RECALLING THE RULINGS OF *AL-ḤĀKIM AL-MUTAGHALLIB:* SHOULD THE CONTEXT BE IMPORTED?

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Mohamed Sayed

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Professor/ Khalid Blankinship, Thesis Advisor, Department of Religion

Professor/ Terry Rey, Department of Religion

ABSTRACT

In the aftermath of recent major events in the Muslim world, the Sunni Muslim jurists, hereafter referred to as the "*'ulamā'*," turn to the classic Muslim tradition in search of answers to questions arising from these events. After the Arab Spring and the 2013 military coup in Egypt and the ensuing revolt of the youth, influential *'ulamā'* deferred to authoritative rulings which declare that the "*Ḥākim al-Mutaghallib*" (the Usurper Leader) is to be obeyed. However, those *'ulamā'* ignore the difference between the early context in which these rulings emerged and developed and the context in which the modern state employs them today. The *'ulamā'* treat these rulings as regularized, binding decrees that must be followed by all Muslims – neglecting the fact that they have always been uncertain, controversial rulings. Thus, this paper attempts to compare the two contexts, the classical and the modern state context, to illustrate the problems encountered in the recalling of these rulings. Moreover, it traces the circumstances in which the rulings emerged and how they were legitimized and regularized over the course of Muslim history. This paper attempts to demonstrate that these classical rulings are not immutable and applicable in all times and in all places, as they were developed in response to particular events and in a relatively narrow context. Rather, the rulings should be revisited and reevaluated for applicability in the current time and context.

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INTRODUCTION

Unlike the heresiology disputes of early Christianity, the first conflict among Muslims was political not theological. Christians contested the nature of the divine, while Muslims disputed the nature of community leadership following the death of the Prophet (PBUH) (Black 2011, 15). This dispute developed over the centuries of early Islam, and has endured throughout Muslim history to the present day. Additionally, this original political dispute was the major reason for the emergence of the major Muslim sects, namely, the Sunnis, the Shiites, and the Kharijites. Thus, each sect produced its own canon of political literature which justifies their views. This political literature is known as "*as-Siyāsah al-Sharʿiyah*" (Muslim political thought) – which originated as a specialized category of writings in the books of theology and *fiqh,* and which later became established as a genre of its own – and it concerns, specifically, the Muslim system of governance and the relationship between the ruler and the ruled

My research focuses mainly on Muslim political thought from the Sunni perspective. Not only has there been a long record of disputation between the Sunni sect and its counterparts, but it also believed that this long history of disputes has heavily influenced Sunni political views. One of the most problematic issues arising out these disputes, having enduring effects on Muslim realities and thought, is the legitimacy of *al-Ḥākim al-Mutaghallib*'s rule. *Al-Mutaghallib* is an individual who usurps political control and overpowers the public, forcibly subjugating them to

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his rule (Az-Zoḥīlī 2000, 8/6167). Following events such as the Arab spring of 2010[1], the military coup in Egypt in 2013, and the 2015 war in Yemen, the *'ulamā'* reintroduced precedential classical rulings which legitimized the rule of *al-Ḥākim al-Mutaghallib*. These rulings were recalled in order to discount the public outcries of the supporters of freedom and reform in the modern Arab states, further reifying the concept of *al-Ḥākim al-Mutaghallib* as a legitimate leader who must be obeyed and must not be removed from power. Therefore, this research investigates the issue of recalling classical rulings as precedents, and evaluates the validity of borrowing such rulings from the past in order to create binding laws in the present.

The most salient issue in the process of recalling classical rulings as precedent is that the rulings, in effect, legitimate *al-Mutaghallib*'s rule as valid, giving him all the rights of the ruler in Islam. This type of validation is a powerful concept in Islamic governance in that it gives the ruler all of same the privileges and powers of an *imām* who is freely chosen by the public. This recalling by the *'ulamā'* of the various Sunni sects aims at opposing the current calls for change and revolution, especially the revolution known as the Arab Spring. The *'ulamā'* seek validation of their anti-revolutionary views in the *sharī'a*. Moreover, some *'ulamā'*, depending on these rulings, have validated the mass killing of the opposition parties who revolt against the coup regime. Furthermore, incongruously appealing to *sharī'a* rulings within the context of modern state results in a dangerous paradigmatic conflict. Casting these tyrannical rulings as "*sharī'a*" rulings gives credence to an anachronistic reinterpretation of the early *'ulamā'* as having acted purely for the sake of tyrannical rule. That is, the current state of affairs surrounding the *Ḥākim*

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[1] The Arab Spring: refers to waves of revolutions, riots, civil wars, protests, and coups started Dec 18th, 2010 in Tunisia and spread all over the Middle East and North Africa.

al-Mutaghallib rulings promotes a distorted understanding of what the *sharī'a* is today, as well as the project of the early '*ulamā*'. Thus, a deep study of this ruling and how it emerged and developed through the history of the Muslim heritage will help to conceptualize the circumstances in which the early '*ulamā*' developed and enacted these rulings. In turn, a deeper understanding of the incongruity between the paradigm of the early '*ulamā*' and that of the modern legal institution will demonstrate the problematic nature of the application of classical rulings in the context of the modern nation-state.

This paper, illustrating the problematic aspects of applying *al-Ḥākim al-Mutaghallib*'s rulings in the contemporary context, proceeds in three sections. The first chapter deals with the terms and concepts associated with the idea of *al-Ḥākim al-Mutaghallib* and how they may not ultimately be applicable in the contemporary context. The question I ask here is about the potential for current '*ulamā*' to misunderstand the classical conception of this legacy, and misapply it when they recall it in a dissimilar context. The discussion of the first chapter is considered in the light of the Muslim paradigm as a primary framework within which politics and leadership are subsidiary fields. The dissimilarity between the two contexts will help explaining the problems of the recalling.

Tracing the history of the rulings regarding *al-Ḥākim al-Mutaghallib* and how they became part of the established Sunni *fiqh* is the theme of the second chapter. Here, the discussion aims at discovering the premises on which these rulings depend, in order to cast doubt on their suitability for establishing a binding authority to enforce the *Mutaghallib* rulings in all times and places. In doing so, the research will be based on the *fiqh* (jurisprudence) literature which

includes the *Siyāsah al-Sharʿiyah* works. Based on a reading of these *fiqh* works, the research

aims at exploring how these rulings moved from being applied only in exceptional cases of

necessity to being applied as a general and binding precept based on the authority of the *ʿulamāʾ*.

My references to theology texts (*ʿaqīda*, or creed) will be few, and are limited to demonstrating

the fact that political issues such as the rulings of *al-Ḥākim al-Mutaghallib* have overflowed into

matters of theology. As a matter of personal opinion, political issues have no place in *ʿaqīda*

texts.

Finally, in the third section, I examine the concept of "*ḍarūrah*" (necessity) and its

validity in the contemporary context, since recent times have introduced the Arab world to

mechanisms and methodologies that were not available at the time of the *ʿulamāʾ*. I also reflect

on the effects of past applications of these rulings as well as implications for the present time,

inquiring into who may be held responsible for the outcomes. In particular, I consider the

opinions of two Sunni groups[2] who charge the *ʿulamāʾ* with responsibility – one which holds

responsible the *ʿulamāʾ* in general and a second which exempts the early *ʿulamāʾ*, laying the

blame at the feet of contemporary *ʿulamāʾ*.

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[2] See, Muhammad al-Abdelkarim, Tafkik al-Istibdad, Al-Shabakah al-Arabyyiah Li an-Nashr, Cairo, 2013. Also,
Fahd al-Ajlan's article: *fiqh* al-Taghallub bayn al-Ghlow W at-Tashwih, https://saaid.net/bahoth/224.htm. And Ryad
ad-Dakhil response to it: http://siasashar3ia.blogspot.com/2015/06/blog-post_2.html.

CHAPTER 1

POLITICAL TERMS AND CONCEPTS BETWEEN THE PAST AND THE PRESENT

Historical Backgrounds

The research studies the time from the death of the Prophet Muhammad (PBUH) in 632[3] to the end of the Mamluk dynasty (1517). Historically, the office of "Supreme Leader" has been legitimated through a variety of authoritative means, and his inauguration has taken many forms. The era of the rightly guided caliphs (r. 632-661) provides us with four different models by which the leader has been selected. According to *ʿulamāʾ's* literature, Abu Bakr (r. 632-4) the first caliph after the death of the prophet was nominated by ʿOmar then agreed upon by the community of the companions. The second caliph, ʿOmar (r. 634-644), was chosen by Abu Bakr before his death and he asked the *Ummah* pay obedience to him. ʿOmar, was stabbed and, just before dying, chose six of the *Qurayshi* companions to agree upon one of them as the caliph; they agreed upon ʿOthmān (r. 644-656). Finally, after the death of ʿOthmān, a group of Madinah companions rushed to inaugurate ʿAlī (r. 656-661) as the caliph. According to Sunni literature, ʿAlī was the last of the Rightly Guided Caliphs. As there was no established mechanism for inauguration, each leader appealed to a different source of legitimation for authority. That is, the first three caliphs were believed to be the closest companions of the Prophet and they were the leaders of the immigrant *Qurayshi* community, having been among the first to accept Islam. ʿAlī,

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[3] Unless otherwise indicated, all dates are CE (Current Era).

the fourth caliph, claimed his *blood* relationship with the Prophet as he was his cousin and son-in-law. Yet, the Umayyads and Abbasids and their opponents also had claims to a legitimating relationship with the Prophet.

The murder of ʿAlī opened the door for the Umayyad reign starting with Muʿāwiya I b. Abī Sufyān (r.661-680) the founder of Umayyad dynasty. After the events of the *fitnah* and the war against ʿAli, Muʿāwiya occupied the office of the supreme leader without disputation and reconciled with ʿAlī's son al-Hasan (d. 670). Muʿāwiya, then, shifted the Muslim leadership to become an established monarchy when he appointed his son Yazīd (r.680-3) as a crown prince. This lasted to 684 when Marwān I b. al-Hakam, the Umayyad leader who preserved its continuity (r. 684-5), defeated Ibn Az-Zubayr (d.692)[4], who dominated most of the Muslim lands and gained their recognition following the death of Muʿāwiya II (r.683-4) in the battle of Marj Rāhiṭ (Saʿd 1990, 5/29-31,Yücesoy 1993, 51). In this case, the disputation was between three trends: the continuation of the power in Muʿāwiya's hereditary descendants; the consolidation of the tribal power by inaugurating Marwān, the holder of tribal power; or returning to Muslim values of consultancy and freedom of choice by supporting Ibn Az-Zubayr who was accepted by the majority of Muslims at that time (Yücesoy 1993, 51). But the tribal power was dominant. Marwān was victorious in the battle, after which he started his own monarchy in his own way when he appointed two contemporaneous crown princes for the first time in Muslim history. After he killed Ibn Az-Zubayr, ʿAbd al-Malik (r. 685-705) the son of Marwān became the supreme leader officially. The rule transferred between the descendants of ʿAbd al-Malik except

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[4] ʿAbdullāh b. Az-Zubayr, born the first year for Muslims in Madinah, he is the son of one of the companion's community leaders Az-Zubayr, and he is an opponent to the rule of the Umayyad. He got the allegiance of almost all Muslims after the death of Muʿāwiya II (684) before he loses the battle of Marj Rāhiṭ against Umayyad.

for two leaders, 'Omar II b. Abd al-Azīz (r.717-720) and Marwān II b. Muhammad (r.744-750). Hereditary succession of power had become the only recognized way of inauguration after three usurpations – first by Muʿāwiya then by Marwān, and finally by 'Abd al-Malik.

The Abbasid dynasty (r.749–1258) was launched via usurpation by Abu al-ʿAbbās As-Saffāh (r.749–754). As- Saffāh designated two crown princes from the Abbasids, al-Mansūr (r.754-775) and ʿIsā b. Mūsā (d.784), yet al- Mansūr removed ʿIsā b. Mūsā and designated his own son al-Mahdī (r.775-785) for succession to power before ʿIsā b. Mūsā (Aṭ-Ṭabarī 1968, 8/20,39,60) (al-Balādhurī 1996, 4/252). Since then, leadership was kept among the descendants of al-Mansūr in a hereditary order. Al- Ma'mūn (r.813-833) attempted to end hereditary rule when he designated ʿAlī b. Mūsā ar-Riḍā (d.818)[5] as a crown prince, but the Abbasids revolted against him and the hereditary order continued (Aṭ-Ṭabarī 1968, 8/554) (Khayyāt 1977, 470). A tremendous shift occurred and developed from the time of al- Mutawakkil (r.847-61) which prepares for the second phase of the Abbasid dynasty (Yücesoy 1993, 67). Namely, the influence of the army had increased to such a degree that they were powerful enough to intervene in leadership affairs. This influence continued to increase until 945, when the Buyids (r.932-1062) conquered Baghdad and usurped the power of the supreme leader (Yücesoy 1993, 67-68) (Kennedy 2016, 129-30). The Buyid overcame all the powers of the Abbasid supreme leaders, leaving them in place as puppet-governors with no real power. However, the Buyids did not claim the title, accepting a title subordinate to that of the supreme leader. The Abbasid caliphate of Baghdad continued under the guardianship of different powers, such as the Ghaznavids

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[5] He is a descendant of the prophet Muhammad (PBUH) and the eighth imam of the Shiite.

(r.961-1187) who followed the Buyid and the Seljuqs (r.1037-1194). The title of the Supreme

Leader was maintained in strict hereditary succession with the exception of two cases when

leaders were not sons of previous leaders, namely al-Mustaʿīn (r.862-66) and al-Muʿtadid (r.892-

902).

After the Mongol conquest of Baghdad and the killing of the last Abbasid caliph

(d.1258), the Abbasid dynasty was revived, but from Egypt (r.1261-1517). That is, the cousin of

the last Abbasid caliph appeared in Syria and travelled to Egypt during the reign of the Mamluks.

The Mamluks, who lack legitimacy as they are originally Turkish slaves, found in this an

opportunity to announce the new caliph and seek his approval (r.1261) (Kennedy 2016, 248-50).

The Abbasid caliphate continued in Egypt under the guardianship of the Mamluks until the

conquest of the Ottomans (1517). Although there were other dynasties which claimed the

caliphate or the supreme leadership, the Sunni tradition only acknowledged the above-mentioned

dynasties as legitimate supreme leaders. They also acknowledged the *amīrs* or *sulṭāns* who hold

the actual power at the time of the powerless caliphates, despite their ostensibly lower rank in the

rulership hierarchy. Those *sulṭāns* and *amīrs* reached power through usurpation or through

hereditary succession of power in some cases.

In the light of this historical era, this chapter deals with the terms and concepts that were

invented in the past in *fiqh* sources and *as-Siyāsah al-Sharʿiyah* literature. Furthermore, it

discusses the situations and contexts in which these terms and concepts are currently in recall.

The purpose of the discussion is to problematize this recalling by illustrating the incongruity

between the context where these terms and concepts originated and the context into which

current scholars are trying to fit them. To define these concepts, we will examine *fiqh* literature of the *ʿulamāʾ* as well as that of *as-Siyāsah al-Sharʿiyah*.

Terms and concepts related to leadership, ways to choose leaders, levels of leadership, and the rulings related to them such as obedience and dissidence are the primary focus of this chapter. The examination of these terms and concepts provides a clear understanding of the concept of *al-Ḥākim al-Mutaghallib* and how it gained legitimacy through the history and within *fiqh* literature. Moreover, such a conceptualization can help in the assessment of the validity of using and recalling such concepts within the contemporary context. That is, understanding the nature of the ruling of *al-Ḥākim al-Mutaghallib* and the situations in which this rule was validated can contribute to the evaluation of the current situation in which these concepts are recalled.

The study of the terms and concepts works through two levels. The first level deals with the components of the term "*al-Ḥākim al-Mutaghallib*", exploring each word individually with all their possible synonyms. This includes words of the supreme leadership such as *imām*, *khalīfah*, and *amīr*. In addition, this work tries to uncover the meaning of *at-Taghallub*, whether in the supreme leadership or the lower rank leadership. The second level studies terms and concepts related to the ruling of *al-Ḥākim al-Mutaghallib*, especially obedience and dissidence as they are the most recalled rulings in that regard.

Al-Ḥākim:

Al-Ḥākim is an Arabic word meaning "ruler" or "governor" from the root 'hakam' which means "to rule" or "to judge" (Al-Wasīṭ n.d., 1/190) (Az-Zabīdī 1993, 31/510). It is used sometimes to mean "preventing", thus, *al-Ḥākim* could be understood as the ruler executing judgements, preventing the oppressive from transgressing (Az-Zabīdī 1993, 31/510) (Ibn Manzūr 1994, 12/141). In the early Muslim tradition *al-Ḥākim* is used for the judge in almost all sources of *fiqh* and *as-Siyāsah al-Sharʿiyah*. However, the recent *fiqh* and *as-Siyāsah al-Sharʿiyah* sources use the term for the ruler, whatever his rank or hierarchical level of power. In other words, *al-Ḥākim* for these recent sources could be used for the ruler of all the Muslim community, or the ruler of one or more Muslim territories. This research is concerned with the term as it is used in the combination of *al-Ḥākim al-Mutaghallib,* which refers to the Muslim ruler. The concept of *al-Ḥākim al-Mutaghallib* was used in the early Muslim literature as al-*imām al-Mostawlī* in al-Juwaynī's[6] (1028-1085) book *al-Ghiāthī, imārat al-Istīlāa* in al-Māwardi's[7] (974- 1058) book *al-Ahkām al-Sulṭānyyiah, al-Mutaghallib dhū al-Shawkah* in Ibn Khaldūn's[8] (1332-1406) book *al-Muqaddimah,* or *al-imām al-Mutaghallib* in most of the early *fiqh* sources. Since the recent use of *al-Ḥākim* has replaced the original terms used for the ruler in early Islam, it is necessary to discuss these early terms.

The leadership in the early Islam appears to have had no established one title for the office of the supreme leader who succeeded the prophet (PBUH) (Blankinship 2001, 27).

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[6] Abu al-Ma'ali 'Abd al-Malik ibn 'Abd Allah ibn Yūsuf al-Juwaynī known as Imām al Ḥaramayn, born in Naysabur, is a pioneer Ashʿarī theologian and Shafiʿī jurist.

[7] Abū al-Hasan Alī ibn Muhammad ibn Habīb al-Māwardī, born in Basrah, is a Shafiʿī jurist and judge who served as a diplomate for the Abbasid caliphate at the time of the Buyid.

[8] ʿAbd al-Raḥmān ibn Muḥammad ibn al-Ḥasan Ibn Khaldūn, born in Tunis, is a great Muslim Historian, philosopher, and sociologist. He was raised in a family of scholars and politicians and his works are dedicated to the understanding of civilization.

However, the supreme leadership of the Muslim community adopted three titles in various times and within various sources; *imāmah*, *khilāfah*, or *imārah*. Therefore, my research studies the three titles of *imām*, *khalīfah*, and *amīr* as they are the terms which have been replaced by the term *al-Ḥākim* in the contemporary literature. Although these titles have different meanings and connotations, they all are used for the supreme leader of the Muslim *ummah*.

*Al-imām*ah is from the root *'amma'* which means "to lead" (Ibn Manẓūr 1994, 12/24), so *imām*ah, in this regard means leadership. Moreover, the *imām* in the early Muslim literature refers to the supreme leader, and is used by both Sunni and *Shī'ī*, but with different connotations. *Khelāfah* is from the root '*khalafa'* which means "to succeed" (Ibn Manẓūr 1994, 9/82-83), and the *Khalīfah* means the successor or "deputy". So, when the *'ulamā'* use the title *khalīfah* they refer to the succession of the prophet (PBUH) in leadership and facilitation of the religious affairs (Al-Māwardī 1989, 3) (Ibn Khaldūn 1988, 1/238). The title of *khalīfah* is used later in the Umayyad Caliphate or the Abbasid Caliphate to mean the deputy to God '*khalīfatu-Allah*' (Crone 2005, 18, Landau-Tasseron 2000, 213). However, the earliest term to be used for leadership is *amīr* (Blankinship 2001, 27), which is derived from "*amr*" which implies superiority and sovereignty and above all power to command. *Amīr*, also, is used to refer to the supreme leaders and other leaders from a lower rank, such as army leaders, state leaders, and supreme leaders' deputies.

What concerns us here is that all these terms that are used for the supreme leadership of the Muslim *ummah* are frequently replaced with the term '*al-Ḥākim*' in the contemporary literature. Furthermore, *al-Ḥākim* has inherited all the rulings that have been enacted for the supreme leader

in the early Islam. The problem lies in the connotations of these concepts. The nature of the rule of a supreme leader holding different titles at the same time is vague. As we do not have a clear account from the primary sources for legal rulings regarding the nature of that position, the Qur'an and the Sunnah, *fiqh* sources and the literature of *as-Siyāsah al-Sharʿiyah* have founded their figuration and conceptualization of that position on a combination of sacred texts, historical precedents from the time of the first four 'Caliphs', and experiences from their own times (Kennedy 2016, xx). As the construction blocks of the political discussion, the unreliable historical narratives of the early Islamic experience have produced an unclear or indecisive concept of the supreme leadership (Kennedy 2016, xxi). Moreover, the ever changing nature of the Muslim regimes from the death of the prophet (PBUH) until now has also contributed to this ambiguity. Since the framework of this supreme leadership is based on the early Muslims' experience in the major part, a clear definition for that supreme leadership is a task requiring considerable sophistication and specialized knowledge, not only for the definition, but also for the specifications of this leadership. Questions about choosing the supreme leader, the limitations of his power, and the benchmarks for the validity of his rule or his actions have not been and cannot be answered consistently (Kennedy 2016, xviii-xxii). However, there are common features in descriptions of the supreme leader that could be derived from the literature of the *fiqh* and *as-Siyāsah al-Sharʿiyah*. Comparing these features of *al-Ḥākim* in the early literature to those of the current *al-Ḥākim* will reveal just how precarious are the claims of those excavating outmoded concepts for contemporary use.

Before illustrating these features, we have to distinguish between the idealized description of the supreme leader recorded in the juristic literature written by the *'ulamā'*, and the real expressions of that leadership practiced over centuries. The *'ulamā'*, when describing the ideal of supreme leadership, naturally drew an exemplary image of what they consider rightly guided rule. However, the dynamics of actual leadership in the Muslim *ummah* have always been of an ever-changing nature that cannot be restricted to one model. This might be the reason for the shift in the *'ulamā'* literature regarding Muslim political thought so they could respond to the dramatic shifts in leadership over centuries, as will be explained in the following chapters.

The *'ulamā'* see the supreme leader to be responsible for three major tasks: to act as the successor to the Prophet in a way that protects the religion (Islam) and organizes the people's affairs (Al-Māwardī 1989, 3; Ibn Khaldūn 1988, 1/238; As-Sanhūrī 1999, 80), to enforce *sharī'a* laws, and to unify the Muslim *ummah* under his rule (Ibn Khaldūn 1988, 1/238; As-Sanhūrī 1999, 80). Other common features of the supreme leader stated by the *'ulamā'* that can be attested are that the leader must be a Muslim, male, and of the Quraysh (Prophet Muhammad's tribe) (Riḍā 2015, 21; Al-Māwardī 1989, 5; As-Sanhūrī 1999, 109-118). Although some of these features are religiously established and the others are tribally established, they have become religiously enforced in Muslim literature (Riḍā 2015, 21-27; As-Sanhūrī 1999, 109-118). This conceptualization of the supreme leader based on unstable contexts and frameworks suggests that it cannot be borrowed for a completely different context. In the light of these features, studying the current conceptions of *al-Ḥākim*, the leader, casts doubt on the wisdom of recalling the rulings of the former leadership in general and of *al-Ḥākim al-Mutaghallib*, in particular.

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For the contemporary *ʿulamāʾ*, after the fall of the Ottoman 'Caliphate' in 1924, the unity of the Muslim *ummah* officially collapsed giving way to the rise of modern nation-states performing independently in the political sphere. The establishment of these nation-states under the direct supervision of western colonial forces, influenced the Muslim intellectual imagination. Thus, instead of reconstructing a Muslim epistemological paradigm that sprang organically from Islam, Muslims chose to coexist with the modern, 'distorted' nation-state and tried to reconcile Islam and its teachings with this state (ʿEzzat 2015, 72-75). In the coming paragraphs, my research tries to explain how these established Muslim political conceptions cannot fit within the modern nation-state's context.

To understand this inapplicability, we have to look at the early Muslim context as a paradigm that has a central domain, which is the *sharīʿa*, and other subsidiary domains that serve the central one (W. Hallaq 2013, 17-18). In this context, all domains have been designed to serve the *sharīʿa* as the central domain – not the opposite. That is, the governance system, sciences, education, and the law have been designed to preserve the *sharīʿa*. Thus, the political domain cannot be understood separately from the environment in which it emerged and developed, since this political domain represents a subsidiary domain that serves the central domain, *sharīʿa*.

The modern Muslim states were created forcibly by colonialism with the aim of leaving behind only a distorted type of nation-state, guaranteed to be vassals to the West (W. Hallaq 2013, 13) (Al-Shaṭṭī 2013, 44). Although the current Muslim states, especially those of the Middle East are not ideal modern states, they sustain the basic constitutive characteristics of the modern nation-state. In addition, these distorted nation-states developed into tyrannical states in which the

president or the king gained the power of the state (Al-Shaṭṭī 2013, 50). This usurpation does not strip the state itself of the power; however, the leader of the state becomes the arbiter and decider for the state. In other words, the leader is the state and the state means nothing except the leader, so what is attributed to the state in the ideal modern nation-state must be attributed to the leader in the modern Muslim states. Thus, what applies for the nation-state applies also for the distorted Muslim states formed by the colonization.

One of the striking elements that reflects the difference between the modern Muslim nation-state and the original Muslim paradigm in which the governance system emerged and developed is the disagreement about sovereignty. In the nation-state, sovereignty means that the nation embodying the state is the only decider of its fate (Hay 2006, 4-6). The public will is expected to be embodied in the actions of the leaders of the state (W. Hallaq 2013, 28). In addition, sovereignty is geographic, which means that the state can only practice its sovereignty within geographic limitations known as borders. This means that the state has no sovereignty beyond these borders by any means, since other nation-states in the world have the same right to practice this sovereignty within their borders (Al-Shaṭṭī 2013, 59-60; W. Hallaq 2013, 28). In the worldly order of nation-states, theoretically at least, the state represents the sovereign will, so the state order is the highest order which cannot be restricted by any higher order (W. Hallaq 2013, 28-29).

On the other hand, in the Muslim paradigm of governance, sovereignty belongs only to God. That is, the *ummah*, which somewhat parallels but is not identical to the modern concept of the nation, is the decider but within the limitations of the divine *sharīʿa* ordained by Allah. In

other words, the *ummah* does not own an independent will as does the nation-state, but the will of the *ummah* and its power are subject to general moral rules beyond the power of the *ummah* (W. Hallaq 2013, 42-43). Therefore, unlike the nation-state which is itself the ultimate goal of its own existence, the *ummah* and the governance system in the Muslim paradigm are a means to another supreme goal external to the state itself (March 2013, 112-113). This appears, also, in the practices of the first caliphs, who tended to emphasize their affiliation to the divine. Abu Bakr, the first caliph, in his first speech declares that the benchmark for his rule is the conformity with the Qur'an and the example of the Prophet. Moreover, he exempts people from obeying him if he goes astray from the divine command (Aṭ-Ṭabarī 1968, 3/224) (Balādhurī 1996, 1/590-591).

Unlike the case with the nation-state, sovereignty in the Muslim governance paradigm is demographic, so any Muslim population that represents a majority in some area should fall under the sovereignty of the Muslim governance system (Al-Shaṭṭī 2013, 59). This means that the Muslim government can intervene in these lands and manage them. For instance, East Turkestan or Xinjiang was a Muslim territory that once fell under the Muslim rule. Since China occupied this province and forced it to be under its sovereignty, current Muslim states have been unable to help or defend Muslims who claim a severe persecution from the Chinese government. Nevertheless, in the Muslim governance paradigm, the Muslims are required to support and defend those Muslims who are facing persecution, since one of the major responsibilities of the leader is the protection of Muslims and their allies (Ad-Dahlawī 2005, 2/232; Al-Māwardī 1989, 22). Since the nature of the Muslim governance and that of the nation-state contradict each other, it is contradictory to recall the rulings that were established in the Muslim governance paradigm

and then to apply them in the context of the nation-state. Although some Muslim states base their

legitimacy on the *sharīʿa,* or apply it as the law of the land, their concept of *sharīʿa* and their

practice of it, within the context of government, is distorted and constitutes an abuse of its reality

(W. B. Hallaq 2004; W. Hallaq 2013, 13).

As discussed earlier, the nation-state theoretically and practically centers itself in the

heart as the purpose for the governance practices. This means that the nation-state's main and

only goal is to protect its existence and all wills including the citizen's must submit to the state's

will (W. Hallaq 2013, 29-30, 71-72). In addition, the nation-state aims at replacing God with the

state (Schmitt 1985, 36). Since the current distorted Muslim states that were established

primarily by colonialism are replaced by the leader who has been granted all the powers of the

state (Al-Shaṭṭī 2013, 50), the existence of this leader and the stability of his rule became the

main objective of the governance institutions. That is, all decisions made and all laws enacted are

to serve this regime. Even the *sharīʿa* rulings, when recalled, might aim to serve the same goal.

For example, in 1971 Egypt, As-Sadat (d. 1981), the president at that time, made some

constitutional amendments that guarantee him to be in power forever. Yet, to avoid the public

anger and appealing to the religion of the majority, As-Sadat added another amendment to the

effect that the *sharīʿa* is now *the* main source for legislation, instead of being *a* main source for

legislation (Farahat and Farahat 2011).

On the other hand, leadership in the Muslim paradigm, as a subsidiary domain to the

sharīʿa, is a religious duty that serves the *sharīʿa* as the central domain of that paradigm. It exists

to ensure the application of *sharīʿa* and management of people's lives (Ibn Khaldūn 1988, 1/238;

Al-Māwardī 1989, 3). The objectives of having a leader in the Muslim context are mainly centered on religious duties (Ibn ʿĀbedīn 1992, 1/548). Although the leader is responsible for some duties not considered divine, from the contemporary perspective, like armies and security, the Sunni ʿulamā' perspective includes them under the divine duties. Moreover, when the ʿulamā' validates the rule of al-Ḥākim al-Mutaghallib, they aim at securing the religious status and guarantee the application of the religious rulings. In other words, the early ʿulamā' accepted the rule of al-Ḥākim al-Mutaghallib as a necessity for securing the unity of the ummah, the application of the religious rulings, and the continuation of any war 'jihād' being currently fought (ash-Shirbīnī 1994, 5/423,425) (Al-Juwaynī 2011, 322,331,334).

To enforce its sovereignty and protect its existence the nation-state could sacrifice the citizen. This is, the state in the modernity paradigm is "not an end among others; it is that end for which all others can be sacrificed" (Kahn 2009, 276). Since the state is the only thing that could seek the ultimate sacrifice from all the subjects that surrender to its will (Kelsen 1945, 186), lives of individual humans are of no particular value when it comes to the existence of the state. That is, the perfect meaning of a citizen and citizenship is not based on birth or owning the nationality of this state, but mainly on the readiness of a citizen to sacrifice himself for the state (W. Hallaq 2013, 29-30, 71-72). This characteristic of the state is enough to make the recalling of the rulings of al-Ḥākim al-Mutaghallib precarious.

To explain this point and clarify its contradiction with the Muslim paradigm, we will use the conscription as a manifestation of the state's view of the citizen. A citizen is, politically, obligated to join the army to show his loyalty in the nation-state (Kahn 2009, 230-231,240). In

the Muslim paradigm *jihād*, war, is to be joined as a moral duty. That is, Islam differentiates between two types of *jihād*: *farḍ al-ʿAin* and *farḍ al-Kefāyah* (mandatory and optional, respectively), and both were morally commanded, not politically (W. Hallaq 2013, 70). In other words, the leadership in the Muslim governance system cannot force any Muslim to join the army to fight against the enemies. And, if a Muslim rejects to fight in the mandatory *jihād*, when the enemy is attacking his own city, there will be no political prescribed punishment, contrary to the case of the nation-state. In some cases, a Muslim could be asked to leave the army if his parents objected or if they need nursing (Al-Kāsānī 1986, 9/382).

Reflecting more on that example in the light of the rule of *al-Ḥākim al-Mutaghallib* will reveal serious problems. In modern Muslim states government applies the conscription on the Muslim citizens of the state. The legitimization of these states' regimes as leaders who must be obeyed with their nationalistic features allows them to control people's lives for the sake of the state through the conscription. In addition, the potential wars that these states might trigger could be against other Muslim states, or even an unjust war against another state[9]. This, completely, contradicts the Muslim paradigm which sets war on specific bases for totally dissimilar reasons (Al-Qaraḍāwī 2009, 1/429-504). Hence, to give religious legitimacy to such leaderships recalling the rulings of *al-Ḥākim al-Mutaghallib*, is a regularization of horrible crimes which contradict the objectives of developing such a rule. This grants current leaders of Muslim states the obedience of their people to fight against whoever the leader sees as an enemy and obligates the people to join the war even if it is for unjust or immoral causes. This alerts us to caution in

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[9] For example, the Gulf Wars, the Syrian current civil war, the Egyptian Armed Forces massacre against the Muslim brothers, Known as Rabiʿah, and the war in Yemen, the alliance of Saudi Arabia and Emirates against Al-Ḥawthi Yemenis.

importing a partial or incomplete concept into a new context which differs from or contradicts its original context.

Another manifestation of nation-state's sovereignty that contradicts the nature of the early Muslim governance system is the issue of nationality and state borders. The nation-state defines its existence by borders that define the state. In addition, all people born within these borders are considered to be citizens who carry the nationality of this state. At the same time, some Muslim majority states, in which the rulings of the early *ʿulamāʾ* regarding leadership are recalled, state in their constitution that the leadership is responsible to defend the state as defined by these specific borders and nationality. Furthermore, duties and rights in these states are mainly based on nationality and borders which is contrary to the bases of duties and rights in the Muslim paradigm. The only factors that are considered in the governance paradigm in Islam, which differentiate between people, are religious belief and the relations with Muslim *ummah*. In other words, rights and duties vary according to the religion of the person and the extent to which he has peaceful relations with Muslims. This concept in the modern nation-state's perspective is unjust in the Muslim paradigm. What is more is that some of these Modern Muslim states disallow citizens with dual citizenships to run for the leadership[10]. However, this might be a paradox when it is compared with the nature of the early Muslim conceptualization of governance. That is, a modern Muslim nation-state could accept a non-Muslim leader and allow his rule but cannot accept a Muslim leader who holds a different citizenship.

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[10] For example, Egypt enacted a law confirming that any person who has another nationality other than the Egyptian or any of his parents, or his wife, is not allowed to run for the presidency.

Another major issue in the concept of the early leadership that distinguishes it from contemporary leaderships is that there can only be one supreme leader, and if someone else declares himself a leader he must be removed (Ibn Ḥajar Al-Haitamī 1983, 9/78-79) (Al-Māwardī 1989, 10). So, the early Muslim context did not accept more than one independent leader in the Muslim *ummah*. This is different from lower rank regional leaderships as they are appointed by the supreme leader and submit to his rule. Since one of the central objectives of the supreme leadership is to protect the unity of the Muslim *ummah* under one leadership, the *ʿulamā'*'s acceptance of the rule of *al-Ḥākim al-Mutaghallib* followed primarily from that reason (Al-Juwaynī 2011, 331,334) (Ibn Ḥajar Al-Haitamī 1983, 9/78). In other words, the set of rulings regarding political issues and situations was primary developed within that context aiming at unifying the leadership of the whole *ummah*, while the order of the nation-state promotes borders and discrimination on bases other than the ones considered in the Muslim paradigm.

Overall, what this research demonstrates is that the Muslim paradigm and the circumstances in which early concepts and terms regarding leadership emerged and developed are exceedingly different or even contrary to the contemporary state – either the paradigmatic state or the distorted state. In addition, goals and objectives of the early leadership differ completely from them in the current nation-state. In the current nation-state the nature of the state, the leaders, the rule, and the relationship with other entities and states differ from the early Muslim paradigm. Sovereignty in the early Muslim context is for God, however nation-state preserves sovereignty for itself. There are other analyses which could shed more light on these contradictions, but the scope of this thesis does not allow space to consider all of them.

__Al-Mutaghallib__

Al-Mutaghallib, the usurper, is derived from the root word "*ghalab*, Gh-L-B" which implies

force, overcoming, defeat (Ibn Fāris 1979, 4/388-389). In the context of ruling, *Ghalab* means

that a person takes rule forcibly (Ibn Manzūr 1994, 1/652). Surveying *fiqh* literature including

as-Siyāsah al-Sharʿiyah, the concept of *al-Mutaghallib* varies from a school to anther and from

time to another. These differences are most likely because of the way that this concept and the

related rulings were developed through the history, as my research treats in the second chapter.

In addition, the absence of a solid divine base for the rulings of *al-Mutaghallib* might play a

crucial role in this variance.

The *ʿulamā'* defined *al-Mutaghallib* in two ways. Some of them consider usurpation '*at-

Taghallub*' in the supreme leadership and the others regard it as applying to a rank lower than

supreme leadership such as *sulṭāns* and *amīrs*. In general, *ʿulamā'* agreed upon the use of force

and power from *al-Mutaghallib* to enforce his rule on people until he stabilizes his reign. But,

they disputed other components of the definition. Regarding the qualities required for the

supreme leader, one group of the *ʿulamā'* required *al-Mutaghallib* to fulfill all of the qualities

they require for a legitimate leader to validate his reign (ash-Shirbīnī 1994, 5/423) (Al-Maḥallī

1995, 4/174). The other group did not consider these qualities at all (Ibn ʿĀbedīn 1992, 2/139)

(Ibn Ḥajar Al-Haitamī 1983, 9/78) (Al-'Anṣārī 1994, 2/187) (I. Q. Al-Maqdesī 1968, 8/526).

Concerning people's agreement on his reign the *ʿulamā'* were not certain about this point. While

some *ʿulamā'* would not validate the reign of *al-Mutaghallib* unless he forces all the public to

accept and submit to his reign (Aṣ-Ṣāwī n.d., 4/427), other *ʿulamā'* do not consider the public

opinion as long as *al-Mutaghallib* takes control over the power (Ibn ʿĀbedīn 1992, 1/549) (Al-'Anṣārī 1994, 2/187). Only ash-Shirbīnī (1570)[11] and some Shafiʿīs required the vacancy of the position to validate the rule of *al-Mutaghallib*, when others add some details in that case. Some *ʿulamāʾ* validated his rule even when he overcomes the legitimate leader (I. Q. Al-Maqdesī 1968, 8/526); however, other *ʿulamāʾ* reject his leadership if he overcomes a legitimate leader (ash-Shirbīnī 1994, 5/423). Finally, all of the *ʿulamāʾ* are in agreement that a *Mutaghallib* who overcomes another *Mutaghallib* is legitimate.

  At-Taghallub is considered, as well, in the case of the *sulṭān*. The *sulṭān* has appeared with the Buyid's control over the Abbasid caliphate from 945. That is, the Buyids overcame Baghdad and usurped the power of the Abbasid caliph, however they simulated a recognition of the caliphal superiority (Kennedy 2016, 129). This usurpation of the caliph's power was continued after the Buyid by other dynasties such as the Seljuqs. Yet, the *ʿulamāʾ* literature insists on preserving the prestigious status of the supreme leader stipulating that any *sulṭān* must seek validity from the supreme leader even if the supreme leader has no real power. Thus, my research will defer to the conceptualization of the *ʿulamāʾ* literature, referring to the *sulṭān* as a lower rank of leadership.

  The concept of *al-Mutaghallib* within the lower ranks of leadership is defined also, but in a different context. All the *ʿulamāʾ* who discuss this type of rule state that there must be a supreme leader (Al-ʿaynī 2000, 3/51) (Al-Miṣrī n.d., 2/155). In addition, *al-Mutaghallib*, in this case, is the one who takes power over a state or more that lie under the rule of the supreme leader

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[11] Al-Khaṭīb ash-Shirbīniy, born in Egypt, is a Shafiʿī jurist. His works include theology, Arabic linguistics, and exegesis.

(Al-Māwardī 1989, 44). This rule can only be validated through the public approval of the supreme leader, despite the ironic fact that it is the supreme leader whom *al-Mutaghallib* has just overcome. In this case, the *ʿulamā'* advise the supreme leader to validate the reign of *al-Mutaghallib* to preserve the prestige of the supreme leadership as he, the supreme leader, does not have the power to remove that rule (Al-Qrāfī 1994, 10/32).

Reflecting on the differences among *ʿulamā'* about their conceptualization of *al-Ḥākim al-Mutaghallib*, it seems that every group of *ʿulamā'* was studying the term in accordance with a specific era in mind. Those who consider the caliphate of the Umayyads, the Abbasids, and the Ottomans, constructed their concepts in accordance with events of these caliphates. They only conceptualized the idea within the context of the supreme leadership as this was the case with these caliphates in general. Those who required the death of the legitimate *imām* to validate the rule of *al-Mutaghallib*, might have evoked the caliphate of ʿAbdel-Malik b. Marwān after the killing of Ibn Az-Zubayr. That is, the reports claim that the recognition of the rule of ʿAbdel-Malik b. Marwān happened only after the death of his opponent ʿAbdullāh b. Az-Zubayr (Al-ʿAsqalānī 1960, 13/7). In the meantime, those who suggest that *al-Mutaghallib* could lead even in the case when the office of leadership is not vacant, they might have reflected on the Abbasid or the Ottomans when they knocked down the Umayyad and the Mamluks.

On the other hand, definitions that imagined *al-Mutaghallib* in the lower ranks of leadership were likely to be influenced by different eras and forms of rule, such as al-Māwardī who lived in the second era of the Abbasid Caliphate. This era witnessed the transformation of the power from the office of the supreme leader to different forces that overcome the office of

the supreme leader, without claiming the caliphate (Al-Māwardī n.d., 16-20). In addition, the

supreme leader lost his power to appoint the low rank leaders, as the forces in control took that

right and forced the supreme leader to accept lower ranking leaders (Ibn Ṭabāṭabā 1997, 278-

285). In this situation the forces that run the office, such as the Buyids at the time of al-Māwardi,

are *al-Mutaghallib* and they are of a low rank of leadership under the supreme leader, according

to al-Māwardi's literature. Despite this ostensibly lower rank, in reality they have full power.

This historical background explains why the definition of al-Māwardi for *al-Mutaghallib* focused

only on the low rank leadership. That is, al-Māwardi, when he imagined the Muslim political

thought, was likely to be influenced by the status quo of his time (Afsaruddin 2006, 51). The

most salient point about the terms I have introduced is that none of the definitions discussed have

any reference in the Qur'an, the Sunnah, or the actions of the Four rightly guided caliphs, which

represent the benchmark for Sunni Muslims (Afsaruddin, "The "Islamic State": Genealogy,

Facts, and Myths 2006, 155). The definitions were mainly based on the *ʿulamā*'s understanding

of the concepts of *maṣlaḥah* and *ḍarūrah*, which vary from time to time and from one situation

to another, and yet to have been defined or framed consistently.

Concepts Regarding _al-Ḥākim al-Mutaghallib_:

The legitimization of the rule of *al-Ḥākim al-Mutaghallib* necessitates the exposition of

concepts and terms related to the Muslim leadership. Regardless of the polemics around the

parity of the legitimacy between the freely elected leader and *al-Ḥākim al-Mutaghallib*, the two

main concepts which must be considered in the discussion of any Muslim rule are obedience and

dissidence 'at-Ttāʿah W al-Khurūj'. The following paragraphs will attempt to explain these two concepts in a prelude to illustrating their development through Muslim history in the next chapter.

Obedience in general is referred to the Qur'anic verse "*Yā 'Ayyuhā al-Ladhīna 'Āmanū 'Aṭī`ū Allāha Wa 'Aṭī`ū Ar-Rasūla Wa 'Ūlī al-'Amri Minkum*" Qur'an 4.59 which is translated "You who believe, obey God and the Messenger, and those in authority among you"[12]. The word "'*Ūlī al-'Amri*" is used to refer to leaders in the context of forcing their obedience on Muslims. However, the concept of *'Ūlī al-'Amri*, when used in a political context, is an evolutionary concept that developed different meanings through the time (Afsaruddin 2006, 49-50). The ruling of obedience is supported through the Sunnah of the prophet as well, and it was ordained in general for any type of leadership. The concept of obedience in the *'ulamā'* literature is always restricted to obey in lawful orders. In this regard, it has been reported that the prophet (PBUH) said "for obedience is required only in what is good" (al-Bukhārī n.d., 93/9). This hadith is a comment by the prophet (PBUH) on a situation when one of his leaders ordered his army to throw themselves in the fire as representation of obedience. The soldiers refused the order and complained to the Prophet upon their return, and upon hearing the complaint the Prophet gave this *ḥadīth*.

The obedience to *al-Ḥākim al-Mutaghallib* is also framed and influenced by the historical examples that occupied the *'ulamā'*'s intellect. While some *'ulamā'* seek the proof on the obligation of obeying *al-Ḥākim al-Mutaghallib* from the situation of ʿAbdullāh b. ʿOmar (610-

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[12] The Quran, translated by M. A. S. Abdel Haleem, Oxford University Press, 2008.

693)[13] with ʿAbdel-Malik b. Marwān, one of the modern *ʿulamā'* justifies his ruling by the situation of al-Sultan Abdel-Hamid □. That is, some *ʿulamā'* validate the rule of *al-Ḥākim al-Mutaghallib* and oblige obedience to his rule because Ibn ʿOmar did the same with ʿAbdel-Malik (Ash-Shāṭebī 1992, 2/182) (I. Q. Al-Maqdesī 1968, 9/5). More recently, Muhammad Rashīd Riḍā (1865-1935)[14] used a real-world example to validate his view about the obedience to *al-Ḥākim al-Mutaghallib*. Riḍā argues that *al-Ḥākim al-Mutaghallib* is to be obeyed within the limits of his power, not beyond, using the example of al-Sultan Abdel-Hamid □ when the Afghanis, Yemenis, Najdis, and Moroccans rejected to pay him obedience (Riḍā 2015, 53-58). In these examples, Riḍā implies his validation of multiple Muslim rulers ruling at the same time in different areas, but he is not the first to validate this multiplication of rule[15].

Al-Khurūj is the most controversial term concerning Muslim political history. The Sunni used this term over history to refer to the dissidents to the rulers, starting from the time of ʿAlī b. abī Ṭalib. The study of the dissidence in the *ʿulamā'* literature is rich and full of difference. That is the *ʿulamā'* are not consistent on the definitions of *al-Khurūj* and *al-Baghī* since both terms refer to the group of dissidents who use force to try to overcome the supreme leader. While some *ʿulamā'* equalize between *al-Khurūj* and *al-Baghī*, the others see them differently. The earlier *ʿulamā'* tend to consider *al-Baghī* as the same as *al-Khurūj*, insofar as both mean dissidence

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[13] He is the son of the second caliph ʿOmar and a close companion to the prophet. He is known for being of the most knowledgeable among companions about the traditions of the prophet. In addition, he is known for his neutral position at the fitnah.

[14] Born in Ottoman Syria, Riḍā is one of the Muslim reformers who influenced the modern Muslim thought in many aspects including politics. He is a supporter of the Ottoman "caliphate" and of the preservation of the caliphate order.

[15] For the early views that claim the validity of multiple supreme leaders, see (An-Nawawī 1991, 10/47) (ash-Shirbīnī 1994, 4/132) (Al-Azharī n.d., 1/251)

against the leader and possession of power (Ash-Shaybānī 2012, 2/34) (Al-Gaṣṣāṣ 2010, 6/100) (Al-Qurṭubī 1980, 1/486-8) (I. Q. Al-Maqdesī 1995, 27/57-59) (Ibn Ḥazm n.d., 11/333). The Shāfeʿīs and some Ḥanafīs and Ḥanbalīs affiliate *al-Khurūj* to *al-Khawārij* the political group which emerged at the time of ʿAlī b. abī Ṭalib, and consider them as one type of the *bughāh* (Ash-Shāfeʿī 1990, 4/229) (I. Q. Al-Maqdesī 1995, 10/49-50) (Ibn ʿĀbedīn 1992, 4/261-264) (Ibn Ḥazm n.d., 11/333).

In the meantime, another group of *ʿulamā'* who come later from different schools choose to differentiate between them in the definition and the implications (ash-Shirbīnī 1994, 5/401-2) (Ibn Abī Al-ʿEzz 2003, 4/298-302) (Ibn Taymyyiah 1995, 35/53). It is worth mentioning that those *ʿulamā'* who tend to differentiate between them seek to prove their opinions using the *ḥadīth* of the Prophet (PBUH) which is absent in the earlier *ʿulamā'*s accounts. The later *ʿulamā'* argue that *al-Khawārij* are to be killed from the outset without waiting for them to start the fight (Ibn Taymyyiah 1995, 35/53). What is more is that they report the dispute among the *ʿulamā'* if they consider *al-Khawārij* infidels or not. In addition, they specify *al-Khawārij* based only on the political dispute that resulted the known political group of *al-Khawārij*. They did not put specifications that define any potential Kharijite group. However, those who consider *al-Khawārij* as part of *al-Bughāh* mention these specifications. For them, both *al-Khawārij* and *al-Bughāh* are the dissidents who refuse to obey the ruler, either partially or completely, when they have the power to fight the leader and have a religious argument (Ash-Shāfeʿī 1990, 4/229) (Ibn ʿĀbedīn 1992, 4/262) (I. Q. Al-Maqdesī 1995, 10/49). The distinction that they make is that *al-Khawārij*'s argument is certainly invalid, but the one of *al-Bughāh* is arguably invalid (ash-

Shirbīnī 1994, 5/400-1). Moreover, *al-Khawārij* accuse the sinners to be infidels, so they refuse to attend the *jumʿah* prayer and the *jamāʿah* with the ruler who commit great sins (Ash-Shāfeʿī 1990, 4/227-36) (ash-Shirbīnī 1994, 5/401).

Summarizing the *'ulamā'* literature about dissidence, it is clearly stated that the reference for the definitions and rulings is the events of the *fitnah* after the murder of ʿOthmān the third caliph. Those who equalize between *al-Khawārij* and *al-Bughāh* based their justification on the situations of ʿAlī with people of al-Jamal 656[16], Seffīn 657[17], and Ḥarūrāa 659[18]. Thus, they saw them all as Muslims who had a religious debate against the ruler and intended to use power that they already possess to enforce their opinion. The supporters of differentiation interpret these events in the light of the *ḥadīth* of the Prophet describing a group of renegades who seem superficially pious, thus he commands Muslims to kill those renegades wherever they are found (al-Bukhārī n.d., 66/82). So, they appoint the group who fought against ʿAlī in Ḥarūrāa to be the renegades who must be killed, unlike the other two groups, as they include some of the companions who are to be glorified.

The questionable attitude here is the attitude to employ only particular, ancient historical events to derive definitions and rulings and to make them stand or to be used as a fixed reference forever. The only verse used in this context talks about an instance when two Muslim groups fight each other, the Muslims are commanded to reconcile them. But, if one of them violated the

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[16] It is a battel between the army of ʿAlī, the fourth caliph, and another army under the leadership of some eminent companions who demand the revenge for the third caliph ʿOthmān in Basra.

[17] A battle waged between ʿAlī, the fourth caliph, and Muʿāwiya, the founder of the Umayyad reign, within the first civil war in the Muslim community 657. This battle was the start for the major division in the ummah which led to the emergence of the sects of Sunni, Shiite, and Kharijite.

[18] A battel between ʿAlī, the fourth caliph, and the first vanguard of the Kharijites who rejected ʿAlī's decisions of accepting arbitration in the battle of Seffīn. This battle is named an-Nahrawān.

other, they must unite to fight this group until they get back to the strait path[19]. How could this verse reveal all this explanation? And how could the *ʿulamā'* exclude some Muslims and include others from the verse or the previous *ḥadīth*? And how could such historical concept of *al-Khawārij* be used in the contemporary context to describe political opposition groups? The employment of the Qur'an and the *ḥadīth* to favor certain group or to underestimate another is dubious.

Focusing on *al-Ḥākim al-Mutaghallib*, dissidence means the use of force to depose *al-Ḥākim*. Although there is no reference in both Qur'an and Sunnah regarding al-*Khurūj* against *al-Mutaghallib* since his emergence was a necessity, some *ʿulamā'* grant him the position of the legitimate supreme leader (Ibn ʿAbdel-Wahhāb and al 1996, 9/19-20). Hence, the nature of al-*Khurūj* and the rulings related to it is derived from texts prohibiting the disputation with the leader using force. This force is stated in the *ḥadīth* to be military, despite the nature of this force developed in the literature to include even the speech against the ruler; the legitimate or *al-Mutaghallib*. Thus, some *ʿulamā'* prohibit criticism unless it was given secretly.

ahl al-Ḥall w al-ʿAqd, the Party of Loosing and Binding, are recalled through the literature on *al-Ḥākim al-Mutaghallib*. Those people are regarded to be responsible to choose the supreme leader, grant him legitimacy, and depose him if he did not fulfill or break the assigned conditions for the supreme leader. In the case of *al-Ḥākim al-Mutaghallib*, some *ʿulamā'* require the approval of *ahl al-Ḥall w al-ʿAqd* to validate the rule of *al-Ḥākim al-Mutaghallib* (Al-Māwardī 1989, 44-45). Although the concept of *ahl al-Ḥall w al-ʿAqd* appears in countless

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[19] Quran, 49:9

situations in the *'ulamā'* literature, a determined or a decisive definition of it could hardly be found[20], which suggests that this group is an artificial and idealized construction that never had any historical reality. The specifications of such a position differ from one source to another. Even when they are gathered, they cannot be measured or determined such as *al-'ilm* (Knowledge that makes him able to decide on which is the best for leadership), *al-'Adālah* (Justice), and *al-Hikmah* (Wisdom). These characteristics differ from one person to another and from one time to another (Al-Māwardī 1989, 4) (ash-Shirbīnī 1994, 5/422). In addition, they are vague, since they could be found in many people but with various levels.

Some *'ulamā'* attempt to include *ahl al-Ḥall w al-'Aqd* in a specific category of people. They define them as the *'ulamā'*, leaders, nobles, public figures (ash-Shirbīnī 1994, 5/422, Riḍā 2015, 58-59), however they are silent about who and how to choose them. In fact, there is no reference in the *'ulamā'* literature to the origins of the idea of *ahl al-Ḥall w al-'Aqd*, except for the historical narratives concerning the way the first and the third caliphs were chosen. It could be argued that the obscurity around this concept comes from the depending on some inconsistent historical events that were only based on human reasoning (*ijtihād*), and the attempt to make them a model to be followed. Actually, this could be said about many concepts and rulings that have been enacted as certain facts in the Muslim political thought, as the research exhibits.

Hence, terms and concepts used in the early *'ulamā'* literature are possibly formed and influenced by the early experience of the four rightly guided Caliphs and the following centuries. Their times, also, might play a significant role in shaping their view of things. Mostly, such

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[20] I have studied this point in detail in an unpublished research paper.

historical terms and concepts are hardly to be applied in the modern times, since communities now are massively more developed. Especially, after the Sykes-Picot Agreement of 1916 and its consequences on the Arab land with the emergence of the nation-state, the recalling of such concepts is problematic. The formation of these states by occupation, the continuation of the regimes brought and established under the supervision of that occupation, and the suspicious loyalties of these regimes contradicts the objectives behind the validation of this kind of leadership. Furthermore, in the idealistic literature of the *ʿulamā'*, they validate the rule of *al-Ḥākim al-Mutaghallib* to unite the Muslims and lead the war against their enemies. How could this be imagined with leaders who fight each other and strive to break this unity[21]? How this could be imagined with a regime that kills its own people with the support of their enemies[22]?

Adding to that, some of the concepts that we inherited from the early *ʿulamā'* were harder to be determined in the first place rather than to be applied. The specification of methodology for the selection of the supreme leaders are vague and hardly to be found. For example, the condition requiring Quraysh lineage for the caliph is not realistic to be applied currently, since this condition emerged in a tribal community that recognizes the superiority of some tribes over the others. While, in modern times it was replaced by nationalism which pays loyalty only on the basis of nationality.

What adds to the complexity is that some of these terms and concepts have been developed over a long history; so if we recall them in the current context, which concept is to be recalled? And

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[21] For example, consider the Gulf War between Iraq and Kuwait, the war between Iraq and Iran, and the most recent gulf crisis.
[22] Syria is a clear example.

what are the bases of our choice? The inconsistency of these concepts and terms, which results

from their dependence on inconsistent historical experiences, complicates their suitability for

recall. In addition, how will these claims deal with the originally politicized concepts? That is,

some of the concepts related to Muslim political thought were created and formulated to support

certain groups on political backgrounds (Macías-Amoretti 2014, 26).

CHAPTER 2

THE EMERGENCE AND THE DEVELOPMENT

In the aftermath of the Egyptian coup in 2013, claims about the obligatory obedience to

the authorities and the prohibition of dissidence started to be released again. The same claims

had started before in the new millennium in conjunction with the Egyptian uprising in January

2011. Along with these claims, the question of the legitimate leader was brought to the surface.

In the Egyptian context bloody events, such as religious debates about who is the legitimate

leader and what is the religious characterization of that situation, represented another violent

fight. In this fuzzy context the rulings of *al-Ḥākim al-Mutaghallib* was at the heart of the

disputation, especially the one of al-*Khurūj*. The former Mufti of Egypt ʿAlī Jumʿa issued a

fatwā commanding the armed forces to kill the protesters of the coup claiming that they were

Kharijites[23]. Yāser Burhāmī, the leader of the Salafi party, An-Nour, states that Sīsī, the General

and president of Egypt after the coup, became *al-Ḥākim al-Mutaghallib* who must be obeyed,

and that it is prohibited to rebel against him. The same *fatwā*s are used in different countries and

contexts to justify the reign of the leaders there and to guarantee the public submission to them.

These *fatwā*s are supposed to be based on two hypotheses. The first is that the

contemporary leaders of the Muslim states are legitimate leaders according to the Muslim

tradition. Although the first chapter explains how different the concept of leadership in the early

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[23] This fatwā was issued in a conference in one of the Egyptian military bases, see the Video:
http://www.aljazeera.net/news/arabic/2013/10/8/%D9%85%D9%81%D8%AA%D9%8A-
%D9%85%D8%B5%D8%B1-%D8%A7%D9%84%D8%B3%D8%A7%D8%A8%D9%82-
%D9%8A%D8%A4%D9%8A%D8%AF-%D9%82%D8%AA%D9%84-
%D8%A7%D9%84%D9%85%D8%AA%D8%B8%D8%A7%D9%87%D8%B1%D9%8A%D9%86

Muslim literature is from the current concept, if we consider the managerial aspect of leadership, the contemporary leaders can only fit into the category of *al-Ḥakim al-Mutaghallib*. That is, from the point of view of the literature, they lack some of the qualifications for the leadership. There are multiple leaders who rule multiple Muslim states, however, the leader should be only one for the whole Muslim *ummah*. Most of them reached power using force, whether they wielded it directly or under the supervision of the occupation[24]. The second hypothesis is that they interpret the *ḥadīth*s about dissidence in a way that includes the type of the current *al-Ḥakim al-Mutaghallib*. So, they transfer the rulings of *al-Ḥakim al-Mutaghallib,* which were enacted as a necessity at the early time, to be applied as binding rules in contemporary times giving him all the powers of the legitimate leader. In doing so, they report the literature of some *ʿulamā'* who claim the consensus on the validity of these rulings.

Hence, this chapter aims at tracing the emergence and development of *al-Ḥakim al-Mutaghallib* in the *ʿulamā'* literature and the rulings related to it. Following this development, the discussion will examine the ways in which the sacred text has been replaced by the *madhhab* texts of the four great *ʿulamā'* for Sunni Muslims – Abu Ḥanīfah (699-767)[25], Malik (715-795)[26], al-Shāfeʿī (767-820)[27], and Ibn Ḥanbal (780-855)[28] – as the authoritative reference for Sunni

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[24] For example, the emergence of the Gulf countries under the supervision of the British occupation. In addition, the establishment of the modern Saudi state using Al-Ikhwan movement and the support of the British occupation. See, Kostiner, Joseph. "On Instruments and Their Designers: The Ikhwan of Najd and the Emergence of the Saudi State." *Middle Eastern Studies* 21, no. 3 (1985): 298-323. See, also, g: G. Troeller, The Birth of Saudi Arabia; Britain and the House of Saud (London: Cass, 1976).

[25] Born in Iraq, Abū Ḥanīfa al-Nuʿmān b. Thābit b. Zūṭā b. Marzubān is the founder of the Sunni Hanafi school of jurisprudence.

[26] He is Abū ʿabd Allāh Mālik ibn Anas ibn al-ḥārith al-aṣbaḥī, born in Madinah. He is the founder of the Sunni Maliki school of jurisprudence in Madinah and the author of the prominent ḥadīth compendium of al- Muwaṭṭaʾ.

[27] Abū ʿAbdullāh Muhammad ibn Idrīs al-Shāfiʿī is the founder of the Sunni Shāfiʿī school of jurisprudence in Baghdad and Cairo. He is also the father of Usūl al-Fiqh the principles of Islamic jurisprudence.

Muslims. It will also consider how the authority of the rulings of *al-Ḥākim al-Mutaghallib* was

established over time, based merely on the reasoning of the *ʿulamā'* who tried to legitimize the

status quo of their time. Furthermore, the chapter will examine if these rulings are still

compulsory to the modern times or if they are of a limited nature that cannot overstep its

limitations.

At-Taghallub, or usurpation, entered the Muslim literature in the form of a legitimate

method for the supreme leader's inauguration. That is, most of the Sunni *ʿulamā'* consider the

supreme leadership to be valid only through three ways: the election of the supreme leader by the

ummah, through *ahl al-Ḥall w al-ʿAqd*; the appointment by the former supreme leader; or by At-

Taghallub. The *ʿulamā',* when enacting these ways, they based their choice on the first

experience of the rightly guided Caliphs. However, the rulings of At-Taghallub cannot be related

to that preliminary period. To justify the way of At-Taghallub as legitimate, the *ʿulamā'* attribute

it to the decree of the companions, the consensus of the *ʿulamā'*, or the *de facto* necessity, as will

be shown below.

The *ʿulamā'* primarily agreed upon validating the rule of *al-Ḥākim al-Mutaghallib* as a

necessity case to solve the political dilemma of their times. This could be derived from some of

the *ʿulamā''*s reports on the rule of *al-Ḥākim al-Mutaghallib*. Al-Ḥaṣkafī (1616-1677)[29] states

that the rule of *al-Mutaghallib* could be validated for the necessity. Ibn ʿĀbedīn (1783-1836)[30],

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[28] Born in Baghdad, Aḥmad bin Muḥammad bin Ḥanbal Abū ʿAbd Allāh al-Shaybānī is the founder of the Sunni Hanbali school of jurisprudence. He compiled the ḥadīth compendium known as the Musnad of Aḥmad.
[29] ʿAla' Ad-Dīn al-Ḥaṣkafī was the Hanafī *muftī* of Damascus and the author of many books in *fiqh* and Arabic linguistics.
[30] Muhammad Amīn ibn ʿAbedīn was a prominent Hanafi scholar in Damascus.

then, comments on this statement saying that the necessity here is the avoidance of the *fitnah* (Ibn ʿĀbedīn 1992, 1/549). The avoidance of *fitnah* is a common reason in the *fiqh* literature for accepting injustice, as the *ʿulamā'* justify the prohibition of disposition of the unjust leaders due to the same reason. al-Khairabaitī (d.1440)[31], also, reports that Sunnis do not accept the rule of *al-Ḥākim al-Mutaghallib* if he does not fulfil the qualifications of the legitimate leader, yet obedience to him is mandatory to avoid the *fitnah* (Al-Khairabitī n.d., 137). following the same track, Ad-Dosūqī (d.1815)[32] validates the rule of *al-Ḥākim al-Mutaghallib* without any regard to the qualifications, since the concern is on the avoidance of evils and committing the least of two harms (Ad-Dosūqī n.d., 4/298). Commenting on the *ʿulamā'* views on *al-Ḥākim al-Mutaghallib*, Wahbah Az-Zohīlī (1932-2015)[33] proclaims that the acceptance of At-Taghallub is an exceptional law that contradicts the original position of free choice, and that the necessity and the fear of bloody wars is the reason behind this exception (Az-Zohīlī 2000, 8/6166-7). Rashid Riḍā assures this exceptionality when he argues that the leadership of *al-Mutaghallib* Must be removed when this is possible without *fitnah* or great harm (Riḍā 2015, 40).

The literature of *fiqh ʿulamā'* is rich and full of evidences that recognize the case of necessity in accepting the rule of *al-Ḥākim al-Mutaghallib*, but the research cannot exhibit all the reports due to its nature. Nevertheless, the reports mentioned above is enough to prove the first hypothesis of this chapter that the validation of the rule of *al-Ḥākim al-Mutaghallib* is only because of the *ʿulamā'* 's fear of the chaos or the bloody war. As we mentioned before, the

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[31] Maḥmūd Ibn Mīkāeīl al-Khairabaitī, is scholar, who was close to the Mamluk sultan Az-Zahir Jaqmaq (r.1438-1453) of Egypt to whom he gifted his book, Ad-Dorrah Al-Gharrāa Fī Naṣīḥat As-Slāṭīn W Al-Quḍātu W Al-Omarāa.

[32] Muḥammad ibn Aḥmad ibn ʿArafah Ad-Dosūqī is a prominent Maliki late jurist who lived in Desouk, Egypt.

[33] A contemporary pioneer jurist who was the head of the fiqh department at the University of Damascus.

centrality of the leader's position in the early Muslim political system, makes the existence of that leader, regardless the way of his inauguration, a necessity. That is, the leader in that system was tied to several religious duties such as alms collecting, managing armies, leading the prayer, and appointing judges and ministers. So, for the *ʿulamā'*, injustice is less harm than the obstruction of leaders' duties.

Another element that could be noted from the *ʿulamā'* literature is the absence of the reference to the divine text or the Prophet's practice. One or two reports refer to some historical events in which some companions reacted in a way that accepts the rule of *al-Ḥākim al-Mutaghallib*, as we will see, yet this cannot be a solid proof since other companions in the same events took an opposing position. In addition, some of them recall the *ḥadīth* about the obedience to leaders and the prohibition of dissidence. In general, they rely their choice on the consensus of the *ʿulamā'* on the validity of *al-Ḥākim al-Mutaghallib*.

The Maliki, Yahyā b. Yahyā (848)[34], narrates that the reign of ʿAbdel-Malik b. Marwān was legitimized by the Ibn ʿOmar's declaration of obedience to him, as Malik, the founder of the *madhhab* narrates (Ash-Shāṭebī 1992, 2/626). That is, ʿAbdel-Malik b. Marwān usurped the rule from ʿAbdullāh b. Az-Zubair. However, Ibn ʿOmar accepted his rule after he forced all people to pay obedience to him. Ibn ʿOmar represents an authority for most of Sunnis regarding these political issues that has no divine reference. In similar cases like the revolutions against Yazid b. Muʿāwiyah the *ʿulamā'* introduces the model of ibn ʿOmar as the right position that should be followed in similar situations. Regardless of the nature of his position, the insistence of some

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[34] Yahyā al-Laithī was an Andalusian Muslim jurist representing the Maliki school of jurisprudence. Also, he is the most well-known transmitter of Malik's Muwaṭṭaʾ.

Sunni *ʿulamā'* on considering Ibn ʿOmar's position in critical political events and ignoring the rest of the companions who lived the same events suggests dubious intentions that needs a separate study for them. What concerns us here is that the authority of ibn ʿOmar's positions cannot be superior to that of any of the other companions. Furthermore, his own reasoning cannot be a reference for a binding law and be equalized to the authority of the divine text.

Before going into the development discourse, I wish, first, to clarify some points about the literature of Muslim political thought. First, most of the decrees and provisions of the *ʿulamā'* in the Muslim political rulings are of a presumptive nature that cannot be surly proven (Al-Juwaynī 2011, 59-60). As the Qur'an and the Sunnah of the Prophet are almost silent about the nature of the Muslim leadership, the ways of inaugurating a leader, and the qualifications of this leadership, the Muslim *ʿulamā'* use the experience of the first Muslims, the companions and their followers, as the benchmark for their conceptualization. The lack of clear rulings in the sacred sources contributed to the irregularities of the first experience and the accounts of the *ʿulamā'* who based their work on that period. Moreover, the political choices of the first Muslims and the *ʿulamā'* were limited to available sources at that time.

Although the Sunni *ʿulamā'* claim that the Qur'an and the Sunnah, respectively, form the reference for their rulings, these references were ignored with the passage of time. The received authority of the Qur'an and the Sunnah has witnessed transformations over history. The early *ʿulamā'* used to have a direct connection with the sacred text as the reference in their attempts to derive rulings from these sources before the *madhhab*s' authority was established between the

eighth and the tenth centuries (Al-Khaṭīb 2001, 127-128) (W. B. Hallaq 2004, 61).

Consequently, the followers of the early *'ulamā'*, especially the four well-known founders of the *madhhab*s, contributed to the establishment of the *madhhab*s with their recording of the *'ulamā'*'s opinions and interpretations. In contrast, this establishment of the four *madhhab*s circumscribed any trial of independent reasoning and may be a reason for the absence or the marginalization of other opinions and interpretations which could have resulted in significant changes to our study. That is, the necessity of having *al-Ḥākim al-Mutaghallib* has been continuous since early Muslim history with no meaningful changes, as the paper will reveal. Even when there is a dissenting opinion, it is always ascribed to an aberrant group that is excluded from the mainstream of the Sunnah.

Of concern here is the later development of the four *madhhab*s to form the authority for the Sunni Muslims in the Twelfth century and later (W. B. Hallaq 2004, 61). Strikingly, the founders of the *madhhab*s, or those to whom the Madhabs were ascribed, did not intend to replace the supreme authority of the Qur'an or that of the subsequently compiled source, the Sunnah. A quick reading of the writings ascribed to them reveals the fact that their intentions were not to build an authoritative new source, that which we know as the *madhhab*; they were simply attempting to understand the divine text and to derive laws and provisions for the emerging new questions of the expanding community. Al-Shāfiʿī prevented his student Al Rabi' from imitating him, and he states that "my view is what is supported by the authentic text, if not, ignore it" (Al-Subkī 1984, 3/208, A-Shawkānī 1976, 57). The same is narrated about Abu Hanīfah when he says about the early Muslims, the companions and their followers, 'we are all

the same' regarding the understanding and interpretation of the text (As-Sarkhasī 1993, 11/3).

Ahmed b. Ḥanbal, as well, decries those who imitate other jurists and do not derive from the

sacred text directly (A-Shawkānī 1976, 61). This implies that the opinion of these four schools of

fiqh as exclusive authorities was formed after the death of their eponymous founders.

Yet, later, the *'ulamā'*'s texts became the authority and the communication with the

divine text (*ijtihād*) was exclusively restricted to the founders of the madhhabs. Those *'ulamā'*

are called absolute *mujtahid*s who can establish a direct communication with the text (Al-Khaṭīb

2001, 136). Wael Hallaq, the author of Authority, Continuity and Change in Islamic Law 2004,

provides a clear case in which the later *'ulamā'* were content with the closest earlier *'ulamā' '*s

opinions on the issue without taking any step back toward the original references, which are the

Qur'an and Sunnah (W. B. Hallaq 2004, 66-73). Illustrating the development of the

qualifications of the Mufti in the *'ulamā'* literature through time, Hallaq exhibits the opinions

within the Shāfeʿī *madhhab* from the time of al-Shāfeʿī (d.820) to Jalālu-Dīn al-Mahallī[35]

(d.1459). At the time when al-Shāfeʿī requires the Mufti to obtain the qualities of the *mujtahid*,

his close students who appear within two centuries later insists on the same requirements for the

Mufti. But, one century later, another Shāfeʿī *ʿālim* agrees upon reducing the conditions of the

Mufti set by his former *'ulamā'* in the same *madhhab*. Later on, the following *'ulamā'* tolerated

this reduction in the qualifications to the degree that they accepted that the Mufti could be a mere

Muqallid, which is a much lower rank than the *mujtahid*. Hallaq notes that the later *'ulamā'* do

not seem to appeal to literature any earlier than that of the eleventh century, which started to

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[35] He is a Shāfeʿī jurist who is famous for his Quranic exegesis, Tafsir al Jalālayn.

tolerate this reduction. This indicates that the later *ʿulamā'* were aware of the *madhhab* as an

established reference authority. Even when they discuss the opinions of the early *ʿulamā'* they

compare them to the later ones as two contested views within the *madhhab*. Then, they simply

weigh the later one more heavily. The cumulative literature of the *madhhab* is what constitutes

this authority. The later views represent the reference for the later *ʿulamā'* who could scarcely

break free from the *fiqhī* literature and refer to the sacred sources themselves.

What is more is that the authority of the divine text was usurped by that of the texts of the

ʿulamā', - texts which began, simply, as an attempt to understand the divine text. By the text we

mean the *'naṣṣ'* which has a specific meaning in the *fiqh*. That is, the *ʿulamā'* attribute features

and apply sciences created to serve the divine text to texts of the *fiqh* (Al-Khaṭīb 2001, 133). The

followers of *fiqh* schools consider the text of their *imām* to be '*naṣṣ'*, the word used for the text

in Arabic, which means arise or reach the peak of something (Ibn Fāris 1979, 5/356). The

conventional meaning of the word '*naṣṣ'* refers to the clarity of the significance in the statement.

It is used mainly to refer to the Qur'an or the *ḥadīth* and their clear significance on specific

meanings (Al-Khaṭīb 2001, 130). That the jurists use the word '*naṣṣ'* to refer to the statements of

their *imāms* implies a huge transformation of the authority among Muslims. It indicates that the

statements of the *imāms* became a substitution for the original divine text they attempt to explain.

An example of this transformation can be found in the accounts of An-Nawawī (1233-

1277)[36] on the limitations of the *mujtahid*s within a specific school of *fiqh*. He reports that a lay

person can ask a minor *mujtahid* within a specific school of *fiqh* about his *fatwā*, but this minor

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[36] Yaḥyā Ibn Sharaf An-Nawawī is one of the most famous Shāfiʿī jurists who massively contributed to the
madhhab. He is also known for his explanation of the *ḥadīth* compilation of Saḥīḥ Muslim.

mujtahid cannot perform an independent *ijtihād* outside the frame of his school. For An-Nawawī this minor *mujtahid* is only allowed to search this *Fatwā* in one of the authentic books of the *imām* of the school, if he is authorized to be a trustworthy transcriber (Y. I. An-Nawawī n.d., 1/45). An-Nawawī goes further in glorifying the '*naṣṣ*' of the *imām* when he requires the Mufti within a specific school of *fiqh* to investigate many sources of that school to guarantee that what he chooses matches with what the *imām* of this school chooses (Y. I. An-Nawawī n.d., 1/47). The glorification of the '*naṣṣ*' of the *imām* developed into making it the only source from which the restricted *mujtahid* can derive laws and judge them, even if the '*naṣṣ*' relates to personal affairs.

As a clear example of the authority of the *imām*'s *naṣṣ*, the Shāfiʿī school makes it undesirable to marry a blond girl, because Al-Shāfiʿī has asked his student al Rabīʿ (884)[37] to return his blond servant justifying that he never gained anything good from a blond person (ash-Shirbīnī 1994, 4/207). Although this '*naṣṣ*' is about a personal preference of the *imām* and has nothing to do with the religion, Shāfiʿī's jurists derives from this story that a blond girl is unsuitable for marriage. This example shows how the authority of the *imām* and his *fiqh* school replaced the authority of the divine text and inherited all its features. Although this solicitousness to the '*naṣṣ*' of the *imām* could be seen as a glorious work ethic, it wasted Muslims' efforts, intellects, and potentials and confined them to the authority of the early *ʿulamāʾ*. Furthermore, it has crucial implications for Muslim political thought and the rulings of *al-Ḥākim al-Mutaghallib*.

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[37] al Rabīʿ b. Sulimān Al-Murādī is the closest student and companion to Al-Shāfiʿī, and the transmitter of his major works.

The transformation of authority in the rulings of *al-Ḥākim al-Mutaghallib* appears in more than one place in the *fiqh* literature, especially books of commentaries, but the current study will consider only two examples. The first book is the *Toḥfat al-Moḥtāj* of al-Haitamī (1504-1567)[38], which is an explanation of *al-Minhāj* by An-Nawawī and includes two other commentaries of al-Shorwānī (d.1884)[39] and al-ʿAbbādi (d.1584)[40]. Although the book is on the Shāfeʿī *madhhab*, the four *ʿulamāʾ* contradict the opinion of al-Shāfeʿī, and they followed An-Nawawī the author of the explained text. The main author and the two commentators work within the limits of the original view of the text, and do not go beyond An-Nawawī in reaching back to the founders of the madhhabs, or even by referring to the divine text itself. Even when al-Shorwānī seeks an outsider reference he refers to *Mughni al-Muhtāj* of al-Sherbīnī which is another explanation of *al-Minhaj*. They all see the same view that the Leadership is valid through *al-Taghallub* over a vacant position or another *mutaghallib*, but not over a legitimate leader. This is a view that distinguishes the Shāfeʿīs from other *madhhab*s (Ibn Ḥajar Al-Haitamī 1983, 9/73-78) (ash-Shirbīnī 1994, 5/423).

The other example is *Nihāyat al-Moḥtāj* of Ar-Ramli (1513-1596)[41] (Ar-Ramlī 1984, 7/407-412) which provides an explanation of *al-Minhaj* of An-Nawawī and includes two other commentaries of al-Shabramalsī (1588-1676)[42] and Ar-Rashīdi (d.1685)[43]. What applies to the

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[38] Shibab al-Dīn Abū al-ʿAbbās Aḥmad ibn Muḥammad ibn ʿAlī ibn Hajar al-Haitamī is a well-known Ashʿarī theologian and Shāfeʿī jurist.
[39] ʿAbdel-Hamīd al-Shorwānī is a late Shāfeʿī jurist born in Dagestan.
[40] Ahmad b. Qāsim al-ʿAbbādi is a Shāfeʿī jurist and an Arabic linguist who lived in the Ottoman era.
[41] Born in Menoufyyiah, EgyptMuhammad b. Ahmad b. Hamzah Shihābu-Dīn Ar-Ramlī, known as al-Shāfeʿī the young, is the most prominent Shāfeʿī jurist in Egypt in the sixteenth century.
[42] Nūr Ed-Dīn ʿAlī b. ʿAlī, born in Shubramals, Egypt, is a Shāfeʿī jurist who authored many works on fiqh, exegesis, and Arabic syntax.
[43] Ahmad b. ʿAbdel-Razzāq al-Maghrebī Ar-Rashīdī is a Shāfeʿī jurist born in Rashid, Egypt.   `

previous book of al-Haitamī is exactly the same in Ar-Ramlī's and the two commentaries. The

book is for *madhhab* al-Shāfeʿī and adopts the same views and formation of the previous one.

For sure, the implications of this transformation of the authority from the divine text and the first

interactions with it to the *madhhab*s that are mentioned previously play a crucial role in the

contemporary views on *al-Ḥākim al-Mutaghallib*.

The literature of *al-Ḥākim al-Mutaghallib* is distributed in three categories of Muslim literature:

theology books, *fiqh* books, the specialized books of As-Syasah al-Sharʿiyyah. This explains

why some Muslims currently consider the dispute in political issues to be a theological one

which leads to a state of being astray (*ḍallālah*). In addition, this influences them to connect it to

the contexts in which these issues were contained, so they ascribe the opposition to leaders to the

Kharijites who deserve to be killed[44]. Imitating these views, Sīsī, the president of Egypt swears

that he wishes he could wear his regimentals and fight against the Kharijites in Egypt, meaning

the opposition[45]. Although al-Ghazzālī (1058-1111)[46] refused, generally, to include political

rulings in theology books, he did include them in his theological work *al-Iqtsād fi al-Iʿtiqād*

justifying this by the dominant mainstream thought of his time (Al-Ghazālī 2004, 127).

Accordingly, he argues that the *fiqh* literature is the right place to include political rulings.

The study of Leadership in theology literature is mainly polemical for the sake of refuting

doctrines of groups other than Sunnis. The mentioning of *al-Ḥākim al-Mutaghallib* depends on

the context of the book. In other words, if the book responds to a purview that includes the

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[44] See Ali Gomaa's previous discourse, and the discourse of Al-Madakhilah, such as; Muqbil Al-Wadiʿi and Saeed Raslan.
[45] See the video on https://www.youtube.com/watch?v=pWX94w238EU
[46] Abū Ḥāmid Muhammad Al-Ghazālī, known as Ḥujjat al-Islam, is one of the most influential Muslim Sunni jurists, philosopher, theologian, and mystics. He is also a Shāfeʿī and an Ashʿarī who left massive amount of books.

validity of the Umayyads or the Abbasids, the authors insist on assuring the validity of *al-Ḥākim al-Mutaghallib* (Al-'Ashʿarī 2002, 296) (Ash-Shāṭebī 1992, 2/624-627) (Ḥazm n.d., 4/131). That is, many theological works were authored to respond to other sects who were politically forming the opposition against the rule of Umayyad and Abbasid. We note that some of them like al-Ashʿarī (874-936)[47] and al-Shātebī (d.1388) [48] accept the rule of *al-Mutaghallib* wholesale, while the others provide some details about the reasons for accepting it. Ibn Ḥazm (994-1064)[49] recognizes the rule of *al-Mutaghallib* when the position is vacant after the death of the leader. Meanwhile, al-ʿImrānī (d.1163)[50] agrees with Ibn Ḥazm and adds another valid situation when *al-Mutaghallib* overcomes another *mutaghallib* (Al-ʿImrānī 1999, 3/823). On the other hand, some theology sources mention nothing about *al-Ḥākim al-Mutaghallib*, and only uphold the validity of the choice of *ahl al-Ḥall w al-ʿAqd* and the rule of the first four caliphs against the Shiite views (Al-Bāqllānī 1987, 432-478) (Al-'Aāmedī n.d., 364-392) (Al-Ghaznawī 1998, 269-306). Despite my agreement with al-Ghazali that *fiqh* literature is the right place to study political issues, I nonetheless prefer to provide a brief look on the context in which theology literature discusses the rule of *al-Mutaghallib*.

Following the development of the rulings regarding *al-Ḥākim al-Mutaghallib* in *fiqh* and As-Syasah al-Sharʿīyyah sources, will help evaluating problems of the contemporary recalling.

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[47] Abū al-Ḥasan ʿAlī ibn Ismāʿīl b. Isḥāq al-Ashʿarī, is the founder of the well-known Ashʿarī school of theology. He started his journey as a Muʿtazilites then he found his own way which turned into a major Sunni Muslim theology school.
[48] Abū Isḥāq Ibrāhīm b. Mūsā al-Shātebī is a prominent Andalusian Sunni Maliki jurist. He is also famous for his magnificent work in the realm of the objectives of the *sharīʿa*.
[49] Abū Muḥammad ʿAlī ibn Aḥmad ibn Saʿīd ibn Ḥazm, known as aẓ-Ẓāhirī, is an Andalusian polymath, jurist, historian, philosopher and theologian. He is also a leading scholar over the course of Muslim history and from the first to study religions comparatively.
[50] Yaḥyā Ibn Abī Al-Khair Al-ʿImrānī is the major Yemeni Shāfeʿī jurist of his time.

Noting that the bases on which the ʿulamāʾ decide that the rulings of *al-Ḥākim al-Mutaghallib* are not binding and subject to limited contexts problematizes those claims that recall these rulings as binding laws. That is Islam was nothing except the divine text, the Qurʾan and the Prophet (PBUH) as the example who represents the practical Qurʾan. The authority that emerged from the interaction between the divine text and the happenings which produced the *fiqh* is formed through history to seem equal to the authority of the divine text as illustrated before. The problem here is that the belief that established through history that the *fiqh* text represent an independent binding authority, however the Sunnis at the same time claim the superiority of the divine text. That is, the establishment of the *fiqh* authority might be formed in the Muslim intellect unconsciously through time (Yāsīn 2000, 8). In other words, Muslims believe that the divine text is valid for all times and all contexts. This validity, if considered, cannot be transferred to a *fiqh* text as it is a humanly interactive text that is influenced by the time and the space in which it emerged. So, recalling the *fiqh* text that is not firmly based on a divine text is problematic since it creates a gap which is between the time of recalling and the time of emergence of this idea. Hence, the research when following the *fiqh* literature of *al-Ḥākim al-Mutaghallib* and how it was developed and the reasons behind it tries to illustrate the lack of reliance between the *fiqh* text and the divine text, and the gap between the context of emergence and the context of recalling.

Hayrettin Yücesoy, the author of Tatawwur al-Fikr al-Siyasi ʿinda Ahl al-Sunna: Fatrat al-Takwin [The Development of Sunni Political Thought: The Formative Period], attributes the

start of accepting the rule of *al-Ḥākim al-Mutaghallib* to al-Shāfeʿī (Yücesoy 1993, 151) who states that:

> Whoever usurps the Caliphate using sword until he is called Caliph, and people agreed upon him he is a Caliph if he is from Quraysh. And, people must conquer with him and pray Jumʿah under his leadership, and who rejects, he is a heretic. (Al-Baihaqī 1970, 1/448) (Ar-Rāzī 2003, 222)

Reflecting on al-Shāfeʿī's statement we could derive some notes. First, al-Shāfeʿī does not refer to any proof for his opinion. In addition, he adds two restrictions for that Mutaghallib; to be from Quraysh and to obtain approval from the people, however, this contradicts the definition of *al-Mutaghallib* for the other *ʿulamā'*. It, also, shows how the *ʿulamā'* are hesitant and inconsistent about this idea, thus it strengthens the claim that the rule of *al-Mutaghallib* is baseless regarding to the text and it is only the dictation of the de facto. Dating this opinion back to the time of the disputation between al-Ma'mūn and his brother al-Amin (Yücesoy 1993, 151) enhances the possibilities of the beginning of the submission to the state quo.

Ahmad b. Ḥanbal refers to the Sunnah of the prophet when he establishes the validity of the rule *al-Ḥākim al-Mutaghallib*. In addition, he equalizes between the legitimate leader and *al-Ḥākim al-Mutaghallib* that both must be obeyed, and it is prohibited to be a dissident against them (Ibn Ḥanbal 1991, 45-46). Despite that he refers to the Sunnah of the Prophet (PBUH), he does not mention any *ḥadīth*s. Nevertheless, one could understand that he means the *ḥadīth*s about dissidence[51]. If this is the case, he is required to prove the legitimacy of *al-Ḥākim al-Mutaghallib*

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[51] There are some ḥadīths in which the Prophet prohibit Muslims from disobeying their leaders. But, most of these ḥadīths could be rejected regarding the obedience to al-Ḥākim al-Mutaghallib as he usurped power unjustly. Only one ḥadīth could be imported in this discussion. In this ḥadīth the Prophet ordains the obedience to leaders even if they flagged peoples backs and snatched their wealth (Al-Ḥajjāj n.d., 20/4554). Some *ʿulamā' refer to that* ḥadīth to prohibit dissidence whatever the leader has severely done as long as he declares himself as a Muslim. However, this

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first and that he equalizes the legitimate leader in his rulings. There is no one text about *al-*

Ḥākim al-Mutaghallib, thus to grant him the rulings of the legitimate leader you must prove his

validity first. Moreover, the rule of *al-Ḥākim al-Mutaghallib* takes different forms and conditions

among the *ʿulamāʾ*. Which one is the acceptable form? And why is it that one, specifically? We

might also go with the necessity and legitimize all forms of *at-Taghallub*; then the question

would be, when will this state of necessity end? These questions must be answered by the

ʿulamāʾ and those who support the recalling of these rulings.

Later, the *ʿulamāʾ* started to use the ijmāʾ 'consensus' as a proof in validating the reign of

al-Ḥākim al-Mutaghallib. Al-Ashʿarī is the first[52] to claim the consensus on the validation of *al-*

Ḥākim al-Mutaghallib and the equalization between him and the legitimate leader (Al-'Ashʿarī

2002, 168). But, al-Ashʿarī does not specify who made this consensus and in which era. Ibn

Battāl (1057)[53] reports the consensus on the obedience to *al-Ḥākim al-Mutaghallib* but with

conditions that he should perform *jumʿah, ʿeīd, jihād*, and support the oppressed (Ibn Baṭṭāl

2002, 10/7-8). Ibn Battāl adds three justifications for accepting the rule of *al-Ḥākim al-*

Mutaghallib: his obedience is better than dissidence against him; controlling the riffraff; and

protecting lives. Being pragmatic, Ibn Battāl provides the bases on which the consensus was

built. However, the question asked to al-Ashʿarī could apply here too. Regarding his

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hadith contradicts another ḥadīth ordaining a muslim to fight back for the sake of protecting his life or his wealth
even if this leads to his own killing (Al-Ḥajjāj n.d., 1/259). The ʿulamāʾ who are against dissidence make an
exception for that ḥadīth that leaders are excluded from that ḥadīth in order to eliminate the contradiction between
the two ḥadīths. Nevertheless, I could argue that the first ḥadīth did not mean flagging and snatching unjustly, but if
this is done as a just punishment by the judge or the leader.
[52] My research has reached this conclusion after chronological surveying the ʿulamāʾ literature on al-Ḥākim al-
Mutaghallib.
[53] ʿAlī b. Khalf b. ʿAbdel-Malik Ibn Baṭṭāl is a great Maliki jurist who is famous for being a master of the prophetic
Sunnah. He is also one of the commentators of the highly valued ḥadīths compendium of al-Bukhārī.

justification, what if the dissidence and the removal of the leaders at a specific time was more

beneficial than keeping them, will their rule be valid? Although he attempts to seek validity from

the Sunnah texts, the *ḥadīth*s he mentions is general for the leader (Al-Ḥajjāj n.d., 20/

4519,4554). Since we have no primary textual proof on the validation of *al-Ḥākim al-*

Mutaghallib that grants him the status of the legitimate leader, we cannot consider him in the

*ḥadīth*s talking about leaders. That is, the Quran, which is a higher authority than the Sunnah for

Sunni Muslims, ordained consultancy in the choice of leaders primarily, and usurpation

contradicts the value of consultancy.

The claim of the consensus appears again later at the time of Muhammad Ibn ʿAbdel-

Wahāb, who claims the consensus of all *madhhab*s that anyone who usurps a state (or states is

granted all the advantages of the legitimate leader (Ibn ʿAbdel-Wahhāb and al 1996, 9/5). Along

with reporting the consensus, he justifies his view that people from before the time of Ahmad Ibn

Ḥanbal never agree on one supreme leader which makes life hard to reject *al-Ḥākim al-*

Mutaghallib over a state or more (Ibn ʿAbdel-Wahhāb and al 1996, 9/5). However, this could be

easily refuted that the choice which is the opposite way of inauguration does not require every

person agreement in the view of Sunnis. Al-Ashʿarī reports that it could be done only by one,

and other Sunnis do not require everyone to choose or agree (Al-Ashʿarī 1980, 460).

The reference to consensus is hard to see as a proof in this case. First, the consensus for

Sunnis requires the agreement of all *mujtahid*s at a specific time on a specific issue (As-Sobkī

2003, 76). Those who report consensus on the legitimacy of *al-Ḥākim al-Mutaghallib* do not

provide any proof that such consensus in that way ever happened. One could argue that many

scholars over the time have validated the rule of *al-Ḥākim al-Mutaghallib*, yet the consensus for

Sunnis to be valid it must be at one specific era and all *mujtahid*s to agree upon that specific

thing. Furthermore, the *'ulamā'* are inconsistent on the valid kind of *al-Ḥākim al-Mutaghallib*, as

the research is going to explain. *At-Taghallub* itself differs from one era to another. While the

Umayyads and the first reign of the Abbasids witnessed usurpation on the level of the supreme

leadership, the second reign of the Abbasid caliphate witnessed a new type of usurpation, on the

level of ministers. Hence, it is hard to prove such consensus.

One of the problems of that consensus, if proved, could be its objectives. That is this

consensus did not aim from the outset at developing a method of inaugurating a legitimate ruler,

however, it was initiated to legitimize the de facto status. Whatever the reason behind this

legitimization, the position of the *'ulamā''* towards the political de facto seemed to be

submission, indifference, and resentment (Black 2011, 38). By doing that the *'ulamā'* guarantee

leaders safety and legitimacy, and frightened people from opposing those leaders using their

religious authority. One could argue that the *'ulamā'* believed that there is nothing better to look

for (Black 2011, 38), and they do not have the power to change. A clear representation of this

status is Ibn ʿĀbedīn, declaration that in his time the rulers fight for the sake of leadership and

their interests, thus we follow who wins (Ibn ʿĀbedīn 1992, 4/261). But, if this is the case, they

are not supposed to legitimize the rule of *al-Ḥākim al-Mutaghallib* and prevent people from

attempts to make the change. Taking that negative position from the leader while having a very

strong positive position from the public, promotes the power of the leader to become tyrannical

and jeopardizes the opportunity of the public to achieve the change, thus they negatively submit.

Reading through this literature of the early *'ulamā'*, their submission to the status quo and their attempts to legitimize the reality of their time becomes evident. Considering al-Māwardi's unique work, al-Ahkām As-*Sulṭān*yyiah, we could notice the extent to which he is influenced by his own time. The status quo of al-Māwardi's time forced him to accept laws and orders that were rejected before, such as the limitation of the caliph's power, and the acceptance of a low rank usurper leader (Kadi and Shahin 2015, 46). Al-Māwardi found himself in a context where the caliph had no actual power. His main concern was to protect the unity of Muslims under one polity, but the reality was that this polity had no power (Crone 2005, 233). Thus, he was forced to find a solution for that dilemma that could serve the superior goal in his view which is unity. Al-Māwardi's solution aimed at legitimizing the reality and preserving the status of the supreme as the symbol for unity and the power giver. In doing so, he provides a new categorization for the supreme leader who does not have full freedom to act. He attributes this lack of freedom to two reasons wardship (Ḥajr) or captivity (Qahr), then he differentiates between them. Al-Māwardi validates the rule of the supreme leader under wardship as long as the usurper is acting in accordance with *sharīʿa*. But the captive leader might lose his power if the hope to release him is lost. Despite al-Māwardi's endeavor was to legitimize the de facto ruler, the deterioration of the supreme leader position was continuous, as there were three supreme leaderships[54] for the Muslim *ummah*. It could be inferred that al-Māwardi in his *ijtihād* to derive the rulings was centered around his own reality trying to figure out the best solution to fill the gap between the ideal example of Muslim leadership and the de facto. Thus, the rulings

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[54] The Abbasids, The Fatimid in Egypt and North Africa (r.909- 1171), and the Andalusian Umayyads (r.929-1031).

that al-Māwardi derived were restricted to his era only and could not be applied in any different context except if it correspond to the same status quo.

The other example that shows how al-Māwardi was influenced by the circumstances of his time, and also how his rulings were enacted to fit to his era, is his views on the usurpation of a state or states. As his time was known for the Buyids' usurpation of the supreme leader's power, al-Māwardi's views on the regularization of the rule of that *Mutaghallib* reflects a unique example on how the *ʿālim* interacts with his reality (Al-Līthī 2015, 93-94). Al-Māwardi argues that when a leader usurps power in a state or some states and subjects them to his rule, the supreme leader is recommended to approve the usurper's rule over this state. This, from his view, guarantees the usurper's legitimization along with enforcement of laws, though it is not valid conventionally (Al-Māwardī 1989, 45). It appears here also that the legitimization of *al-Ḥākim al-Mutaghallib*'s rule is a response to a status quo: that the *ʿālim* sees this validation as the best solution for his time even if it is a baseless legalization. This question of reference or legal base is perfectly valid here. What is the reference that made al-Māwardi issue this 'sweeping concession' over this crucial matter? The only understandable basis that al-Māwardi used to establish theses rulings is necessity and the impossibility of fulfilling the established conditions for leadership (Gibb 1982, 163-164). Thus, the transcending of rulings which emerged and was legalized to fit within the irregularities is questionable.

In another context, the rulings of *al-Ḥākim al-Mutaghallib* appears, but hypothetically. Al-Juwaynī, in his book *al-Ghayāthī*, imagines an era that is vacant from a supreme leader (Al-Juwaynī 2011, 317-40). Then, he supposes someone to claim leadership when he fulfils all

qualifications of the supreme leader. If this person takes power using force and usurpation, then he is a legitimate leader. He justifies this view illustrating the lack of mechanisms through which a legitimate leadership could be held, such as the supreme leader himself, and the Party of Loosing and Binding. Another necessity case, for al-Juwaynī, is the existence of only one candidate who has the power, and the serious need for a leader who manages people's lives and executes religious rulings (Al-Juwaynī 2011, 336-8). This case is widely attested in the literature of the *ʿulamāʾ* and they all require the absence of the *imām* to validate the rule of *al-Ḥākim al-Mutaghallib* (Ibn Jamāʿah 1988, 55-56) (Al-ʿImrānī 1999, 3/823) (An-Nawawī 1991, 10/46) (ash-Shirbīnī 1994, 5/423). In all these cases, the rule of *al-Ḥākim al-Mutaghallib* is only valid when he is the only candidate who has power, and where no supreme leader exists. All the *ʿulamāʾ* who argue that view justify it by asserting that the validation of *al-Ḥākim al-Mutaghallib*'s rule in this case guarantees the unity of the *ummah* and its protection from disputation.

The fear of the *fitnah* and the civil war was one of the motives that made the *ʿulamāʾ* prefer submission to the unjust leaders and usurpers. Almost all the reports of the *ʿulamāʾ* validate the rule of *al-Ḥākim al-Mutaghallib* and prohibit the rebellion against him to avoid civil wars and *fitnah*. This could be explained that the *ʿulamāʾ*, based on their worldview, hypothesized this dichotomy of the existence of either the leadership or the *fitnah*. That is, they believe that the absence of a legitimate leader or even the disputation of his power by any means would inevitably lead to a civil war or a *fitnah*. This assumption could be based on their view of the first and second *fitnah* and the early civil wars. However, if we agreed with their view we

could not apply it to the modern world, as the modern nation-state divides the power among different institutions. Thus, the removal of the leader or the president, will not lead to a *fitnah* or a civil war, since the state institutions will continue working in a systematized manner and they are even able to reelect the leader in a brief time.

We cannot guarantee that the f*itnah,* or the civil war, occurred as a result of the absence or the disputation of the leader's power. Moreover, the concept of the *fitnah* cannot be measured and one *fitnah* differs from another. That is, one could argue that the legitimization of *al-Ḥākim al-Mutaghallib*'s rule undermines the right of the *ummah* to choose their righteous leaders freely, who might carry on their responsibilities in a better way. Furthermore, the application of the free choice might have prevented the *fitnah* started by rulers to crush the revolts. In addition, we might have had supreme leaders with the full power as they gain their legitimacy from people's free choice. Nevertheless, the *fitnah* could still exist, but we are trying to prove here is that the *fitnah* cannot be framed or measured so we could use them to justify the legitimization of *al-Ḥākim al-Mutaghallib* or regularization of the minor usurpers.

Hence, after examining most of the Sunni literature on *al-Ḥākim al-Mutaghallib*, a reflection on that literature is important. It could be argued that the *ʿulamā'* concentrated their efforts more on the preservation of the form of leadership than its essence. That is, the *ʿulamā'* were more concerned with the forms of early leaderships and the literal imitation of them, at the time they pay less attention to the objectives of this leadership. This could be implied in their many debates surrounding the number of the *bay'ah* (allegiance) payers, when they ignore the principle of *Shūrā* and how to put it into practice. Then they agree upon the validity of a one

bay‘ah payer to have a valid rule (An-Nawawī 1991, 10/43, Al-qalqashandī n.d., 1/44), though this eliminates the right of the *ummah* to choose their leader, which is the main objective of *Shūrā*. A clearer example is the insistence of having the supreme leader even though he had no power at all in the second Abbasid period. This led some *‘ulamā’* to validate illegal practices in rule in order to preserve the original form of the supreme rule, namely, the caliphate. However, in reality, the necessity of having a leader who unites the *ummah* and executes religious rulings necessitates a true righteous leader who can fulfil his responsibilities, but it does not mean to preserve the form (having a specific form of rule), regardless of the way he practices his rule or fulfils his responsibilities. At the same time, the *‘ulamā’* did not achieve what they aimed at, since civil wars were continued, and the *ummah* was divided. The lack of ruling in divine text, concerning the form of the supreme leadership and ways of appointing, led the *‘ulamā’* to derive the form from the first experience of the rightly guided caliphs with tenuous reference to the divine sources. Instead of building on the objective content of their caliphate, they borrowed the mold of this caliphate and restricted themselves to it. They borrow the way Abu Bakr was inaugurated to prove that one could appoint someone to the supreme leadership neglecting that it was a *faltah* (slip) as ʿOmar himself expressed (Az-Zahabī 1993, 3/6), that cannot be repeated.

The authenticity in the Muslim political literature transferred from the divine authority to the historical precedents. That is, this literature does not refer to the divine text to claim authenticity, but to the historical events and molds. This was represented in the reasoning of the *‘ulamā’* on many political rulings. For instance, the legitimization of *al-Ḥākim al-Mutaghallib* based on the existence of a similar case in the early history, which is the case ʿAbdel-Malik Ibn

Marwān's reign. Another clearer example is the ʿulamāʾ 's specification of the ways in which the contract of the supreme leadership could be held. The ʿulamāʾ confined it to three ways that most of them agree upon which are the free choice by *ahl al-Ḥall w al-ʿAqd*, the appointment by the former leader, or *at-Taghallub* (Ad-Dosūqī n.d., 4/298) (I. Q. Al-Maqdesī 1968, 8/107) (ash-Shirbīnī 1994, 4/130) (Ibn ʿĀbedīn 1992, 1/369). These specifications of the ʿulamāʾ, which became binding rules, are mainly derived from the historical precedents not from the divine text nor reasoning. The problem lies with the authorization of historical precedents as authentic legal sources on a comparable level with the divine text. That is, the historical precedents are influenced by people's narrow perspectives, limited sources, and voracious desires. More importantly, historical precedents are not from the valid sources of legislation in the Sunni tradition (Yāsīn 2000, 12). In other words, the minimization of the permissible domain of the religious by the ratification of history as a binding authority is likely the reason for the recession of the Muslim intellect and the gap between the reality and the theorization (Yāsīn 2000, 13-14).

Although the Sunni political literature insists on some principles like *ahl al-Ḥall w al-ʿAqd*, the election as a way of inauguration, and the Quraysh linage, they were dispensable in practice and theory. That is, these principles are based on a combination of the divine text and the historical precedents. For instance, *ahl al-Ḥall w al-ʿAqd* is based on the divine principle of *Shūrā*, however the conceptualization of this group is derived from the historical experience of early Islam: ʿOmar's appointment of a group of people to choose one from among them, and the existence of a group called *ahl a-Shūrā* ('Imārah 1989, 56-57). This created a gap between theory and reality, since there was not such a group in the practice, after the death of ʿOthmān, however

the existence of this group is possible and advantageous. (Yücesoy 1993, 156). The ʿulamā',

instead of building this concept providing its practical specifications and generating an

applicable mechanism, submitted to the status quo and continued to build this illusion stating

some general Islamic features. Then, to keep the authenticity of their theorization and to fit the

changing status quo, the ʿulamā' were forced to distinguish between the rightly guided caliphate

of the first four caliphs and attribute the later forms to a kingship that is valid but in a lower level

than the rightly guided leadership. The gap between the theorization and the reality, might be the

reason that forced the ʿulamā' to abandon some elements of their theorization that was based on

the rightly guided era to regulate and legitimize illegal forms of rule (Yücesoy 1993, 156-8). It

might be attributed, also, to the firm standing for a specific form of leadership that they believed

to be the legitimate form as it was derived from the exemplary era. But, this mold cannot be

applicable forever, since it is a human experience.

The *ijtihād* performed by the ʿulamā' on the political issues was in the main part a response to an

irregular reality. In other words, it was not a mere theorization attempting only to derive the

rulings from the sacred text to provide people with a divine system to follow. Rather, it was an

attempt to regularize and legitimize a real situation that strayed from the exemplary path which

the ʿulamā' themselves drew, based on the era of the rightly guided caliphs. So, the ʿulamā' after

failing in enforcing this exemplary model of leadership, added to it the emergent forms of

leadership of separate times to grant them legality (Crone 2005, 254). Hence, the literature

produced of that process, regardless of its validity, cannot be suitable for other eras or contexts,

except for cases in which there is an identical context; then we could argue for its validity. This

shifting theorization for changing polities cannot be granted applicability for all times, or considered as binding laws.

Depending on necessity in enacting rulings and laws, as the *'ulamā'* do, is precarious. That is, necessity cannot be standardized across varying contexts and paradigms. It differs from one time to another, one place to another, and context to another. What someone considers as a necessity could be an option for another. For example, the *'ulamā'* argue that the existence of supreme leader is crucial for the religious rulings that must be fulfilled by him, and that this leader must be one to save the unity of the *ummah*. However, some of these duties of the leader became institutionalized recently to be done automatically without a need for the leader to intervene. In addition, the multiple leaders became the status quo and the acceptance of them even with the absence of the supreme leader, became the necessity. This could be noticed nowadays in the Muslim nation-states where leaders are many without a validation from a supreme leader, and Muslims can perform *jum'ah and jamā'ah*, and practice Hajj without the leader. It worth to be mentioned that the Muslim ummah has survived and flourished without the office of caliph since 1258, as the Abbasid caliphate of Cairo of 1261-1517 cannot be taken seriously, as it was not recognized outside of the Mamluk Sultanate except by the Sultanate of Delhi in India. Also, multiple rulers claimed the title of caliph, but had no real pretensions to general rule such as the Abbasids had had.

Another motive behind the acceptance of *al-Ḥākim al-Mutaghallib* was that, for the *'ulamā'*, the obedience to that form of leadership is better than resistance as the result of resistance would be the *fitnah* or the civil war. The imagination of the *'ulamā'* of these times was

restricted to two main scenarios: either a full submission, whatever the extent of injustice, or falling into a bloodbath. That is, most of the *'ulamā'*, when surveying their literature, agree that *al-Ḥākim al-Mutaghallib* is a sinner by usurping leadership and in the case of his death before reaching power he will die on the status of *Jāhiliyyah*, which equals being un-Islamic (Ad-Dosūqī n.d., 4/299) (Al-Haitamī 1997, 2/627) (Al-Juwaynī 2011, 327) (An-Nawawī 1991, 7/266) (Ibn Ḥazm n.d., 11/354). Yet, once he reaches power he is a legitimate leader who must be obeyed to avoid this bloody fate. However, this justification is not valid any more if we consider the recent state. The recent state provides manifold options that breaks that old dichotomy of the *'ulamā'*. The modern state consists of institutions that share power in a nearly balanced way, thus the resistance against the president or *al-Ḥākim al-Mutaghallib* does not result in the fall of the state and the disabling of the religious rulings, if they are, truly, in effect. Moreover, the world now is introduced to different peaceful mechanisms for change and resistance that eliminates the fears of the *'ulamā'*.

What this chapter argues is that, the literature of the *'ulamā'* on the Muslim political thought was produced in an inconsistent manner that makes its applicability and binding questionable. Many rulings of that literature, especially the case of our research, were enacted to correspond to specific contexts that are totally different from ours. The ruling of *al-Ḥākim al-Mutaghallib* was created to regularize a case of necessity, but the historical forces and the transformations of authority rooted it to become an established method for having a legitimate leader. So, this ruling was a result of the accumulation of literature that was not examined to be inherited as a binding law among other rulings. In other words, demands for recalling this ruling

as a law binding upon Muslims are baseless, since they build their argument on inauthentic references. Furthermore, the research illustrates that the reasons for legalizing this ruling are not applicable in modern times, and that the *'ulamā'* themselves validate it for a lack of a peaceful method to remove it. Since we have alternatives, we are supposed to disregard it.

CONCLUSION

The concept of necessity occupies a huge part of this research due to its centrality in the emergence of the rulings of *al-Ḥākim al-Mutaghallib* and their development. Necessity needs to be examined as to whether it is still valid or not. In addition, it is crucial to discuss the implications of recalling this rule, and who is responsible for the negative implications – the early *'ulamā'*, or the contemporary ones. This short section explores these and other minor points which did not fit into the previous chapters.

The necessity that forced the *'ulamā'* to legitimize the rule of *al-Ḥākim al-Mutaghallib,* as the literature we studied reveals, could be the fear of a great harm if they try to remove him, such as a *fitnah* or a civil war, or the lack of established mechanisms that could enforce his removal without causing a great harm, or the inability to creation and enforcement of a practical method for the election of the leader by the *ummah*. The first suggestion implies a presupposition that the removal of the leader can only be by force which will lead to a war and the implications of this war will be harmfully greater than his rule itself. So, for the *'ulamā'* they preferred to legitimize his rule, since many religious rulings are restricted, in their context, to the existence of the leader. However, if we examine this premise for necessity in the contemporary Muslim states, one could argue the absence of this necessity since we are introduced to some peaceful methods that help removing these regimes, such as civil disobedience, demonstrations, and revolutions. In addition, the harm cannot be measured so easily, as in some cases the harm caused by some tyrannical leaders was greater than any harm could be caused if people removed

him from the beginning. Moreover, in the current context of the nation-state, the religious responsibilities are not the same as those of the classical context, since people could practice their religion and live without having this leader at all. That is, the Modern nation-state substitutes the leader who controls everything himself by the state which includes institutions that work automatically to fulfil these tasks, such as courts, municipalities, ministries, and armies. Thus, the contemporary *'ulamā'*, must rethink the existence of the necessity before continuing to grant such regimes legitimacy, in the light of the objectives of leadership in the Muslim paradigm.

Along with the claims for recalling the rulings of *al-Ḥākim al-Mutaghallib*, there is a debate among Muslims on the role of the *'ulamā'* in the consolidation of tyranny. While some blame all of the *'ulamā'* for their legitimization of this rule, some tend to differentiate between the early and the modern *'ulamā'* as they have two different discourses. By legitimizing the rule of the usurper, you might encourage other forces to seek power the same way as their rule will be legitimized. In addition, legitimizing this rule means that Muslims cannot remove this regime and must submit to it. This guarantees the usurper a legitimate rule and obedient public. Those who recall the rulings of *al-Ḥākim al-Mutaghallib* are excluded from this discussion as they do not consider it tyrannical.

In defending the early *'ulamā'* and blaming the contemporary *'ulamā'*, this situation argues that the early *'ulamā'* are misunderstood by the contemporaries who validate usurpation itself after the usurper obtains an established and stable rule. That is, the early *'ulamā'* prohibited usurpation from the beginning, and separated usurpation from the rule of the usurper as

necessary to be obeyed to guarantee the preservation and the application of the *sharīʿa*. In addition, the early *ʿulamāʾ*, when validating his rule, do not mean to support him or give him immunization from removal. However, some of them opposed those leaders when they strayed, and even allowed their removal if it would not cause great harm. But, some of the contemporary *ʿulamāʾ* report the validity of usurpation itself, show support for those leaders, and incite them against the opposition claiming affiliation to religion and the early *ʿulamāʾ*. This situation justifies the *ʿulamāʾ*'s legitimation of the Mutaghallib from difficulty of finding another way of inauguration other than usurpation as a characteristic of their time.

The opponents of that position claim that we cannot deny any kind of relation between the early and current *ʿulamāʾ*'s views, since the latter based their claims on the authority of the early *ʿulamāʾ*. They add that the intentions of those *ʿulamāʾ* must not be of a concern as we are supposed to judge the actual reality not the intentions. Moreover, the role of the *ʿulamāʾ* is not to submit to the status quo, claiming that nothing better could have happened. Instead they are to seek the righteous option and declare it to the public and they must struggle to enforce it, as nothing comes easy without struggling. Regarding the claim of the importance of having the leader in order not to obstruct some religious rulings that require the leader, the legitimization of the usurpers obstructs the ruling of *Shūrā* and "commanding good and forbidding evil".

Reflecting on this argument, one could illustrate valid points in both arguments and add to them. The position of the early *ʿulamāʾ* was problematic for several reasons. First, they validated the rule of *al-Ḥākim al-Mutaghallib* as a necessity that should be removed when it does not cause a great harm, however the early *ʿulamāʾ* themselves state in their books that usurpation

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is one of the legitimate ways to attain to power. If this rule is legitimized to correspond to a

necessity how has it become an established law? This makes a clear relation between the

contemporary *'ulamā'* 's claims and the position of the early *'ulamā'*. However, we could blame

the contemporary *'ulamā'* as they do not examine the root for the rulings of the *'ulamā'* – if they

are binding laws that are based on the divine or *ijtihād* made by the *'ulamā'* in a specific context,

this is not valid in our contemporary context. Furthermore, if the early *'ulamā'* found themselves

between two options only civil war or the rule of *al-Ḥākim al-Mutaghallib*, why do current

'ulamā' follow this ruling in a time when other options are available? Why do not they enforce

new political practices like the peaceful exchange of power and strive for mechanisms and

regulations that prevent usurpation and promote the consideration of the *ummah* in choosing

their leaders? The current *'ulamā'* do abuse these rulings when they use them to protect dictators

who kill their people and impoverish their sources for the sake of the dominant colonial power,

and when they validate regimes that were implanted by the colonization to guarantee everlasting

poverty, disease, and ignorance.

In conclusion, it is crucial to assure, again, that the extraction of a single ruling or a set of

rulings to be applied out of context is problematic. That is why the recalling of the rulings of *al-*

Ḥākim al-Mutaghallib, applied to the contemporary leadership in Muslim states, increased the

power of the tyrannical regimes providing them the religious legitimacy. Since the modern era

provides mechanisms and methods that promote peaceful changes of regimes in power, the

'ulamā' must pay more attention to promote theories of righteous governance and urge the public

to enforce political reform. But, before doing that, they are required to reconstruct a Muslim

paradigm that guarantees that all these subsidiary domains will serve the *sharīʿa*, its central domain. Since these rules lose their particularities when applied outside the paradigm. That is, when the juristic intellect validated the rule of *al-Ḥākim al-Mutaghallib* and regularized its position in the literature, it was within a Muslim paradigm that sought authority and acted towards the *sharīʿa*, the central domain. This context makes the leadership and any political interaction fall under the aegis of the *sharīʿa* and guarantees the unity of the *ummah* and the execution of religious rulings. However, in the contemporary context of the nation-state, the Muslim paradigm does not exist and leadership in the Muslim states has inherited the powers of the nation-state which create an inevitable dictator and tyrannical ruler. Recalling the rulings regarding the legitimate leader as equal to *al-Ḥākim al-Mutaghallib* adds to the tyrannical authority of those leaders and provides them a smoke screen in the shape of "religion" to cover their crimes. This covering is not only protective for the leader, but also taming for the Muslim public against injustice and persecution. Contrary to the early *ʿulamāʾ* who aim at unifying the *ummah* and protecting Muslims everywhere when they legitimized the rule of *al-Ḥākim al-Mutaghallib*, the legitimization of such rule in the current state breaks the unity and promotes the separation. That is, the world order of the nation-state restricts sovereignty to specific borders and over specific nationalities and prohibits the intervening in other states affairs. This will probably promote a self-centered state that neglect its religious dimension, as it is beyond its sovereignty and adds weight to their responsibilities.

The contemporary *ʿulamāʾ* are required to rethink the binding of the rulings of *al-Ḥākim al-Mutaghallib*, since they are not established on a divine base, but mainly on necessity bases. In

addition, they are required to revisit the *ʿulamā'* literature on other subjects that affect our daily

life and are taken for granted as they might be established on weak bases, as well. This does not

mean to annul the Muslim *ʿulamā'* heritage; it calls rather, for a study of the development of

their rulings and provisions to distinguish the divinely established rulings from those that are

established on necessity or other limited sources. Finally, it is important for the *ʿulamā'*, when

recalling such rulings, to recall from the outset the moral rulings of justice, equality, and freedom

of choice. So, when they fail to enforce them, they are not supposed to regularize usurpation and

injustice.

GLOSSARY

al-Ḥākim al-Mutaghallib: the leader who usurp power over all Muslim states or only one Muslim state.

amīr: a leader of a single state, a local governor, or an army commander.

bayʿah: the oath of allegiance to the ruler.

bughāh; baghī(s): a group of Muslims who have a view differs from the one of the ruler and use force against the ruler.

faltah: it only happens once and cannot be repeated.

farḍ al-ʿAin: an obligation that must be fulfilled individually.

farḍ al-Kefāyah: an obligation that if fulfilled by some the rest will be exempted.

fatwā: a jurisprudential opinion

fiqh: jurisprudence; the science of religious rulings

fitnah: a civil war in the Muslim community or a dispute

ḥadīth: a tradition said, done, decreed by the Prophet.

hajr: prevention of acting

ijmāʾ: the agreement of all Muslim scholars in a specific time upon a specific decision.

ijtihād: the use of reason in deriving religious rulings.

imām: the leader of the Muslim community, or the leader in prayer.

Jāhiliyyah: the period of savagery in the Arab lands before the message of Islam.

jamāʿah: the collective prayers in the Masjid

jihad: the war against the oppressive enemies for a religious cause.

jumʿah: Friday, or the Friday prayer.

khalīfah: the deputy, or the leader of the Muslim community.

khawārij: a historical name ascribed to the dissidents who fought against ʿAlī in the battle of Ḥarūrāʾ

madhhab: a Muslim school of Jurisprudence

naṣṣ: the text

qahr: usurpation

Quraysh: a great strong Arabic tribe lived in Makkah.

recall: the importing of past views to the modern context.

sharīʿa: the main domain for the Muslim paradigm, or Muslim legal rulings.

shūrā: consultancy, a value that urges the effective participation of Muslims in making crucial decisions.

As-Siyāsah al-Sharʿiyah: Muslim political views.

sulṭāns: leader who holds a huge power in reality but he falls under the supreme leader in the hierarchy.

supreme leader: the leader of the Muslim community who held titles of caliph, imām, Amīrul-Muʾminīn.

ṭāʿah: Obedience

ʿulamāʾ: experts in the tradition of the prophet and Islamic sciences.

'ulī al-'Amri: those who hold any kind of leadership or responsibility.

ummah: the Muslim community.

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