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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

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Appendix A

Translation:

Risāla fī-'l-Siyāsāt al-Shar'iyya

Treatise on Governance in Accordance with God's law.

by

Abū 'Abd Allāh Muḥammad Ibn Ḥusayn Bayram (1716-1800).

May God forgive them out of the generosity of His blessings and His nobleness. Amen.

(2) In the Name of God, the Compassionate, the Merciful, may Gods blessing be upon our Lord and Master Muḥammad, on his family and his Companions.

In the name of Him Whose names are hallowed and Whose graces are great. Let my beginning and my conclusion, my moving about and my settling down, be in the name of God. He is beyond having any equal. He is exalted. He is beyond needing support by any supporter (*wazīr*). I salute our Lord Muḥammad who led us. He was the best leader and has led us to the noblest of ethics and to the sources of wisdom. [I salute] his family and his Companions, the family of [ʿAlī] (*ʿitratih*i)[1] and his followers (*ḥizbihi*).

One of the most important issues people of wisdom among judges and rulers are discussing with each other, is the repression of the people of evil and corruption (*ahl al-shar wa'l-fasād*) and the safeguarding of the people of virtue and integrity (*ahl al-faḍl wa'l-sadād*).

Through this the lands prosper and conditions of the people are well-organized. This cannot be accomplished to the full without the application of the rules of governance in accordance with the law (*siyāsāt al-sharʿiyya*), in conformity with the basic rules of jurisprudence. I did not see its subject elaborated upon inclusively in one chapter by any of our scholars of *fiqh*, except for Shihāb al-Dīn al-Ṭarābulsī,[2] in his book *Muʿīn al-Ḥukkām.* He devoted an important chapter to the question and this should have sufficed to solve the problems. He brought the scattered pearls together and only left unmentioned a few minute details. Therefore, I wrote down the best [of it] in this treatise. Preferring it to be concise I avoided any superfluity.

I have added to it [material] from *Al-Iḥkām* of al-Qarāfī[3] and of [the book] *Siyāsāt* of Ibn Qayyim al-Jawziyya.[4] I have [also] added to it many relevant regulations *(furūʿ)* of the Ḥanafiyya. I pray to God that my work will be accepted.

I have divided it into an introduction, four chapters and a conclusion. May God provide us with His blessing on what He values best of it, with His mercy and grace, out of His bounty and His power.

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[1] *ʿitra*, the stem or stock of a tree, and the branches of a tree. Hence: the people or tribe of a man, consisting of his nearer relations, both the dead and the living (…) or the people of a man's house, the more near and the more distant. The nearer portion of the tribe of the Prophet, (…) or, as is commonly held, the people of the house of the Prophet; those from whom it is forbidden to exact the poor-rate, and those to whom is assigned the fifth of the fifth, mentioned in *Sūra* 8, 42. In: E.W. Lane, *Arabic-English Lexicon.* New York (Frederick Ungar Publ. Co.) Ed. 1955, 1946.
Synonym to *Ahl al-Bayt*. The Shi'a have a preference for the term *ʿitra.* In one version of the Farewell Sermon Muhammad is represented as saying that God has given two safeguards to the world: His Book and the Prophet's *Sunna*; in another version this is replaced by: His Book and the Prophet's *ʿitra*. In EI_2 I, 258.

[2] Ḥanafī jurist, judge of Jerusalem. Is mentioned in Brockelmann S.II, 91, as ʿAlī al-Dīn ʿAlī b. Khalīl al-Ṭarābulsī (d. 844/1440).

[3] Shihāb al-Dīn al-Qarāfī (626/1228-682/1283). Egyptian Mālkī jurist, author *of Kitāb al-Iḥkām fī Tamyīz al-Fatāwa wa tasarrafat al-Qāḍī wa'l-Imām.* In: S.A. Jackson, *Islamic Law and the State. The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī.* Leiden (E.J. Brill) 1996, xix.

[4] *Al-Ṭuruq al-Ḥikmiyya fī 'l-Siyāsāt al-Sharʿiyya* (also called: *Kitāb al-Firāsa*), of Shams al-Dīn Ibn Qayyim al-Jawziyya. Ḥanbalī theologian and jurisconsult of Damascus. Pupil of Ibn Taymiyya. (691/1292-751/1350). In: EI_2 III, 821.

The Introduction, concerning the Definition of Siyāsat al-Sharʿiyya.

It is, as Ibn ʿAqīl[5] * [in the margin: al-Ḥanbalī] has said, the policy through which people are brought close to righteousness and kept away from corruption, even though it was not laid down by the Prophet and no revelation concerning it was sent down [to man]. In [the book entitled] *Al-Kulliyāt* by al-Kaffāwī,[6] it [means] improving mankind by guiding men along the secure path, saving them here on earth as well as in the Hereafter.

It is a [prerogative] of the prophets (3) to guide the elite and the common people (*al-khāssa wa'-l-ʿāmma*),[7] both in their outward conduct as in their inner behavior. It is [a prerogative] of the sultans and kings to guide both of them [but] only in so far as their outward conduct is concerned, not in anything else. It is [a prerogative] of the *ʿulamāʾ*, the heirs of the prophets, to guide the elite, only in so far as their inner behavior is concerned, not in anything else.

The First Chapter, concerning its Legitimacy

Know that the political domain (*al-siyāsa*) is of two kinds: unjust politics the *sharīʿa* does not condone, and just politics taking from the unjust person the right that does not belong to him.[8] *[in the margin: This was taken from Ibn Farḥūn, in his *Tabṣirat*. Look][9] [The just politics] deter people from corruption. The *sharīʿa* makes it a duty to follow them, be it that they should be followed in moderation, avoiding negligence as well as exaggeration. Whoever would ignore them, be it even in some rare cases, he squanders [legal] rights, impairs the canonical limits of permissible action and supports the people of corruption (*ahl al-fasād*).[10] Whoever goes beyond their bounds dissents from the law and into all kinds of injustice.[11]

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[5] Abū al-Wafā b.ʿAqīl al-Baghdādī al-Zafarī. Ḥanbalī jurist and theologian (431/1040-513/1119). In: EI$_2$ III,699.

[6] Abū al-Baqāʿ al-Ḥusaynī al-Kaffāwī, Ottoman jurist and author of the work *Kulliyāt al-ʿUlūm*. From Kaffa (or Kefe, the old name of the town of modern Theodosia (Russian, Feodosia) in the Crimea (1028/1619-1094/1683). In: Brockelmann S. II, 673, and in EI$_2$ IV, 868.

[7] Traditional two-class division employed by Muslim writers in the medieval period and beyond. The first are the notables, the distinguished, the second are the common people, the masses.

[8] In: Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*. Cairo (Matbaʿa Al-Adab wa'l-Muʿayyid) 1889, 5.

[9] Bayram does not refer to the work of this Mālikī judge from Medina (about 760/1358-799/1377). Study of his two-volume manual for judges, *Tabṣirat al-ḥukkām fī usūl al-aqdīya wa manāhij al-ahkām*, (Cairo: Maktabat Kulliyāt al-Azhar. 1406/1986), reveals that it does contain two sections on the subject of *siyāsa*, in the pages 12 and 13 of the first volume, and in the pages 104-115 of the second. Both are quoted from Ibn Qayyim al-Jawziyya, whose sources were Ibn ʿAqīl and al-Qarāfī. The latter is also mentioned by Ibn Farḥūn, thereby making it less likely that Ibn Farḥūn was a direct source for Bayram, as seems to be suggested in the margin.

[10] In *Muʿīn al-Ḥukkām* of al-Ṭarābulsī, is added '… and helps the wealthy.' (p. 164). See also: L.C. Brown, The Surest Path, 127.

[11] The first three paragraphs of this chapter appear almost identical in al-Ṭarābulsī, *Muʿīn al-Ḥukkām*, 164, and in Dede Efendi's *Risāla*, 1.

It is erroneously believed that al-*siyāsat al-shar'iyya* is incompetent [to assure] the welfare of the community. Well, that is a flagrant mistake and a [certain] proof of ignorance. God Most High has said: 'Today I have perfected your religion for you.'[12]

Religion includes all matters divine and mundane in a most perfect manner. The Prophet (SL'M) has said: "[Verily I have fulfilled my mission.] I have left that amongst you, - a plain command, the Book of God, and manifest Ordinances – which, if ye hold fast, ye shall never go astray."[13]

Ibn Qayyim al-Jawziyya transmitted on the authority of Ibn 'Aqīl in answer to the one[14] saying there is no *siyāsa* except that which is in conformity with the law *(shar)*': 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 scholar [knowing of] the Sunna.

One only has to remember the burning of the *Muṣāḥaf,* the decision for which was taken on the basis of a [personal] opinion on the principle of the interest of the community at large (*maslaḥa*). [And one only has to remember] 'Alī, may God be pleased with him, [who] burned the heretics (*zanādiqa*) in the pits of fire,[15] and said in this respect: 'Verily, I, whenever I witness something wrong, I set my fire and call for Qumburan.'[16]

[And one only has to remember that] 'Umar b. al-Khaṭṭāb, may God Most High be pleased with him, sent into exile Naṣr b. al-Ḥajjāj after the shaving of his [i.e. the young man's] head, because the women used to be so fond of him. These [then] were sufficient [for the principle of *maslaḥa*].[17] End of quotation [of Ibn 'Aqīl]. * [in the margin: At the moment he heard a woman singing: How can I get wine and drink, or how can I get to Naṣr al-Ḥajjāj].

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[12] *Sūra* 5, 3 (4)(5). Qur'ān quotations in the text are from: A.J. Arberry, *The Koran Interpreted*. London (George Allen & Unwin Ltd.) 1955.

[13] From the Farewell Pilgrimage of the Prophet. In: W. Muir, *The Life of Mohammad*. Edinburgh (John Grant) 1912, 474.

[14] In the original text of Ibn 'Aqīl the 'one'is defined as a Shāfi'ite. In: G. Makdisi, *Ibn 'Aqīl et la resurgence de l'Islam traditionaliste au Xe siècle*. Damas (Institut Français de Damas) 1963, 527. See also Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 12, 13.

[15] *Sūra* 85, 4.

[16] One of the servants of 'Alī Abū Tālib, a cousin of the Prophet who married his daughter Fatima. Also in: Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya,* 19.

[17] Ibn 'Aqīl's last quotation refers to a story of 'Umar b. al-Khaṭṭāb (reigned 634-644), the second caliph after the Prophet, of which the historical base is uncertain: during a nightly tour of inspection through Medina, 'Umar heard a woman singing 'How can I get wine and drink it? How can I approach Naṣr b. al-Ḥajjāj?' 'Umar had the young man come to him. He was very beautiful. He had him shave his head. This, however, only served to enhance his beauty. He had then send him into exile to Baṣra, so that the women could no longer be seduced by him. This story appears in Ibn Taymiyya's *Kītāb al-Siyāsa Shar'iyya*, in the chapter on discretionary punishment. H. Laoust, *Le Traité de Droit Public d'Ibn Taymiyya*. Traduction annotée de la *Siyāsa Shar'iyya.* Beyrouth (Institut Français de Damas) 1948, 147.

Of Ibn Qayyim al-Jawziyya is here a statement of the purport that if there appear to be clear signs of justice – wherever and whenever – then for that reason [one knows] it is the law of God: God Most High is too wise to specify certain ways of justice and then negate that which would be more obvious and evident.[18] (4)

In an allegation the Messenger of God (SLʻM) held back [his verdict] when there appeared to be signs of doubt with regard to the accused. Whoever puts the accused under oath and releases him, knowing him to have a strong inclination toward corruption (*fasād)*, saying: 'I cannot judge him unless I have two upright witnesses', he is acting contrary to the rules of government in accordance with the law (*siyāsat al-sharʻiyya*).

[Another example is that] he (SLʻM) deprived the killer [in battle] from having the spoils of war (*al-salab*) because his brother-in-arms, who testified for him, disobeyed the head of the military. Therefore, the one witnessed for was punished through his witness.

[Another example is that] he gave order to kill the drinkers of wine after [he had warned them for] the third or the fourth [time]. He neither abrogated this, nor did he make it a legal obligation. On the contrary, he took into account the common interest and left it to the ruler (*Imām*) to decide.

[Another example is that] Abū Bakr[19] burned the homosexuals after having consulted the Companions. Thereupon ʻAbdallāh b. al-Zubayr[20] during his reign burned them. Thereupon Hishām b. ʻAbd al-Mālik[21] burned them.
ʻUmar b. al-Khaṭṭāb, may God Most High be pleased with him, burned a wine seller's shop and all there was in it.
[He also] burned a village in which wine used to be sold. He burned the castle of Ibn Abī Waqqās[22] because [the latter] used to keep himself secluded from his subjects. [To name a few examples] from his [i.e. Ibn Qayyim al-Jawziyya's] *Siyāsa.*

The judge if he is not an expert in *fiqh*,[23] abiding in pursuit of circumstantial and verbal evidence to no more than just the general rules, squanders many of the legal rights people are

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[18] Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 14. See also, L. C. Brown, *The Surest Path*, 126.

[19] Abū Bakr b. Abī Quhāfa, one of the Prophet's first Companions, his father-in-law and his successor (d. 13/634).

[20] Born in Medina, twenty months after the *Hijra.* Some sources state that he was the first born child to the group around Muhammad that migrated to Medina. He became the 'anti-caliph': belonging to the noble Muslim families in Mecca, he resented the capture of the Caliphate by the Umayyads and was for a short period recognized by their opponents as Caliph. He died in 73/692. In: EI_2 I, 54.

[21] Tenth Caliph of the Ummayyad dynasty. Reigned from 105/724-125/743. In: EI_2 III, 493.

[22] Saʻd b. Abī Waqqās was one of the oldest Companions of the Prophet. He was one of the six candidates chosen by ʻUmar to succeed him. He took part in the battles of Badr and Uhūd and in most of the campaigns of the Prophet. He is said to have founded Kūfa. He died in Medina in 55. In. H. Laoust, *Le Traité de Droit Public*, 189.

[23] *Faqīh al-nafs*, a jurist who has not mastered his school's jurisprudential principles but does command its doctrines and reasoning, and is allowed to choose between its various views. In: M.K. Masud (ed.), *Islamic Legal Interpretation*. Cambridge, Mss. (Harvard University Press) 1996, 405.

entitled to. He delivers judgment [in such a manner that] people know it to be invalid, relying on outward appearances and not taking into consideration the inmost aspects of the matter.

We have to distinguish here between two kinds of legal knowledge (*fiqh*), both are necessary to the judge: legal knowledge in all regularly occurring cases, and legal knowledge concerning the actual reality and the circumstances of the people, enabling him to distinguish between the speaker of truth and the speaker of lies, [between] the honest person and the liar. Thereupon he should compare the one and the other. Thus, in the sentence he passes, to [people's] reality is accorded that which is legally required; he does not allow the demands of the law to be incongruous to the reality [of people's daily lives].[24]

The Second Chapter concerning the Rights of the Ruler as distinct of those of the Judge (mā li'l-wālī dūn al-qāḍī)

To the ruler's mandate belong employment of intimidation and investigation into matters [thereby] considering clear indications and circumstantial evidence, i.e. all that may contribute to reveal the truth – in distinction to the [practice of the] judges. Al-Qarāfī has said:

> The first to establish the *wilāyat al-maẓālim* in Islām was ʿAbd al-Mālik b. Marwān.[25] (5) He used to chair the *maẓālim* court on a specific day, transferring the arduous problems to Idrīs al-Awdī.[26] 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. End of quotation.[27]

For instance, he has the right to hear statements from persons not included in the definition of upright witnesses (*mastūrīn*),[28] according to the standard view of the authoritative scholars (*al-muftā bihi*). *[in the margin: And that is the statement of the two *Imāms*, [Abū Ḥanīfa and Aḥmad b. Ḥanbal]

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[24] The first paragraphs of the *Risāla's* page 4 up to the second chapter appear almost identical in Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 15 and 16.

[25] ʿUmar [II] b. ʿAbd al-Azīz b. Marwān, fifth caliph of the Marwānīd branch of the Umayyad dynasty, reigned from 99/717-101/720. In: EI_2 X, 821.

[26] The same quotation is found in al-Māwardī, The Ordinances of Government (*Al-Ahkām al-Sulṭāniyya wa'l-Wilāyāt al-Dīniyya).* Reading. The Center for Muslim Contribution to Civilization. (Garnet Publishing Ltd.) 1996, 88. '…In particularly problematic cases or when a legal verdict was needed, he consulted with his judge Abū (sic) Idrīs al-Awdī, accepting the latter's decision. Thus, justice was enforced by Abū Idrīs upon the command of 'Abd al-Mālik.' In Shihāb al-Dīn b. Abū Faḍl, *Tahdhīb al-Tahdhīb I* (852AH, ed. 1320 AH, p. 195) the judge is mentioned, without year of death, as Idrīs al-Awdī, son of Yazīd 'Abd al-Raḥman al-Awdī al-Zi'āfirī.

[27] In Al-Qarāfī, *Kitāb al-Iḥkām*, 162, 163.

[28] Persons not included in the definition of upright witnesses normally heard by the judges. In: Al-Māwardī, *Ordinances*, 94. In: *Ahkām al-Sulṭāniyya*, 105.

i.e. that the judge does not pass sentence on the basis of apparent honorable conduct; he definitely can only pass judgment on the basis of indisputable evidence. On the other hand is there the statement of the [one] *Imām* that he is allowed to pass sentence on that basis, i.e. in the case the evidence is obtained from a testimony of a person not included in the definition of an upright witness].

Another example is that he has the right to ask witnesses to take the oath, if he has doubts about them, contrary to the judges' practice *(bi-khilāfihim),* according to the correct view.

Another example is that he has the right to call for witnesses and to interrogate them on their knowledge of the case, contrary to the judges' practice. Because they [i.e. the judges] do not hear evidence until they request the plaintiff to provide it. They do not hear it until he has been interrogated.[29]

Another example is that he 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.

Another example is that he may take into consideration circumstantial testimonies and character descriptions of the defendant, in determining their hardness and their weakness. If the defendant is, for instance, charged with fornication and is characterized as often being seen in the company of women, that may strengthen the charges made - contrary to the judges' practice.

Another example is that he may expedite the defendant's imprisonment to establish his innocence and pending [further] investigation, its duration to be a month or more depending on what he sees fit - contrary to the judges' practice.

Another example is that it is permitted to him to award beating to the defendant as a disciplinary measure, not as a legal punishment - contrary to the judges' practice.

Another example is that he has the right with regard to the recidivist, who cannot be restrained by legal punishments (*bi-l-ḥudūd*), to perpetuate his detention for life in the case his criminal conduct has a deleterious effect on the public at large.

It is said in *Al-Khulāṣat*[30] that persons of questionable morals (*al-duʿār*) will be imprisoned until they publicly show their regret, drawing upon the Treasury for sustenance and clothing - contrary to the judges' practice.

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[29] The first four paragraphs of this chapter are also found in Dede Efendi's *Risāla,* pages 9 and 10, and in al-Qarāfī's *Kītāb al-Iḥkām*, pages 162, 163. The list with differences between judge and political ruler appear in the *Muʿīn al-Ḥukkām* (170) of al-Ṭarābulsī. It may also be found in *Al-Dhakhīra* of al-Qarāfī, a title not mentioned by Bayram, however, quoted by Dede Efendi in his pages 9 and 10. Contrary to Bayram al-Ṭarābulsī and Dede Efendi both mention their source, i.e. al-Māwardī's A*l-Aḥkām al-Sulṭāniyya*. I have not been able to consult *Al-Dhakhīra*. See my paragraph on Bayram's sources for a comprehensive collation.

[30] See footnote 37.

Another example is that he has the right to force the criminal to repent, intimidating him in such a manner that he will be led to it on his own accord. He may threaten to kill him in cases in which death [as a legal punishment] is not applicable because of the fact that to threat is not to implement - contrary to the judges' practice.

Another example is that he may hear the statements of craftsmen of the same profession *(ahl al-mihan)*[31], [persons] who – regardless of their number – cannot be heard by the judge,[32] because of the fact that they were either not meeting the legal requirements of righteousness or were not included in the definition of upright witnesses (*li-kaunihim 'immā fussāqan au mastūrīn*).

Another example is that he has jurisdiction with regard to acts of aggression even if they do not involve a *ḥadd* case or a monetary compensation. Then, if neither of the two parties displays any sign of being injured, he may begin by hearing the statement of the person who first presents his claim, whereas if one of them does show a sign of being injured, he may commence the case by hearing the claim (6) of the injured party.

The majority is of the opinion that he should commence the case by hearing the first claimant; the crime of the person who started the aggression is more serious, so he deserves greater punishment. The ruler may discriminate between the two litigants regarding the chastisement imposed upon them on the basis of their social status and their dignity. If he, considering the common interest, sees fit to suppress the lowly people *(ahl al-sifla)* by defaming them publicly for their crimes, he may do so. This is even applicable in the case of mere suspicion of crime.

The difference between rulers and judges is only apparent before the crime is legally established, either by confession or by legal evidence. However, after its establishment rulers and judges have the same competence in the administration of its legal punishment or chastisement.

In *Mu'īn al-Ḥukkām* according to *Al-Ghunya*[33] [is mentioned] the case of a person beating another with no right whereupon the person who was attacked gave him a beating as well. Also [is mentioned] that they were both chastised. The chastisement was first administered to the person who started, his crime being the most serious [of the two]. Therefore it is incumbent that he should be punished first.

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[31] In al-Māwardī's *Ordinances*, (p. 240) 'men of the treasury (*ahl al-māl*), in al-Ṭarābulsī's *Mu 'īn al-Ḥukkām* (p. 170), the suspects (*ahl al-muttahamīn*). In the process of copying an error might have slipped in in one of the works.

[32] In this sentence a number of differences between the jurisdiction of the ruler and the judge are apparent. For the ruler witnesses do not have to be upright *('adl)*. Also, their great number does lend additional value to their testimonies, contrary to the procedure in the judge's court where this is not the case. In: J. Schacht, *An Introduction to Islamic Law*. Oxford (At the Clarendon Press) 1965, 189, 192, 195.

[33] *Kitāb al-Ghunya*, by Qāḍī 'Iyād al-Sabtī (476/1088 - 544/1149) was one of the most celebrated figures of Mālikism in the Muslim West, certainly also in Tunisia. His existence coincided almost exactly with that of the Almoravid dynasty to whom throughout his life he remained inflexibly attached. He was judge in Ceuta and Granada. In: EI_2 III, 289.

To this paragraph belongs that which appeared in the original text of Muḥammad, may God Most High have mercy upon him,[34] that the defendant, if he is a thief and a repeat offender, most of the shaykhs would agree that he should be chastised if he was found on the spot of the alleged offence. For even if he was only seen in the company of thieves or sitting together with the morally deprived (*al-fussāq*) without drinking wine, he is [still] with them in the place of sin (*fī majlis al-fisq*).

According to ʿIṣām b. Yūsuf [35] who visited Ḥabbān b. Abī Ḥabala who was the ruler [at the time], he [the ruler] said when a thief was brought in: 'What do we have to do with him?' Said he [ʿIṣām b. Yūsuf]: 'He should say the oath and the claimant has to come with the evidence.'

The ruler said: 'Bring us the whip and the gratings *('aqā'in)'*. With these is referred to two objects to be put apart from each other in the ground between which is spread out the person to be flogged and crucified. Like [it is written] in *Al-Mughrib.*[36] It only took ten floggings with the lash before he confessed to have committed his theft. Said ʿIṣām, 'God be praised, I have never seen an injustice which is more similar to justice'. End of quotation from *Al-Khulāṣat.* [37]

ʿIṣām could not but consider this as an injustice because he went by outward appearance only. It is possible, though, that it was known to Ḥabbān that this man was of the people of ill repute [and] that he could be expected to do what he had done. *[in the margin: He was merciless and punished the suspect, which was not a violation of the law.] In short, he acted with rudeness towards the people of evil thus restraining them, this being one of the ways by which God sets out the people and the lands to prosper. It is said: 'He who does not prevent the people from corruption, does not lead them to justice.'

Al-Qarāfī has said: "The granting of a wider jurisdiction to the ruler in his political domain *(siyāsa)* is not contrary to the law. This can be confirmed by clear demonstration as well as by the law's basic principles, viewed from different perspectives. (7)

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[34] From the eulogy it is clear that not the Prophet is referred to here. Abū ʿAbd Allāh Muḥammad b. Al-Hassan b. Farhad al-Shaybānī (132/749-50- 189/805), in classical judicial literature often simply called 'Muḥammad' is meant here. In: EI_2 IX, 392.

[35] 'Isām's story appears in *Muʿīn al-Ḥukkām* of al-Ṭarārbulsī (p. 172) and in Dede Efendi's *Risāla* (p. 6). In the latter's version the name of the ruler, Ḥabala, is not mentioned. Dede Efendi mentions, as his source, *Al-Bazzāziyya*. (see note 37). In Bayram the term '*aqā'in* is explained.

[36] *Kītāb al-Mughrib fī tartīb al-muʿrib*. Dictionary, in particular used by the Ḥanafis. Composed by Abū al-Fath Nāṣir b.ʿAbdassayyid al-Mutarrizī (538/1144-610/1213). He was not only a philologist but also versed in Ḥanafī *fiqh* and Mu ʿtazilite dogmatics. In: Brockelmann G.I., 350-352.

[37] *Khulāsat al-Fatāwī ʿl- Bazzāziyya* of Hāfizaddīn al-Bazzāzī al-Kerderī (Kurdurī), lived in Sarash on the Wolga, went to the Crimea and finally to present-day Turkey, where he died in 1424. In: Brockelmann, S II, 316. The story is also mentioned by Colin Imber in *Ebu's-suʿud. The Islamic Legal Tradition.* Edinburgh (University Press) 1997, 217, 218 as appearing in *Al Fatāwa al-Bazzāziyya*. Imber translates *'aqā'in* as scourges, suggesting they would be 'whips'. In my view the word 'grating' would be a more appropriate translation here. It seems less likely then that the *Khulāsat* of Ṭahar al-Bukhārī (d. 542/1147) is meant here as is suggested by S. Al-Aslī, *Risāla*, 99.

For instance, the fact that corruption (*fasād*) has increased and became widespread in deviation to the first epoch [of Islam]. This required a variation in the rules in order not to depart from the law altogether, according to the words of the Messenger (SLʿM): [There shall be] 'no damage and no mutual infliction of damage' (*lā ḍarar wa-lā ḍirār*)[38], while omitting to apply these rules would lead to duress. This is corroborated by all the texts ordering to avoid hardship (*bi-nafī al-ḥaraj).*

Another example is the concept of *maṣlaḥa al-mursala*[39] which is adhered to by a number of scholars. The concept of *maṣlaḥa* does not have a textual basis in the law, i.e. it is neither supported nor disqualified by it. The application of *maṣlaḥa al-mursala* is substantiated by the fact that the Companions, may God Most High be pleased with them, handled their affairs in a manner not yet qualified as law (*muṭlaqan*). They took several decisions for which there were no precedents, such as the writing down of the *Muṣḥaf*. They had no precedents at their command nor any examples to follow.

And, [concerning] the government during the time[40] of Abū Bakr and 'Umar, may God Most High be pleased with them, they had no precedents for their decisions nor any examples to follow. In this manner the succession was left to the consultation between six.[41]

Also the organization of the administrative system (*al-dawāwin*), the minting of coins for the Muslims, the use of prison[s], and other institutions that were initiated by 'Umar.

Also the demolishing of the buildings of the religious endowments that were in front of the mosque, that is to say, the mosque of the Prophet, in order to enlarge it with them [i.e. the money from the religious endowments] when it became [too] small].

He burned copies of the Qur'ān to have only one single copy to be compiled by 'Uthmān, may God be pleased with him, and so forth, of which there were a great many [examples] calling for the application of *maṣlaḥa.*

Another example is that the law has stricter conditions with respect to legal testimonies than to reports *(riwāya)* in the case of a person suspected of a criminal offence. If it concerns a criminal offence to be categorized as *jināyat*,[42] than an adequate number [of persons testifying]

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[38] This maxim is given as a saying of the Prophet (...) appearing for the first time in *Al-Muwatta* (iii, 207) of Mālik b. Anas (d.179). In: J. Schacht, *The Origins of Muhammadan Jurisprudence*. Oxford (University Press) 1979, 183.

[39] The statements made on *maṣlaḥa* and *maṣlaḥa al-mursala*, are quoted from al-Ṭarābulsī, *Muʿīn al-Ḥukkām* (page 172) and al-Qarāfī. The latter's quotations are from his *Dhakhīra*, as becomes clear in Dede Efendi's *Risāla* (pages 5 and 6).

[40] *Wilāyat al-ʿAhd*: preference is given here to the translation mentioned above, as the term as a concept is only introduced at a later date, i.e. from the time of the Umayyad ruler 'Abd al-Mālik. From then on the caliph was in the habit of leaving a written designation, called *ʿahd*, granting the heir presumptive the title *wālī al-ʿahd*, in the sense of beneficiary of a contract concluded between him and the community. In: EI_2 IV, 938.

[41] 'Umar b. al-Khaṭṭāb, the second caliph, made succesion to the caliphate a matter of consultation among six persons. He said: '*If you divide two against four, then decide in favor of the four.*' In: L.C. Brown, *The Surest Path*, 89.

[42] In the Ḥanafī tradition (…) jurists group what other legal systems might classify as criminal offences under four headings. In the first category are the offences which incur a fixed penalty *(ḥadd*, pl. *ḥudūd)*. In the second are offences (*jināyat*), comprising homicide, injury to the person, and some cases of damage to property. In the third is

and their condition of being a free person is obligatory. This is not the case when the testimonies [are only based] on reports [of informers], because there will be hatred among humankind until the Day of Judgment[43] - which would take us too far a field to explain.

One [official] witness is adequate in transactions for practical reasons, while it is too limited in the testimony concerning cases of adultery. [In that case] no less than four are accepted, testifying that adultery took place, like the feather into a pot of kohl (*ka-al-mirwād fī'l-makḥula).*

[In cases of] murder two [witnesses] are accepted although bloodshed is a more serious offence. The reason being that the objective [of the law] is protection [in the aforementioned case of adultery].

Of the husband who pronounces the *liʿān*[44] is not required to give any other proof than his oath. The penalty for *qadhf*[45] is for him not applicable unlike in the other cases of *qadhf*; this to emphasize the protection of the family and the marital institutions from reasons of suspicion.

There are many special characteristics and distinctions in the law [to suit] different circumstances. Therefore, it is necessary to bear in mind the changing conditions of the time. (8)

It is [exactly] the correlation with the reality [of people's daily lives] in these *siyāsa* regulations that supplies the proof that these belong to the basic tenets of the law and [therefore] should be acknowledged. It does not concern here matters of public interest, no, these *siyāsa* regulations are of a more elevated nature and on the same level as the original tenets [of the law]. As a consequence, every rule in these regulations implies either its own evidence or a principle on the analogy of which this rule is built.

It is a premise generally agreed upon that if we do not find close at hand qualified witnesses, we take the best of them and the least immoral to give their statements. This same premise is imperative to the judges and others, in order not to forfeit rights and render judgments ineffective.
Commonly the view is held that no one should presume this to be subject to a variety of interpretations. It is a legal obligation, provided the conditions to implement them are there. [So] if the pervasion of corruption in the land and amongst its people make it permissible to appoint unqualified witnesses of questionable moral standards, then expanding the ruler's mandate is permitted on the same grounds.

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usurpation (*ghasb*), a term which covers misappropriation and damage to property. In the fourth are offences which incur discretionary punishment (*tazir*) (sic). In: C. Imber, *Ebu's Su'ud*, 210.

[43] *Sūra* 5, 64(67): '…We have cast between them enmity and hatred, till the Day of Resurrection.'

[44] To provide for the case where the husband cannot produce this difficult standard of proof [i.e. to establish legal proof of fornication] of his wife's adultery, the Qur'ān institutes the exceptional procedure of the mutual 'oath of imprecation' (*liʿān*) between the spouses (XXIV, 6-9). This procedure, although it does not properly speaking, establish proof, has nevertheless, important legal effects. In: EI 2 I, 1150.

[45] *Qadhf* is slander in a special sense. If anyone accuses a respectable person (*muḥṣan*) of incontinence, without being able to bring four witnesses to suuport him, he is liable by law to definite punishment (*ḥadd)* of eighty lashes. In: SEI, 201.

‘Umar b. ‘Abd al-Azīz, may God Most High be pleased with him, has said: ‘The more people have brought forth immorality, the more problems they have to resolve.’

Al-Qarāfī has said that there is no doubt that the judges of our times, their witnesses, their deputies and their [other] court officials *(‘umanā’),* if they were in the first century they would not have been appointed – no one would have given them a second look. In that same era these appointments would have been unlawful *(fusūq*). For the best of people of our times would be the worst in that time [and there is no doubt that] the appointment of bad people is immoral. Thus, bad has changed to good. That which was too narrowly defined, was given room [for modification]. The rules vary [and follow] the different [circumstances] of the time. End of quotation.

One of the law’s basic rules to support this, is that the law makes mud *(ṭīn al-maṭr)* permissible [for the ablution]. Muḥammad [al-Shaybānī] mentioned this, referring to the clay of Bukhāra,[46] regardless of the dirt and impurity containing it.

[Another example is that] the law permits the abandonment of some aspects of the *ṣalāt* and its obligations, like [for instance] in the case of the *ṣalāt al-khauf,*[47] when people’s lives are in dire straits.
Frequently our *Imāms* have justified moderations in [times] of the community’s crisis (*takhfīf al-aḥkām biʿumūm al-balwā).* This is one of the basic rules of Abū Ḥanīfa, may God Most High be pleased with him, which frequently appears in the law. That is why al-Shāfiʿī, may God Most High be pleased with him, has said, as soon as matters are restricted [and too narrowly defined], they should be given room to expand [and become permitted]. He pointed out such cases of silent understanding (*al-muwāṭan*). It is one of the efficacious concepts supporting Ibn Nujaym’s[48] ideas in his [*Kitāb] al-Ashbāh [wa’l-Nazāʿir*], in which he explains: If matters become constrained, they should be given more space, if matters get out of bounds, they should be constrained, and he elaborated on this.

So, in the same manner, if the ill winds of misfortune are inflicted upon us and deeds of corruption seem hard to ward off, then, in that case rules of law should be given room to expand in a most sufficient manner, considering this silent understanding. This is Gods Divine Law (*Sunnat Allāhi al-Ƒāriyya*),[49] ever present in His Creation.

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[46] In the fourth century the town [of Bukhāra] was overcrowded and unsanitary, with bad water and the like (…). Because of the height there was no running water, not even in the area of the Friday mosque, until the twelfth century. In: EI_2 I, 1295.

[47] Alternative ritual prayer that received its name from a passage in the *Qur’ān*: ‘And if you are in fear [for an attack, pray] then afoot or mounted.’ *(Sūra* 2, 240).

[48] Zayn b. Ibrāhīm Nujaym al-Miṣrī, Ḥanafī scholar (926/1520-970-/1563). Born in Cairo. His *Kitāb al-Ashbāh wa’l-Nazāʿir* is partly based on a work of Jalāl al-Dīn al-Suyūtī (1445-1505) with the same title. In: EI_2 III, 901.

[49] *Sūra* 33, 62: ‘…God’s wont with those who passed away.’ In the translation of A.Y. Ali. Lahore (Sh. Muḥ. Ashraf Publishers) 1990: ‘…[Such was] the practice [approved] of Allāh among those who lived aforetime: No change wilt thou find in the practice [approved] of Allāh.’ See also: *Sūra* 35, 43. See also: N.H. Abū Zayd, *Vernieuwing in het islamitisch denken*. Amsterdam (Bulaq) 1996, 89.

Don't you see that during the first beginning of human life in the time of Adam, peace be with him, conditions were weak.[50] So the sister was permitted to her brother [as a wife] (9) and many [other] things for which God made more allowances. When circumstances improved and progeny increased, it became forbidden in the time of the Banī Isrā'īl.

The sabbath was forbidden and [eating] the meat's fat, the camel's meat and many [other] matters. It became a religious duty to them to pray fifty times[51] and [it became a duty] for anyone of them to repent the killing of a soul.[52] [It became a duty] to remove the impure things [meaning] the impure object itself was done away with [i.e. in stead of washing] and similar, more severe measures.

When it comes to the end of time, the flesh weakens and the strength of the will diminishes. As God Most High treats with kindness the ones who serve Him, most of what was forbidden became allowed. The number of prayers was made less and repentance became accepted. It has become clear that laws and regulations take into account the different circumstances in time, considering the clear indications.

The *siyāsat al-shar'iyya* does not depart from the [law's] basic tenets: it is not a reprehensible innovation. It bears in mind [the words] of the law itself.

The Third Chapter, concerning the Allegations of the Offence committed, [the Acts of] Aggression and the Defendant

It is divided into three categories. The first [category] deals with the case of defendant who is innocent and not belonging to the people susceptible to the crime of which he is accused, for instance when he is a man of good reputation. As for this category it is generally agreed that no punishment should be administered. As for the person who casts the allegation (*al-rāmī*), he is punished in order to protect the reputation of the good and innocent people from the aggression of the bad people.
This is corroborated by the contents of the Commentary on *Al-Tajrīd*[53] at the end [of its discussions of cases] similar to slanderous allegations (*qadhf).*

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[50] *Sūra* 4, 28(32): '… God desires to lighten things for you, for man was created a weakling.'

[51] According to Muslim tradition the establishment of five daily observances of the *ṣalāt* dates back to the beginning of Islam. It is connected with Muhammad's ascension to heaven. When Muḥammad is taken up to the highest heaven fifty prayers daily are imposed upon the community by Allāh (…). When [the prophet] Mūsā hears the orders he says: 'Return to thy Lord for the community is not able to bear this.' Allāh then alters the fifty to twenty five (…). The same processes are repeated until finally the number remains at five. In: SEI, 492.

[52] *Sūra* 5, 32(35): '…Therefore We prescribed for the Children of Israel that whoso slays a soul not to retaliate for a soul slain, nor for corruption done in the land…'.

[53]*Kitāb al-Tajrīd*, a work in seven volumes (*asfār*) on the juridical divergences between al- Shāfi'ī and Abū Ḥanīfa by the Ḥanafī jurist of Baghdad Abū al-Ḥusayn al-Qudūrī (d. 428/1037). In Makdisi, *Ibn 'Aqīl*, 169. Aslī (p.100) refers to *Sharḥ 'alā tajrīd al-kalām l-l-Tūsī*, by 'Alā al-Dīn 'Alā al-Qushajī (d. 797/1492).

On the authority of Abī Ḥanīfa regarding the person who said to another person: 'Ah, you thief, ah, you liar!' is mentioned: If the latter belonged to the honest people, although he was not known as such, the man who gave the false accusation should still receive the chastisement because of the disgrace inflicted upon him. End of quotation.

The second [category] deals with the case of the defendant accused of immoral actions like for instance theft and being engaged in highway robbery, murder and adultery. This is the category for which coercive interrogation in proportion to the allegations and the notoriety [for the offences] concerned is necessary. Sometimes it takes place through beating, through confinement without beating, compatible to what is commonly known about them.

Ibn Qayyim al-Jawziyya al-Ḥanbalī has said:[54] I do not know a single leading Muslim scholar who is of the opinion that this [category of] defendant in this and similar cases, should be put under oath [of denial] and sent away without any form of detention or other measures.
Not any of the leading scholars of the four schools of law and others would agree that to have him say the oath and [then] release him, was correct. If we would put under oath every one of them, set him free and let him go, knowing him to have a strong inclination towards corruption (*fasād)* here on earth, and [knowing him to be] a frequent thief, while we say, 'we cannot judge unless we have two upright witnesses,' than that is an action that is inconsistent with the *siyāsat al-sharʿiyya*. (10) Whoever presumes that is is inherent to the law to let him say the oath and then release him, makes a serious mistake rendering ineffective the words of God's Messenger (SLʿM) and the consensus of the leading scholars. This serious mistake would lead the rulers to a violation of the law.

People erroneously believe that the *siyāsat al-sharʿiyya* is incompetent to lead mankind and to [assure] the welfare of the community. Hence, they transgress the limits set by God and deviate from the law, into all kinds of injustice and reprehensible innovations in the political domain, in a manner which is not permitted. The cause of [all] this is the ignorance with regard to the law. We know with certainty that the Prophet (SLʿM) has said that whoever adheres to the Book and the Sunna will not go astray.

Among the acts of the Messenger (SLʿM), which have already been mentioned, there are those that point to the punishment of the accused and his detention. It is permitted with this category of suspects to beat them and to detain them, because of the legal proof existing to that effect. End of quotation.

In the fatwas of Khayr al-Dīn al-Ramlī[55] [is mentioned] the question concerning a man of piety and integrity whose books were stolen from his room (*ḥujratihi*) located in the mosque. He had a neighbor who belonged to the people susceptible of transgression; he held him to be the thief. He informed a judge [known to be] employing *ʿurf* to whom the use of force was not entrusted. He might come to the truth of the matter through genuine *firāsa,*[56] whether he was

[54] The following quotation up to 'reprehensible innovations' appears in Ibn Qayyim's *Turuq* as a quotation of Ibn Taymiyya, 'our shaykh', *shaykhnā* (p. 103).

[55] Palestinian mufti, born in Ramla. He changed from the Shāfiʿ to the Ḥanafī school of law during the course of his study at the Azhar University in Cairo. (1585-1671). In: H. Gerber, 'Rigidity versus Openness in the late Classical Islamic Law.' *Islamic Law and Society* 1998, 165.

[56] See page 150 of this chapter.

to be blamed thereof or (sic) had to be reprimanded for it. The answer given was that this was not the case. It was in particular so, as he was a judge applying customary law (*ḥākim al-ʿurf*) without authorization to use force. Moreover, he was an intelligent man. * [in the margin: '…his corrupt and evil behavior was established by the judge.' A word such as 'if' or 'not' seems to be missing here.]

The political domain (*al-siyāsa*) distinguishes: good governance taking from the unjust and immoral person a right not belonging to him. This [kind of governance] is part of the law. Whoever has knowledge of it, is aware of it; whoever is ignorant of it, fails to understand.

About the *siyāsat al-sharʿiyya* people have written numerous books. In *Al-Baḥr*,[57] quoting from *Al-Tajnīs*[58] [the following information] about the customary conduct in cases of theft is mentioned:

> If a man [usually] occupied with his own affairs and not known to be a thief, is found [stealing], he should not be executed. He should be arrested and it is up to the *Imām* [to decide] to hold him in detention until he shows regret. For detention with the object of suppression of crime and making people repent is a legitimate action. End of quotation.

To this category [also] belongs that which is [mentioned in the book] *Al-ʿĪḍāḥ*:[59]

> A man came to see a man in his house. The owner of the house overpowered him and killed him, saying that he was immoral: 'He came upon me in my house and would kill me!' If the one who entered the house is known to be a immoral person, retaliation (*qiṣāṣ*) is not applicable, whereas in the case he is not known as such, retaliation should be applied.

(11) In the book on compulsion (*Kitāb al-Ikrāh*) of Muḥammad b. al-Ḥasan [al-Shaybānī], the companion of the *Imām*, Muḥammad has brought forward:

> We have learned from Abū Ḥanīfa, on the authority of Hammād,[60]on the authority of Ibrāhīm,[61] concerning the man who was found killed in the house of [another] man who was saying: 'He denied me all I have! I killed him with the sword,' that the victim should be looked upon as if he was an immoral person, who had been accused of theft before. His blood went for nothing,[62] while the murderer was made to pay his blood money. He was, however, not accused of murder as such. This is the opinion of Abī Ḥanīfa and Muḥammad. End of quotation. * [in the margin: If you say how do we have to understand his statement…].

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[57] *Al-Bahr al-Rāʾiq*, commentary by Ibn Nujaym on *Kanz al-Daqāʾiq*, a work by the Ḥanafī scholar Hāfiz al-Dīn al-Nasafī, from Nasaf in Sogdania, a region in Central Asia (d.701/1310). In: EI_2 III, 901.

[58] *Kitāb al-Tajnīs wa ʾl-Māzid fiʾl-Fatāwā*, a collection of fatwas of the Ḥanafī scholar A.b.a.Bakr b. Abdaljalīl al-Farghanī al-Marghīnānī (d.593/1197), also author of the *Hidāya*. In: Brockelmann G.I, 378 and EI_2 VI, 558.

[59] *Kitāb al-ʿIḍāḥ*, of Abū ʿAlā al-Fārisī, a legal scholar from Baghdad (288/901-377/987). F. Sezgin, *Geschichte des Arabischen Schrifttums*. Band IX. Leiden (E.J. Brill) 1984, 102.

[60] Ḥammād b. Abī Sulaymān (d. 120/738). In: G.H.A. Juynboll, *Muslim Tradition. Studies in Chronology, Provenance and Authorship of Early Hadith.* Cambridge (University Press) 1983, 120.

[61] Ibrāhīm b. Yazīd an-Nakhaʿī (d. 97/715). Judge in Kufa and Baṣra. Id. 53.

[62] *Batala damuhu*, he was slain without there being obtained for him either blood revenge or blood wit.

Some of them [i.e. the scholars] are of the opinion that the defendant when under suspicion, should be subject to a term in prison; the duration [of the imprisonment] to be determined by the *Imām.*[63]

Some of them are of the opinion that if one finds in the possession of the suspect some stolen property and he claims he has bought it, while he cannot supply any proof, an accusation of theft is applicable. [This is when] the defendant[64] cannot distance himself from the things in his possession, even when he was not known to possess them. It is up to the ruler *(al-ṣultān)* to place him into custody and to investigate the case. It is known from authentic report that [the Prophet] (SL'M) is rightly quoted in saying: 'Detain him in case of suspicion.'

If the person is known to be a thief his detention should be prolonged until he confesses. 'Umar b.'Abd al-Azīz, may God Most High be pleased with him, has written that he should be held in detention until he dies, that is to say, if he has not confessed.

And al-Layth[65] agreed with this – and his remark may be found in some books * [in the margin: his statement is that they should be arrested…] concerning the person, being robbed of certain goods, accused a man known to be a thief. In al-Layth's opinion the thief should be imprisoned, because if he is known for his recurring criminal behavior and consistent in his conduct of damaging and wasting people's properties, his detention will divert from the people the harm he causes. He must then be arrested [to protect] them and put in detention. To imprison him during certain times is more appropriate than to do so at other times, even though his situation is the same in both cases.

It is said in the chapter on compulsion [in the book] *Lisān al-Ḥukkām*[66] and in *Al-Muḥīṭ*[67] that some scholars uphold the validity of a confession of stealing under compulsion.

According to Ḥassan b. Ziyād[68] it is allowed to beat the thief to make him confess. He said: 'If you do not cut the flesh, you cannot see the bone.' End of quotation.

The same [may be found] in [the book] *Majma' al-Fatāwī.*[69] In the *Siyāsāt* of Ibn Qayyim al-Jawziyya there is a passage of the following purport:

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[63] In this case is referred to the political ruler.

[64] In the text is mentioned 'the claimant' (*al-mudda'ī*). I have assumed the defendant was meant here.

[65] Naṣr Abū al-Layth al-Samarkandī (d. 373/983/4- 393/1002/3). Also known as *Imām* al-Hudā, a Ḥanafī theologian and jurisconsult. In: EI_2 I, 1373.

[66] *Lisān al-Ḥukkām fī ma'rifat al-aḥkām*, by Muhibbadīn al-Walīd al-Shihna, a scholar of the Shāfi 'ī school of law (d. 882/1477). In Brockelmann S II, 115.

[67] See note 70.

[68] Most probably the judge from Kufa, al-Ḥasan b. Ziyād al-Lu'lu'ī (d. 254/868). In: G.H.A. Juynboll, *Muslim Tradition*, 87 n. 48.

[69] A compilation of fatwas issued by one of the teachers of Khayr al-Dīn al-Ramlī, the Egyptian jurist Muḥ. b. 'Umar Shams al-Dīn b. Sirāj al-Dīn al-Ḥanūtī (d. 1601). In: M.K. Masud, *Islamic Legal Interpretation*, 136.

> An allegation was made against a person stealing [other people's] goods. He denied [the allegation] and was made to confirm this by oath. * [in the margin: the statement that the claimant was made to confirm his claim with an oath is not of the Hanafis. Perhaps Ibn Qayyim's words were taken from the Hanbalis.]
> Thereupon it appeared that the stolen goods were in his possession and the claimant was made to confirm his claim by oath. The claimant's oath was of higher worth. If he would demand the ruler that he (i.e. the thief) should be beaten, in order for him to bring forward the stolen goods in question, he has the right to do so.

In another source it is said that if a man is brought before the judge, known for theft and immoral conduct, while [another] man accuses him thereof, he is imprisoned to investigate the matter. Confession while in detention of all charges made against him is imperative. This kind of detention should be considered a form of coercion. (12)

In the commentary on *Al-Tajrīd* referring to a similar case [is mentioned]: If on a person [intimidation is applied] by frightening him with the prospect of being lashed with the whip or by a day's detention to make him confess, than that is not a matter of coercion. Muḥammad [al-Shaybānī] stated that there is no specified time [for detention] in this case, but the time needed to produce distress is proof that people are different in that respect. Some might be overcome by grief by just one day in prison, while others will not be affected [in the same manner] because of the differences in feelings of honor and lowliness. This, therefore, was left to the discretion of every judge (*qāḍī*) in his own time. If in his opinion it concerned a case of coercion, he would forestall his approval and declare the judicial process invalid. If this was not the case he would not.

I say that this is at variance with what is mentioned in *Al-Muḥīt*:[70] the wording [in that respect] is unambiguous, making it clear [that] a confession of theft forcibly extracted is taken into consideration. Perhaps this is the view of the other group of scholars. This ends the section on property and possessions.

As for the case in which coercion is applied in order to obtain a confession of a *ḥadd* offence or [in the case] of retaliation (*qiṣāṣ):* coercion is not permitted in such cases. [However], there is difference of opinion concerning [the ruler] taking it upon himself to inflict flogging on that person under suspicion and detain him. A group of scholars made it clear that both the ruler and the judge have the right to beat him and to put him in prison.

This is also the opinion of Aḥmad b. Ḥanbal. The view of some Shāfiʿī scholars and of the Ḥanbalī scholars in this respect is, that this only pertains to the right of the ruler, and not to that of the judge, because the legitimate beating concerns flogging as a *ḥudūd* punishment and [as a form of] *taʿzīr*. This, however, only takes place after the establishment of its cause and the supplying of proof that the incident occurred. This, then, is dependent upon the judge. The ruler's domain is the prevention of corruption (*fasād*) on earth as well as the suppression of the bad people and their [deeds] of aggression.

However, this is only possible by inflicting punishment on the people we know to be inclined to criminal behavior. Because the correct view is that the general and the specific public

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[70] Probably *Kītāb al-Muḥīt al-Radawī*, by the Syrian scholar Radī al-Dīn Muḥ. b. Muḥ. Al-Sharakhsī (d. 1149), a summary of the famous *Kītāb al-Mabsūṭ* of Muḥ. b. Aḥmad al-Sharakhsī (d. 1090) and of texts composed by one of the fathers of Ḥanafī jurisprudence, Muḥ. al-Shaybānī (d. 805). In: M.K. Masud, *Islamic Legal Interpretation*, 348 n. 21.

offices differ according to custom which has no limit in the law. Thus, the office of judges in some countries and in some eras comprised everything conferred to them by the office of war and vice versa. This is in accordance with custom and with the general and the specific custom of the [legal] injunctions.[71]

The third category deals with the suspect whose circumstances are unknown to the judge. It is not known whether he is a man of integrity or someone deviating from the right path. If an allegation is made against him, [people from] this category should be held in detention until their status is disclosed. This is the rule with all the scholars of Islam and it is stipulated by most *Imāms* that the ruler as well as the judge can hold him in detention.

The Fourth Chapter, concerning Taʿzīr

[*Taʿzīr*] is a disciplinary measure in which not a *ḥadd* offence is involved, that is to say, it is chastisement. As with chastisement [as a punishment], it may take the form of a slab in the face, [it may take the form of] imprisonment, setting the person by the ears ands [giving him] a severe reprimand. [It may take the form of] confrontation [of the defendant] with a stern look and with insult, in all cases that do not concern false accusation or manslaughter. (13) It may take the form of banishment from the country.
The maximum number of lashes [in beating] is seventy five in accordance with the [accepted] view exposed in legal opinions, except if it surpasses the number of lashes specified in *ḥudūd* cases. The specification [of the number of lashes] is entrusted to the personal opinion of the judge, [but] it should not exceed that which he thinks is appropriate in terms of suppression, while [at the same time] it should not be less than [the number by which] suppression occurs.

In the *Siyāsāt* of Ibn Qayyim al-Jawziyya [is mentioned that] if [the case] concerns the omission of a duty, the beating will be administered time and again. The beating is to be administered to him day after day, until the duty is performed. If it concerns an offence conducted in the past, [beating] is inflicted only so far as may be necessary.[72]

Execution is allowed if this is the only way to ward off the malicious deed. The death sentence may then be compared to the execution of him who sows dissension in the Community of Muslims and of him who propagates views different from those in the Book of God and the *Sunna* of His Messenger.

In the *Ṣaḥīḥ*,[73] on the authority of the Prophet (SLʻM) [is mentioned]: 'If two persons are paid homage to as caliphs, then kill the last of the two.' He [also] said: 'Whoever comes to you and

[71] Bayram leaves out here an interesting piece of information provided by al-Ṭarābulsī (*Muʿīn al-Ḥukkām*, 174) concerning the chain of text transmitting: '… of the words of Ibn Qayyim al-Jawziyya al-Ḥanbalī who transmitted them from the Shāfi ʻītes. These were the words of al-Māwardī in *Aḥkām al-Sulṭāniyya*, which were transmitted by al-Qarāfī. [The words of al-Māwardī] were based on the legal practice of Ḥishām b. ʻAbd al-Mālik, the *qāḍī* of Medina.'

[72] This paragraph appears almost identical in *Al-Ḥisba fī'l-Islām* by Aḥmad Ibn Taymiyya of whom the author quoted was a pupil. In *Public Duties in Islam. The Institution of the Ḥisba by al-Shaykh al-Imām Ibn Taymiyya.* Translated from the Arabic by M. Holland. Leicester (The Islamic Foundation) 1982, 60.

[73] *Saḥīḥ* van Muslim. *Kītāb al-Imārat*. III: 1480.

orders you to obey one single man, wishing to divide your community, [you shall] hit his neck with the sword, whoever he may be!'

I say, and [it is mentioned] in some book, on the authority of Ibn ʻAbbās,[74] may God Most High be pleased with them, on the authority of the Prophet (SLʻM), that he said: 'Whoever sees of his ruler matters he abhors, he shall be patient, for no one will split the community [of Muslims], not by an inch without dying the death of a heathen.'[75] End of quotation.

In *Kanz al-ʻIbād fī Faḍā'il al-Ghawz wa'l-Ǧihād*[76] of Abū al-Qāsim b. Iqbāl, 'Arfaja,[77] may God Most High be pleased with him, transmitted, saying that the Prophet (SLʻM) said: Ominous events will come to pass: 'Whoever strives to undermine the sake of the community as a whole (*umma*), hit him with the sword, whoever he may be.' It is related by Muslim[78] and Abū Dāwūd and al-Nasā'ī that this is a sure sign of pure evil.

According to ʻĀmir b. Rabīʻa,[79] may God Most High be pleased with him, the Prophet (SLʻM) has said: "Whoever dies without obedience [to an *Imām*], will die the death of a heathen, while if he renounces this [obedience] after having taken it upon himself for someone else than God, he stands without proof."

It is transmitted by Aḥmad [b. Ḥanbal] and Abū Yaʻlā,[80] al-Bazzār[81] and al-Tabarānī[82] and on the authority of ʻAbd Allāh b. ʻUmar, may God Most High be pleased with both of them, who said: "I heard the Prophet (SLʻM) say, 'whoever pledges his loyalty and thereupon breaks it to someone other than God Most High, his oath will be broken.' End of quotation. (14)

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[74] ʻAbd Allāh b. al-Abbās, cousin of the Prophet (d.68/687/8). In SEI, 4.

[75] This hadith appears in the *Saḥīḥ* van Muslim. *Kitāb al-Imārat*. III: 1480.

[76] This title appears in Brockelmann S.II, 648, as a work written by Ramaḍan b. Muṣṭafā b.al-Walī b. al-Ḥaj Yūsuf between the years 1097/1102-1687/1691.

[77] 'Arfaja al-Ashja´ī'. In Ibn Saʻd 's *Kitāb al-Tabaqāt al-Kabīr* only his name is mentioned. In: S. Aslī, *Risāla*, 153: Muhammad al-Shaybānī.

[78] Muslim (202/817 or 206/821-261/975), Abū Dāwūd (d. 275/888) and al-Nasā'ī (d. 303/915) are all authors of canonical collections of Traditions.

[79] ʻĀmir b. Rabīʻa was allied to the al-Khaṭṭāb family. In: Ibn Kathīr, *The Life of the Prophet Muḥammad* (*Al-Sirat al-Nabawiyya*). Reading. Center for Muslim Contribution to Civilization. (Garnet Publishing Ltd.) 1998, II, 1.

[80] Muḥ. b. al-Ḥusayn Aḥmad al-Farrā', also known by the name of Qāḍī Abū Yaʻlā, was one of the masters of the Ḥanbalī school in Baghdad in the eleventh century. He was a contemporary of the Shāfiʻī scholar al-Māwardī. His treatise on public law [also called] *Kitāb al-Aḥkām al-Sulṭāniyya*, reveals some surprising similarities with the latter's work with the same title, while nevertheless differing with it on many points. (380/990-458/1066). In: EI_2 III, 765.

[81] Aḥmad b. Amar b. 'Abd al-Khāliq al-Bazzār (d. 292/905). Basra, Baghdad. In: G.H.A. Juynboll, *Muslim Tradition*, 183. Aslī describes him as belonging to the Hadith-movement and author of *Al-Bahr al-Zakhhār* (154, n.4).

[82] Sulayman b. Aḥmad al-Tabarānī (d. 360/971). In: G.H.A. Juynboll, *Muslim Tradition,* 189.

The Prophet (SL'M) killed a man who intentionally had lied, when saying: 'The Messenger of God (SL'M) has sent me to judge your women and your possessions.'

[The Prophet] was asked about the person not refraining from drinking wine and said: 'Whoever does not keep away from it, kill him.'
He [also] ordered the execution of the person who married his father's wife.

From among the leading scholars [of the schools of law] Abū Ḥanīfa was the most restrained in administering death as a *ta'zīr* punishment. He, however, permitted this form of deterrence if public interest was involved, for instance the execution of persons often practicing their homosexual behavior (*al-mukthir min al-luwāṭ*) and the execution of murderers having committed their crime by means of a sharp instrument (*bi'l-mathqul*).[83] * [Insofar as the margin note to the right of the text is intelligible, it seems to reflect the same meaning as the sentences next to it].

Mālik held the view that death as a *ta'zīr* punishment was appropriate for a Muslim spy.[84]

Some of Aḥmad [b.Ḥanbal]'s companions were of the same opinion. He himself considered it in the same way. The great majority of Aḥmad's companions, however, and al-Shāfi'ī held the view that execution as a deterrent tends to a reprehensible innovation (*bid'a*).

In *Al-Tanwīr* of the *Imām* [Abū Ḥanīfa] execution of a thief is [considered to be] a form of *siyāsa*. In its commentary, entitled *Al-Durr al-Mukhtār* [85] is said that his spread of corruption (*fasād*) causes damage if it is repeated. As for his execution, this was done from the beginning. It does not apply to the domain of the political ruler (*siyāsa*) in any way. End of quotation.

Chastisement by exposure to public scorn (*bi'l-tashhīr*) is permitted - according to the words of Abū Ḥanīfa - if it concerns a case of a false witness. He is chastised by public exposure in the openness of the markets and nothing else. In his opinion one should not torment [this person] nor by beating nor by imprisonment.

In some of the treatises of Ibn Nujaym after his remarks on chastisement (*ta'zīr*) [ordered] by the judge (*qāḍī)* in cases of exposure to public scorn [is mentioned]: If you say: "Does he have the right to blacken the face and to shave a side of the beard, despite the fact this presents exemplary punishment (*mithla*), which is a form of punishment forbidden to the judge?", I say he has the right and it does not involve a form of exemplary punishment.

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[83] 'Purely willful or premeditated murder involves intent to kill by a sharp instrument such as one made of iron (…)'. In: Al-Māwardī, *Ordinances of Government*, 251. *Aḥkām al-Sulṭāniyya*, 287.

[84] Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 107. Ibn 'Aqīl, the Ḥanbalī said in this respect: 'L'imām peut sanctionner selon sa discretion et même condamner à mort dans la cas d'un espion musulman, si cela est exigé par le principe d'utilité.' In : G. Makdisi, *Ibn 'Aqīl*, 528.

[85] Of the Ḥanafī scholar 'Alā al-Dīn al-Haskafī (d. 1088/1677). Muḥ. Amīn b. 'Ābidīn (d. 1252/1836) wrote a commentary on the work, entitled *Radd al-Mukhtār*. In: EI_2 III, 163.

It is the answer given on the basis of the action by ‘Umar, may God Most High be pleased with him, related by Ibn Abī Shayba[86] in his *Sunan*, that ‘Umar 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.

‘Abd al-Razzāq[87] has transmitted in his *Muṣannaf* that ‘Umar, may God be pleased with him, ordered to blacken the face of a false witness, to wrap his turban around his neck and to walk him around amongst the tribes (*qabā’il*). As exemplary punishment is not only considered the cutting of limbs and other mutilations of parts of the body that continue their functions; as [exemplary punishment] may also be considered the ‘washing away’ of honor.

Some shaykhs answered that the procedure followed by ‘Umar is *siyāsatan*, [it belongs to the jurisdiction of the ruler]. Therefore, if the ruler (*al-ḥākim*) considered it to be a matter of public interest, than it is up to him to act in this manner. Furthermore, he added that from the above mentioned case may be concluded that *siyāsa* is what the ruler (*al-ḥākim*) undertakes to further the welfare of the community, without it being mentioned in the law. End of quotation. (15)

With regard to banishment from the country, Ibn Nujaym brought forward the following: if you say: “If the witnesses inform the judge that a man impairs upon the Muslims through his mischievous actions, his corruption and his forgery, then should he banish him from the country?” I say: ‘It was the opinion of the *shaykh al-islām* al-‘Aynī[88] that he should be exiled,’ In the same manner ‘Abd Allāh b. ‘Umar issued a fatwa.

He then said: if you say: ‘Has the judge the right to remove a recalcitrant person from his house?’ I say: “It is mentioned in *Al-Bazzāziyya*[89] that to address him on his immoral conduct in his [own] house is a preferable way of action. If he does not abstain from his acts by remaining there, the ruler will put him in prison, discipline him with the whip and remove him by force from his house because all these may be considered as an appropriate application of *ta‘zīr*.”

On the authority of ‘Umar [is mentioned] that he gave order to set fire to the house of a wine seller. On the authority of al-Ṣaffār al-Zāhidī[90] [is mentioned] that the house of an immoral person may be demolished. End of quotation.

Yet the text in *Al-Bazzāziyya* is clear in attributing [the authority of] this act to the *imām*, [the political ruler]. How could the authority to act be conveyed to the judge (*qāḍī*), unless it was not clearly stated to whose authority it belonged? He, however, was averse of attributing it to the judge responsible for it, and answered that it belonged to the *imām*’s authority.

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[86] ‘Abd Allāh b. Muḥ. b. Abī Shayba (d. 235/849), author of *Kītāb al-Sunan fi’l-fiqh*. In: EI$_2$ III, 692.

[87] ‘Abd al-Razzāq b. Hammān (d. 211/827). In: G.H.A. Juynboll, *Muslim Tradition*, 188.

[88] Abū Maḥmūd b. Mūsā Badr al-Dīn al-‘Aynī (d. 855/1451). In Brockelmann S II, 50.

[89] Of the Ḥanafī scholar from the Crimea, Ibn Bazzāz (d. 1424). In: Brockelmann S II, 316. See also n. 37.

[90] Ibrāhīm b. Ismā’īl b. Aḥmad b. Ishāq b. Shayth b. al-Ḥākim, *Rukn al-Islām* al-Zāhidī, known as al-Ṣaffār, author of *Talkh al-Ẓāhīdī*, one of the sources of Qāḍī Khān (d. 354/964). In: S. al.Aslī, *Risāla,* 157.

In *Al-Muḥīṭ* of al-Sarakhsī,[91] its legal basis, i.e. of *taʿzīr*, is that which is transmitted [about the case of] a man who said to another man: 'Ah, you impotent weakling!' whereupon 'Umar, may God be pleased with him, chastised him.
Then he said: Ibn Samāʿa[92] mentioned, based on the authority of Abū Yūsuf who had transmitted a hadith on the authority of 'Umar, may God Most High be pleased with him, that he had dealt with the case of a man having had intercourse with an animal. He chastised him. As for the animal, it was ordered to be slaughtered and burned. The general rule [concerning this] as expressed in *[Kitāb] al-Ashbāh [wa'l-Nazāʿir]* and similar works, is that in every [case] of disobedience for which no *ḥadd* penalty is stipulated, the rules for *taʿzīr* are applicable.

It is transmitted in *Al-Tatārkhāniyya*, that whoever hurts another person, through his words, his deeds or by the way he looks at him, will be punished following the rules of *taʿzīr*. It is transmitted on the authority of *Al-Tatārkhāniyya* that *taʿzīr* is applicable to him on the basis of [his demonstration of] cold-hearted overzealous piety (*waraʿ al-bārid*) as is defined in analogy to [the hadith of] a date picked up from the ground.[93]

Transmitted on the authority of a judgment [mentioned in] *Al-Lūlawājiyya* [94] [the case of] a man misleading another man's wife. [The latter] brought her out and married her to someone else – [the same would apply in the case of] a minor. He should be put in prison until he makes up his mind to repent or until he dies, because he is 'a fomenter of corruption in the world.'[95]

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[91] See note 69. Muḥammad b. Aḥmad b. Abū Sahl Abū Bakr, *Shams al-A'imma*, al-Sharakhsī. Ḥanafī jurist who lived and worked in Transoxania. (d. 483/1090). In: EI_2 IX, 35.

[92] Abū 'A. M. b. Samā'a b. Ubayd al-Kūfī (133/747-233/847). He became *qāḍī* in Baghdad after the death of Abū Yūsuf, in 799. In: F. Sezgin, *Geschichte des Arabischen Schrifttums*. Leiden (E.J. Brill) 1984) Band I, 435.

[93] Reference is made here to the hadith mentioned in the *Saḥīḥ* of both Muslim and al-Bukhārī, in which the Prophet is quoted saying concerning a date found on the road: 'If you are afraid it might belong to a gift someone wanted to give, eat it!' In: Muslim, *Kitāb al-Zakāt*, no. 165; In Al-Bukhārī, *Kitāb al-Laqata*, p. 94, no. 6). Al-Aslī (*Risāla*,159 n. 6) refers to the edition of the *Fatāwī al-Tatārkhāniyya II*, in the Manuscript Department of the Bibliothèque Nationale in Tunis, where he found on the back side of p. 100: "…there was a man who picked up a date from the ground in the market of the town. This was at the time of 'Umar b. al-Khaṭṭāb. He took it and said: 'Whoever lost this date, will come back on his word and he knows it.' The intention of these words are clear: his indifference to worldly things (*zuhdihi*), his piety and his feeling of obligation towards the people. 'Umar heard what he said and remarked: 'Ah, you are all hypocrites, for that is piety that is detested by God, beat him with the whip (*bi'l-dirra*)!"
Dirra (in: Lane): 'A whip for flogging criminals [although] I have not found any Arab who can describe it in the present day. It seems to have been a kind of whip of twisted cords or thongs, used for punishment and in sport, as is now called *farquilla*. Or a whip made of a strip of thick and tough hide or the like.'
The *dirra* is often associated with 'Umar b. al-Khaṭṭāb. Oral communication G.H.A. Juynboll (20.01.05).

[94] *Fatāwī al-Lūlawājiyya* of Zahīr al-Dīn b. Abū al-Makārim Ishāq al-Ḥanafī (d. 710/1310) In : Al-Aslī, *Risāla*, 103.

[95] *Sā'in fī'l-arḍi bi'l-fasād. Sūra* 5, 36 : 'Those that make war against God and His apostle and spread disorder in the land.' The term represents a special category of criminals justifying punishment that went beyond the normal *sharīʿa* penalties and had to be implemented by the sultan or bey. In: U. Heyd, *Studies in Old Ottoman Criminal Law*. (Ed. V.L. Ménage). Oxford (At the Clarendon Press) 1973, 195.

In *Al-Ghunya* [is mentioned the case of] a man who had misled another man's wife or his daughter while she was a minor. He brought her out and had her marry a man. Muḥammad [al-Shaybānī] said : 'Put him in prison for this until he brings her back or until he dies.'

In the fatwas of Qāḍī Khān and on the authority of Abū Yūsuf[96] is mentioned that the man who sells and buys wine thereby neglecting his daily prayers, should be put in detention and disciplined, after which he may leave [the prison]. The person suspected of murder, theft and beating people should be imprisoned and remain in detention until remorse is shown. End of quotation. (16)

In the commentary to *Al-Wahbāniyya* on the authority of *Al-Khizāna* [97] [is mentioned that] if it concerns a *ḥadd* punishment for an adulterer, the person should not be imprisoned, while in a case of theft he should, until regret is shown about the harm done to someone else through [his act of] stealing. In the same manner as in *Al-Muḥīṭ*, al-Tarasūsī[98] expresses as his view that the objective of remorse is that remorse is clearly shown. Otherwise we are unable to verify its veracity. End of quotation.

In the fatwas of Qāḍī Khān and on the authority of Muḥammad [al-Shaybānī] [is mentioned the case of] a man of virtue and respect abusing people. He should be spoken to but should not be detained. If he is not a man of virtue, he must be disciplined. If it was common to him to abuse [people], flogging should be administered and he should be put in detention.

In *Al-Muḥīṭ* of al-Sarakhsī [is mentioned the case of] a man abusing another man. The opinion of Muḥammad [al-Shaybānī] in this matter is that if he is a man of virtue worthy of respect, he should be rebuked (*waʿz*). Virtue (*al-murūʾa*) is the integrity (*ʿadl*) of his faith. If he is not a man of virtue, he is to be put in prison. If he is an abuser, flogging is to be administered and he should be put in detention. End of quotation.

I am of the opinion that the objective is that he [i.e. the transgressor] is admonished, as *taʿzīr* to him is called exhortation (*waʿz*). If it concerns *taʿzīr* to be implemented on persons of honor and high repute (*ashrāf al-ashrāf*) admonition is rendered by the judge, informing him in a precise manner about his misdoing (*ʿilām*): 'It has come to my knowledge that you have done such and such.' Through this the person in question will be restrained. The admonition therein is the notification (*ʿilām)* and more. There is thus no contradiction between this and what was mentioned in *Al-Muḥīṭ*, in the fatwas of Qāḍī Khān and the commentaries upon it.

Taʿzīr is a right belonging to the person, like the other rights due to him in which acquittal and pardon are permitted as well as indirect testimony.[99] Oaths can be rendered concerning it.

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[96] Abū Yūsuf of Kūfa (d. 182/795), student of Abū Ḥanīfa and chief *qāḍī* of the caliphs al-Mahdī and Hārūn al-Rashīd. In: I. Goldziher, *Introduction to Islamic Theology and Law*. Princeton N.Y. (Princeton University Press) 1981, 65.

[97] *Khizānat al-Fiqh*, by Abū al-Layth al-Samarkandī al-Ḥanafī (d. 373/983). In: Brockelmann G. I, 210.

[98] Ibrāhīm b. Imāddīn Abdassamad al-Tarasūsī al-Ḥanafī. Judge in Damascus (746/1345-758/1356). In: Brockelmann G. II, 87.

[99] *Al-shahāda ʿalā al-shahāda*, testimony confirming declarations made before a judge in another districts. B. Johansen, 'Eigentum, Familie und Obrigkeit in Hanafitischen Strafrecht.' *Die Welt des Islams* XIX 1979, 14, 8.

Now, as for his statement [i.e. the one mentioned in the fatwas of Qāḍī Khān] of a man accusing another man of insult or of physical assault, saying: 'I have evidence somewhere in the land,' from him is requested a personal bail.[This] personal bail obtained from him for three days enables him to produce two male witnesses or one male witness and two female witnesses. Or, if he produces two testimonies against the testimony of two men, a[nother] bail will be taken from him, so that [the judge] may obtain enquiries from the persons testifying. He [in the meantime] will not be imprisoned. If testimonies prove to confirm the truth, flogging will be administered with the whip, the number of lashes being not less than three and not exceeding the number of thirty-nine, according to the view of Abū Ḥanīfa and of Muḥammad [al-Shaybānī]. However, according to the opinion of Abū Yūsuf concerning the prevailing view of their school of law (*zāhir al-riwāya*) seventy-five [lashes are mentioned].

In the *Nawādir* of Hishām[100] seventy-nine lashes [are mentioned]. If it is the personal opinion of the ruler (*al-ḥākim*) that he should be castigated and that he should be put in detention for a number of days as a punishment, he may do that. If the defendant is a man of virtue and a first offender, it is more appropriate to warn him with words of admonition and not apply castigation. If he would return to his malpractice and fall back [into mischief], then – as is (17) transmitted on the authority of Abū Ḥanīfa, he should be castigated.

It is incumbent upon the ruler that he formulates [in the case concerned] an independent judgment. The meaning of his words '…not to apply *taʿzīr* ' is, not by means of flogging or detention. To chastise him with words of admonition should suffice.

In *Muʿīn al-Ḥukkām* [is mentioned] that if it is the personal opinion of the ruler that a person well-known for his homosexuality should be executed, execution will be carried out. Whether the person is *muḥṣan*[101] or not is not of relevance to the case, as it concerns here the jurisdiction of the political ruler (*siyāsa*).

[Also mentioned in it and] based on what is mentioned in *Majmaʿ al-Fatāwī* [the case of] a woman accusing her husband of beating [her] in a most atrocious manner. If he is proven guilty, he must be chastised. Likewise [the case of] a schoolmaster beating a small boy in a most atrocious manner. He must be chastised.

Also mentioned therein, on the authority of *Al-Munya*[102] and *Al-Durar*[103] the case of a man who saw a man together with his wife or his female relative (*maḥramihi*).[104] They both voluntarily

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[100] Hishām b. 'Ubaydallāh al-Rāzī, a student of Abū Yūsuf and al-Shaybānī (d.201). In: G.H.A. Juynboll, *Muslim Tradition*, 240.

[101] Term in Muslim jurisprudence denoting persons liable in the event of sexual misconduct to death by stoning. They may originally have included slaves, but the scholars eventually settled on three qualifications with respect to the category of *muhsan*: marriage – duly consummated, liberty and Islam. In: EI_2 VII, 475.

[102] *Kitāb al-Munyat al-Muftī*, written in approx. 638/1240 by Yūsuf b. Saʿīd al-Sijistānī (Ḥanafī). In: Brockelmann S I, 653.

[103] *Durar al-Ḥukkām fī Sharḥ Ghurar al-Ahkām*, by Molla Khusrev, a famous Ottoman jurist, whose real name was Mehmet b. Farāmurz b. 'Alī. From 874/1469 until his death in 885/1480 he was *shaykh al-islām* in Istanbul. In: EI_2 V, 32.

[104] *Maḥram*, one with whom iit is unlawful to fight, or whom it is unlawful to slay (…). One who has a covenanted right to protection or safeguard. In: Lane, 556.

admitted their offence. Both the man and the woman were killed. It is said in *Majmaʿ al-Fatāwī* that there are different ways of establishing this, the most correct of them is: If two people are found killed in one bed, or in one house, or in one dwelling, then the killer should [disculpate himself] by an oath [stating that] he saw the two people together in the house. * [in the margin: A method to verify this claim…].

In *Muʿīn al-Ḥukkām* [is mentioned] if a *dhimmī*[105] abuses [someone else], he should be chastised, because he committed a sin of insubordination.

In *Al-Asbāh* is transmitted on the authority of *Al-Ghunya*: It is said that if a person abuses a *dhimmī* by saying 'Ah, you unbeliever!', a sin is committed if he hurts him [at the same time].

In *Muʿīn al-Muftī*[106] is mentioned that a person drinking wine during the month of Ramaḍan is punished with the *ḥadd* penalty for [drinking] wine, that is to say, eighty lashes and thereupon put in detention until the effects of flogging have subsided. Subsequently he is to be chastised. For breaking the fast [within the month of Ramaḍan] by drinking wine implies a *ḥadd* penalty and, to defile the holiness of the month of fasting must be countered with [the application of] *taʿzīr*.

In the same manner is mentioned in the commentary to *Al-Wahbāniyya*: "I say, in analogy with what we said earlier concerning the mandatory character of the death penalty: if someone eats during the day in the month of Ramaḍan, deliberately and openly without any excuse, it is said that he should be killed. Likewise, if he drinks wine, this is the most appropriate procedure to follow." End of quotation.

I believe that what is meant here with his reference to his preceding remarks in the chapter on ritual prayer, is as follows: In *Al-Ghunya* is mentioned that who deliberately and openly eats during the month of Ramaḍan, will ordered to be executed.

Ibn Wahbān explained this [punishment by saying]: 'It is because he is ridiculing or denying the faith as it is established by necessity that these are matters of religion.' Said he: "It is conceivable that by using the word 'killing/executing', he [in reality] was referring to heavy castigation." It is clear that execution by the sword is meant here. End of quotation.

In *Al-Ghunya* [is mentioned the case of] slave requesting to be sold from his master, while he admits that is treating him fairly. He was castigated because he was of an obstinate nature.

[Also mentioned in *Al-Ghunya* the case of] two men between whom an argument arose. They both belonged to the common people (*min ʿurḍ al-nāss*). One of them came to the other, taking

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[105] A person whom the Muslim state undertakes to protect in the practice and profession of his religion, particularly the Jew and the Christian. In: N.J. Coulson, *A History of Islamic Law.* Edinburgh (University Press) 1964, 236.

[106] *Muʿīn al-Muftī ʿalā Jawāb al-Mustaftī*, written in 986/1577 by Muḥ. b. 'Alī al-'Arabī al-Ḥanafī, pupil of Ibn Nujaym (d. 970/1563). In: Brockelmann G II, 403.

with him documents in which legal scholars had written down their views. His opponent said: 'The case is not the same as given in the[se] fatwas'. Or he said: 'I am not going to act according to what is mentioned in it.' *Taʿzīr* was applied to him [i.e. the proponent], because he indulged in a reprehensible act. (18)
I say: His words are to be understood in such a manner that if they both would have been religious scholars, no *taʿzīr* would have been applied to the person coming up with the suggestion, as [in that case] it would have been a suggestion on the basis of interpretation or on the basis of evidence.

[Application of *taʿzīr*] should be restricted to him who proposed the suggestion, because only he tried to gain by it. Also, it is dependent on the condition that no mockery is implied. Because, if the law or the faith is ridiculed, he is to be qualified as an unbeliever (*kāfir)* by the consensus of the Muslims as is written in *Al-Khayriyya*.[107]

After I had written this, I did see [mentioned] in *Al-Ghunya* the [following] text: "Whoever says: 'I do not follow the fatwas of the *Imāms* nor do I put into practice their advice,' he rejects the Messenger, the consensus of the community and the teachings in the texts. Of him is required to show regret and to ask for forgiveness. It is said that exercising his own independent reasoning (*ijtihād*) is not possible [for him. If he would] it may be feared he is committing a deed of unbelief (*kufr*)." End of quotation.

In *Al-Ghunya* is also mentioned [the case of] a man entering the house of a man, wanting to take all that belonged to him. He [,the owner] took the stolen goods and set him out of the house. He has the right to kill him as long as the stolen goods are on his person, according to the words of the Messenger (SLʻM): 'Fight to protect your property.' But if he had thrown them away, this would no longer apply.

In the book *Al-Karāhiyya*[108] [is mentioned the case of] a man looking over the wall of another man ['s house]; on the wall was hanging a woman's veil. The owner of the wall was afraid that if he would shout, he might take the veil and disappear. [The question is]: Did he have the right to knock him over? Some of them said to him that this was the case if [the price of] the veil was the equivalent of ten *dirham*. The jurist Abū al-Layth said: Our Companions did not follow that measure [of the value of the veil], but gave the owner the absolute right to knock him over, thus adhering to the text that has come down to us [i.e. 'Fight to protect your property'].

Thereupon it was said that Abū Ḥanīfa vented as his opinion that you have the right to kill the thief who tries to escape. If he enters your house and you are afraid he will start hitting you or you are afraid that he has something with him and will throw you down, then you should throw him down, otherwise, warn him.

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[107] *Al-Fatāwī al-Khayriyya li-Nafʻ al-Bariyya*, A collection of fatwas by the Syrian (sic) mufti Khayr al-Dīn al-Ramlī (1585-1671). The collection was printed as early as 1858 in Egypt, a second edition followed in 1882. In: M.K. Masud (ed.), *Islamic Legal Interpretation. Muftis and their Fatwas*. Cambridge, Mass. (Harvard University Press) 1996, 12. Al-Ramlī is one of the youngest sources for Bayram.

[108] *Kitāb al-Karāhiyya*, a work by the Ḥanafī scholar A.b.M.b.S. al-'Allāmī (no dates mentioned) In: Brockelmann S II, 949.

Muḥammad [al-Shaybānī] has said that [it is to be understood in such a manner that] if a robber, not carrying a weapon upon him, enters a man's house, the owner of the goods is entitled to hit and kill him, provided he knows the thief may take the goods if he stays and chances are he may disappear[with them]. This would only apply in the case the owner of the goods is aware he cannot overpower him. (19).

The Conclusion, comprising of Three Studies

The first study concerns the administration of justice on the basis of indications of clear and apparent evidence (*al-qarā'in wa'l-amārāt al-zāhira*).The second study deals with [the concept of] *firāsa*. The third study is dedicated to [the institution of] *ḥisba*.

Concerning indications of apparent evidence, there is no disagreement about them: there is consensus in whose favor the evident [facts] testify in every event that occurs. The statement of the opponent is not accepted, unless [corroborated] by evidence.

Our *'ulamā'* say that customary law on the basis of *'urf* is like the law. They modify their legal assessments in accordance with the variations in *'urf*. They consider as ignorant the mufti displaying an inflexible attitude towards the transmitted texts of the books, who does not have an open eye for [the possibilities of] *'urf*.

The following questions were laid before al-Qarāfī: What is the correct view at this point in the legal assessments of the schools of law of al-Shāfi'ī and Mālik and the others, based on customs and customary law, in the event of an apodictic judgment of the *'ulamā'* concerning these rules? If these customs change and are tending to the opposite effect to what was aimed at in the first place, should these fatwas recorded in the books of the religious scholars be considered invalid and should there be issued fatwas meeting the requirements of the new customs? Or, should one say: We are *muqallidūn* and it is not up to us to innovate a legal rule, because of the fact that we are legally incompetent (*li'adim ahliyyatin*) to perform *ijtihād*, so that we [can only] issue fatwas on the basis of works transmitted from the *Mujtahidīn*?

He answered that the enforcement of rules which have 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 that follows the customary practice, changes its rule when this customary practice changes towards the requirements of the renewed practice.
This is not a renewal of the *ijtihād* by the *muqallidīn*, conditioning the capacity to this independent reasoning as an obligation, no, this is a basic rule resulting from the *ijtihād* of the scholars on which they have reached consensus. Moreover, we may follow them in this respect without [embarking] on a renovation of *ijtihād*.
Don't you see [for instance] that in matters of transactions the religious scholars are in agreement that if the price is mentioned in a general sense, this is understood in terms of the money in general use? And when the custom adopts any other kind of money, then their understanding [of the precise meaning of the price] is changed accordingly. Consequently, we reject the first understanding as custom has moved away from it.

The same holds true for general references with regard to testaments, oaths and to all the chapters of the law to be interpreted in accordance with customs: If practices change, so the legal assessments should change.

This also applies to [cases of] (20) claims when the claimant loses his right because custom changed after he lodged his claim, thus changing the situation to the opposite. [The same holds true for many] other cases mentioned in his [i.e. al-Qarāfī] book, entitled *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā ʿan al-Aḥkām wa tasarrafat al-Qāḍī wa'l-Imām*.[109]

In *Al-Fawā'id al-Fiqhiyya* of Ibn al-Ghars[110] [is mentioned that] proof is either provided by evidence, or by confession, or by oath, or by refusal to testify [against an oath], or by compurgation (*al-qasāma*)[111] or by the judge's knowledge[112] he is willing to provide, or by circumstantial evidence clearly indicative to the judgment required, because [all these relate] to the domain of the [judge's] decision.

[In this context the following example is told] of a man who was seen leaving a house, holding in his hand a knife, stained with blood. He quickly hurried along and was clearly affected by fear. The house was entered without any delay and in the house was found a man just murdered, his blood all over him. With him had been no other than that man just described, i.e. the one who had left the house. This man, without doubt, is to be arrested. There is clearly not a shadow of a doubt that he has killed him. The contention that he has committed suicide or that he has been killed by another person who had climbed over the wall and escaped and so forth, is an unlikely possibility. It will not be taken into consideration as it not based on evidence. End of quotation.

Also mentioned therein: one of the conditions for the legitimate legal claim is that its contents may be subject to verification, rationally or in the context of customary behavior. Therefore, the complaint lodged under the circumstances mentioned above is evidently untruthful because of its inability to fit into a context of customary behavior and certainly untruthful from the perspective of rational considerations.

An example of a legal claim [of the first category], i.e. the impossibility to verify it in the context of customary behavior, is the claim made by the person well-known for his poverty and destitute conditions: he [even] accepted *zakāt* from the rich. He claimed to have given in loan to a person a sum of hundred thousand dinar in cash in one installment. He now wants to have the money at his own disposal and demands the counter value of that sum of money. The case will not come on for hearing by the judge. It is dealt with as a false and deviating case. The defendant [in these kind of cases] is not required to react to the claim.

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[109] The proceeding paragraphs starting with 'The following questions…' are quoted from the pages 231, 232 of al-Qarāfī's book.

[110] Badraddīn al-Yusr al-Ghars al-Misrī al-Ḥanafī (d. 932/1525). In Brockelmann G. II, 400.

[111] A process of compurgation [i.e. clearing from a charge] in cases of homicide where the killer is unknown. It has the effect of releasing the community, group or individual from *qiṣāṣ* [retaliation], but not from *diya* [blood money]. In: C. Imber, *Ebu's-su ʿud. The Islamic Legal Tradition.* Edinburgh (At the University Press) 1997, 278.

[112] *ʿIlm al-qāḍī*, to be understood as the knowledge a *qāḍī* has acquired in his district and during his time in office. One of the demonstrations of proof a person is entitled to in *taʿzīr* cases. In: B. Johansen, 'Eigentum, Familie und Obrigkeit im Hanafitischen Strafrecht.' *Die Welt des Islams* XIX 1979, 8.

In *Al-Siyāsat* of Ibn Qayyim al-Jawziyya [is mentioned] the same legal procedure concerning possession (*ṭarīq al-ḥukm bi'l-yad*) in the case clear indications do not contradict the claim of the owner. If they do, however, no consideration is given to the claim and we know we are dealing with [a case of] (21) fraudulent personal possession.

This is like the case of a man who is seen running along holding in his hand a turban while [also] having a turban on his head. Another man, following him, demands from him the turban. He is bare-headed, though it is not his custom to walk without head-covering. [So in this case] we decide that the turban – the one which was held in the hand – belonged to the other [running after him]. The [first man's] claim to possession is not taken into consideration. In cases with such clear indications judgment should be passed accordingly. For the information derived from it (them) is much stronger than the presumption to be obtained from the fact of possession. The [other man's] claim to possession does not even produce a presumption at all. So how would it gain precedence over certainty or quasi-certainty?

In the same manner, if we see a man leading a saddled horse by the rein, this not being one of his usual means of transport and behind him is a prince on foot, then we decide that this is a case of fraudulent personal possession.

In the same manner [is treated] the case of a person suspected of theft who is seen with a turban while he clearly does not belong to the kind of people accustomed to wear one. It is as if one would see him wearing [fine] clothes and jewels, etcetera, which do not fit his status, while he would still claim them to be his property and possession. No consideration is given to such kinds of [claims to] possession.

Similarly, every claim to personal possession that can be annulled by clear indications is considered to be fraudulent. However, a claim on the basis of personal possession will be admitted if it is not contradicted by stronger evidence and when [the claim of] personal possession is annulled by a refusal to testify in court and one witness [giving] an oath. It certainly will be annulled by evidence much stronger than these, by way of priority. There is no doubt that this belongs to the rules of justice with which God sent His Messenger and which He revealed in the Scriptures and imposed them among His people. End of quotation.

In the chapter on Testaments from *Ǧāmaʿ al-Fatāwī* and in [the book] *Al-Mabṣūṭ*[113] [is mentioned]: If it concerns a [court] case between a good person and a bad person the good person should say the oath even though he is the claimant. He, upon whom may rest God's blessings and peace, has said: "The evidence should be brought forward by the claimant and the oath should be given by the one who denies [the allegation] when it concerns a court case between two good men." Because the oath may ruin soul and faith, the oath is not allowed to the person who may ruin his soul and faith. Also, the bad person is not concerned about the damage he might inflict on them, because of the words of the Messenger (SLʿM): 'The

[113] *Kitāb al-Mabṣūṭ*: 'Outstanding among the scholastic compendia of jurisprudence produced in the fifth/eleventh century are (…) and the *Mabṣūṭ* of the Ḥanafī scholar Shams al-Dīn al-Sarakhsī (d. 483). These works encoded three centuries of juristic speculation while confirming and promoting the distinctive patterns of their respective law schools.' In: N. Calder, 'Friday prayer and the juristic theory of Government. Sarakhsī, Shīrāzī , Māwardī.' *BSOAS* 1986, 35.

ignorant is his own enemy.' Therefore, how could he be truthful to someone else? End of quotation. (22)

The application of circumstantial evidence is practiced in matters upon which the four schools of law have agreed.

As an example may be mentioned their agreement about the permissibility granted to the man to have intercourse with [his] wife on their wedding night[even] if there are not two upright witnesses to testify that she is the daughter of such and such with whom a marriage contract was arranged and neither is it confirmed by women that she is his wife. [In a case like this one] relies on apparent evidence (*al-qarīna al-ẓāhira*), placing it on the same level as the [formal] testimony.

As another example may be mentioned that the people, now and in the past, always trusted the words of boys and girls, when they were sent with gifts. They accepted their words and they ate the food that was sent and similar matters that would take too far to explain.[114]

Much is said about these matters in *Muʿīn al-Ḥukkām*. Ibn Qayyim al-Jawziyya mentioned in this respect over thirty examples. At the end he says: And numerous other questions for which the judicial practice proceeds according to customary law and local customs. The *sharīʿa* does not reject a right, nor does it appreciate as null and void truthful indications. Verily, God Most High, praised be He, ordered a most careful verification of the information provided by an immoral person. He did not reject it outright. Information provided by an immoral and unbelieving person may be corroborated by signs of truthfulness. In that case its acceptance is due and [considered] effective. End of quotation.

The Second Study, dealing with the subject of Firāsa[115]

Its origin is found in the words of [God] Most High: 'Surely in that are signs for such as mark.'[116] This was explained by the Messenger (SLʻM) and Al-Ḥākim al-Tirmidhī[117]

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[114] These two examples appear in Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya* (19) and in al-Ṭarābulsī, *Muʿīn al-Ḥukkām* (161). In the last work many more examples are given, as Bayram also indicates.

[115] Bayram describes in this second study a number of cases, quoting Ibn Qayyim al-Jawziyya, in which the judge comes to his verdict through *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. Bayram derived the definition of the term from al-Ṭarābulsī, although the latter is fare more specific. We find in his book *Muʿīn al-Ḥukkām* (p.163) a reference to Abū Bakr b. al-ʻArabī (1165-1240), who in turn refers to Abū Bakr al-Shāshī (1037-1114), who claimed to follow the method of Qāḍī Iyās, judge at the time of ʻUmar b. ʻAbd al- Azīz.

Iyās b. Muʻāwiya was appointed judge of Basra in 99/178. He became proverbial for his perspicacity (…) His ability to extract precise information from hints unnoticed by others and his shrewdness are often praised. *Adab* literature presents him as a kind of Solomon, and he is the hero of a large numbers of anecdotes. He died in 121/739, at the age of 76. In: EI_2 III, 291.
A number of the Iyās stories have come to us through the work of Burhān al-Dīn Ibrāhīm ben Yahya, also called El-Wat'Wat', in his *Ghurār al-Ḫhasais* (sic) (718/1318/19). Two centuries after his death (1535/36) we find the story about the man and the deposit in the work of the French author Nicolas de Troyes *Le Grand Parangon des Nouvelles nouvelles*. In: René Basset, 'Le Dépositaire Infidèle.' *Revue des Traditions Populaires. Contes Arabes et Orientaux*. Tome VI No. 2, 1891, 66.

[116] *Sūra* 15, 57.

mentioned it in [his work] *Nawādir al-Uṣūl*, saying to the ones applying *firāsa*: 'Fear the intuitive eye of the true believer *(firāsa al-mū'min)*, for he sees with the light of God.' And he (SL'M) said: 'God has worshippers who will recognize the people by an outward sign.' Al-Tirmidhī mentions both of them despite the fact that some reckon the hadith 'Fear the intuitive eye of the true believer' as one of the *mawḍū'āt*.[118]

[*Firāsa*] originates in the perfection of a fine character, in the sharpness of sight and in the clearness of thought. It is not permitted to judge on its basis and they considered a judgment on the basis of *firāsa* as unjust and immoral, because it is conjecture and [based on] assumption, and assumption may err as well as be correct. It only may help to establish the truth.

They say that the judge if he perceives through outward signs in a litigant that he is hiding something, and he is concerned the claim may be fraudulent, despite the fact that the arguments brought forward by the claimant point in the right direction and the document he has in his possession is consistent with the outward appearance of his claim, then he renders the favor of further research and examination into the actual state of affairs.
For, nowadays, people are often inclined to deceit and their trustworthiness may be questioned. However, if the circumstances do not become clear to him, he [i.e. the judge] would do well to admonish [the person] if he finds a way to do so and remind him of the words of [God] Most High: (23) 'Consume not your goods between you in vanity.'[119]

If he does not repent [the judge] will announce his verdict on the basis of apparent evidence. If during the course of the investigation, his doubts increase, he arrests the case and pursues his investigation for a few more days. The strength of his doubts will dictate the speed of the procedure: he shall not act in a hasty manner in coming to his decision. He will form his opinion to the best of his abilities, until the truth of the matter becomes clear to him in this [particular] case or until his doubts have disappeared.
Likewise, when the dispute in a certain case continues and a critical situation arises, there is no objection for the judge to tear up their documents and order them to commence the lawsuit all over again.

[An extraordinary example of *firāsa* has come to us] from 'Umar, may God be pleased with him. [One day] a group of people came to visit him among whom was a man who suffered from an eye ailment (*ashtar*). 'Umar looked at them and said: 'Who is he?' They said: 'Mālik b.

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[117] Abū 'Isā Muḥ. b. 'Isā b. Sawra b. Shaddīd al-Tirmidhī (d. 270,275/883,888). Author of one of the canonical or semi-canonical collections of Traditions. In: SEI, 595.

[118] Problematic in view of their authenticity.

[119] *Sūra* 2, 184(188).

Harith!'[120] He said: 'What has befallen him? – May God hit him! I see him causing a fierce day for the Muslims![121] Afterwards he committed his notorious deeds during the *Fitna*.

[There is also the case of] a delegation from the Yemen that entered Medina while 'Umar and the Companions were in the mosque. They pointed to a man of the delegation and said to 'Umar: 'Do you know him?' He said: 'Perhaps he is Suwād b. Qārib.'[122] And he was.

[There is also the] story of a man who gave his money in safekeeping to a man.[123] When [after some time] he asked it back, the man refused. He went to [Qāḍī] Iyās and told him [about the case]. Iyās said to him: 'Go away and keep silent about the matter and do not let him know that you have come to me. Then, come back to me after two days.'
[Then] Iyās sent for the man with whom the money was deposited and said to him: 'I have here a considerable sum of money and I would like to give it to you for safe-keeping. Is your house safe?' He said: 'Yes.' He [i.e. Iyās] said: 'I will fix it on the spot and [with the use of] carriers.'
The man returned to Iyās , who said: 'Go to your mate, then ask him for the money and if he refuses, say to him: 'I will tell the *qāḍī* about it.'
The man came to his mate and said: 'My money! Or else I go to the *qāḍī* and complain to him!' He then gave him his money. He returned to Iyās and said: 'I have got my money!' [Then] the deposit-holder (*amīn*) came to Iyās for the appointment [they had made. But] he chased him away saying: 'Do not come close to me, you traitor!'

[Now] the man deposited money with another man, who refused [to give it back].[124] He lodged a complaint with Iyās who rejected it, saying to the claimant: 'Where did you hand it over?' He said: 'In the desert.' He [i.e. Iyās] said: 'What is there?' He said: 'A tree.' He said: 'Go there, perhaps you gave the money there at the tree and you forgot. You might remember if you see the tree.' He departed.
He [i.e. Iyās] said to the opponent: 'You just sit here until he comes back.' Iyās waited for him hour after hour. After a while he said: 'Hi, you there, what do you think, would your mate have reached the place with the tree by now?' 'No', said he. He [i.e. Iyās] said: 'Oh, you foe of God, truly you are a traitor.' When the one who had been sent away came back, Iyās said to him: 'Go to him and take what is rightfully yours.' (24)

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[120] Mālik b. al-Harith b. Yaghūth al-Najaʻī, also known as the man with the eye ailment (d. 37/657). He was the chief of his tribe. He lived in Kūfa and was witness to the battle of Yarmūk, where his eye was wounded. He was amongst the people who joined forces against 'Uthmān and was present at the siege of the latter's house in Medina. In: S. al-Aslī, *Risāla*, 179.

[121] *Sūra* 11, 77(79): '…This is a fierce day' (*yaumun ʻaṣībun*).

[122] A diviner and poet in the time before Islam. He became a Muslim, and died in Basra in 15/636. In: S. al-Aslī, *Risāla*, 179.

[123] This story appears in Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 25,26.

[124] Id., 27.

[Now] the judge Abū Ḥāzim[125] was in cases [of *firāsa*] the most amazing [of judges].[126] A certain author said: I was in the court of the judge Abū Ḥāzim when an old man came forward and with him was a young lad. The old man formally lodged a complaint, accusing him of owing him a sum of thousand dinar. He said [to the young man]: 'What do you say to that?' He said: 'Yes [it is true].' The judge said to the old man: 'What would you want [me to do] ?' 'Put him in prison.' He refused. The old man said: 'If the judge would be wise enough to put him in prison, that would give me a chance to get what is due to me.' Then Abū Ḥāzim studied the case with the help of *firāsa* for a while and subsequently said: 'Wait until I have looked into your case in another session of the court.' I told him: 'Why do you postpone his detention?'
He answered: 'Because in most cases I am able to distinguish between truth and lie. This has become my second nature which hardly ever fails. Now it occurred to me that the lenience of this person to confess is somehow a bit dubious. Don't you see how little both of them are rejecting [the claim of the other] without much ado and how quietly they are in their behavior? Such piety is rare! It does not happen everyday that someone would confess so quietly and so easily to owe such an amount of money.' He [i.e. the author] said: 'We would do exactly the same.'

As they were talking a merchant asked permission to enter and subsequently told them: 'My misfortune is a young lad who wastes all he can lay hands on of the money I have with mister so and so. When I forbid him [to do so], he forces me by tricks to pay the loss caused by him. Today the owner of the singing girls demands a thousand dinars from him. I was told that he went out to the judge in order to confess. [The judge] put him prison. He also made trouble with his mother which ruined our lives – until I would settle his debts.'
The judge smiled and asked: 'What do you think?' I said: 'This the grace of God bestowed upon the judge!' Then he called for both of them. He gave the old man a good scare and admonished the young man. Both of them confessed.

[Another example of the use of *firāsa* is the account of] two men from Quraysh[127] who paid to a woman [an amount of] hundred dinar in deposit, saying: 'Do not give it [back] to [either] one of us without his friend [being present].' They waited for one year. One of them came and said: 'My friend has died [so] pay me the dinars.' She refused, saying: 'You both said to me not to give it to one of you without the other friend [being present].'
He put her under pressure through her family and neighbors until she gave it to him. Subsequently the other came back after a year and asked for it.
She said: 'Your friend made us believe that you were dead and I gave it to him.' Thus they presented their dispute to 'Umar, may God be pleased with him, who wanted to judge against her. She said: 'Let us bring the case before 'Alī b. Abū Ṭālib, may God be pleased with him.' 'Alī knew that they both had cheated her and said: 'It is true, is it not, that you both said, do not give it to one of us without his friend being present.' He said: 'Indeed!' [Whereupon] 'Alī said (25): 'Your money is with her, so go [to her] with your friend so that she will pay it to you both.'

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[125] Most probably Abū Ḥāzim b. al-Farrā, son of the famous Ḥanbalī qāḍī Abū Ya'lā of Baghdad. (d. 527/1133). In: G. Makdisi, *Ibn 'Aqīl*, 258.

[126] Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 27, where the story is told by Makrum b. Aḥmad.

[127] Id., 30, 31.

In the same manner the following example is told about Aḥmad b.Ṭūlūn,[128] which occurred during one of his court sessions. A beggar came [to him], wearing an old and worn garment. Chicken, bread and some sweets were brought to him by one of his slaves. But the beggar did not welcome him and did not seem to care [for the food], though this happened before his very eyes. He said to the slave: 'Take it away!' which the slave did. He then interrogated the beggar. He gave a good answer and he did not have to be forced to it.
[Aḥmad b.Ṭūlūn] said: 'Give me the documents you have with you and tell me the truth about who sent you. I am sure you understand what I mean!'
He had the whips brought in and then he confessed. Some of the people that were with him in the courtroom said: 'By God, this is magic!' [Aḥmad b.Ṭūlūn] said: 'This is no sorcery but true *firāsa*: I saw the predicament of his situation. I had food put before him that would even attract the person who is sated. But he did not lift a finger to touch it. I had him brought in and he encountered me in a strong and composed manner. When I watched his selfconfident appearance and saw his shabby clothes, I knew he was an intelligent man.'

[Another example of *firāsa* has come to us] from the time of [Caliph] Muktafī[129] when a large sum of money was stolen. He enjoined the police officer to arrest the thieves and make them compensate the [stolen] money. [The police officer] made the rounds on his own by day and by night as was his routine, until at a certain moment he came to a deserted ally, in one of the outskirts of the town. He entered it and found the ally to be a dead end. Near one of the doors he found a great number of fish bones. He said to a person who happened to be there: 'How much would the price be for a fish with such bones?' He said: 'A *dinar*.' [The police officer] said: 'It is clear that this is an ally in a rather poor neighborhood close to the desert and the circumstances of the people [living there] will not allow them to buy this sort of food.'

He knocked on a door that did not have any fish bones and a weak old woman came outside. He asked her for a drink of water and began asking her about the daily life in the ally. She told him [a thing or two], and then he asked her about the person who lived in that house [with the fish bones]. 'There are five young men living there since a month', she told him, 'passing the whole day in there together. They eat, drink and play chess and backgammon. One of them goes out for the daily necessities, but he usually comes back quickly. They have a small boy to serve them. When night falls they go back to their home in Al-Karkh[130] and then they will call the small boy in the house to look after it. At daybreak they return.'

The man said: 'This is the description of thieves!' He immediately called for ten of his helpers and led them to the roofs of the neighbors. He knocked on the door. The small boy opened and he rushed inside, seizing them till the last one. They were all thieving mates together.

Likewise, [is mentioned the case of] a young man, belonging to the *Anṣār*[131] who claimed – in the presence of 'Umar, may God be pleased with him, that a certain woman was his mother.

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[128] Member of the governing family of Egypt from 254/868-292/905, during the brief restoration of Abbasīd rule over the province. In: EI_2 X, 616.

[129] Abū Muḥammad 'Alī b. Aḥmad al-Muktafī bi-llāh., 'Abbasīd caliph, reigned from 289/902 until his death in 295/908. In: EI_2 VII, 543. Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 44.

[130] Karkh (from the Aramaic *karkha*, meaning a fortified town), a quarter in Baghdad. In: EI_2 I, 908.

[131] *Ansār*, 'helpers', title of the believers in Medina who received and assisted the Prophet after his flight from Mecca. In: SEI, 43. *Ṭuruq al-Ḥikmiyya*, 45.

She denied and he had no proof. (26) She brought a group of people with her, who testified that she was not married and that he had slandered her reputation. He gave order to have him flogged. [Later] ʻAlī, may God be pleased with him, met him and he told him the story. He said to the young man: ʻRenounce her, like she renounced you.ʼ He said: ʻI did already renounce her.ʼ ʻAlī [then] said to the legal guardians of the woman: ʻIs my order in this case permitted?ʼ They assented. He said: ʻI make those present here witnesses of the fact that I give this woman in marriage to this young man,ʼ and he, out of his own means, paid the dowry for her [to the amount of] four-hundred-and-eighty dirham, while he said to the young man: ʻTake the hand of your woman and do not come back to me without having celebrated the wedding feast!ʼ
When he came close [to her] the woman said: ʻOh, Abū al-Ḥasan, oh God, I fear Hell, he is my son, because my brothers gave me in marriage to his father. I got pregnant and his father left to fight as a soldier and was killed. I was sent with him to a certain tribe and he grew up among them, I[in the meantime] denied that he was my son!ʼ
Thus he restored their relationship and his kinship was established.

From [other] affairs [handled] by ʻAlī, may God be pleased with him, [is mentioned the case of] a man brought to him who had been found in a rundown place with a knife stained with blood.[132] In front of him had been a dead man fallen to the ground in a pool of blood. He interrogated him and he said: ʻI killed him.ʼ He said: ʻTake him away and execute him.ʼ
While they were taking him away, a man came to them, hurrying along, and said: ʻOh, you, people, do not hasten yourselves!ʼ So they brought him back to ʻAlī. Then the man said: ʻOh, Commander of the Faithful, this is not the man you are after! I killed him.ʼ
ʻAlī said to the first one: ʻWhat made you say you killed him?ʼ He [then] said: ʻOh, Commander of the Faithful, I would not be able to kill someone in cold blood! The patrol stopped to look at a man laying in his blood in [this] rundown place and I stood there, and in my hand I had a knife with traces of blood. I was afraid that they would not believe me!ʼ

ʻAlī said: ʻYou miserable creature! So what really happened?ʼ He said: ʻI am a butcher and I went out to my shop in the dark. The cow had a terrible smell. While stripping off her skin, I was overcome by the call of nature. I went into a rundown place in the neighborhood and did what I had to do. I [then] wanted to go back to my shop, when, oh! there was the dead man, fallen on the ground in his blood. It gave me a fright! And, I stood there, looking at him with the knife in my hand! Before I knew what was happening, your men had seized me and taken me away. The people said: ʻThis is the killer! He did it! And, I was sure that you would not believe my word against theirs. Thus I confessed a crime I did not commit.ʼ

Then ʻAlī, may God be pleased with him, said to the second confessor: ʻAnd, you, what do you have to say?ʼ [The man said:] ʻI am a Bedouin with empty pockets. I killed the man out of greed for his money. Then I heard the patrol [coming]. I went outside and bumped right away into this stupid butcher in the way [just] described. (27) I hid from him in a corner of the place, until the patrol came and took him away. When you ordered his execution, I knew that I would have his blood on my conscience as well, so I confessed the truth.ʼ

If you say that this diminishes the value of what I said before about the taking into account of circumstantial evidence, viz. that the person clearly affected by fear, [who is seen] leaving a house while holding in his hand a knife stained with blood, while in the house, which is

[132] Ibn Qayyim al-Jawziyya, *Ṭuruq al-Ḥikmiyya*, 55.

entered immediately [afterwards], is found a man murdered and so forth [in the same manner] as I said before, and the same matters were found on the butcher as well, while in actual fact he was innocent, I say: 'This is a very rare case, no attention should be paid to it. [In the same manner] as we remarked earlier that no attention should be given to the assumption that he either killed himself or was killed by someone else who escaped by climbing over the wall. Assumptions not based on evidence are not to be taken into account.'

The Third Study on the Subject of Ḥisba[133]

Al-Qarāfī has said that the office of market inspector (*muḥtasib*) is of a more restricted nature than that of the judge who has jurisdiction in all legal assessments (*aḥkām*). However, the market inspector may exercise his independent judgment[134] in cases of disorder related to the public area outside the houses and buildings of stone on the roads and other matters related to [the office of] *ḥisba*.

He has no authority to issue a verdict, nor does he have executive powers either in concluding marriages or in business transactions. His function is more extended than that of the judge (*qāḍī*) 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; he cannot investigate a case for which no complaint is lodged with him.

He has authority in cases that are not submitted to the judge. His role is to intimidate whereas the judge's role is to render justice.[135] The office of the market inspector is in certain aspects more extended than that of the judge, while in other aspects more particular. End of quotation.[136]

Ibn Qayyim al-Jawziyya in his *Siyāsāt* brings forwards the following which, summarizing, conveys that to the realm of *ḥisba* in particular belongs the commanding of the commendable and the forbidding of the reprehensible. The market inspector enjoins the masses [to perform] the five prayers at the appointed times, punishing the person who did not fulfill his duties through flogging and detention. He enjoins attendance to the Friday prayer and leads the faithful to truthfulness and sincerity in [their] words and deeds. He will restrain faithlessness,

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[133] Bayram's words do not seem to relate to a practical situation, although the market inspector must have been there, in eighteenth century Tunis, still under the old Ḥafṣīd title of *mizwār*. The office, however, lost its reputation and was abolished by Mustafa Bey in 1836 (*Itḥāf* III, 207). Later in the nineteenth century attempts were made for its revival and a member of the Bayram family appointed 'to the despair of his brother, [the *shaykh al-Islām*] Bayram IV, as the appointee had no education at all and was abusive in his conduct.' Continuation of the office was soon called off again. In: M. El-Aziz Ben Achour, *Les 'Ulamā'*, 113.
Demeerseman even mentions two kinds of *mizwār* (also *mizwāl*): the *muḥtasib* of the Great Mosque who placed himself before the i*mām* in the mosque on Friday, held his staff until he had occupied his seat and gave the directions for prayer; and, the *muḥtasib* as described by Bayram I. In: A. Demeerseman, *Aspects de la Société Tunisienne d'après Ibn Abī al-Dyāf*. Tunis (IBLA) 1996, 72.

[134] Al-Māwardī, *Ordinances of Government*, 260.

[135] Id., 262.

[136] These first three paragraphs are quotations from al-Qarāfī's *Kitāb al-Iḥkām*, pages 167, 168 and 169.

stinginess in measuring or weighing, [he will restrain] fraud in workmanship and in selling, he inspects the weights and measures and the conditions of those preparing food and those of the manufacturers of clothing and tools.

He will prohibit the manufacturing of what is forbidden under any circumstance, like [the manufacturing of] musical instruments and silk clothing for men. He prevents the use of [different] kinds of stimulants (*al-muskirāt*) . His office's main task is to control swindlers and cheaters. He has no mercy for their dealings and will teach them a lesson; he will not spare them their punishment for the damage inflicted through them to the public. (28) In particular the alchemists who counterfeit coins, jewelry and perfume and the like: they parody by their cheating God's creation. In the *hadith qudsī*[137] [is mentioned]: 'Who is more wrongful than they who try to copy My creation. Let them create a mote (*dharra*), let them create a hair.'

He will see to it that no one obtains for himself a monopoly. He prevents the brokers (*al-dallālīn*), the distributors (*al-qassāmīn*) and the inspectors (*al-shuhūd*) to form partnerships amongst each other, [for] if partnerships are formed and the public is dependent upon them, their earnings will rise.

In the same manner he will restrain the seller from pre-arranging to sell only at a fixed price. He will restrain buyers from sharing the purchase of goods as this would cause injustice to the salesman. He will prohibit the renting of shops alongside the road and in smaller townships for fixed prices and on the condition that only one tenant is allowed to sell there. For, this would be a gross injustice to the one who lets [the shops] and to the tenants [of the shops]. He [who commits this offence] withholds God's blessing (*rizq*) [from others]. It may be feared that God would deny His compassion [to the one who would embark on such a malpractice].

Likewise, it is an obligation that food and the like are only sold by well-known people and no others should vend [them. For], this would be an injustice on earth, [a token of] corruption and evil, which would hold back the rains from heaven. Those people should be treated severely. They should not sell and they should not vend unless for a fixed price only.

Likewise, if people are in need of certain crafts or trades, like farmers, weavers, builders and so forth, and they turn down the order, then the legal authority has the right to oblige them to lend their services at a fair rate or remuneration, because the public welfare may only be attained [through their contribution]. Therefore, some companions of Aḥmad [b. Ḥanbal] and al-Shāfiʿī held the view that to learn these skills is a collective duty, like the preparing of the dead and burying them. The same applies to [several] kinds of general public and more specific private offices without which the public welfare cannot be achieved.

If the owners of food shops exceed the limits [in their prices], he should fix the prices in consultation with men of experience and insight. He should assemble the people of the market in which these particular wares are sold, in the presence of others, to demonstrate their integrity. He will ask them how they buy and how they sell. He will then bring them [i.e. the

[137] In hadith collections a distinction is made between *hadith nabāwī* and *hadith qudsī*. The former were attributed to Muḥammad as the speaker and consisted either of his sayings, his doings or acts which he permitted. These were (…) handed down (…) from the lips of those who heard the words or were witnesses of his acts in question. But in some cases the form of a tradition showed that it contained the actual word of God, and not the word of the prophet merely. Such traditions were designated as *hadith qudsī* (holy), or *hadith ilāhī* (divine tradition). In: S.M. Zwemer, 'The so-called *hadith qudsī*.' *The Moslem World* XII, 1922, 263.

prices] to a level that is reasonable to them [i.e. the merchants] and to the people at large, [in such a manner that] they are satisfied.

Concerning the peddlers in livestock, Ibn Rushd[138] held the view that there is no difference of opinion on the issue that among the peddlers there is no fixed price for the goods they bring to the market for sale. However, to those among them who overcharge [their customers] and are selling at higher prices than is commonly done, they are given the choice to either adjust their prices or otherwise to be removed from the market.

As for the tradesmen with shops and with a fixed location in the market, those who buy from the peddlers and others wholesale (29) and sell retail, like meat, anything to go with bread, and fruit, it is said that they are like the peddlers; there is no fixed price for what they sell. To those among them whose prices are too high, is announced that they either should sell to the price demanded by the other salesmen, or otherwise be removed from the market. It is said, however, that they are different from the peddlers in that respect: it should not be left to their own choice [to fix the prices] as this might be confusing to the people at large.

It belongs to the duties of the market inspector to know for which prices they sell. He establishes for them the margin of profit which he thinks fair [and] he forbids them to exceed the proper bounds. He is to survey the market at all times, forbidding them to exceed beyond what is regulated concerning margins of profit. Whoever disobeys his order will be subject to a disciplinary measure or be removed from the market.

It is not allowed to anyone of the *'ulamā'* to say to them: 'Only sell for such a price, whether you make a profit or take a loss, without looking at what they sell!' And, [it is also not allowed to anyone of the *'ulamā'*] to say to them [about the goods they have bought]: 'Only sell [them] for such price which is fair, or less.'

As they have to pay tax on their profit in accordance with buying prices, he will watch them carefully if they buy for high prices, even though they do not increase the profit in accordance to what has been allotted to them. [The reason for this being] that they may become negligent in buying [for sharp prices] when they know for sure that their profit will not escape them.

God Most High, praised be He, He is the One hoped for in providing for the Muslims and in supporting their authorities in suppressing the disobedient among them. Gods blessings and peace on our Lord Muḥammad, on his family and on his Companions. Salutations and everlasting prayers in abundance until the Day of Judgment. Praise to God, the Lord of all Being. There is neither power nor strength but with God Most High and Powerful.

[138] Abū al-Walīd ibn Rushd [also] called '*al-Ǧadd*' (the grandfather) (d. 520/1126). Grandfather of the famous Spanish theologian, philosopher and Aristotle commentator by the same name who is known by his European name as Averroes.
A jurisconsult of the Mālikī madhhab. He was chief judge and *imām* of the Great Mosque in Cordova. In: EI_2 VII, 397.