historiens Tunisiens*. Paris (Librairie Klincksieck), 1973, 73.

[20] J. Revault, *Palais et Demeures de Tunis (XVIe et XVIIe siècles),* 26.

[21] P.S. van Koningsveld, 'Islamitische slaven en gevangenen in West-Europa tijdens de late Middeleeuwen.' Inaugural address University of Leiden. 4 February 1994, 25.

activity on the high seas was in fact retaliation for English, Dutch and French violations of treatises and agreements.[22]

For the first two centuries after the Ottoman intervention this concord of trade and piracy defined the interaction between the countries of Europe and Tunisia. In its connections with the kingdoms and republics north of the Mediterranean, Tunisia definitely was at the receiving end. West European nations, among which the 'Staten-Generaal of Holland'[23] were anxious to please the Beys to safeguard their passage through the Mediterranean. The situation in the eighteenth century Mediterranean was still one of equality between 'Islam and the West'.

Piracy in Tunisia never reached the Algerian levels. Tunis and also the other coastal cities, like for instance Sfax, had already since centuries an important network of commercial relations with many European countries: they had to find a balance between the interests of trade and those of piracy. As a consequence the Tunisian harbors were considered safer than the one of Algiers. Many European nations had their own storehouse (*funduq*) there, the French being the finest. So it was trade, and to a lesser extent also piracy, that flourished in Tunis in the sixteenth and seventeenth century. It were those twin factors that laid a firm base for the years of rest and relative prosperity of the eighteenth century, its 'golden age'.

Tunisia in the Eighteenth Century

During the eighteenth century Tunisia's 155,000 square kilometers were inhabited by one million people.[24] Only twenty percent lived in urban centers of more than 20,000 inhabitants. The largest of these was Tunis, which had a population of about 120,000. The greater part of the burden of supporting the beys' regime (…) rested upon the eighty percent of the population which lived in the rural areas.[25]

There was a slight rise in population during Ḥammūda Pācha's reign. This can be explained by the greater prosperity of that time, not only through the benefits of trade and piracy, but also through the beneficial effects of a relatively healthy population: after the plague had ravaged through the land in the years 1702-1705, Tunisia was spared until 1784 before it hit again. These eighty plague-free years allowed for an increase in population.[26]

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[22] J.B. Weiner, 'New Approaches to the Study of the Barbary Corsairs.' *Revue d'Histoire Maghrébine* (no. 13/14) 1979, 207.

[23] The Staten-Generaal of Holland could conclude a treaty on the 19th of July 1713 only after the following presents were handed over: 'Un carosse doré, dix canons de 12 en fer montés sur fûts, deux mille boulets de divers calibers, quatre quintaux de poudre, quatre cents sabers, quatre cents canons de mousquets et deux gumers de 18 pouces.' In : El Mokhtar Bey, *Le fondateur Hussein Ben Ali – 1705-1735/1740 – de la Dynastie Husseinite.* Tunis (Ouvrage édité par l'auteur) 1993, 596.
France, Tunisia's number one trading partner, sealed its 1741-treaty with a shipment of the following gifts : 'Along with rare cloth and works of silver and gold, Alī Pācha received thirty six cases of fruit preserves and thirty loaves of sugar (…) a precious commodity.' In: L. Valensi, *Tunisian Peasants in the Eighteenth and Nineteenth centuries.* Cambridge (Cambridge University Press), 1985, 162.

[24] In the practical absence of records of a general census this must be regarded as an approximate number.

[25] J. M. Abun-Nasr, 'Religion and Politics in Eighteenth-Century Tunisia'. *Zeitschrift der Deutschen Morgenländischen Gesellschaft.* 1977. Suppl. III, 301.

[26] L. Valensi, *Tunisian Peasants*, 3 and 183.

Tunisia's eighteenth century is, to a certain extent, comparable with other 'golden ages' in cities, city states and countries north of the Mediterranean. Tunis' ship owners played a role similar to those of for instance the merchants of Venice or … of Michiel de Ruyter for that matter. The riches the latter provided contributed to 'the flowering of Western culture known as the Renaissance'.[27] However, whereas European capital was mainly invested in the arts, in architecture, Tunisian funds were expended on the restoration and revival of the religious infrastructure, which had suffered greatly from the repeated Spanish attacks in the early decades of the sixteenth century, preceding the Ottoman intervention. Much of the corpus of Islamic learning had been destroyed in very much the same manner as the Spanish conquistadors eradicated the intellectual foundations of the Inca, Aztec and Mayan civilizations in the Americas.[28]

The subsequent advent of the Ottomans and the re-introduction of the Ḥanafī *madhhab*[29] had initially meant a decline of the judicial system. The Ḥanafī judges imported from Istanbul or some other place of the empire were appointed for a period of no more than three years and often ill-equipped. Often they were more soldiers than scholars (*ashbaha bi-l-jundī min al-'ālim*).[30] Some of them hardly spoke any Arabic.

The Mālikī institutions which under the Hafṣīds had developed into a sophisticated system of law, proved to be too strong to be overruled or eliminated. Although in a poor state they still formed the foundation of the society. As a consequence, the Ottomans never succeeded in imposing on the Tunisian province the Ḥanafī law as the sole law of the land. Therefore, many of the efforts put into the restoration and revival were focused on establishing a balance between the two schools of law,[31] and consolidation of Ottoman Ḥanafī authority.

'Ḥanafī' and 'Mālikī' were more than indications for a school of law. The terms figured in Tunisia also as a kind of 'identity markers'. The Mālikīs felt themselves belonging to the land, they represented as it were 'une tunisianté', 'une arabité'. The Hanafīs represented the Ottomans, the Turks. The soldiers of the Bey, for instance, were still in 1865 called '*askar al-Ḥanafiyya*, Ḥanafī soldiers.[32]

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[27] L.A. Barrie, *A Family Odyssey. The Bayrams of Tunis. 1756-1861*. Boston (Boston University: unpublished dissertation) 1987, 53.

[28] L.A. Barrie, *A Family Odyssey*, 55.

[29] When the Fatimīds appeared in Tunisia in 909 they found both schools of law, Ḥanafī and Mālikī. The former were pro-'Abbasīd, the caliphate on behalf of which the then Aghlabīd dynasty governed in Tunisia, while the local population already then favored the pro-'Umayyad Mālikī madhhab. In: W. Madelung and P. Walker, *The Advent of the Fatimids. A Contemporary Shi'ī Witness. An Edition and English Translation of Ibn al-Haytham's Kitāb al-Munāẓarāt.* London (The Institute of Ismaeli Studies. I.B. Tauris) 2000, 3.

[30] A. Ibn Abī al-Dyāf, *Itḥāf Ahl al-Ẓamān bi Akhbār mulūk Tūnis wa 'Ahd al-Amān*. Tunis (al-Dār al-'Arabiyya al-Kitāb), 2001, II, 95. Unless stated otherwise this latest edition is used.

[31] It took a long time before a certain balance in prominence between the – usually - Ḥanafī *Shaykh al-Islām* and the Mālikī office of *bāsh mufti* was established. It was only in 1932 that through the Mālikī mufti Muhammad al-Tāhir Ben Achour the fatwas of the *madhhab* gained prominence. In: A. Demeerseman, *Aspects de la société tunisienne*, Tunis (Pubications de l'Institut des Belles Lettres Arabes) 1996, 190.

[32] Id., 201.

A great number of mosques and *madrasas* was built in the eighteenth century, not only in Tunis, but also in Sfax, Sousse and Nefta in the far south. Kairouan, the exclusively Mālikī holy town of Tunisia had its walls rebuilt and saw its number of mosques and *zawiyas* considerably extended. The religious infrastructure was further enhanced by the establishment of religious councils *(majlis al-sharʿī)* throughout the country. By the last two decades of the century the important towns of Tunisia each had their *majlis*. In the region outside the capital these were Mālikī and headed by the dean of the muftis in that town, the *kabīr ahl al-shūrā.* At the Zaytūna Mosque new teaching posts were created and financial arrangements made for them.[33] The Mosque was provided with a library and numerous titles on *hadith* and *fiqh* manuals acquired.[34]

The Mālikī scholars in the Bey's vicinity, received a regular allowance from then on like their Ḥanafī colleagues. Under the patronage of Yūsuf Sāḥib al-Ṭābiʿ, the chief minister of Ḥammūda Pācha, the Mālikī scholar Ibrāhīm al-Riyāḥī, who would later play such a prominent role in nineteenth-century' Tunisia was provided for with proper dwellings and a stable means of support.[35]

The agenda for this 'renaissance' program of religious renewal and restoration was made between the walls of Le Bardo Palace, just outside Tunis' old medina and formed part of a broad scheme of centralization that affected large sections of the Tunisian society and even reached out to the far south of the country, hitherto mostly left to its own devices.

To the eighteenth-century Tunisian Beys it was an almost constant concern to strengthen and centralize their power and to lend legitimacy to their authority: [36] their power base was still rather thin, having only assumed power in 1705. They were alive to the fact that socio-political stability depended on the existence of stable religious institutions and harmonious relations between their leaders and the ruling elite. This process of consolidation and centralization was continued throughout the eighteenth century. It grew in refinement and radicalization under Ḥammūda Pācha '… le perfectionnement de l'appareil étatique qui arrive à son plus haut degré avec le regne de Ḥammūda Pācha, a joué en faveur d'une politique de centralisation à outrance.'[37]

It is in the context of this restructuring and consolidation process that the Ḥanafīs, although at first weak by number and intellect, gained in importance. Gradually more Ottoman soldiers decided to stay in the country and embarked on other professions than the military. As from

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[33] J.M. Abun-Nasr, 'Religion and Politics', 307.

[34] Abdesselem, *Les Historiens Tunisiens*, 61.

[35] M. El-Aziz Ben Achour, *Les 'Ulamā'*, 77.

[36] M. El-Aziz Ben Achour, 'Les Šarifs à Tunis au temps des Deys et des Beys (XVIIe-XIXe siècle)'. *Oriento Moderno* 1999, 347.

[37] A. Henia, *Le Ğrid. Ses Rapports avec le Beylik de Tunis (1676-1840).* Tunis (Publications de l'Université de Tunis) 1980, 343.

1745 the Ḥanafī judges were no longer dispatched from Istanbul but recruited from among the local population.[38]
From then on they were appointed by the Bey himself, who made his choice from a small number of *'ulamā'* families of Turkish origin, i.e. the Bārūdīs, the Ben al-Khūjas, and the Bayrams. The Bayrams provide in this context not only a fine example of an upward social mobility, but also a revealing instance of the Bey's policies of 'encapsulation'.

Our author was the first generation venturing on the field of *'ilm*, out of a family of military officials. Bayram's ancestor had been a man belonging to the army of Sinān Pācha, the Ottoman commander, who 'conquered this Islamic land and saved it from the hands of the Spaniards who had subdued it.'[39]

Ḥammūda Pācha and the Law of Islam

The solidity of the Beys' power base could not only be provided by the support of their subjects. Their political survival was dependent upon the consent of the Sultan of the Ottoman Empire, of which Tunisia formed part.

Ḥammūda Pācha, during whose reign and by whose presumed order Bayram's treatise was composed, is described - sixty years after his death - as an absolute ruler in *Itḥāf Ahl al-Zamān bi Akhbār mulūk Tūnis wa 'Ahd al-Amān* by the already mentioned Ibn Abī al-Ḍiyāf, a contemporary and political friend of the minister and writer, Khayr al-Dīn .

Ibn al-Ḍiyāf commences his nine volume history of Tunisia with an overview of theories of government. He distinguishes three kinds of kings, three kinds of political rulers, i.e. firstly, constitutional kings or kings bound by constitution *(mulūk muqayyad bi'l-qanūn)*, a constitution to be understood in a strictly Islamic context, secondly, heads of republics (*mulūk al-jumhūriyya)* and thirdly, absolute kings or kings - literally - with no restrictions (*mulūk al-'iṭlāq).*[40]

The constitution alluded to here by Ibn al-Ḍiyāf, was certainly not meant as a departure from the law of Islam into the realm of positive law. Ḥammūda Pācha and the Beys before and after him, were and had to be, kings, Beys *'muqayyad bi'l- sharī'a',* bound by God's law. What Ibn al-Ḍiyāf envisaged was a charter in which the office of the head of state was clearly defined.

The preference of the author, secretary to three consecutive beys, is definitively for the first category: the king bound by constitution, *muqayyad bi'l-qanūn*, to such an extent even that he perceives in the manner of rule of Ḥammūda Pācha the early signs of a development in that direction:

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[38] R. Brunschvig, 'Justice Religieuse et Justice Laïque dans la Tunisie des Deys et des Beys jusqu'au milieu du XIXe Siècle.' *Studia Islamica* 23 (1965) 46.

[39] *Ithāf* VII, 30.

[40] *Itḥāf* I,9.

> He was of a strong and noble character, of a mind acute and intelligent, nevertheless, he did not want to do without the consultation (*mashūra*) of the men of his government (*daulatihi*) (…) He was in that respect like a king bound by constitution (*qanūn*), despite the fact that he was an absolute ruler.[41]

Although we must not forget that Ibn al-Ḍiyāf's perception was colored by years of close proximity to reigning power and nurtured by the ideologies of reform of the nineteenth-century's sixties, the image created of a sovereign receptive to the idea of discussing his role, be it only in the slightest, is corroborated by the observations we made above of a ruler in the process of centralization and bureaucratization, in which the early signs of a process of 'nation building' are to be perceived. This image is corroborated by Abun-Nasr, who characterizes Ḥammūda Pācha's government as 'no longer an improvised administration but an established structure with specialized departments and a delegation of his powers to recognized officials.'[42]

That does not alter the fact that the *siyāsa*, representing the Bey's executive authority and his political domain, after a period of strictly military rule before the advent of the Ḥusaynīd dynasty in 1705, developed into a traditional Muslim state in the following decades. The Beys awarded themselves a strongly supervising and coordinating role in judicial matters and prided themselves to now play a prominent part, not only as a head of state but also as head of judiciary.

The many jurisdictions functioning outside the realm of the *qāḍī*, were all under the Bey's supervision: he appointed the district governors in the country and also the *shaykhs* of the local communities could not perform their duties without the consent of the Bey.[43] The same applied to the 'Council of Ten' the overarching organization of the guilds, who handled their affairs on the basis of customary law (*ʿurf)*. It was certainly true for the head of the urban police, the *dey,* originally the function of the head of Ottoman military but since the advent of the Ḥusaynīds stripped of most of its duties.[44]

Like the Ḥafsīd sultans of old, Ḥammūda Pācha continued the practice of convening the high religious council, the *Majlis al-Sharʿī,* once a week to examine, together with the Ḥanafī and Mālikī muftis, the most important or most arduous cases. The *Majlis al-Sharʿī* was open to anyone and could be addressed by persons from whatever place in the Regency. However, despite the fact that this high religious council was always rather moderate in its sentences, [45] most people preferred the Bey's own court which he held every morning from eight until midday just by himself in his Bardo Palace, mainly because of the swiftness of its procedure.

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[41] *Itḥāf* III, 75.

[42] J.M. Abun-Nasr, 'Religion and Politics', 314.

[43] A. Henia, *Le Ğrīd,* 122.

[44] M. El Aziz Ben Achour, 'Organisation de la justice religieuse dans la Tunisie husaynite (18ème-19ème siècles).' *IBLA* 1984, 80.

[45] R. Brunschvig, 'Justice', 52.

The vivid and colorful description by Dr. Frank, the Bey's physician, of one of these court sessions[46], approaches the character of the '*firāsa*[47] stories' we find in the *Risāla*, where judges are praised for their perspicacity, their cunning wisdom and their wit. Bayram devotes ample attention to the issue of *firāsa*. Five out of his twenty nine pages describe court cases in which these methods are applied, a sure indication of the importance he attached to these. They are all examples of times long gone, from the times of the 'Abbāsīds and even further back, to 'Alī, the Prophet's son-in-law and to 'Umar b. al-Khaṭṭāb, the second caliph.

Another European, the English major Grenville Temple, present several times at these Tunisian 'levees' in Ḥammūda Pācha's time, provides us with a detailed and graphic description:

'After having arrived at half-past eight and waited in the inner court for about half an hour, a shuffling of slippers was heard on the stairs, and soon after his highness, proceeded by the Chaoosh selam,[48] singing forth his praises, entered the court, and proceeded to the judgment hall (…) where he sat down on his throne or *musnud* cross-legged', [49] dressed in a silk caftan.

Standing behind the Bey were two officers, sabres in hand; on his right were the princes, on his left the ministers, generals and colonels of his palace. At the far end of a carpet on which were seated the Bey's secretary and his auxiliary, the litigants presented their case. Everyone, except the Bey and two secretaries, remained standing, including any foreign visitors. Soldiers watched over the public.

After the hand kissing ceremony, the baker of the barracks [*bāsh ayyāshi*, chief supplier of bread] presented a loaf of bread to the Bey, which he kissed before eating a piece of it, while pronouncing a few words of piety. Coffee was served to all people of importance present; after the Bey had taken a few puffs from his pipe, the row of litigants and witnesses started to move. The secretary read out aloud in a concise manner the text of the complaint, which was written in either black, red or blue ink depending whether it concerned a case of a crime with harmful intent, or a case of self defense or a case of obvious innocence. After considering the

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[46]Dr. Louis Frank, *Tunis*. In : M.J. Marcel (ed.) *L'Univers : Histoire et description de tous les peuples : Algérie, Etats Tripolitains, Tunis*. Paris (Firmin Didot Frères, Editeurs), 1850,59. Frank wrote his part of the book in 1816.

[47] *Firāsa*, 'the ability to judge a defendant by his personal characteristics that are not accessible to the senses of the average person', the science of physiognomy. See text *Risāla,* 22 ff. in Appendix A, and page 28 of this chapter.

[48]The *chāwush salām*, in colorful attire and a large turban, was in the Ottoman tradition the high court functionary for the greeting ceremonial at the Bey's entering and departing.

[49] Grenville Temple, T, *Excursions in the Mediterranean. Algiers and Tunis*. London (Saunders and Otley) 1835, 186. Major Temple makes an interesting remark (p. 190) concerning the modes of dress of the beylical family, the officers, the household and all the Moorish nobles: 'They are all dressed in the lately introduced and highly-unbecoming dress adopted from the Turks. It consists simply in a blue jacket, buttoning in front, with red collar and cuffs, and blue overalls, made excessively large and full to the knees, and then fitting quite close to the leg, as far as the ancle. (…) on the head the shasheeah, or red cap with a long blue silk tassel, the same that in Turkey is called *fez*, and in Egypt *tarboosh*. (…) The former dresses of the Bey were really splendid: the cloth was of the most beautiful shades of colour, almost covered with gold lace (…) enriched with diamonds, emeralds, rubies and sapphires. These dresses cost, without the jewels, from three thousand to three thousand five hundred piastres, and each occupied the tailor from six to nine months in making. (…) The present dress cannot cost more than forty or fifty piastres, and the tailors are ruined, and ripe for a revolution, which might re-establish the old order of things.

information, the Bey spoke his verdict. Complicated cases were referred to the *Majlis al-Sharʿī,* held on Sundays, otherwise the verdicts were executed immediately and on the spot.[50]

The picture drawn here is an almost exact duplication of the image created by the words of the fourteenth-century' *faqīh* of Cairo, al-Qarāfī, quoted in the treatise of Bayram I.

> The first to establish the *wilāyat al-mazālim* in Islām was ʿAbd al-Mālik b. Marwān. He used to chair the *mazālim* court on a specific day, transferring the arduous problems to Idrīs al-Awdī. He had all the competences the judges have except that there were more possibilities open to him than there were to them. He had the authority to accept clear indications and circumstantial evidence, a practice judges are not permitted to resort to. There were many aspects specific to him not applying to judges. [51]

It is in the *mazālim* courts that the concept of *siyāsa sharʿiyya* has its clearest exposition. The *mazālim* courts dealt with complaints (*mazālim*) against the behavior or the judgments of *qāḍīs* and those of government officials, at least that is the definition generally employed. It was an implementation of the duty of a Muslim ruler to defend the oppressed and to protect them against abusive conduct and arbitrary rule.

There is, however, not a specific point in time in Muslim history that clearly indicates the introduction of the institution. Nielsen puts a question mark at the early date of al-Qarāfī's 'prototype' and situates the regular holding of the *mazālim* sessions in ʿAbbāsīd times, or even before,[52] which is in fact supported by Bayram's examples of *firāsa.* Already at the time of the Arab conquests there existed a structure of concepts and institutions only partly derived from Sassanid and Byzantine models.

> Part of the informal customary judicial procedure of the Bedouins was ease of access ot the elders of the clan and tribe, and this tradition was absorbed into the more explicitly judicial role of the Prophet Muḥammad.[53]

In Tunisia the Bey's daily court sessions had a broader function; they served as a court of appeal and of first instance at the same time and dealt with a wide range of offences. The Tunisian *mazālim* tradition goes back a long way: the sovereigns of the Ḥafṣīd dynasty took a personal pride in this moral obligation.[54] In the Ḥafṣīd model we recognize the *mazālim* not only as a court of justice, but as forming part of a series of different ceremonies of the so-called *khidma*,[55] the gathering during which the nobility of the land paid their respect to the sovereign.

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[50] R. Brunschvig, 'Justice', 55.

[51] *Risāla*, 5. See Appendix A, 125.

[52] J.S. Nielsen, *Mazālim*, in EI_2, III, 934. It is remarkable that Nielsen signals in his article the same lacuna in literature on the subject as Bayram did in his preamble almost two centuries before him. Nielsen only mentions two Muslim scholars who have dealt with the issue, their work is based on that of al-Māwardī, as was the case with the – again different – authors quoted by Bayram.

[53] J.S. Nielsen, *Secular Justice in an Islamic State: Mazālim under the Bahrī Mamlūks, 662/1264-789/1387*. Istanbul (Nederlands Historisch Archeologisch Instituut) 1985, 33.

[54] R. Brunschvig, *La Berbérie Orientale*, II, 143.

[55] E. Tyan, *Institutions du Droit Musulman*. Paris (Receuil Sirey) 1956, II, 60.

Concordant with this model, the accounts of Grenville Temple and Frank reveal that during the reign of Ḥammūda Pācha the morning sessions also served indeed to receive ambassadors of foreign nations and other visitors from abroad.

Frank estimates that the Tunisian Bey considered these morning court sessions as the most important of his duties.[56] Later Beys continued the practice and also appreciated their involvement in the judicial practice as an intrinsic part of their *siyāsa* authority.

The justice administered by the Bey was considered by the population as the court of the highest instance, superior even to that of the *Majlis al-Sharʿī*. In general, the Bey occupied himself with cases relating to problems of the public order, with the tribes, cases of rebellion, complaints against the judicial practice of the provincial governors who had local jurisdiction in criminal and fiscal cases. Cases relating to issues of personal status and transactions were left to the *qāḍī*.[57] Complicated cases that needed deeper reflection and study were referred to the *Majlis al-Sharʿī*, in the same manner as the Umayyad caliph ʿAbd al-Mālik b. Marwān referred his problematic cases to the *qāḍī* Idrīs al-Awdī.

In all these instances the Tunsian Beys kept in regular contact with the *ʿulamāʾ* to receive the assurance that their performance remained in line with the law, as becomes clear of the following example from the reign of Ḥusayn b. ʿAlī, the first of the Ḥusaynīd dynasty:

> Le bey consultait [le *qāḍī* du Bardo] sur les solutions à adopter et le shaykh ne manquait jamais de lui trouver des textes lui permettant d'arranger tout suivant son désir et de mettre d'accord la légalité avec les nécessités administratives ; aussi le prince montrait-il à son égard la plus grande générosité.'[58]

As governors of the Ottoman province of Tunisia they had at least one good reason to hold these consultations in esteem.

Ḥammūda Pācha and his Relation with the Ottoman Sultan

The Bey was, in the late years of the eighteenth century, not yet bound to his subjects by any form of constitution, but by the line of delegated authority he received through the Ottoman Sultan. The Sultan's authority was based

> not on the apostolic succession from the Prophet, but on the divine right of those who had established their power and used in the interests of Islam. The sultan defended the frontiers against the Christians and the Shiʿis; he protected the Holy Places and organized the Pilgrimage with care; he paid respect to the *Shariʿa* and its guardians. In principle all his acts and edicts were subordinate to the *Shariʿa*.[59]

Through this delegated authority (*tafwīḍ*) Ḥammūda Pācha's flock was included in the community of Muslim believers. The link thus established with Istanbul was the Bey's life line. It would remain the life line of the consecutive Bey's in the nineteenth century, despite

[56] L. Frank, *Tunis*, 58.

[57] M. El-Aziz Ben Achour, 'L'organisation de la justice religieuse', 80.

[58] Id., 61.

[59] A. Hourani, *Arabic Thought*, 27.

speculations by West European countries − mostly France − that Tunisia would be in a process of growing independence from Istanbul. The Tunisian Beys understood very well that severing the bonds of loyalty with the Sultan would bring them in a perilous dilemma: France would immediately take advantage of the situation. Even much later, in the end of the nineteenth century when French encroachment was imminent in Tunisia's ruling bodies, this same attitude towards the head of the *umma* prevailed : 'Le Bey a compris tout bonnement qu'il sera plus libre en avouant sa dépendence du Sultan qu'en conservant une indépendence nominale sous la tutelle de la France'.[60]

Contacts with 'The Abode of Felicity', as the Sultan's Court was called, were frequent and intensive on the level of governmental affairs and intellectual exchange.[61] Ministers often went there and so did members of the *'ulamā'* class.

It did not mean that the bond with the neighboring Ottoman provinces of Algiers and Tripolitania were of a brotherly cordiality. To the west hostility ruled: apprehensive of the apparent independent course set in by the Ḥusaynīds, the Deys of Algiers many times raided deep into Tunisian territory. Relations to the east, with Tripolitania, were positive, judging from the fact that in 1793 Ḥammūda Pācha came to the Qaramanlis' rescue and reinstated them on the throne against the wish of Sultan Selim III (1789-1807) and despite the fact that our author refused to give a fatwa justifying the Bey's plans.[62]

Ḥammūda Pācha and his Relation with his Subjects

The Muslim inhabitants of his territory understood his relation to the Sultan as their sole means of inclusion into the *umma*, which inclusion gave them the only 'formal' identity they had: they were no Tunisians in the first place, but Muslims. For this reason the Bey could not do without the approval and support of the *'ulamā'* and through them without the support and approval of his population. The *'ulamā'* formed, in particular in their roles as leading members of the Sufi *ṭarīqas* the buffer between the ruler and the ruled. The brotherhoods constituted the only societal infrastructure in Tunisia's pre-modern society. 'Les confréries sont la structure dans notre pays; il n'y a pas un autre'.[63] They were mediators, not only between God and man, but also between state and society. 'they tempered the tyranny of the government and muted the frustrations of the common people.'[64]

Not only needed the Bey the support of his subjects in general, more in particular, he could not do without the blessing and consent of the *shaykh al-Islām*, in this case Bayram I, the author of the *Risāla*. The *mashaykhat al-Islām* started to emerge under Ḥammūda Pācha's reign: another instance of how the head of state formalized the religious institutions, thereby

[60] *The Levant Herald*, 27 October 1871.

[61] Economically, relations with Istanbul were not important and never had been. In: Kh. Chater, *Dépendence et Mutations Précoloniales. La Régence de Tunis de 1815 à 1857*. Publications de l'Université de Tunis 1984, 151.

[62] *Ithāf* III, 23.

[63] Oral communication M. Bennani, Tunis. 02.05.2000.

[64] L.A. Barrie, *A Family Odyssey*, 7.

'encapsulating' its leaders. Bayram I was the first *bāsh mufti* so called.[65] Though in the Tunisian context the title is a honorific one, the function – on a much more modest scale – is comparable to the one of the *shaykh al-Islām* of Istanbul, who was regarded as the Abū Ḥanīfa of his time:[66] he was the highest religious dignitary in the country. [67]

It is in this context that Bayram and his *Risāla* must be situated. He, as the *shaykh al-Islām,* had to prove that the Bey was '*muqayyad bi'l- sharīʿa',* a king bound by God's law and find the legal justification for his actions.

The Author

Ever since the middle of the eighteenth century the Bayram family left its mark on Tunisia's history: from 1756, the year Abū ʿAbd Allāh Muḥammad b. Ḥusayn Bayram, the author of the *Risāla*, at the age of thirty, was appointed the second Ḥanafī mufti, throughout the entire nineteenth century and beyond. And still today a member of the Bayram family is *shaykh* of the Yūsuf Sāhib al-Ṭābiʿ Mosque in Tunis' Halfaouine district.[68] They served their country as judges, professors and initiators of reform. Seven of them were given the highest religious office in their country, i.e. that of *shaykh al-Islām.*[69] Bayram IV, the great-grandson of our author issued a fatwa, gave his consent to the abolition of slavery in Tunisia, in 1846, Bayram V, professor at Zaytūna University, left the country after the political downfall of Khayr al-Dīn, in 1877. He would later, in 1885, lance the weekly journal, 'de tendance panislamiste' '*Al-ʿIlam'* in Cairo.[70]

Bayram al-Awwal, the first, as he came to be called, wrote his treatise on the relation between political leadership and *sharīʿa* in the evening of his life, after a long career in the field of law and jurisprudence. He finished it three months before his death (26 March 1800), at the age of 84. The issues dealt with were not his regular subject. To his earlier works belongs an extensive work on family law, a commentary on the work of the Ḥanafī judge from Damascus

[65] And not his father Bayram II as Abun-Nasr states in page 11 of his article.

[66] J.H. Kramers, Art. *Shaykh al-Islām*, in *Shorter Encyclopaedia of Islam (*hereafter called SEI), Leiden (E.J. Brill), 1995, 521.

[67] The office of *shaykh al-Islām* ceased to exist in 1957 with the effectuation of the *Code de Statut Personnel*. In 1962 the post of 'mufti de la République' was created. Muhammad al-Fādhil Ben Achour was the first to be appointed to the post. In: A. Demeerseman, *Aspects de la Société d'après Ibn Abī al- Dyāf*. Tunis (IBLA) 1996, 202.

[68] The mosque was built during Ḥammūda Pācha's reign (in 1812) at the instigation (and with funds) of Yūsuf Sāhib al-Ṭābiʿ, the first minister. For some years it overshadowed the old Mālikī Zaytūna Mosque. Ahmad Bey's reforms of 1842 returned to the latter its primary position in educational possibilities. In: M. El-Aziz Ben Achour, *Les 'Ulamā'*, 164.

[69] A. Demeerseman, *Aspects de la Société Tunisienne d'après Ibn Abī al-Dyāf*. Tunis (Institut des Belles Lettres Arabes) 1996, 201. The office of *shaykh al-Islām* ceased to exist in 1957 with the effectuation of the *Code de Statut Personnel.* In 1962 the post of 'Mufti de la République' was created. Muhammad al-Fādhil Ben Achour was the first to be appointed to the post. In: Demeerseman, 202).

[70] M. Chenoufi, 'Les Deux Séjours de Muhammad 'Abduh en Tunisie.' *Cahiers de Tunisie* 1968, 62.

al-Ṭarāsūsī (746/1345-758/1356), *Bughyāt as-sā'il fī ikhtiṣār 'Anfa' Waṣā'il' li-l--Ṭarāsūsī*[71] and a range of smaller writings on a variety of subjects.

His life had evolved along the lines of Tunisia's political vicissitudes. Under 'Alī Pācha, Tunisia's ruler from 1735 until 1756, he was imprisoned several times, and when free, had to seek the refuge in the *zawiya* of Sīdī Manṣūr in Tunis' medina, or in the town of Zaghouan, a sixty kilometers south of Tunis. According to Abdesselem Bayram I 'connut sous le règne de 'Alī Pacha [1735-1756] , tour à tour la prison, (…) et celle d'un proscrit réfugié dans une zaouia.' His father had died in prison.[72]

His chances turned for the better with the change of regime and the advent to power of 'Alī Pācha's nephews, Muḥammad b. Ḥusayn (1756-1759) and of 'Alī b. Ḥusayn (1759-1782). In 1756, at the age of thirty, he was appointed the second Ḥanafī mufti, in 1772 he became *shaykh al-Islām*. He was, as we have seen, in this function the highest religious dignitary in the country, and also in a more general sense a person of high repute:

> In the pre-modern Islamic world, jurisprudence occupied the central position in Islamic intellectual life, enjoying much the same prestige as theology in medieval Europe. Theology, quranic exegesis and the study of Prophetic Traditions existed as independent and prestigious sciences, but each in its different way served to underpin jurisprudence.[73]

II. *The Treatise*

Bayram's Methods and Sources

Introduction

Though Bayram's treatise is a work on governance, one will search its pages in vain for an inclusive political theory. The assembling of the 'scattered pearls' , the string of examples from the past, does not result by way of deduction or abstraction in the establishment of an underlying political ideology that would serve him as a base from where the legal issues in his own time could be given support. It is a practical work, on procedure rather than on law itself. Although the political ruler was actively involved in the judicial process, he was not in a position to legislate or even to interpret the law.

As from the emergence of the schools of law in the ninth century, a clear demarcation line had been drawn between the interpreters of the law, the *'ulamā'* – and more specific, the *fuqahā* -

[71] Bibliothèque Nationale Tunis, Salle des Manuscrits, no. 18156.

[72] A. Abdesselem, *Les Historiens Tunisiens*. Paris (Librairie Klincksieck) 1973, 289. Abdesselem's source here is the *Kitāb al-Musāmarāt*, van Muhammad al-Sanūsī (1849-1900), his second volume, which is in manuscript in the ''Abd al-Wahhab Collection in Tunis, and which I have not been able to consult. I could not find confirmation in Ibn Abī al-Dyāf's biography of Bayram I. I did find a small handwritten note of Bayram in a copy of the fatwa collections of Qādī Khān, saying that he was in Zaghouan (in the year 1782), while living in Tunis '*makānan Tūnis*'. Zaghouan was quite often used as a place of refuge or exile.

[73] C. Imber, *Ebu's-Su'ud. The Islamic Legal Tradition*. Edinburgh (University Press) 1997, 38.

and their executive counterpart, the head of state. It was not law that was ceded to government, but only the legal process.[74]

The Bey's involvement was, as we shall see, first of all a functional requirement. Bayram's work is therefore not a theoretical discourse, it is on praxis and matters of jurisdiction.

The Structure of the Treatise

Like so many author-jurists before him, Bayram's mode of discourse is selective citation and juxtaposition of earlier authorities.[75] Some subjects are mentioned only 'in passing' as it were. Others are discussed extensively and looked at from different angles, like the employment of force as a means to extract a confession from a defendant.
Large parts of the treatise are literal and almost literal citations, quoted directly or indirectly from his main sources.

The manuscript comprises twenty-nine pages in which at least thirty-five sources are quarried. It may be read as a traveling journal through the legal history of Islam, a report as it were of a hermeneutical journey that stretches from the first two caliphs in the seventh century, Abū Bakr and ʿUmar Ibn al-Khaṭṭāb to the Palestinian mufti Khayr al-Dīn al-Ramlī in the seventeenth century (1585-1671) one of the 'youngest' of his sources, reflecting their attitudes towards the ruler and the legitimacy of his discretionary powers.

In his preamble Bayram reveals to his reader the objective and scope of his scholarly exercise. For the lands to flourish, he writes on his page two, 'repression of the people of evil and corruption and safeguarding the people of virtue and integrity' is an essential prerequisite. 'This cannot be accomplished to the full', he continues, 'without the application of the rules of governance in accordance with the law (*al-siyāsa al-sharʿiyya*), on which subject he could not, in his own words, find a specific work by 'any of our scholars of jurisprudence'. He therefore sets himself to the task of composing a treatise on these issues.

Subsequently, the author gives his epistemological account and mentions his most important sources: Shihāb al-Dīn al-Ṭarabulsī, the fifteenth-century' Ḥanafī *qāḍī* of Jerusalem is introduced: 'He brought' in Bayram's words, 'the scattered pearls [on the subject of *siyāsa*] together and only left unmentioned a few minute details.'[76]
Furthermore, he resorted to the work of the thirteenth-century' Egyptian Malikī jurist Shihāb al-Dīn al-Qarāfī and to that of the well-known fourteenth- century Ḥanbālī jurisconsult from Damascus Shams al-Dīn Ibn Qayyim al-Jawziyya. And, as he writes in those first lines, "I have added much of what is relevant from the regulations (*furūʿ)* of the Ḥanafiyya", his own school of law (*madhhab).*

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[74] S.A. Jackson, *Islamic Law and the State. The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī.* Leiden (E.J. Brill), 1996, 192.

[75] W.B. Hallaq,' The Author-jurist and Legal Change in Traditional Islamic Law'. *Recht van de Islam* 2001 (18), 51.

[76] *Risāla*, 2. Appendix A, 121.

In the introduction (*muqaddima*) Bayram deals with the definition of the concept of *siyāsa sharʿiyya*, and mentions the Ḥanbalī Ibn ʿAqīl, already quoted before, and the 'youngest' of Bayram's sources, the Ḥanafī jurist from the Crimea, al-Kaffāwī (1028/1619-1094/1683), in whose view the policies of *siyāsa sharʿiyya* are to be employed 'to improve mankind guiding men along the secure path, saving them here on earth as well as in the Hereafter'.

In the first chapter he expounds on the legitimacy of the concept (*mashrūʿaitihā)* and the basis for a further elaboration of the concept of the *siyāsa* policies is laid. It is here that we find the preliminaries to the following chapters.
Referring to the Companions and the Righteous Successors, who in the absence of any written laws had to take decisions on the basis of their personal opinion, on their idea of what was in the interest of the people, Bayram quotes Ibn Qayyim al-Jawziyya, who transmitted:

> On the authority of Ibn ʿAqīl, in answer to the one[77] saying there is no *siyāsa* except that which is in conformity with the *Sharʿ*: If you mean by your phrase only that which is in conformity with the law, that is to say, whatever is not in contradiction to that which is explicitly stated in the law, well, that is correct. If you mean to say that there is no *siyāsa* except for that which is explicitly stated in the law, that is a mistake.[It] would do wrong to the Companions, may God be pleased with them. Of the Righteous Successors are mentioned in the sources [cases] on execution and exemplary punishment, which will not be denied by any *ʿālim* [knowing of [the Sunna.[78]

The second chapter concerns the rights the ruler is entitled to, compared to those of the judge, i.e. '*mā li-l-wālī dūn al-qāḍī*', enumerating cases from the daily judicial practice. A list of ten of the most prominent of those may be traced back – through al-Ṭarabulsī, al-Qarāfī and ultimately Ibn ʿAqīl - to the eleventh century Shāfiʿī scholar from Baṣra, al-Māwardī, although Bayram does not mention him. In this chapter also figure other contributions of al-Qarāfī, supporting the legitimacy of the *siyāsa sharʿiyya* concept:

> The granting of a wider jurisdiction to the ruler in his political domain (*siyāsa*) is not contrary to the Sharīʿa. This can be confirmed by clear demonstration as well as by the law's basic principles, viewed from different perspectives.[79]

Chapters three and four feature in great detail the differences between the *qāḍī* 's jurisdiction and that of the political ruler in matters of criminal law, including an elaborate section on *taʿzīr* (deterrence) 'punishment administered at the discretion of the ruler, to deter the offender himself or others from similar conduct.'[80] It is in particular in these chapters that we find an abundance of quotations from all four schools of law, of different periods. They seem to be serving as illustrations and elaborations of the second chapter.

In Bayram's conclusion any concluding comments are absent. It comprises of three more studies, the first one on the administration of justice through apparent evidence (*al-qarāʾin wa-l-amārāt al-ẓāhira*). The second study is on *firāsa*, i.e. the technique of reading and judging by certain aspects of the defendant's physiognomy, meant for those judges that are endowed with

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[77] In the original text of Ibn 'Aqīl the 'one' is defined as a Shāfi`ite. In: Makdisi, 527. In *Turuq al-Hikmiyya*, 12, 13.

[78] *Risāla,* 3. Appendix A, 123.

[79] *Risāla*, end of page 6. Appendix A, 128.

[80] N.J. Coulson, *A History of Islamic Law*. Edinburgh (At the University Press) 1991, 133.

‘the perfection of a fine character, sharpness of sight and clearness of thought’.[81] Five of the twenty-nine pages are devoted to *firāsa*, illustrated by numerous examples from the famous eighth-century’ judge from Baṣra, Qāḍī Iyās.

The third study in Bayram last chapter is on *ḥisba*, in its widest sense the function of ensuring that the precepts of the *sharīʿa,* particularly those of a moral and religious nature, are observed. The *muḥtasib* is the market inspector, an official with authority in the particular field of wrongs and offences in the public domain. He is to control measures and weights, to keep a watch over the preparation of food and the manufacturing of clothing and tools.

> He may exercise his independent judgment in cases of disorder related to the public area outside the houses and buildings of stone on the roads (…) His function is more extended than that of the judge in that he may by his own initiative examine reprehensible acts even if they have not been brought before him. The judge can only handle cases that are submitted to him (…) His role is to intimidate whereas the role of the judge is to render justice.[82]

Bayram’s Sources

Although large parts of the treatise can be traced back to the authors Bayram mentions as his main sources, there are, however, two, possibly three scholars to whom this does not apply. Firstly, Abū Ḥusaynī al-Kaffāwī, a Ḥanafī scholar from the Crimea. Of him there is only one quotation, in the introduction, in page 2, where he provides a definition of the concept of *siyāsa sharʿiyya* from his book *Kulliyāt al-ʿUlūm*, we just quoted.
He is the ‘youngest’ of the scholars quoted by Bayram, who by the mere fact of his date of death excludes him as an indirect source quoted from the authors mentioned above. He lived from 1028/1619-1094/1683.

Secondly, Khayr al-Dīn al-Ramlī, the Palestinian mufti, also a Ḥanafī, who lived from 1585 to 1671, for the same reason. Of him there are two quotations, in page 10 on the employment of *ʿurf,* and in page 18 , from his book *Kitāb al-Fatāwa al-Khayriyya.* Khayr al-Dīn al-Ramlī was a scholar well-known to Bayram. We find him quoted several times in Bayram’s earlier work, *Bughyāt.*

The possible third is the famous Qāḍī Khān, the twelfth-century’ scholar from Transoxania, whose compendium of fatwas used to be on the book shelf of every Ḥanafī scholar, and as we discovered, also on Bayram’s. We found Bayram’s signature, of the year 1782, on one of the last pages of a very fine edition, kept in the library of one of his descendants,[83] rendering it thereby highly improbable that Bayram simply copied the quotations of Qāḍī Khān from, for instance, al-Ṭarābulsī. Qāḍī Khān is quoted three times in Bayram, in the pages 15 and 16.

[81] *Risāla*, 22. Appendix A, 150.

[82] Id., 27. Appendix A, 155.

[83] Mme Ouassila Bayram, Tunis.

Furthermore there are scholars like Qāḍī ʿIyād and Molla Khusrev, who enjoyed a wide popularity among the Tunisians, not only among the learned. Molla Khusrev's work remained on the 'top list' for the Zaytūna students until the twentieth century.[84]

There is another author whom Bayram might have employed as a source, although among the scholars mentioned his name is absent, i.e. Dede Efendi (d. 975/1567),[85] an Ottoman jurist at the time of Sultan Suleyman I (1520-1566). Heyd refers in his *Studies in Old Ottoman Criminal Law*[86] to a *risāla* with exactly the same title as Bayram's, written by this Dede Efendi. Heyd indicates that 'very many' manuscripts of the title exist in Turkish libraries. It was at least twice translated into Turkish under the title *Siyāsetname*, the latest, according to Heyd, being 'the rather free and enlarged translation by Meḥmed ʿĀrif Efendi, who from 1854 to 1858 was Şeyḫulislām. It was published at Istanbul in 1275/1858-59.' I found two more Dede Efendi manuscripts in the Staatsbibliothek zu Berlin.[87]

Another edition of the work surfaced in the library of the Tunisian Malikī scholar, Muḥammad aṭ-Ṭahir Ben Achour (1879-1973), in La Marsa, Tunisia, bound together in one volume with Bayram's treatise. And, on the first page we find the same *Muʿīn al-Ḥukkām*, the work of Shihāb al-Dīn al-Ṭarābulsī, introduced in very much the same manner…
It could be a coincidence. Neither treatise bears a date and it could even be the case that the two books were bound together at some point in time simply because of the similarity in subject and title. It is, however, very likely that Bayram had knowledge of Dede Efendi's work. Judging from the very many manuscripts of the title, it must have been well-known in Ottoman Ḥanafī circles.

There are four units in Dede Efendi's text that bear great similarities with the corresponding subjects in Bayram. Still, they amount to no more than an approximate forty lines out of the thirty-two pages of Dede Efendi's treatise and the twenty-nine pages in Bayram. Though both writers devote a separate chapter to *taʿzīr*, in this particular section hardly any identical sentences are to be found. In Dede Efendi's treatise the chapter on the office of the market inspector, *ḥisba*, is missing, as are the pages on *firāsa*, on which Bayram dwells so extensively. The outline of chapters, however, is to a large extent identical to that of Dede Efendi. It seems to me that Bayram took refuge to Dede Efendi to find a matrix for his assembled quotations: the arrangement of chapters is to a large extent identical.

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[84] A. Abdesselem, *Les Historiens Tunisiens*, 34.

[85] Burhānaddīn Kamāladdīn Ibr. B. Bakhshī Dede Khalīfa Qara Dede (also called Minkārizāde). Born in Sumisa (d. 1567). In: Brockelmann GAL.II, 593.

[86] U. Heyd, *Studies in Old Ottoman Criminal Law*. Oxford (At the Clarendon Press) 1973, 198.

[87] Staatsbibliothek zu Berlin, Orientabteilung. Two editions: Wetzstein II 1844, fol 118b-128 (approx. date of copy 1200/1785, with name of copyist and commissioner) and, Landberg 471, fol 161-181 (approx. date of copy: 1100/1688, with name of copyist). For collating purposes I used the Landberg manuscript, the Wetstein being hardly intelligible.

Bayram and the Ḥanafiyya

As Bayram indicated in the preamble to his treatise, apart from the work of his three main authors of whom two were not of his own school of law, he 'also added to his work a large number of relevant regulations from the Ḥanafiyya'. It is in particular in the third and the fourth chapter that we find an extensive summing up of quotations from all times and places. Ḥanafīs are certainly in the majority, but Mālikīs follow them closely. Scholars from the two other law schools, though less prominent, are quoted as well.

There was, as we have seen, no strict adherence to one single *madhhab* in Ottoman Tunisia at that time or later. It therefore does not come as a surprise that Bayram would delve into other than strict Ḥanafī sources. In fact, he uses examples from all four schools of law to strengthen his argumentation. In one of his earlier works *Bughyāt*, a book on family law, he follows a similar pattern.

The question is, however, whether this has to be related to the specific Tunisian situation. Did Bayram depart from the scholastic particularity of adherence to one single *madhhab* in a country?[88] Did the particular genre of his treatise, a *risāla,* offer him a greater freedom of quoting? This possibility cannot be excluded. On the other hand, we register in the *Risāla* that not only Bayram quoted freely from schools other than his Ḥanafiyya, the Mālikī al-Qarāfī quotes the Ḥanbālī Ibn ʿAqīl, al-Ṭarābulsī mentions many times the Mālikī Qāḍī ʿIyād and his *Kitāb al-Ghunya.* More examples abound in Bayram's pages. We may conclude that in contradiction to Kamali's assertion, 'scholastic isolation' was less an issue than generally assumed.

Bayram did not comment on the texts he quoted. Most of the time he quoted them literally. And, sometimes, surprisingly, he left out sentences that might have contributed to a better understanding of the subject, as in the case of the origin of the al-Māwardī regulations in the practice of the Medina *qāḍī* Hishām b.ʿAbd al-Mālik, or in the case of al-Ṭarābulsī's elaboration on the pros and cons of *firāsa* and on its history, which Bayram chose not to reproduce in his work. The five pages on the subject seem to be disproportionate in relation to other subjects dealt with.

III. *The Analysis of the Risāla*

Introduction

Forty, fifty years later there would be paintings of Napoleon's battles on the walls of Le Bardo Palace.[89] Aḥmad Bey, the tenth Ḥusaynīd Bey (1837-1855), was a great admirer of Bonaparte's military skills. Ḥammūda Pācha, as his contemporary, could not afford such a relaxed mind set: he must have stood in awe and fear at the news of his Egyptian invasion: 'For the moment we have nothing to fear', he is recorded to have said. 'But our turn will

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[88] Moh. Hāshim Kamali, '*Fiqh* and Adaptation to Social Reality.' *The Muslim World* LXXXVI, No.1 (1996), 79.

[89] The name Bardo is of Spanish derivation (pardo, is meadow), probably from the vocabulary of the Muslim immigrants from Al-Andalus. In: M. El-Aziz Ben Achour, *La Cour du Bey de Tunis*. Tunis (Espace Diwan) 2003, XIX.

come. Napoleon is too great not to be worried about.'[90] Yet, there is no allusion to those events of the first of July 1798 in the treatise. Nor is there the slightest hint at the extensive Tunisian reply to the letter of the Wahhābī movement, written by his learned colleague *shaykh* Ismāʿīl al-Tamīmī (d. 1248/1832) and *shaykh* ʿUmar al-Maḥjūb (d.1222/1807) in the same year.[91]

And neither is there any reference to what must have been the greatest source of discontent and frustration of his years, i.e. the continuing attacks of his neighbors in the west, the Ottoman military leaders, the Algerian Deys. During the entire century they had glanced with disapproval at the process of 'de-Ottomanization' that went on over the border and had invaded the western territories on a number of occasions. It was one of the reasons Ḥammūda Pācha changed the Regency's building and restoring enterprise from *madrasas* and mosques to barracks[92] and fortifications.[93] In short, there is in Bayram's work not one single indication of time, place or addressee, let alone an intimation of its immediate cause.

Its Objective

If we return to the question whether there was any particular event at the time that offered an incentive to Bayram to compose his treatise, two observations need to be made.

Firstly, Bayram's refusal to issue a fatwa condoning Ḥammūda Pācha's intervention in Tripolitania, we already shortly referred to earlier. 'This is a political question', is Bayram's reaction to the Bey's request

> It would be much better if you would consult the people who have a certain opinion in political affairs, the chiefs of the military, or the ministers (*akābir al-daula*). As for the *ʿulamā',* they cannot give you an advice that that would serve your purpose. Do not hope to get from them a fatwa that would justify a war between Muslims. We are bound by the *bayʿa* to the Sultan. We have a moral responsibility with respect to the Sultan and he is [therefore] entitled to our loyalty (*muṭlaq al-taṣarruf*)'. And if you request a fatwa from the *ʿulamā'*, their hesitation to respond could provoke disorders among the people.[94]

With a few strokes of the pen an illuminating insight is given into the relations between Sultan, Bey and the people. To Bayram, apparently, loyalty to the head of the *umma* and concern for the *raʿīya,* the subjects, came before compliance with the Bey's request. That, in the first place is noteworthy. Secondly, Bayram's evasive response 'this is a political question' strikes us as remarkable. Does it imply that the *shaykh al-Islām* kept himself aloof from political matters, and, does it also imply that he did not consider the treatise he wrote seven years later as a work on matters of state?

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[90] *Ithāf*, III, 77.

[91] A.H. Green, 'A Tunisian Reply to a Wahhabi Proclamation: Texts and Contexts.' In: A.H. Green (Ed.), *In Quest of an Islamic Humanism. Arabic and Islamic Studies in Memory of Mohamed al-Nowaihi.* Cairo (The American University of Cairo Press) 1984, 155 ff.

[92] One of the barracks he built not far from the Zaytūna Mosque. It now houses Tunisia's National Library.

[93] The supervision of these new constructions was entrusted to Jean Emile Humbert (1771-1839), a Dutch engineer. See also Chapter II, 67.

[94] *Ithāf* III, 23.

The second observation refers to Ibn Abī al-Ḍyāf 's elaborate paragraphs on issues of political authority and their relation with the law of Islam. In that particular section Bayram's work is not mentioned. He alludes to the *Risāla* a few paragraphs further on, but then in another context, namely that of the Bey's troublesome relations with the governors in the country. The link, however, between the treatise and matters of political authority and constitutional development is then not made. This is all the more surprising if we take note of Ibn Abī al-Ḍyāf's willing disposition towards Ḥammūda Pācha's ascribed feelings for a constitution we signalled earlier. With respect to the governors in the country he registers:

> He was hard (*shadīdan*) [in his conduct] towards [the governors of] the districts (*al-umāl*). The majority of them in the country, deserved such a conduct. If people complained about them, he heard the charges, the witnesses and the evidence that was brought forward, just like one would do with suspects in a law suit. It was difficult to establish the truth following the *sharīʿa* procedures *(ʿalā al-ṭariq al-sharʿiyya*). He [therefore] employed [the methods] of *siyāsa* to obtain the truth from them and let himself be guided by the practice of ʿUmar, may God be pleased with him.[95]

Immediately following this paragraph, Ibn Abī al-Ḍyāf remarks that the Bey asked the *shaykh al-Islām* Bayram to compose a work on *al-siyāsa al-sharʿiyya,* upon which Bayram wrote 'sa célèbre épitre'.

These two observations assign to the *Risāla* its place in Tunisia's historical context: the political reality of the problematic circumstances of the governors demanded a different approach than the strict rules of *sharīʿa* procedure could provide, in other words, it is here that the 'real' and the 'ideal' collide and Bayram offered in his work some legal alternatives:

> …ʿUmar wrote to his governors in Syria on the subject of a false witness, that he should receive forty lashes, that his face should be blackened with soot, that his head should be shaved and that he should be detained for a long time. (….) Some *shaykhs* answered that the procedure followed byʿUmar is *siyāsatan* [it belongs to the jurisdiction of the ruler]. Therefore, if the ruler (*al-ḥākim*) considers it a matter of public interest, than it is up to him to act in this matter. Furthermore he added that from the abovementioned case may be concluded that *siyāsa* is what the ruler does to further the welfare of the community, without it being mentioned in the law.[96]

> Another example is that he (the ruler) has the right to resort to the reports of his deputies concerning the person under suspicion: whether he is one of those people susceptible to the crimes in question or not. If the allegation under consideration is not established, and he proves to be a man of integrity, he will set him free. If the allegations are confirmed, he has to expand the investigation – contrary to the judges' practice.[97]

Who were the governors in the district, why did they deserve the severe treatment that the Bey was obviously meting out to them? And, even more relevant, where do they figure in Bayram's *Risāla?*

Ḥammūda Pācha's policies of consolidation and bureaucratization also included a firmer grip on the regions outside Tunis. One of the first affairs he took at hand was a reform of the tax

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[95] *Ithāf* III, 82.

[96] *Risāla,* end of page 14. Appendix A, 140.

[97] Id. , 5. Appendix A, 126.

system in the areas. *Ittifāq*, the amount of money that had to be paid to obtain the right to act as governor and to collect taxes, was now offered to the highest bidder for a period of no longer than one year, whereas under his predecessors this right had belonged to families of local notables resident in the area since a long time. The governor served as the permanent representative of the Bey to his subjects. Governor and receiver of tax money, he also had police and judiciary powers.[98]

The new system of tax farming, that by the time the treatise was written, had been in use for about eighteen years, easily led to fraud and other instances of misuse of authority. Problems between the population and those local authorities arose and the Bey in his role as judge and court of appeal saw many of those tribulations lodged as complaints before him. "La source la plus fertile du revenu public, et en même temps la plus ruineuse pour les contribuables, provient des gouverneurs ou Qâyds, établis dans chaque arrondissement," remarked Dr. Louis Frank.[99]

The governors are not explicitly mentioned in Bayram's pages, nor does he refer to a request made by the Bey or even allude to the reason why he set himself the task of composing the treatise. As his incentive he presents:

> For the lands to prosper and the conditions for the people to be well organized, repression of the people of evil and corruption (*ahl al-shar wa'l-fasād*) and safeguarding the people of virtue and integrity (*ahl al-faḍl wa'l-sadād*) is imperative. This cannot be accomplished to the full without the application of the rules of governance in accordance with the law (*siyāsa sharʿiyya*.)[100]

These are Bayram's opening lines in which the treatise' theme is introduced. They belong at the same time to the very few words in his work that are his own.

Throughout the entire work runs this same leitmotiv. 'It is', in the words of the author, 'one of the most important issues people of wisdom among judges and rulers are discussing amongst each other', as they did indeed during Ḥammūda Pācha's years.

In Bayram's expositions a clear distinction is made between the so-called people of corruption and the people of integrity. There is discrimination in the way punishment is inflicted upon them and in the nature of the disciplinary action. Who were these 'people of evil and corruption', who were the 'people of virtue and integrity' ? Even though the terms are not his own – we find the same expression used by the authors he quoted from – they do reflect a social reality that Bayram recognized as his own. The question can be raised here whether the categories of the *ahl al-fasād* and the *ahl al-faḍl wa'l-sadād* coincided with the terms *khāss* and *ʿāmm*, representing the elite ('les gens de droit d'exception') and the common rank and file ('gens de droit commun')[101] or whether they stood for a division of a more political nature, [102] such as a divide between Ḥammūda Pācha's constituency of 'the willing' (*ahl al-faḍl wa'l-*

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[98] L. Valensi, *Tunisian Peasants*, 229.

[99] Dr.L. Frank, *Tunis*, 66.

[100] *Risāla,* 2. Appendix, 121.

[101] 'Les gens de droit déxception' and 'Gens de droit commun'. In : A. Henia, 'Le pouvoir entre 'notables' et 'élites'. Les cycles de la notabilité'. *Monde arabe. Maghreb Machrek.* No. 157 (juillet-sept. 1997), 93.

[102] In classical Muslim literature in general the traditional division between *khāss* and *ʿāmm* was a common phenomenon. Apart from political affiliations people of the elite were approached in a different manner than the members of the lower classes. When it came to the application of criminal law the rift was even deeper, and presumptions of integrity and corruption were sometimes 'naturally' attached to respectively the *khāss* and the

sadād) and the faction of the politically incorrect (*ahl al-fasād*). The tax farmers' conduct was an issue not only in the late years of the eighteenth century, it would remain a problem in at least the five forthcoming decades, as we shall see. It is clear that not a simple division between elite and lower classes is meant here, but that reference is made to the all too ambitious tax farming governors, who frustrated the Bey's relations with the people in the regions outside the capital.

Heyd in his work on Ottoman criminal law[103] makes it clear that the *ahl al-fasād* were 'the fomenters of corruption in the world', *sāʿin fī 'l-arḍi bi'l fasād* - a term also used by Bayram – whose offences were crimes against the state or against the public order requiring punishment that went beyond the normal *sharīʿa* penalties. This category is described in the Qurʾān, in Ṣūra 5, 32(37), '…those who fight against God and His Messenger, and hasten about the earth, to do corruption there.'

Even stronger arguments for the contention that the term *fasād* refers to a crime against the state or to an offence of a political nature, are provided by Henia, in his article on Tunisian prisons[104] as well as in his book on the relation of the regions in the south with the beylical authorities in eighteenth-century' Tunisia, both of them relating to the period Bayram was active as a mufti, later as a *shaykh al-Islām*. *Fasād*, in his words, constitutes a crime against the state, it is an offence against the political order.[105]

Where do they figure in the Risāla?

Although no specific reference is made to the problems Ḥammūda Pācha encountered with the governors in the country, if we now look at the text, bearing in mind the situation described above, there are several sections in the text that fit in this particular context. One of them clearly stands out, i.e. the paragraph with the differences between political ruler and the *sharīʿa* judge (*mā li-l-wālī dūn al-qāḍī*) on Bayram's page five. It is here that Bayram clearly juxtaposes ruler and judge. He defines their respective positions of the political ruler, the *wālī* and the judge, the *qāḍī* in a list of eleven points.

The paragraph appears in the second chapter to which the other chapters must considered to be illustrations and elaborations. It is an extensive paragraph which Bayram quoted from al-Ṭarābulsī and al-Qarāfī. Ultimately it has its provenance in the work of the Shāfiʿī scholar from Baṣra we mentioned before, al-Māwardī, in his *Al-Aḥkām al-Sulṭāniyya (The Ordinances of Government*). He was one of the first who after the establishment of the schools of law, articulated the position of the head of government in relation to the law. The words of al-Māwardī according to al-Ṭarābulsī were based on the legal practice of Hisham b. Abd al-

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ʿāmm. Some fatwa collections even prescribed four levels of *taʿzīr* punishment for people of four different social levels.[102] In: Masud, 'Siyāsa', 16, referring to the seventeenth-century fatwa collection *Fatāwā al-ʿĀlamgīriyya.*

[103] U. Heyd, *Studies in Old Ottoman Criminal Law*. Oxford (At the Clarendon Press), 1973, 195, 196.

[104] A. Henia, 'Prisons et Prisonniers à Tunis vers 1762 : Système Répressif et Inégalités Sociales.' *Revue d'Histoire Maghrébine*, 1984, 238.

[105] A. Henia, *Le Ğrīd. Ses Rapports avec le Beylik de Tunis (1676-1840).* Tunis (Publications de l'Université de Tunis) 1980, 136.

Malik, in the words of al-Ṭarābulsī, the *qāḍī* of Medina.[106] Bayram's list is in fact a combination of two lists both appearing in the work of al-Māwardī, one in a chapter 'On the Redress of Wrongs', and another 'On Crimes and Punishments'.

It is here that we see a clear instance of the assertion brought forward in the introduction, i.e. that the *sharī'a* with its strict rules of procedure and limited jurisdiction never provided an all-encompassing structure for law and order; other jurisdictions either developed next to it, or the position of power and authority attributed to the political rulers since the early days of Islam, was once more confirmed, as in the case of the Bey in the present study. To keep 'the social conditions well organized' Ḥammūda Pācha was given the authority to act against his tax farmers in the interest of his subjects' welfare.

The Juridico-Theological Justifications in Bayram's Treatise

Bayram did not mould his justifications for the Bey's actions into one comprehensive theory. The reasoning for the employment of *maṣlaḥa*, considering of public interest, for instance, has to be retrieved from a variety of quotations of his main sources. Although al-Qarāfī is recorded relatively modest in that respect, and also despite Bayram's claim that al-Ṭarābulsī is his main source, Bayram leans heavily on al-Qarāfī for the juridico–theological underpinnings of his reasoning, through either direct or indirect quotations.

We find the thirteenth-century Mālikī scholar from Cairo for instance in page 7, where the avoidance of hardship and duress is given as the justification for a wider jurisdiction of the political ruler than the law would provide:

> For instance the fact that corruption *(fasād)* has increased and spread itself, in deviation to the first epoch. This required a variation in the rules in order not to depart from the law altogether, according to the words of the Messenger, may God's blessing and peace be upon him, '[There shall be] no damage and no mutual infliction of damage (*lā ḍarar wa-lā ḍirār*), implying that this leaves out the rules that would lead to duress. This is supported by all the texts in the *Qur'ān* in order to avoid hardship (*bi-nafī al-haraj*). Therefore the granting of more judicial space (…) to the ruler's domain is not contrary to the *sharī'a*.[107]

Another paragraph, with the questions laid before al-Qarāfī[108] and his subsequent answers, constitutes in my view the most interesting of the treatise, transcending the tax farmers case. There he is even more specific. It presents a fine specimen of al-Qarāfī's methodology to accommodate change, while bypassing at the same time the controversial employment of *ijtihād*, so aptly described by Jackson as 'legal scaffolding': '… rather than abandon existing rules in favor of a new interpretation of the sources [genuine *ijtihād*] jurists seek needed adjustments through new divisions (…) and expanding or restricting the scope of existing laws.' [109] We read in page 19:

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[106] *Mu'īn al-Hukkām*, 164.

[107] *Risāla*, 7. Appendix A,128, 129.

[108] Id. 19. Appendix A, 146.

[109] S. Jackson, '*Taqlīd*. Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Mutlaq* and '*Amm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī.' In: *Islamic Law and Society* ,1996. 1996, 167.

> (…) He answered that the enforcement of rules having as their rational basis the local practice, despite the fact that this practice has changed, is at variance with the consensus of the scholars and based on ignorance of the faith. We may even say that everything in the law changes its rule towards the requirements of a renewed practice as soon as this [old] customary practice changes.
> Do you not see that in matters of transaction the religious scholars are in agreement that if a price is mentioned in a general sense, this is understood in terms of the currency then in circulation. And when any other kind of currency is adopted, then their estimation [of the precise value of the price] is changed accordingly. We then reject the first estimation of the value as practice has moved away from it. [110]

Al-Qarāfī's thirteenth-century' statements have a 'ring' of modernity to them. His liberal interpretation of the rules must have been a welcome weapon for Bayram in his plight to find a justification for the Bey's authoritative powers. Bayram by quoting these words of al-Qarāfī touches upon an important discussion in Islamic legal history, related to the question whether a legal scholar is qualified to use his own independent reasoning (*ijtihād)*, in coming to his legal assessments. During the formative years of Muslim jurisprudence and the subsequent establishment of the schools of law, the use of independent reasoning by legal scholars became progressively restricted to be replaced by the duty of *taqlīd*, or imitation, reducing the *'ulamā'* to 'imitators', *muqallidūn*, bound to accept and follow the doctrines established by their predecessors,[111] their learned colleagues of the early formative period, the *Mujtahidīn*. Bayram, supported by al-Qarāfī finds a way out of the dilemma of *taqlīd*. 'We do not need at all to follow the [forbidden] road of *ijtihād'*, he claims. 'We may do an appeal on the legal concept of customary law *(ʿurf)* and thus come to new rules.'

In the end, so we may understand Bayram, the law should provide for new circumstances: '[The judge] should not make that which is legally required in opposition to the reality [of the people],' says Bayram earlier in his treatise.[112] In the words of al-Qarāfī Bayram found the basis for a legitimization of the Bey's jurisdiction, to move beyond the *sharīʿa* legislation that proved to be too narrowly defined to provide for the ruler's functioning and for the changing circumstances in the new times (*ikhtilāf al-zamān*).

Conclusion

Were al-Qarāfī's words and the al-Māwardī rules meant to widen the Bey's current jurisdiction, giving him an extra authority and excuse to employ violence and intimidation, or were they put to use to narrow down, to codify the Bey's existing practice? Did he request from Bayram a fatwa, a mark of approbation to go beyond the fixed *sharīʿa* methods or did his request to Bayram arise from his wish to formalize his role as a sovereign into a legal framework? These questions still have to be answered.
And although the answer by necessity must contain an element of speculation, there are two reasons favoring the last option.

First of all, the assumption that Bayram wrote his work specifically to advise to Bey in his handling of the problems with the tribes in the south and to grant him a wider authority for this purpose, as seems to be suggested by Ibn Abī al-Ḍyāf, leaves unresolved why he devoted

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[110] *Risāla* 19. Appendix A, 146.

[111] Coulson, *A History of Islamic Law*, 80.

[112] *Risāla*, 4. Appendix A, 125.

so many pages to subjects that did not have an immediate bearing to problems with the Bey's tax collectors. The problems with the governors might have provided the immediate cause, though. The five pages on *firāsa*, to mention one example, seem to be disproportionate in respect to the total of twenty-nine pages and also disproportionate if we would consider them as mere illustrations of the preceding chapter on the subject of apparent evidence. They will have served as instructing examples to the Bey.

The same applies to the description of the office of *muḥtasib*, the market inspector, which would hardly be of relevance in the suppressing of the unruly governors far outside Tunis, in the country. The many instructions supplied for the handling of cases of theft are also a case in point.

Secondly, the codification supposition fits into the eighteenth-century context of formalization and consolidation policies of the Ḥusaynīd Beys, which had their culmination point under Ḥammūda Pācha. Several reasons were already given in these pages to support this assertion. The strongest argument is provided by the need to hold on to his 'life line', i.e. the line of delegation he acquired from the Ottoman Sultan, which meant for him and his subjects inclusion into the community of believers, the *umma*. In order not to jeopardize his base of power and authority, he had to comply to the law of the *umma*, he had to be *muqayyad bi'l-sharīʿa*. Loyalty to the Sultan was of political relevance to the Bey. For his *shaykh al-Islām* it was something else as well: to him it also held a spiritual and devotional importance. To Bayram, writing his *Risāla* was a work of piety, of faith. Bringing the rules and regulations necessary for the *raʿīya* of Tunisia in harmony with the law, was doing what he believed God asked him to do.

Concluding, the treatise finds its place in a context of bureaucratization, so characteristic for Ḥammūda Pācha's reign. Anxious to stay within God's divine order, he asked his *shaykh al-Islām* for advice, like Ḥusayn b. ʿAlī, the founder of the dynasty had done before him.

Does that imply that it also can be assessed as an indication of 'a first venture into change of modes of governance'? Did Bayram have 'a precognition of changes to come'? Ṣāliḥ al-ʿAslī, my learned colleague in Tunis, seems to be open to this suggestion, linking Bayram's work with the process of constitution (*taqnīn*) in Tunisia's nineteenth century.[113] And indeed, in retrospect these can be held as precursory indications, although Ibn Abī al-Ḍyāf, sixty years later, did not recognize them as such. Whether it was Bayram's point of departure is to my mind doubtful; it would impose on him a role he, in all likelihood, did not play and which would lift him out of his eighteenth-century' context.

Bayram's treatise is a compilation, a condensation, or to use Bayram's own words, the *zubda* (literally, the butter) of a scholarly production on the relation between government, *siyāsa* and the law of Islam, the *sharīʿa*. Through Bayram's words we look into the many centuries of Muslim jurisprudence. When he quotes the Ḥanafī qāḍī from Jerusalem al-Ṭarābulsī, we also hear the voice of the famous twelfth-century Malikī *ʿālim* Qāḍī ʿIyād from Ceuta and Granada in his *Kitāb al-Ghunya*. When he quotes al-Qarāfī, we hear the twelfth-century theologian and jurist from Baghdad, Ibn ʿAqīl, who through his master Abū al-Faḍl al-Hamadānī must have been influenced by al-Māwardī. When he quotes the Ḥanbalī Ibn Qayyim al-Jawziyya, we may be sure that some of the ideas of his master Ibn Taymiyya must have trickled through … He did, in fact, no more and no less than what he said he would do: he assembled al-Ṭarābulsī's 'scattered pearls' and supplemented it with material from his other three great precursors and many others. His originality shows up in the manner 'he brought the pearls

[113] S. al-Aslī, *Risāla* , 93.

together'. And, as he wrote in his preamble: 'preferring it to be concise I avoided any superfluity.

If there is one thing that overtly transpires from the *Risāla*'s pages, it is that Bayram and with him the many Muslim scholars he quoted, expressed an open and liberal attitude towards the law of Islam, the *sharī'a*. They did not waver to adapt, to widen or to restrict the existing rules if circumstances in time or people's realities so requested. Did they not view the law as immutable as so many after them? In particular, the answers of the thirteenth-century Egyptian scholar Al-Qarāfī are in this respect revealing and raise the question at what point in time the label of 'conservative', 'inflexible', 'averse to change and modernity' was attached to Islam's legal scholars.