Islamic Constitutionalism Before Sovereignty: Two Defenses of the Tunisian Constitution of 1861[1]

Andrew F. March

Abstract

This article focuses on the Tunisian constitutional moment of 1857-1861. Its goal is to explore an important moment in Islamic modernity for the purposes of drawing a contrast with twentieth-century, post-caliphal Islamist thought. The primary themes visible in nineteenth-century Islamic constitutional thought are a "descending" conception of sovereign constituent power with a strong emphasis on the pre-political existence of a divine law that is both binding and guiding but not necessarily the exclusive source of lawmaking. The debates of the 1860s and Ottoman constitutionalism more generally do not lead directly to a non-sovereigntist political vision. But they are representative of a pre-colonial (and thus, to a certain extent, pre-apologetic) Islamic thought that centralizes the public interest, the varieties of political judgment, and the compatibility of distinct kinds of expertise with a desacralized centralized authority. This period may hold relevance for our present moment when twentieth-century ideals of both divine and popular sovereignty seem to no longer dominate Islamic (and Islamist) approaches to political life.

The nineteenth century witnessed the first efforts to draw up constitutions in traditional Muslim monarchies.[2] Far from emerging out of popular pressure, never mind revolution, these documents were largely motivated by

Andrew F. March is Associate Professor of Political Science at the University of Massachusetts, Amherst. He is author of *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (New York: Oxford University Press, 2009) and of *The Caliphate of Man: Popular Sovereignty in Modern Islamic Thought* (Cambridge: Harvard University Press, 2019).

the desire of rulers and their chief advisors to rationalize state legal and bureaucratic authority, in order to both strengthen central state control internally and also deal with increasing European pressure, particularly in fiscal and economic matters.[3] Nonetheless these texts reflect a language of authority and legitimacy that is to a large extent a reflection of traditional Islamic constitutional theory, in its form prior to the rise of popular, mass politics and the associated ideological transformation of Islamic political thought.[4] These constitutional documents include those adopted (often briefly) in Tunisia (the 1857 "Pact of Security" followed by the 1861 constitution), the Ottoman Empire (1876), and Egypt (1882).

This period of external pressure and internal constitutional reform is frequently dated from 1839, the year that the Sublime Porte issued the Gülhane Decree (*Hatt-ı Şerif* of *Gülhane*, or the "Noble Rescript of the Rose House") in the presence of European diplomats as well local officials and notables.[5] The Gülhane Decree[6] inaugurated the Tanẓīmāt reforms, which were primarily concerned with three main promises: (1) "guarantees promising to our subjects perfect security or life, honor, and property," (2) "a regular system of assessing taxes," and (3) "an equally regular system for the conscription of requisite troops and the duration of their service." To a certain extent, the Gülhane Decree is a contemporary record of certain assumptions of Ottoman Islamic political theory.[7] In line with the Sultan's view that "the Caliphate has passed on to us by inheritance and by right,"[8] the text proclaims both the state's ancient fidelity to the *sharīʿa* and at the same time the Sultan's own personal absolute legislative sovereignty. "Full of confidence in the help of the Most High and certain of the support of our Prophet," the text derives its authority and force from the Sultan's personal judgment that "we deem it necessary and important from now on to introduce new legislation to achieve effective administration of the Ottoman Government and Provinces." Its move in the direction of legal equality and regularity for all citizens (without regard for religious affiliation) was thus presented as a free act of sovereign will on the part of the Sultan. Its pledge at the end of the document notwithstanding—for the Sultan (along with the senior *ʿulamāʾ* and state officials) to take an oath in the hall of the sacred relics, swearing to not act contrary to its stipulations (an unprecedented promise for an Ottoman sultan)—this was not yet a move to establish a full constitutional monarchy and elaborate a theory of legal and political sovereignty.

Instead of that Gülhane Decree, this article focuses instead on the short-lived constitutional moment (1857-1861) of Ḥusaynid Tunis. I examine two important sources for the study of the emergence of modern Islamic political-constitutional thought and the problem of sovereignty. The first set are the initial attempts to create written constitutions for existing regimes and dynasties. The second set are the writings of important reformist intellectuals, both from within the lineage of traditional Islamic scholarship and from the class of new elites educated along "European" models, that sought to provide the intellectual and doctrinal justification for formal, written constitutions.

The goal of this article is to explore an important moment in Islamic modernity for the purposes of drawing a contrast with twentieth-century, post-caliphal Islamist thought. The primary themes visible in nineteenth-century Islamic constitutional thought, on my reading, are a "descending" conception of sovereign constituent power with a strong emphasis on the pre-political existence of a divine law that is both binding and guiding, but not necessarily the exclusive source of lawmaking. So-called "descending" tropes of political authority are in evidence in two primary forms: first, specific offices (most notably the Caliphate) are seen as ordained by God and obligatory on the Muslim community, which does not create them; second, power is frequently spoken of as being bestowed on rulers directly, without any mediation or authorization by the people. Where the ruler is said to derive his authority from human appointment, authorization, or acclamation, this is usually done by the "People Who Loose and Bind" (*ahl al-ḥall wa'l-ʿaqd,* scholars or other social notables) on their own authority (whether grounded epistemically or in social recognition) without election by the people they are meant to represent. Finally, while the authority of God's law is uniformly asserted, the texts in question—from constitutions to scholarly treatises—do not tend to be preoccupied with the *concept* of "sovereignty" and its precise location. As nineteenth-century constitutionalist movements were largely elite-driven affairs that pursued limited, legally-constrained governance as a path to political and economic modernization, they did not yet face opposition from mass movements using the language of Islam as a mobilizing ideology. Rather, their opposition came from entrenched elites (including traditional Islamic religious authorities) who had not yet formulated a coherent counter-revolutionary language.

Tunisian Constitutional Documents: 1857 and 1861

A province under the suzerainty of the Ottoman Sultan since 1573, the lands roughly corresponding to modern-day Tunisia had been ruled by a succession of local dynasties, first the Murādids (1613-1705) followed by the Ḥusaynids, until the nineteenth century. Politically and economically, Ottoman Tunisia followed a path comparable to nineteenth-century Egypt. It was led by a strong ruler with Westernizing aims (Aḥmad Bey, 1837-55), followed by a reactionary (Muḥammad Bey, 1855-59) and then another reformer (Muḥammad al-Ṣādiq, 1859-82). Both countries took excessive loans from European powers and went into bankruptcy around the same time. Both countries fell under colonial rule within a year of each other. Tunisia experienced a brief period of constitutional rule (1861-1864), which was suspended in the wake of a countryside revolt against the Ḥusaynid dynasty. This was followed by period of reform (1873-77) led by the historic figure of Khayr al-Dīn Pasha.[9] After Khayr al-Dīn's period of stewardship in Tunisia, there was the return of Beylical autocracy before the start of the French protectorate in 1881.

Despite this mixed record of political modernization, Tunisia can still lay claim to the first written constitution in a Muslim country. The process leading to that development was inseparable from increased European interference in Africa and the Middle East. In 1857 the Tunisian ruler, Muḥammad Bey, executed a Tunisian Jew for blasphemy after an altercation in the marketplace, an event that provoked diplomatic pressure by the French and British authorities on the Ḥusaynid ruler to formally enact a "Pact of Security" (*ʿahd al-amān*).[10] This document, promulgated on September 10, 1857, was in effect imposed on the Bey and was not yet a full constitution.[11] Like the 1839 Gülhane Decree, the Pact of Security consisted mostly in promises to uphold physical security, equality before the law, and full due process for all "subjects and inhabitants of our country, despite difference of religion, language or color." Its eleven substantive maxims or principles (*qawāʿid*) also contain the Bey's assurances for future equality and due process in the areas of taxation, religious freedom, military recruitment, minority representation in criminal courts, commercial law, and property rights for foreigners within Tunisia. The Pact's focus on legal equality and administrative regulation must be seen not only in the context of foreign colonial pressure, but also in terms of local elites' interests in state modernization. As Nathan Brown notes, such nineteenth-century

constitutional processes were "far more likely to be designed to shore up the state from the inside than satisfy European audiences."[12]

However, the Pact is framed in some suggestive language that reflects certain points of substance on the question of legal and political sovereignty. It begins with a formulaic expression of praise and gratitude to God and the Prophet, followed by the declaration that "the command that God has conferred on us in entrusting us with the affairs of His people in this land has imposed on us necessary rights and binding duties that cannot be performed without His assistance, on which we rely." The Pact thus reflects the view, current through the nineteenth century, that the authority to rule in some way directly devolves onto the ruler from God without any prior creation or appointment by the people. The ruler has strict *moral* obligations of legality and justice, but not the obligation to derive his authority from the more fundamental constituent or even delegatory authority or consent of the ruled.

The Pact does refer to the existence of a Sharīʿa Council "whose rulings are in force and obeyed"[13] and promises the creation of new legal institutions that might conceivably bind and hold the ruler accountable, but the creation of these institutions itself is not seen as an obligation on the ruler. It is a free act of delegation on his part. The Pact declares that Muḥammad Bey has "written to the leading scholars of this community and some notables about our resolve to establish councils comprised of pillars of our community to supervise criminal and commercial affairs." The only principled constraints on the ruler (apart from pressure from what the Pact refers to as "our friends, the great states") are divine, and thus strictly moral. The Bey promises that "we will not neglect anything in fully upholding the [people's] rights," which are posited by God rather than the ruler, and that "we have legislated on these political areas in a way that does not, God willing, clash with the divinely-ordained rules (*al-qawāʿid al-sharʿiyya*)."

At the same time, the *sharīʿa* is not characterized only as a strict code of rules or even fixed principles. Nor is it portrayed as an *insular* system of law or morality. The Pact observes that "we have seen the rulers of Islam and the great powers guarantee the security of their subjects, which they regard as among the acknowledged rights that are affirmed by both reason and nature. And if there is some worldly benefit (*maṣlaḥa*) in this then revelation (*al-sharʿ*) also bears witness to it because the *sharīʿa* was sent down to remove the morally responsible human from the impulse of caprice. Who commits himself and swears himself to justice is the closest to piety, and hearts are calmed only through justice and piety." This view of

the divine law blurs the line between a revealed law functioning as a set of rules commanded by God and a revealed law that harmonizes with natural needs and interests recognized by all humans, whether or not they have experienced a particular divine command.

More interesting from a theological perspective is the claim in the Pact's third rule or maxim (*qāʿida*) that "equality between Muslims and others in this land in their right to justice and equity is because the right to justice is based solely on the attribute of humanity, not any other attribute." Such a claim might be seen to call into question not only the traditional distinction between the rights enjoyed by Muslims and non-Muslims in Islamic legal procedure (for example, on witnessing and bringing claims), but also the classical theological basis for rights. The entire premise of the *dhimma* (protection) contract is that non-Muslims acquire rights and protections within the Islamic order on the basis of a specific contract, which has its own conditions and stipulations, rather than natural rights.[14] Indeed it might be asked why the Pact, and later constitution, needed to preserve the category of "*dhimmī*" at all (which it did) if the most important civil rights and obligations were held in common both as a matter of moral principle and positive law, as the Pact proclaims in its fourth point: "the *dhimmī*'s covenant of security (*dhimmatuh*) requires that he has the same rights as us, and the same obligations."

The terms of the agreement that led to the proclamation of the Pact mandated the creation of a council tasked with preparing a new basic law (*qānūn siyāsī*) that would result in a constitutional monarchy. In the Pact itself, the Bey conditions his own legitimacy, and that of his successors, on fidelity to the present Pact. However, the political covenant in this case is strictly between the Bey and God directly: "I testify before God and this great and lofty assembly, that I and my successors will have the right to rule only by swearing to uphold this Pact of Security, to which I have devoted my efforts." The pledge is seen as strictly to God, and no accountability for violating it is mentioned, other than to God. Invoking the Qurʾān (16:91: "Fulfill the pact of God when you have pledged it, and break not your oaths after solemnly affirming them, and having made God a Witness over you. Surely God knows whatsoever you do"[15]), the Pact declares oaths and promises inviolable—but does not preclude the present or future Bey from replacing an oath with a new one. Constituent power, such as it appears, lies with the Bey himself. Not even a cursory mention is made of the nominal sovereignty of the Caliph in Istanbul. In fact, the Pact cites one of the

most important Qurʾanic verses referring to God deputizing a lieutenant or vicegerent on Earth (the prophet David, in Q. 38:26), but in the context of affirming the Bey's own personal authority and, hence, moral obligation to "rule rightly amongst men," not to "follow whim and desire" or to "stray from the path of God."

Less than four years later, on April 26, 1861, a full constitution was adopted by a new Bey (Muḥammad al-Ṣādiq, r. 1859-82).[16] The constitution was drafted by a small committee that initially included four religious scholars (*ʿulamāʾ*). They resigned, however, after the first meeting on the grounds that such "political" activities belonged to the Bey and his entourage. It can only be a matter of speculation whether these scholars felt their influence to be negligible and wished to distance themselves from a document that might be seen as heretical from a religious perspective (as was to be the case in the first constitutional moments in the Ottoman Empire and Persia), or whether their deference to the Bey was grounded in traditional Islamic constitutional theory (*siyāsa sharʿiyya*) according to which the "secular" rulers enjoyed wide latitude for discretionary judgment in areas of policy or administration. That the Bey met with none other than Napoleon III in Algiers in 1860 with a draft of the constitution to get his approval for the document cannot but lend weight to the former speculation.[17]

The 1861 constitution bears the formal title of "Law of the Tunisian State" (*Qānūn al-dawla al-tūnisiyya*) and is comprised of 13 Chapters and 114 Articles. The constitution creates or recognizes the following institutions of governance: the head of state (stylized as "king" (*malik*) in the constitution, who is also the head of the Ḥusaynid royal family, which enjoys constitutional status), a Supreme Council (*al-Majlis al-akbar*), a Sharīʿa Council (*al-Majlis al-sharʿī*[18]), and various councils to supervise the affairs of the police, the military, commerce, as well as the normal complement of ministries. The document seeks to set out legal guidelines for the whole range of administrative affairs suggested by these councils. Chapters of the constitution are dedicated to the organization and regulation of ministries, budgetary allocations, and the rights of both citizens and foreigners.[19] But the most significant aspects of the constitution, from the standpoint of legally constraining the authority of the ruler, consist in the articles outlining the composition and functions of the Supreme Council.

The constitution begins (after a first chapter outlining the status and governance of the Ḥusaynid royal house) with a discussion of the rights and

responsibilities of the king. The contractual nature of the king's authority, implied in the Pact, is strengthened in Article 9 (II.1) of the constitution:

> The King is obliged, on his accession (*wilāya*), to swear by God and His covenant, not to violate any of the principles (*qawāʿid*) of the Pact of Security or any of the laws based on it, to protect the boundaries of the realm. This oath is to be pronounced in the presence of the People Who Loose and Bind, who are comprised of the members of the Supreme Council and the members of the Sharīʿa Council. Only after the oath does he receive the oath of loyalty (*bayʿa*), and if he violates the law intentionally after his assumption of power (*wilāya*) then the contract of loyalty to him (*ʿaqdat bayʿatihi*) is withdrawn.

There is very little that is startling here from the perspective of traditional Islamic constitutional theory. A few things merit notice, however. First, the question of constituent authority is almost completely neglected. The king's right to obedience is contingent upon his performance of certain obligations, but his right to accede to the throne in the first place is not derived from any kind of election or even nomination. Article 1 states simply that "the eldest of the Ḥusaynid family is the one who accedes to authority (*yataqaddam li'l-wilāya*) upon the death of his predecessor." There is no discussion of the origin of the claim of this family to the rulership and, notably, there is no authority in whose name the constitution is issued. The acceding king gives an oath to God as a public promise, but the text lacks both the claim that God is the direct source of the Ḥusaynid family's right to rule and the claim that it is God's law that the king is bound to enforce. The document lacks even the traditional *basmalah* ("In the name of God, the Benevolent, the Merciful") that begins almost all public forms of speech. Intriguingly, the prior source of legality and legitimacy that is referred to is actually the Pact of Security, which was issued in the name of the ruler's own authority. The Pact is thus treated not as a moral *Grundnorm* (the way that the *sharīʿa* itself might figure, or the way it is commonly said that the Declaration of Independence, rather than the Constitution, did for Lincoln), and more as a foundational text of concrete, historical legality.[20]

Second, then, the authority to which the king appears to direct his promise is the concrete assembly of the "people who loose and bind." What normally figures as a vague and functional concept in Islamic constitutional theory ("the people who loose and bind" are whoever the ruler has *in fact* agreed, or decided, to be ratified by) is here identified according to specific criteria. The text is specific that the king can loose his right to obedience

(the *bayʿa*), but the conditions and circumstances of this are not fully clear. The conditions speak of the king violating "the law" (*al-qānūn*), and although it can be assumed that what is meant is the present constitution, or basic law, itself, that is not entirely clear linguistically. (The text might have said "this law," for example.) Moreover, it does not say what kinds of acts would constitute violation of the law that would merit revocation of the *bayʿa*, and while it can be assumed that the two councils mentioned as the witnesses (not recipients) of the oath would be the authorities that could declare the *bayʿa* void, no procedures for this are codified. The furthest the text goes in this direction is Article 11 (II.3): "The king is responsible for his actions to the Supreme Council, should he violate the law."

The constitution, thus, represents a fairly monarchical conception of sovereignty. The king retains many of the classic marks of sovereignty: the king "has the right to pardon whom he wishes, if the offense does not pertain to the rights of another" (Art. 15 (II.7)), is the commander of all land and sea forces, makes all decisions on war and peace (Art. 13 (II.5)), and appoints directly most ministers and functionaries of the state (Art. 14 (II.6)), including the initial membership of the Supreme Council. But the authority of the Supreme Council, and thus the dispersion of certain core attributes of sovereign power, should in no way be downplayed.

Most prominently, the Supreme Council is declared the "guardian (*muḥāfiẓ*) of the pacts and laws and is the protector of the rights of all inhabitants. It prohibits the adoption of acts that oppose or weaken the principles of the laws or that would result in any inequality of persons before the government" (Art. 60 (VII.1)). But the Council's competencies were not only reactive in nature. Article 62 (VII.3) declared that "the Supreme Council may determine policies that appear to be in the interest (*maṣlaḥa*) of the state and the kingdom and propose them to the king. If it is adopted by the king in his Council of Ministers, it becomes law." More importantly, Article 63 designated a wide range of matters that could not be legislated on before having been approved by the majority of the Supreme Council: the adoption or abrogation of any law, raising or lowering import duties and taxes, increasing the ranks of the military, the removal of a public officials, and the introduction of new industries. All laws were to be registered and archived within the Council assembly building (Art. 69 (VII.10)). The Supreme Council also assumed certain judicial and administrative authorities, including hearing appeals from lower courts and even the crucial task

of "interpreting the language of laws if there is a disagreement about its meaning."

The Supreme Council might with some justice be regarded as an embryonic equivalent to both Houses of Parliament, combining legislative, judiciary, adjudicative, and administrative functions. The analogy to a single sovereign "Parliament" composed of the Commons, the Lords, and the King can be extended even further if we take into account the extraordinary influence of ministers like Muṣṭafā Kaznadār and Khayr al-Dīn over both the monarch and the Council, who were not only the driving force behind the constitution but also the actual electors of the Council members who sat on the appointment of the king. It is not an exaggeration to see an attempt to form a single sovereign state body with power and influence distributed between various sites but nonetheless unitary.

Of course, what is most notable about 1861 Tunisian constitution is that it sought to bind reigning monarchs to the rule of law without any explicit mention of Islam or *sharīʿa*, except for the single mention of a "Sharʿī Council," the powers of which were not discussed in the text itself. There is no mention of an official religion or any obligations toward "Islam" itself. This is not to say that concepts from the *sharīʿa* were absent.[21] Much of the political language is formulaically Islamic or traditional: subjects are referred to as *raʿāyā*; the king's accession begins not with a coronation but with a *bayʿa* given by the *ahl al-ḥall wa'l-ʿaqd*; and members of the Supreme Council are referred to with the title of "*mustashār*" (from the Qurʾanic notion of consultation, *shūrā*). More interestingly, the chapter on the rights and responsibilities of the subjects of Tunisia begins with the recognizably *sharʿī* guarantee of "security for their persons, honor, and wealth" (Art. 86 (XII.1)). But the bulk of the remaining articles outlining political rights and duties deal with matters of due process, legal appeals, military conscription, taxation, and freedom of commerce and industry. We do not need to see any of these concerns as alien to Islam, or dismiss the constitution as a foreign imposition (which it wasn't), to hesitate in referring to it as a codification of principles and concepts from the tradition of Islamic constitutional theory and practice.

The constitutional period lasted just a few short years. It was unpopular in the provinces, where it was associated with tax increases. In 1864 there was a revolt in the rural provinces that led to an absolutist reaction. The Bey remained in power, but the constitutional experiment was aborted. When the reformist statesman Khayr al-Dīn Pāsha returned as the chief

minister between 1873–1877, he was to continue political and administrative reforms through direct executive influence. However, the Tunisian constitutional moment is not only of symbolic interest. It is also important for occasioning two important treatises by functionaries close to the court and the constitutional process: Aḥmad Ibn Abī al-Ḍiyāf and Khayr al-Dīn Pāsha himself. I consider each of these thinkers in turn.

The Political Theory of Aḥmad Ibn Abī al-Ḍiyāf

Aḥmad Ibn Abī al-Ḍiyāf (Bin Ḍiyāf; 1804-1874) served as a secretary and advisor to the Ḥusaynid Beys over most of the period between 1827 and 1872. However, Bin Ḍiyāf fell somewhat out of favor of Muḥammad al-Ṣādiq in the time after the suspension of the constitution in 1864, which provided Bin Ḍiyāf the time and freedom to compose his multivolume history of Tunis, *Itḥāf ahl al-zamān bi-akhbār mulūk Tūnis wa-ʿahd al-amān*. It is the introduction to that work that concerns us here.[22] The entire work is styled after the *Kitāb al-ʿibār* of his great Tunisian predecessor, Ibn Khaldūn (1332-1406), and Bin Ḍiyāf's Introduction ("*Muqaddima*") of course pays homage to the part of Ibn Khaldūn's work that has been most widely read in the centuries after its composition.[23] The comparison between himself and Ibn Khaldūn was most obviously intentional, and has framed the reading of Bin Ḍiyāf by such scholars as L. Carl Brown. But not only does the image of a great courtier free from the daily pressures of politics using his time to compose his theoretical reflections on politics also call to mind thinkers like Machiavelli, or even statesmen proper like Cicero, Bin Diyāf's treatise is perhaps also better compared to those latter examples than to Ibn Khaldūn's in that it is a theoretical statement on the purposes of government and the justification for constitutional constraints on the Tunisian monarch rather than a sociological theory of the rise and fall of dynasties.

This is not to say that Bin Ḍiyāf's treatise was an abstract work of political theory devoid of practical, sociological concern. His primary thesis was that the despotic rule of Muslim monarchs was the cause of the present weakness and vulnerability of Muslim states. But the form that his work took was less a scientific study of the causes of the strength and weakness of political regimes than a normative investigation into the nature of Islamic governance, in order to show that non-despotic constitutional rule was not only demanded by the exigencies of the times but also prescribed by the *sharīʿa*. To achieve this, Bin Ḍiyāf seeks to establish that Islam ordains a system of rule that is distinct from two primary alternatives: absolutism (to which some Muslim rulers had, heretically and unjustly, fallen prey) and

full republicanism. The interest of a treatise like this for the purposes of this article is not only the insight it provides into the early constitutional moments in the modern Islamic world, but also to fix ideas and concepts. Bin Ḍiyāf's work is as much a report about what was regarded as the traditional Islamic heritage as it is a move in the reformation of that heritage. Texts like this are crucial for appreciating the novelty and innovation of later works.

Bin Ḍiyāf begins with an orthodox affirmation of governance as such (*mulk*, *ḥukm*) as a necessary condition for human beings, known with certainty both through reason and revelation.[24] The arguments here are familiar: the earliest Muslims all settled on a consensus (*ijmāʿ*) about the necessity of government; humans cannot preserve their existence without coming together and cooperating in securing their needs; humans require social life to achieve even the most basic goals of assuring their food supply and are thus "political by nature"; at the same time, humans suffer from a kind of "unsocial sociability"—they are drawn to each other for the purposes of cooperation but also pursue their own animal desires selfishly within society, leading to strife and the domination of the stronger over the weaker—that necessitates a coercive "restrainer" (*wāziʿ*) in order to prevent oppression, since only few humans can restrain themselves on the basis of their reason or through the guidance of religion. The rest must be coerced through force. Neither Hobbes nor Kant would find this explanation unfamiliar.

Establishing government is a strict religious obligation on the entire community; indeed it is regarded as an act of mercy or grace (*faḍl*) from God. But like many collective or communal obligations, a portion of the *umma* can fulfill the obligation for the rest. In this case, Bin Ḍiyāf writes that the obligation to establish government "refers to the election by the people who loose and bind." Thus, from the outset we observe the traditional preemption of a radical constituent authority on the part of the people. The people have no choice whether to govern themselves coercively and there is no *necessary* right of the multitude to participate in the selection of their rulers, or even of their representatives (the people who loose and bind) who do elect, or ratify, the ruler.

But the authority to constitute is not quite as narrow as it might be. A very narrow view would hold that the extent of the *umma*'s authority is to recognize their representatives' approval of the occupant of a particular obligatory office (the caliphate). But Bin Ḍiyāf loosens this slightly in taking a narrow view of the existence of the caliphate. He cites a *ḥadīth*-report in

which the Prophet predicts that the true caliphate will last for only thirty years after him, and then dates the end of the caliphate to the defeat of ʿAlī's son Ḥasan at the hands of the first Umayyad, Muʿāwiya. After this, all government of Muslims has been mere *mulk*. And so the *umma* (as potential popular political agent) is not strictly constrained to follow the occupant of a single divinely-constituted office. Moreover, while rulers selected (or merely approved or acclaimed) by a narrow and self-recognized body of people who loose and bind are legitimate, there is nothing precluding a broader portion of the people from participating in this process of appointment (remembering that appointment even to existing, constituted offices is a reflection of the ideal of sovereign power), although this theme is not pursued.

With this Bin Ḍiyāf turns to his discussion of the three kinds of *mulk*: absolute, republican, and that "limited by divine law (*qānūn sharʿī*) or political reason." The first two forms are discussed and then rejected in favor of the third. However, Bin Ḍiyāf acknowledges the presence of forms of both absolutism and republicanism in Islamic political practice and so does not treat them merely abstractly. None of the three treatments is aimed at perfect conceptual precision or systematic comprehensiveness, and so his account of sovereignty and authority will have to be assembled from his discussion of all of them.

Absolute rule is not defined carefully in terms of any general theory of sovereignty, but is rather described in terms of its practices. As a normative ideal for governance on Earth it is rejected outright as only fitting for "God, to whom belongs all creation and command."[25] In the hands of a mortal king—"who is not infallible and is constrained by the same things as all other men"—it can only manifest itself as "driving people with his stick to that which he wants from them, on the basis of his own judgment about what is most beneficial." It is clear for Bin Ḍiyāf that this form of rule is not the ideal that Islam prescribes. What is more important from a normative perspective is the response to arbitrary rule on the part of the governed that Islam prescribes. What are the limits of obedience and what means is it permissible for the ruled to use in correcting a tyrant?

The confusion arises in this context partly from the habits of submission and obedience that subjects of Muslim rulers have developed. So overbearing is the fear of a sultan's guards that "the souls of some of the subjects develop such a hue of confinement and submission that the thought of opposing him does not even occur to them in secret, and deviation from

obedience does not even stir in their conscience, from the way they have been shaped by the humiliation of impositions and repression." More urgently, though, Bin Ḍiyāf confronts the widespread, but false, view that any kind of rebellion or disobedience (*khurūj*) to the powers that be (*ūlū al-amr*) is forbidden by the *sharīʿa*, a view that he attributes to later Muslims.

The scriptural basis for this—the analogue to Romans 13:1—is Q. 4:59: "Oh you who believe! Obey God, the Prophet, and those in authority from amongst you" and, more directly a *ḥadīth*-report attributing to the Prophet Muḥammad the prediction that "there will be rulers who oppress you (*yaʿsifūn*)" and the injunction to "bear them patiently (*ʿalaykum al-ṣabr*)" since the rulers will be rewarded or punished by God. However, this command is famously qualified in the event that a ruler commands not only disbelief (*kufr*), but also sin (*maʿṣiyya*), "for there is no obedience to a creature in disobedience to the Creator." Thus, the question of obedience for Bin Ḍiyāf relates to the prescribed scope of the "patience" commanded for Muslims and to the kind of ruler's command to sin that lifts the obligation to obey at all.

Bin Ḍiyāf is not reluctant to observe how many prominent Islamic scholars from the past have counseled against not only rebellion but also passive resistance to unjust rulers. And he does not deny that patiently bearing tyranny may indeed be the preferred or superior (*awlā*) act, given the likelihood of revolt leading to bloodshed. However, he denies that it is required absolutely by the divine law, citing a number of canonical scholars who qualified the obligation of obedience or assistance to a ruler. For Bin Ḍiyāf the legal ruling within the *sharīʿa* on the question of obeying an unjust ruler is that it is merely recommended (*mandūb*), leaving open the space for both conscience and political judgment in deciding to passively or actively resist a ruler. He invokes "the majority of the pious forefathers (*salaf*) of this *umma* who held that contract of the Imamate is dissolved when its very purpose—which is justice and restraining aggression—is violated. And if [a ruler] violates and opposes the reason for which he was appointed then he is not among the Imams."[26]

This discussion might appear fairly mundane, insofar as theories that allow for no disobedience or revocation of loyalty in any circumstances are the exception. But this question opens onto a somewhat deeper dimension of the problem of sovereignty in Islamic political thought. For the question is not only about the limits of obedience to a ruler, but also about the very identification of those who hold claims to sovereign authority on loan from

God. As Bin Ḍiyāf notes in this context, scholars in the Islamic tradition have argued that the "those in authority from amongst you" verse (Q. 4:59) does not call for unlimited and unconditional obedience, but also that it may not even refer exclusively to the holders of coercive power.

He quotes the great scholar Ibn ʿAbd al-Barr's (d. 463/1071) comment that there was dispute amongst the scholars about the meaning of the phrase "people of authority," and that "some of them asserted that the people of authority are the people of justice, benevolence, virtue and piety, along with the capacity to uphold them." Insofar as the concept of sovereignty in a theocratic framework involves an identification of those who hold epistemic and adjudicative authority in disputes over the interpretation and application of divine law, then the Sunni tendency to disperse that authority throughout the informally defined class of scholars is no less than a diffusion of a crucial mark or aspect of sovereignty. At the very least, the comment by Ibn ʿAbd al-Barr that Bin Ḍiyāf quotes approvingly implies both (a) that the authority of worldly rulers is contingent not only on the legality of their ascension to power but also on certain personal qualities of virtue and (b) that the judgment of those qualities (both what they consist in and whether a particular person possesses them) cannot fall to the rulers themselves, who cannot be the judges in their own cases, so to speak.

Bin Ḍiyāf thus stresses that a strong presumption against actual rebellion (*khurūj*) and active disobedience can in no way preclude the public censure of rulers. He invokes here the well-known *ḥadīth*-report "the best *jihād* is a word of truth before a tyrannical ruler" (as well as a number of other similar dicta imploring some form of speaking truth to power), but the more important notion is that this obligation is directly derived from what is perhaps the foundational principle of Islamic political ethics, the obligation of all believers to "command the right and forbid the wrong." Just as with the epistemic aspect of adjudication, the *application* and *enforcement* of what is regarded as God's judgments must be regarded as a crucial attribute of sovereignty. Theories of political obligation that seek to reserve for a single authority (a monarch) a monopoly of sovereign power frequently include the right of pronouncing on what is just and enforcing the judgments that follow from that. Thus, we cannot fail to see theories of political authority that refuse the monopolization of judging publicly what is right *and* the license to act politically on that judgment as dispersing rather than consolidating core attributes of sovereign power.

If the authority not only to make public judgments about justice but also to publicly command the right and forbid the wrong through some means is not seen by Sunni Muslim scholars as a monopoly of the ruling sultan, then where is it dispersed? A first line of defense against unchecked absolute power is, of course, the scholars. The semi-charismatic authority of many early scholars (most notably, Aḥmad ibn Ḥanbal, the eponym of the Ḥanbalī school of law) was derived not only from their superior knowledge, analytic acumen, or personal virtue, but also from stories of them confronting unjust rulers and, often, paying the price. Many aspects of sovereignty in a theocratic imaginary—deciding on what the law means, applying it in courts, appointing the ruler, and, ultimately, judging on the limits of the ruler's authority and seeking to enforce this—are traditionally seen both in Sunni and in post-Imamic (post-Ghayba) Shiʿism as dispersed throughout the body of the scholars. In Sunnism, moreover, that body is loosely defined and even more loosely regulated, which in effect leaves certain elements of sovereign authority always un-monopolized. This view is expressed somewhat more formally by the traditional dictum, cited in this context by Bin Ḍiyāf, that the "scholars are the heirs of the prophets."[27]

But what is intriguing about this obligation to command and forbid is that it ultimately falls to all individual Muslims. Bin Ḍiyāf argues on the basis of a chain of traditional authorities, chiefly the great Abū Ḥāmid al-Ghazālī (d. 505/1111), that all Muslims sin when they let vice or injustice go unadmonished. At this stage this notion of popular authority is put to only minimal use. Bin Ḍiyāf is arguing only against the view (held by very few anyway as a normative ideal, whatever practice might show) that the worldly ruler in Islam holds absolute power and that the subjects of that power have an absolute duty of patience and obedience. And so here he only means to establish the principle that power is limited and to be checked by both legal and moral constraints.

To this end he argues on the basis of both *sharīʿa* authority and reason. He argues that "absolute rule violates the divine law (*al-sharaʿ*) because it treats God's servants and His lands on the basis of individual whim and caprice, whereas all divine laws (*al-sharāʾiʿ*) were sent to deliver the morally accountable person from the influence of whim and caprice." Q. 38:26,[28] the verse that appoints David as God's lieutenant or vicegerent (*khalīfa*), is invoked here since it involves God commanding David to judge (or rule) amongst the people with justice and not to follow his own personal whim, "which will lead you astray from the path of God."[29] But absolute rule "opposes reason as well, because it is domination and coercion, and these are

the effects of anger and the animal faculty of man.[30] The very purpose of installing a restrainer (*al-wāziʿ*) is to ensure equity, remove aggression, bring about public welfare, and prevent corruption. How can the one who is installed to remove injustice engage in it?"[31]

The aim of the nineteenth-century constitutionalists was to regulate and rationalize state power from within, not to justify popular revolution on the grounds of the *umma*'s ultimate constituent authority. A major theme in Bin Ḍiyāf's book is the essentially sociological question that animated pre-modern works like Ibn Khaldūn's, of what makes regimes last and enjoy stability. Thus, his interest in political justice is not only driven by moral concerns. Rebellion and civil unrest are to be avoided for moral reasons, but this must begin with an account of their causes. Here he sees something both natural and noble in rebellion: "This is reason for the great number of rebels against kings of this type…disobedience is hidden within the souls of men by nature, like fire in kindling that emerges at the slightest movement, because human nature finds harm and injury unbearable and looks for the first opportunity to shake them off."[32] Since the demand to bear oppression patiently is both religiously unsound and naturally unreasonable, the solution to the threat of unrest and rebellion must lie in the ruler's justice. Here Bin Ḍiyāf simply extracts multiple pages directly from the self-explanatory section of Ibn Khaldun's *Muqaddima* entitled "injustice causes the downfall of civilization and destruction of the state."

Bin Ḍiyāf is also an astute observer of what he regards as the remaining enclaves of absolute rule in Muslim civilization. He wisely turns his gaze to the Ḥasanid ʿAlawite sultanate in Fes and Marrakesh (Morocco) for an example, rather than to his local Ḥusaynid patron.[33] Bin Ḍiyāf identifies the following attributes of absolute monarchical rule in this context: the sultan issues judgments on the basis of his own independent reasoning (*ijtihād*) in administrative and tax matters, and he rules on punishments (*taʿzīr*) for criminals according to his own judgment each week in a special place called the "*mishwār*" (place of consultation) while dressed in full military uniform.[34] The oath of loyalty (*bayʿa*) received by each ascending ruler is regarded as constituting the full-fledged canonical Imamate (*al-imāma al-sharʿiyya*) and it is received at the tomb of the dynasty's founder (Mawlā Idrīs, a direct descendent of the Prophet through ʿAlī and Ḥusayn). Bin Ḍiyāf claims that all Moroccans accept the personal dignity or charisma (*karāma*) of this line and even that some of the commoners regard Mawlā Idrīs as the true ruler of the country.

At the same time, even this kind of semi-charismatic regime of personal sovereignty is portrayed as diluted by legal constraints. The sultan does not directly interfere in the application of the canonical criminal punishments (*qiṣāṣ* for homicide and the *ḥudūd* for crimes against God) and the other areas of Islamic civil law. These are adjudicated by the *sharīʿa* judges, who are supervised by the religious scholars, although the sultan does retain an ultimate supervisory role over the entire justice system. More importantly, the terms and conditions of the *bayʿa* are written down and deposited at the tomb of Mawlā Idrīs, after the sultan himself signs it and takes an oath before God in front of all of the assembled scholars, nobles, and other notables who constitute the *ahl al-ḥall wa'l-ʿaqd*. Bin Ḍiyāf observes that if these same electors consider that he has violated his obligations under the *bayʿa*, they assemble at the tomb and call on him to correct himself as a first step toward removing him. If he reforms then the obligation to obey is restored; if he doesn't then the assembly can formally declare his removal. Bin Ḍiyāf concludes that "this sultanate of noble lineage has a limit at which it stops in consideration for this written document and most of them are to be praised for their piety, observance of God, upholding of God's law, and their heeding of advice and exhortation."[35]

Having discussed the challenge of absolutism at some length and dismissed forcefully the claim that the divine law requires unlimited patience and forbearance from Muslims in the face of tyrannical, lawless rulers, he quickly rejects the alternative of either full popular sovereignty or republican rule (*mulk jumhūrī*). He praises the system that he sees in countries like America and others for its respect for law, limitation of the pomp and privileges accorded elected rulers, and practices of consultation, and he recognizes the worldly benefit (*nafaʿ dunyawī*) that arises from all of this for both the masses and the elites. His rejection of this from an Islamic standpoint is quite straightforward. It is "because the office of the Imamate is required of the *umma* by the religious law and they sin by abandoning it, just as with the case of abandoning the obligation to confront and correcting wrongs. Many rulings of the religious law are built on the existence of the Imamate related to worship and other matters."[36]

He reports that a French treaty signed with Tunisian authorities from 1729 refers to the Tunisian system of rule as "republican," after a commander had witnessed a consultation session between various local military officers and other officials. This misrecognition of the local reality provokes Bin Ḍiyāf into a brief history of the governance of Tunisia since the Umayyad period. The purpose of this history is not only to refute an unwelcome

accusation but also to diagnose a malaise. Bin Ḍiyāf asserts that Tunisia has always been governed monarchically. At present, and since 1573, Tunisia has been a semi-autonomous region (*iyāla*) the governors of which (the Murādids and then the Ḥusaynids) enjoy legitimate *delegated* authority (*wilāyat al-tafwīḍ al-sharʿiyya*) from the Ottoman sultan.[37]

The extent of this delegated authority in Bin Ḍiyāf's telling tracks closely both the classical constitutional rules (*al-aḥkām al-sulṭāniyya*) of Māwardi but also the theory of *siyāsa sharʿiyya*. He notes that the local Beys have the permission to act at their own discretion in the public interest (*maṣlaḥa*) and to "uphold the obligation of *jihād* in order to bring people into the religion of Muḥammad," alongside other privileges.[38] Yet despite the description of the Tunisian system of rule and relationship to the Ottoman sultan as fully in accordance with *sharīʿa* principles, Bin Ḍiyāf attributes to this state of affairs responsibility for Tunisia's regression (*tarājuʿ*) and stagnation (*wuqūf*). The "first signs of dawn appeared on the horizon," however, precisely on April 25, 1861 with the enactment of the Tunisian constitution. For him this was the advent of "rule limited by law," which is in his account the true political doctrine prescribed by Islam.

What is "rule limited by law" and how does it distribute sovereign powers? A first crucial point, particularly in light of his grounds for rejecting republican popular sovereignty, is that governance limited by law is to be distinguished from the ideal caliphate, or imamate. It is the best form of government *after* the caliphate. That Tunisians of Bin Ḍiyāf's day might have regarded themselves as the distant subjects of an existing caliphate—indeed, one that was reforming and modernizing along the lines favored by Bin Ḍiyāf and his like-minded contemporaries—only makes this more noteworthy. Moreover, shortly after rejecting the principle of republican governance on the "statutory" grounds that it excludes an Islamic obligation to fill the particular office of the caliphate, Bin Ḍiyāf praises governance limited by law partially on the grounds that it is a principle not limited to Muslims; Persians and certain "people of Rome" are praised for being the most resistant to the tyranny of absolute kingship.[39]

But Bin Ḍiyāf is obviously not theorizing a generic form of constitutional governance in this context. He is concerned to elaborate the kind of legal constraints envisaged by Islamic norms. Here, two themes seem to dominate. First is the idea of an entirely pre-political, binding legal framework that always pre-exists any particular political order. Political regimes do not trace their legitimacy or authority to any concrete founding

or constituent moment (although the legal practices and covenants of particular orders may embody valid norms). Rather, the legal constraints are seen as those codified or exemplified by early Islamic political practice and thus prior to and more fundamental than any historically concrete constitution. Second, and somewhat in tension with the preceding, is the contrast between a permanent, quasi-natural conception of justice and the unavoidable historical changes that a political regime must accommodate. Bin Ḍiyāf writes that "the law (*qānūn*) is based on what is required by the time and the political situation, like the circumstance of these times in which eyes and ears have been opened and antipathy to injustice is natural. Everything can be overturned but nature and people are more similar to others of their times than to their fathers. Whoever tries to outrun his age will stumble."[40] Combined, the two dominant themes stress both that justice and legal constraint are principles that precede any political order (and are thus not instituted or constituted by it) but also that this is less an injunction to restore a particular original political form than a call to adopt specific positive laws appropriate for each time and place that are nonetheless compatible with unchanging standards of justice.

The harmony of the two themes is made possible by the abstract and unwritten nature of the law that constrains Muslim rulers. Where Bin Ḍīyāf might be expected to discuss classical Islamic works of constitutional jurisprudence in detail, he instead intones that "the law of Islamic governance (*mulk*) is the Great Qurʾān and the sayings of the Messenger…and then the deductions (*istinbāṭ*) of the great scholars—the heirs of the prophets—from the Qurʾān and sunna using analogy and hewing to the objectives of the divine law (*maqāṣid al-sharīʿa*) for mankind."[41] The experience of the earliest successors to the prophet is used to establish a model of personal virtue on the part of rulers, rather than an original institutional model. The earliest rulers feared God, consulted the public, and allowed themselves to be admonished from the pulpits. While some later (ʿAbbāsid) rulers expanded their individual freedom to judge and rule on the basis of exceptional religious knowledge or perfected intellect, this was precisely the mark of corruption and injustice in later rulers. The evil that the rule of law seeks to avoid is excessive personal authority to judge and rule claimed by kings and sultans.

Thus, Islamic government is "limited by law" at the constitutional level only in the sense that rulers are constrained by their *piety*. It is a *moral* dialectic between the virtue of self-restraint and the vice of arbitrary autocracy that frames Bin Ḍiyāf's enthusiastic endorsement of modern

developments in constitutional codification. Of course, the surplus ruling authority is meant to be shared with none other than the religious scholars. Bin Ḍiyāf quotes enthusiastically from a work of Ottoman historiography that attributed to Sultan Sulaymān ("the Magnificent"; r. 1520-66) the view that "the soundest and most proper action is for me to place the matter [of preventing his descendants from violating the *sharīʿa* or neglecting religious duties] in the hands of the *ʿulamāʾ*, who are in charge of making judgments. If they should see from any of the rulers a deficiency or fault in any aspect of these matters…they will prevent them and restrain them for transgression."[42] As the guardians of the law in a regime where law precedes political power, the scholars are the rightful participants in political sovereignty. The army—"created to defend religion and its people from the Sultanic force"[43]—is only a backstop against executive transgression when scholarly exhortation and suasion fail.

This is most visible in the scholars' autonomy within their own courts (that is, ordinary civil and criminal courts, to be distinguished from "complaints courts" (*maẓālim*) that appeal directly to the executive or special courts for judging soldiers or others in the ruler's retinue), as well as their public power to advise and admonish the ruler. So, "law" constrains to the extent that there is an existing body of law that must be applied amongst Muslims that the executive has no authority to create or alter.

But even here Bin Ḍiyāf is pulled in the direction of abstraction and flexibility. In addition to the fundamental variability of the constitutional arrangements, "which admit of variation according to nations, conditions, regions, times and customs, since the only necessity is justice and all laws are but means to that," he writes that even positive civil laws can be "religiously legitimate by [revelatory] text or by what the revealed law takes into account at its root," mentioning that the laws of European countries of his day can secure justice (and thus political stability) as well as traditionally Islamic laws.[44]

Bin Ḍiyāf's defense of constitutionalism can be summarized as the imposition of laws that "provide for the security of life, wealth and honor"[45] against rulers' arbitrary power, particularly in the area of taxation and use of public wealth. More than fidelity to a particular statutory institution or office (like the caliphate) or procedural legality in the assumption of office or passage of laws, it is the promise of predictability and consistency in daily life that characterizes "governance limited by law" for Bin Ḍiyāf. This pragmatic priority for stability is revealed, for example, in his account of the value of the core Islamic principle of consultation (*shūrā*). Broad-based

input on laws is valuable for epistemic purposes (to produce better laws), but the publicity of consultative procedures is perhaps more important. He writes that the masses do not submit to laws based on public interest without a process of consultation, particularly when the laws pertain to taxation and expenditure. Excessive autocracy in governance also leads to the need for excessive expenditures to protect an insecure ruler and to project his personal glory and majesty. Thus, one argument for the rule of law and procedures of consultation is that they depersonalize state decisions and reduce motives to borrow derived from an individual ruler's taste for honor and glory. If decisions about taxation, borrowing, and spending are spread out to the "people of consultation," passions and whims are replaced with expertise, with a benefit to the public interest.[46] Similarly, even broader representative or consultative assemblies than that which existed in Bin Ḍiyāf's time in Tunis or Istanbul but which were observed north of the Mediterranean were praised largely for the way they signaled to the ruler that he had gone too far, thus enabling him to pre-empt rebellion.

It is worth noting that at this point in the development of modern Islamic political and constitutional thought, the ideal of a single monarch or executive bearing many of the classical powers and markers of sovereignty is still very much assumed. A ruler who limits himself according to legal customs is to be regarded in traditional terms as "the shadow of God on Earth" (*ẓill allāh fi'l-arḍ*).[47] A just sultan is regarded as personally holding in trust (*amāna*) the wealth of God and His servants, is "loved and obeyed, and holds in his hand the force to protect religion and realm," holds full powers of appointment to civil and religious offices, declares war and peace, appoints his own successor, commands the army, guarantees the performance of communal religious obligations, holds ultimate powers of punishment and pardon, and is worthy of glorification and protection.[48] Bin Ḍiyāf is fulsome in his praise of Ottoman developments represented in the *Khaṭṭ al-sharīf* (which he transcribes fully in the present text), which issues solely from the sovereign authority of the Ottoman caliph.

Bin Ḍiyāf's political theory is thus both cautious and closely bound to the concerns of his time. It is a theory of state consolidation and stability before it is a theory of either religious fidelity or popular legitimacy. What then can we learn from this nineteenth-century treatise? A number of aspects stand out.

First, Bin Ḍiyāf does not elaborate an explicit theory of sovereignty. No single word appears to correspond to supreme legislative authority or the power to command. This is not to say that the powers and attributes of

sovereignty are ignored. It is true that he assumes a kind of monarchical sovereignty that shares the prerogatives of law-making and adjudication voluntarily. And the authority of divine law (whether understood as a body of texts or a body of principles) is not questioned. But "sovereignty" is not yet an ideological *problem*. There is no anxiety that a codified constitution or borrowing from non-Islamic laws might be a violation of God's sovereignty. The notion of republicanism is rejected but not on the grounds that it is based on an illegitimate principle of popular sovereignty. Similarly, for all the talk of consultation and the public interest, no particular concern is demonstrated to ground the ruler's status as an agent of the people on the people's prior sovereign authority. The central problems of the text are justice, stability, order, and a moderate form of progress.

Second, the influence of classical *siyāsa sharʿiyya* doctrine is very much in evidence, as suggested by two primary fields of discussion. A first, less technical one is simply the notion that worldly governance must aim at the welfare and interests (*maṣlaḥa*) of the governed. Slightly more technically, it refers to the realm of policy and decision-making not predicted by religious laws with a revelatory textual basis. The idea that the divine law in the form understood and applied by the religious scholar is capable of governing all aspects of society is scarcely considered. And thus there is little anxiety about the basis of public or civil laws that aim at public welfare. There is an un-self-conscious praise for European laws on public matters that is voiced precisely in the context of elaborating Islamic *religious* precepts and objectives.

Third, there is very limited concern with popular authority or participation in politics. Related to this, the notion of the vicegerency (caliphate) of God is never connected to the status of the people-at-large (the *umma*). The Qurʾānic verses on God's designation of a deputy are used to precisely opposite effect: to establish the necessity of some form of monarchical (yet limited) government.

The Political Theory of Khayr al-Dīn Pāsha

Khayr al-Dīn Pāsha (1822–1890, sometimes known by the Turkish rendering of his name, Hayrettin Pasha) was one of the great Ottoman statesmen of the nineteenth century. He was a Circassian, born in Abkhazia, who was enslaved and sold to a notable in Turkey, where he received an elite education in the Islamic sciences. At age seventeen he was sold into the court of Aḥmad Bey in Tunis, where he continued his studies in the ruler's palace and the Bardo Military School, enhancing his traditional Arabic and

Islamic education with the study of the modern military sciences. His exceptional abilities led him to the heights of political power both in Tunis, where he served as Grand Vizier between 1873–1877, and Istanbul, where he held the same position for only eight months over 1878–1879. He was one of the primary forces behind the issuing of the Tunisian constitution and served as the head of the Supreme Council created by it. As Grand Vizier, he was the author of modernizing reforms in the areas of finance, administration, and agriculture.

Khayr al-Dīn provided much of the political leadership behind the modernizing and constitutional movements in Tunisia and the Ottoman state; he also attempted to provide a theory of the relationship between the rule of law and political stability and progress, and at the same time a refutation of religious objections to formal constitutionalism as contrary to the *sharīʿa* and the unitary sovereignty of the ruler. His great 1867 treatise *Aqwam al-masālik fī maʿrifat aḥwāl al-mamālik* (*The Straightest Path in Knowing the Conditions of States*) is nicely complementary to the volumes composed by Bin Ḍiyāf. While both texts include a theoretical introduction to the question of legitimate governance in Islam in light of history and the *sharīʿa*, and both invoke the legacy and authority of Ibn Khaldūn's views on the necessity of justice for political prosperity, where Bin Ḍiyāf's text follows up his *muqaddima* with a comprehensive, multi-volume history of Tunisia, Khayr al-Dīn's introduction sets up a political analysis of the various countries of Europe (not failing to include even the smaller Germanic principalities of his day) and then more succinct treatments of the political development of the various continents of the globe. Khayr al-Dīn's avowed purpose in "mentioning the means by which the European states have attained their present invincibility and worldly power is to enable us to select from those means what is suitable for our present situation and what supports and is in accord with the texts of our *sharīʿa*."[49]

Khayr al-Dīn's introduction is divided into an exploration and defense of the Tanẓīmāt program, a brief summary of European civilization, and a summary of his discoveries and conclusions. A number of themes dominate these sections. First, Khayr al-Dīn identifies "men of religion," and a certain religious consciousness in general, as a primary source of resistance to the modernizing reforms of the Tanẓīmāt. Second, he argues that justice (in the form of governance constrained by law) is in the first place *instrumentally* beneficial to civilizations. Echoing the classical trope of the "Circle of Justice,"[50] over-taxation, arbitrariness, and oppression lead not only to unjust infringements on rights, but to the immiseration of society.[51] Third,

Khayr al-Dīn seeks to show that all societies must somehow solve the *quis custodiet* problem (or, following Ibn Khaldūn, the need for a restrainer on he who restrains others, the *wāziʿ al-wāziʿ*) if they are to be governed justly and prosper socially, but Muslims are actually advantaged over all other civilizations since their *sharīʿa* is already structured as a pre-political rule of law that imposes limits on rulers. Fourth, legally-established constraints on rulers and legal requirements for the ruler to take the advice of experts and religious scholars do not, in fact, subvert the "unity of command" (*waḥdat al-amr*) traditionally envisaged by Muslim political theorists.

From the beginning of the text it is clear that Khayr al-Dīn regards religious objections to the Tanẓīmāt reforms and written constitutions as a primary obstacle to their success. He says that anyone who appreciates that the Islamic *sharīʿa* is concerned with human welfare in both "abodes" (this world and the next) will be "distraught to see some scholars of Islam, who are in fact entrusted with considering the circumstances of the age when issuing rulings, resistant to investigating domestic events and to see that their minds are [completely] empty of knowledge of things foreign."[52] This resistance was based on two distinct misconceptions that Khayr al-Dīn seeks to dispel. First, he expresses frustration with "the persistence in opposing anything, [however] compatible with our divine law, that is praiseworthy from the behavior of others, simply because the idea has implanted itself in their minds that any behavior or organization on the part of non-Muslims must be abandoned, their books must be renounced and not mentioned and, in fact, anyone who praises something from them must be rejected."[53] Second, and more interesting for comparative constitutional purposes, he seeks to refute the view that incorporating the views of either expert or religious advisors in the formulation of policy would constitute a restriction of the Imam's jurisdiction or executive powers.[54]

Khayr al-Dīn devotes whole sections to establishing that whatever in recent European experience is in harmony with the Islamic *sharīʿa* may (in fact, *must*) be adopted by Muslim states. The psychological aspects of antipathy toward borrowing from Europeans are of less importance here than Khayr al-Dīn's account of what the "political *sharīʿa*" is. He has little trouble finding classical scholarly authorities to defend his position that "we are not forbidden from imitating in others that which does not oppose the requirements of our holy law."[55] But the important point is that the contemporary political and economic weakness of Muslim societies *is* a matter for religion, insofar as Islam is not indifferent to the worldly success and independence of the Muslim *umma*. Thus, whereas the present strength

and independence of European states is due to their own prior political "*tanẓīmāt*," Muslims are required to investigate the organizational conditions for such success.

But, for Khayr al-Dīn, it is not simply that these are technical, administrative reforms that are permissible to adopt because they are religiously indifferent. Rather, he views modern political reforms as based on the "two pillars of justice and freedom, which are both basic principles of our *sharīʿa*."[56] Justice and freedom are part of God's law in the two senses in which God gives law: they are enjoined principles of the revealed normative law, and they are part of God's scheme of natural and social causality. He writes that "it is God's custom (*ʿāda*) in his lands that justice and good administration of things are among the causes of the growth of property, population, and wealth."[57] It is worth adding here that it was conducive to the aims of nineteenth-century Muslim thinkers to portray such European progress as owing nothing to Christianity. If non-Muslims stumbled upon beneficial reforms it was in spite of their religion ("the Christian religion does not interfere in politics, since it is founded on celibacy and asceticism"[58]); whereas for Muslims it is precisely their all-encompassing religious law that facilitates political justice. This is not surprising in a text attempting to redeem certain political reforms in the face of religious objections, but it might be worth contrasting with present-day preoccupations with secularism as the Western legacy that is seen as more threatening to religious authority and self-confidence.

Thus, establishing a just and legal political order is in the first place justified in terms of its instrumental benefits as the necessary condition for the flourishing and prosperity of a society. As ever, the key figure here is Ibn Khaldūn, particularly the section of his *Muqaddima* conventionally entitled "Injustice leads to the destruction of civilization." The relevant passages from Ibn Khaldūn relate primarily to the effect that the abuse of property rights and excessive taxation have on the incentive to engage in productive activity, on which the wealth of kingdoms depends:

> Know that aggression against people in their property remove their hopes of acquiring and maintaining it, for people then become of the opinion that the goal and destiny of property is to have it taken away from them. … And if such aggression is general and extensive, affecting all manners of livelihood, then abstention from profit-seeking also becomes absolute, because of the effect on hopes and expectations. … Civilization and its prosperity, and the thriving of its markets, are only achieved through the

> efforts of people coming and going seeking their own welfare and profits. But if people desist from such business activity and their hands withdraw from profit-seeking, then the markets become stagnant and everything crumbles.[59]

For Khayr al-Dīn, the crucial insight from Ibn Khaldūn is that "human nature is such that absolute authority in the hands of kings brings about all manners of oppression and tyranny, as is the case today in certain lands of Islam." He contrasts this with the pre-modern practice of Muslim regimes, which outstripped their medieval European counterparts in good governance, "resulting from the restriction of their rulers by the laws of the *sharīʿa*, which pertained to both religious and worldly matters, amongst the carefully preserved basic principles of which were the liberation of humans from the compulsion of their passions, protection of the rights of all human, whether Muslim or other, consideration of the public interest appropriate for the time and place, prioritizing the removal of harms over the pursuit of benefits, choosing the lesser of two harms, and so on."[60]

Whereas the exigency of justifying strong, centralized organs of government in early modern Europe at times lead to relatively absolutist theories of sovereign authority (as in Bodin or Hobbes), the same imperative for this nineteenth-century modernizer led to a somewhat different emphasis. For Khayr al-Dīn, the primary concern was to tame the individual prince's arbitrary power by stressing the Islamic norms of consultation (*shūrā*) and the legitimacy of authority delegated by the ruler to experts functioning as his agents. It is not difficult to explain this historically. If the challenge for early modern European advocates of sovereign state power was to justify the authority of a single, supreme authority over the web of sub-state feudal, church, and corporate bodies, the challenge for nineteenth-century Ottoman modernizers was to build on whatever central state power that existed while justifying both the restriction of rulers' arbitrary power over property and taxation and the transfer of influence over policy to the small rising class of technocratic experts, who alone had the potential to learn from European success while resisting its increasing domination over southern Mediterranean lands.

Thus, in Khayr al-Dīn's account, the injustice that threatened civilizational prosperity was not local tribal elites or extensive lands and property held in trust (*waqf*) outside the state, but rather the figure of the ruler who refused to consent to consultation with experts or to delegate authority to competent ministers. Citing canonical proof-texts, from Prophetic

ḥadīth-reports to medieval treatises on the obligation of rulers to consult and of the ruled to offer loyal criticism to rulers, Khayr al-Dīn submits that "were it not for [the right of] those who are consulted to try to correct [the rulers], then kingship would not be right for mankind. This is because a restrainer (*al-wāziʿ*) is necessary for the preservation of the human species, but if such a restrainer were left to do as he wills and rule as he wishes then the benefits that the *umma* is supposed to derive from installing him would not appear. The restrainer must then have his own restrainer, either a divinely revealed law or a form of rule derived rationally."[61]

The *sharīʿa* figures here as a pre-existing, inherited legal restraint on arbitrary autocratic rule. But unlike twentieth-century utopian Islamists, for whom the law itself tends to take on panacean properties, Khayr al-Dīn's purpose is less to provide a sweeping apologia for the rule of *sharīʿa* than to stress the need for those responsible authorities to fulfill their supervisory and consultative role. While either revealed or rational laws can serve to guard the guardian, neither can enforce itself against the will of a ruler that would violate it and so "it is incumbent upon the scholars or notables of the *umma* to confront and restrain illegal acts."[62] His ideal here is represented by the councils, parliaments, and free printing presses that have emerged in Europe as a check against executive power. There is no obvious traditional institutional analogue in the Islamic tradition for Khayr al-Dīn to point to, and so it is the general class of scholars and the amorphous collectivity of the "people who loose and bind" whom he calls on to make up for whatever inevitable lacunae in virtue, justice, knowledge, or capacity will afflict even well-meaning kings.

The circle of counselors (*ahl al-shūrā*), ministers (*wuzarāʾ*), and religious scholars are necessary for rulers to fulfill the three conditions of good rulership which are rare to find fully realized in any single person: *knowledge* of what is in the welfare of the people, *love* of what is beneficial to the people, and the *capacity* to bring such policies about. Broadly speaking, executive policies or laws are to be constrained by two external standards: whether they are in conformity with the divine law and whether they are in the public interest, that is, their legitimacy (*sharʿiyya*) and their utility (*maṣlaḥa*). These are, in fact, extensive constraints on the formulation of law and policy. Khayr al-Dīn is clear that ministers must refuse to implement laws that do not promote the public welfare and that their acquiescence in executive harmful policies, even at the command of the ruler, is treason.[63]

At this point we can return to our concern with the conception of sovereignty imagined in this treatise. The first thing to note is that, as with Bin Ḍiyāf, whatever authority is held by individuals or groups claiming to represent the law or the people (the scholars, experts, or other notables) is held by them immediately on the basis of their own status or standing, with no constituent or delegatory activity of the people required. Alternatively, as under the Ottoman constitutional system ordained under Sulaymān's *Qānūn*, the ruler himself acknowledges the scholars, ministers, and notables as the check on his behavior.[64] They tame the prince and advance the people's interests without the people's consent or participation. But this is not an explicit concern of Khayr al-Dīn. The text does not even discuss the problem of constituent power, popular consent, or mass participation. It is taken for granted that the Islamic legal tradition authorizes certain competent elites to attempt to constrain the ruler's sovereignty.

Instead, his main concern is to refute the exactly opposite worry: that the active participation of counselors, ministers, or other agents detracts from the unity of *the ruler's* sovereignty. A long section is aimed at refuting the objection that "the participation of the People Who Loose and Bind with princes in all general areas of governance constrains the breadth of the Imam's reach or his general executive jurisdiction."[65] A string of authorities are introduced to dispel this concern, including Māwardī's theory of "delegated ministerial authority" (*wizāra tafwīḍiyya*) and a passage from the Qurʾān in which the prophet Moses asks for a "helper" (*wazīr*). But his discussion of the corporate agency that emerges from such executive decision-making is much more interesting for our purposes.

Having established on the basis of authority that it is permissible for the executive to delegate authority to ministers or agents, Khayr al-Dīn next argues that sharing authority with a larger number of persons from amongst the people who loose and bind is *a fortiori* permissible because "a collection of opinions gets closer to the correct answer."[66] He considers a few possible implications for this kind of epistemic argument for group deliberation, familiar from Aristotle (*Politics*, III.11) to Condorcet. One is the idea that the Imamate itself can be conceived as a composite entity, a kind of "unitary executive," composed of all officials who participate in policy-making. Another is the idea that the individual, personal rule of a single Imam is categorically constrained by the wisdom or expertise of his ministers.

He takes the idea of what I am calling a "unitary executive" from the fourteenth-century jurist-theologian Saʿd al-Dīn al-Taftāzānī (d. 793/1390), who allowed for the sharing of all executive acts or powers (*taṣarrufāt al-imāma*). Taftāzānī argued that the only "pluralism" in rulership that is forbidden is that which leads to corruption, for example, if there are two separate Imams each claiming obedience. But this does not forbid broad deliberative participation in the formation of laws or policies as long as the unity and finality of command (*waḥdat al-amr*) is preserved in the form of the Imam's exclusive sovereign voice in the promulgation of commands. In fact, with regard to the input of those qualified to loose and bind on matters of "general policy" or governance (*kulliyyāt al-siyāsa*), Khayr al-Dīn interprets Taftāzānī as arguing that advice given by the people who loose and bind in fact amounts to the view of the Imam (*bi-manzalat naẓar al-imām*).[67]

He elaborates this with the parable of an owner of an orchard. The owner is incapable of managing the orchard without the help of employees, including experts in horticulture. If the orchard owner's expert helpers or employees refuse to follow his orders to prune or cut when he asks them to because either (a) this wouldn't actually achieve the aim he wants or (b) it would violate some aspect of the *sharīʿa* (since God is the true owner of the trees and the human ownership is merely a kind of custodianship) then obstructing or invalidating the commands of the owner "could not be considered a restriction the scope of his oversight or his general authority over his own garden…[for] it is well known that the executive authority of the Imam in the affairs of the subjects (*raʿiyya*) does not exceed the scope of their welfare (*maṣlaḥa*)…so to obstruct the will of the Imam when it falls outside this scope is actually in support of him" (*musawwigh lah*).[68]

This account of supreme authority has some interesting implications for Khayr al-Dīn's theory of sovereignty. On this view, what is important is less the Imam's personal legitimacy, or even the sovereignty of the *law*, and more the notion of the Imamate as a collective *office* that is defined in terms of its responsibilities and is comprised collectively by everyone who participates in it. We might thus speak of a composite, *impersonal* executive sovereign agency of the Imam together with his advisors and all the people qualified to loose and bind.

The ultimate authority of law—whether the *sharīʿa* or any positive legal order—here is somewhat ambiguous. On the one hand Khayr al-Dīn's entire treatise is a call for the rule of law against arbitrary personal whim. He holds that "man is naturally disposed to love freedom" and quotes the

"wisdom of Aristotle" that it is a "serious mistake to replace law (*sharīʿa*) with an individual who acts according to his own personal will,"[69] to replace the rule of law with the rule of men. His account of how the Ottomans restored and revived the *umma* relates largely to their adherence to the *sharīʿa* and codification of the supplemental positive legal code (*qānūn*) of Sulaymān. He proclaims that "political authority (*mulk*) in Islam is based on the divine law (*sharʿ*)"[70] and that "the Islamic *umma* is constrained in its religious and worldly actions by the heavenly *sharʿ* and the divine limits revealed according to the most just of all scales, guaranteeing welfare in both abodes."[71] Similarly, Ottoman decline is attributed solely to their departure from governance according to the requirements of both sacred and positive law.

But this legal sovereignty should not be mistaken for a kind of strict legal formalism. Khayr al-Dīn's commitments point in precisely the opposite direction. He wants to emphasize the point where law-as-rules (derived from text or interpretive traditions) ends and law-as-principles begins. If there are certain crucial interests that no specific ruling of the revealed law (*aṣl khāṣṣ min al-sharʿ*) either specifies or rejects, but which the general principles of the law (*uṣūl al-sharīʿa*) require, then the interests of the *umma* mandate that these interests be pursued. But what is interesting in this view is less that it authorizes a space for policy beyond the constraints of the religious law in its textual tradition and more that it seeks to *unify* the will of those speaking for *sharīʿa*-as-rules and those proposing policies compatible with *sharīʿa*-as-principles, that is, religious scholars and technocratic experts. Khayr al-Dīn writes that success in advancing the interests of the *umma* in the direction of progress is contingent upon the unity of these two groups, not only in the sense of productive cooperation or recognition of their proper boundaries of competence, but "such that they all together become like a single person."[72]

What is interesting here for the study of sovereignty is not only what has been noted repeatedly about the claim of scholars and experts to speak on behalf of both the law and the *umma* on the basis of their own epistemic credentials or their authorization by the ruler. There is an ambiguity in statements like this about the commitment to the authority of law in Khayr al-Dīn's theory that relates to law's self-sufficiency. For Khayr al-Dīn some kind of rule of law is the key to justice, modernization, and progress for Muslim societies. But this is not to be understood either as a primarily a matter of fixed *sharīʿa* rules or of codified, positive law, for neither fully encompasses the space of governance to be filled by public policy aiming at the

welfare of the *umma*. The question pertains to how we should understand the idea of *siyāsa sharʿiyya* as a theory of statecraft. Does the collaboration of "statesmen who discern the public welfare as well as the sources of harm and the religious scholars who guarantee that such work is in accordance with the principles of the *sharīʿa*"[73] ultimately reduce in some way to law, or is it rather about an ethic of responsibility (in the Weberian sense) that is in some sense more important than law?

If the former were the notion articulated here, then we should understand the pursuit of the common welfare on the part of a collective executive apparatus (ruler, scholars, experts) to ultimately represent what it means to be ruled by law according to the doctrine of *siyāsa sharʿiyya*. Since the law aims at nothing other than the common good, then whether a Muslim ruler is enforcing traditional *fiqh* rulings or formally adopting policies aiming at benefits for the community he can be said to be enforcing "the *sharīʿa*." We would thus not only have a unitary executive "person" in the form of the ruler's or Imam's *office* that includes the participation of scholars and experts, but also a kind of unitary *sharīʿa* whereby all laws enforced by the ruler have a shared status of religious legitimacy (*sharʿiyya*). This notion would be coherent insofar as all *fiqh* rulings, in order to be enforced, have to be both just and beneficial and all public policies have to be compatible with the principles of the *sharīʿa*. The gap between *fiqh* and *siyāsa* blurs to the point of disappearance.

On the other hand, there is no denying that Khayr al-Dīn stresses the role of judgment, discretion, and prudence in discerning what is in the best interests of *umma* (which he does at one point compare to an immature ward under the benevolent tutelage of a guardian[74]) at any particular moment in history. That scholars are called on to participate in this does not make it entirely clear that the pursuit of social and economic progress reduces to the rule of law. The exigencies of this kind of text did not allow for Khayr al-Dīn to pursue those kinds of complexities, namely what precisely would be required of a public policy for it to be compatible with the principles of the *sharīʿa* (and who would decide) and what precisely would be required of traditional *sharīʿa* rulings by way of justice and expediency for them to be eligible for enforcement (and who would decide). This text was less a constitutional treatise than a plea for the unity of the political will of all elite actors, scholars along with modernizing policy experts. That motive leaves little room for exploring the limits of *sharīʿa*-compatibility in earnest.

Conclusion: Before Sovereignty, After Sovereignty?

Twentieth-century Islamic political thought was to a large extent dominated by the problem of sovereignty. While the demand for upholding the principle of divine sovereignty may seem to be antithetical to more recent Islamist commitments to a kind of popular sovereignty, there is something common when the concept of sovereignty is the master framing device for political theory. The call for sovereignty is the call for a unitary will which can serve as the sole font of all legitimacy and legality. It reflects a desire for the potential closure of political conflict over law, meaning, and the scope of freedom. In the case of the demand for divine sovereignty, this fantasy obscures the limits, gaps, and indeterminacy of divine command for political life. In the case of the appeal to popular sovereignty, it obscures the pluralism of wills and desires of any body politic, as well as the lack of mastery over the consequences of collective action.

Much modern Islamic thought has simply taken for granted that Islam must be sovereigntist in one way or another. But, without claiming that the organization of Islamic political thought around "sovereignty" is a completely novel innovation,[75] it can be pointed out that the language of sovereignty did not always organize the Islamic legal-political imaginary. Classical Islamic law was in some important ways non-sovereigntist. Texts were manifold, not organized as a coherent code, and the right to interpret and argue was never monopolized. Pre-modern Islamic law was more jurisgenerative than jurispathic. Arguably pre-modern Islamic *political* theory was more sovereigntist. The focus on the need for a single rule and to preserve the unity and finality of the ruler's commands is a legacy that survived into the nineteenth century, as demonstrated in some of the preceding discussion. But it still must be said that while certain commitments to the discretionary authority of the ruler in public affairs are pronounced, pre-modern discussions do not tend to be organized around the theoretical and conceptual question of where "sovereignty" ought to be located and what its precise contours and requirements are.

Arguably, contemporary Islamic thought is in a transitional moment where neither the simple ideal of divine sovereignty nor the hope for the sovereignty of a morally united pious people seems to offer guidance for political life. But in addition to a political diagnosis of this moment, we can step back and ask some theoretical questions. Islamist political theorists have tried to democratize Islamic constitutional theory by stressing the consensual, ascending, and contractual foundations of government and

by arguing that they amount to a form of popular sovereignty, both in the sense of constituent power and in the sense of participation in ordinary legislation. But there is no easy reconciliation between these ideas and the core Islamic idea of a pre-political law that is binding on Muslims and constraining of political life. It is the very concept of "sovereignty," which Islamist thinkers not wrongly assumed was something modern conditions required them to have a version of, that forces Islamist political theory into this aporia. It can only be resolved by accepting some version of the fact of reasonable moral pluralism (and giving up on divine sovereignty) or relinquishing the horizon of the modern state (and giving up on popular sovereignty).

This may indeed be a moment when the vision of both democratizing and Islamizing the modern state finally gives way to other horizons and possibilities. When Islamizing law seems less of a panacea or even a minimal condition of legitimacy, living and acting politically in such a moment is less of a challenge, perhaps, than theorizing it. Beyond subtracting Islamist idealism, even utopianism, and accommodating political reality, what are Islamic norms adding to the political?

It is possible that the most important horizon for Islamic political thought today is a post-statist, even post-sovereigntist one. Alongside the claims to have moved into "post-Islamism" or "Muslim democracy," there is a nascent discourse on Islam and the political "after the state."[76] In my view this potentially heralds an Islamic political thought in a new register, a *political* Islamic political thought, one that is informed both by the political as its own domain of pluralism and novelty and also by Islamists' reflection on their cumulative historical experience of political action. There need be no preset script for this register of thought (liberal, theocratic, or otherwise), but it will take place without the fantasy of sovereignty. It also may require new genealogies of the Islamic state, public law, and authority. The debates of the 1860s and Ottoman constitutionalism more generally do not lead directly to a post-statist or post-sovereigntist vision. But they are representative of a pre-colonial (and thus, to a certain extent, pre-apologetic) Islamic thought that centralizes the public interest, the varieties of political judgment, and the compatibility of distinct kinds of expertise with a desacralized centralized authority.

Endnotes

1. This article was written while I was supported generously by a long-term grant from the International Institute of Islamic Thought, which I here acknowledge and thank. The present article was excised during the final revisions of my book *The Caliphate of Man: Popular Sovereignty in Modern Islamic Thought* (Cambridge: Belknap/Harvard University Press, 2019). It thus bears some of the hallmarks of being originally written as part of a larger study. I hope readers will find some interest in it as a stand-alone study.
2. For a succinct overview, see Saïd Amir Arjomand, "Islamic Constitutionalism," *Annual Review of Law and Social Science* 3 (2007): 115–40. See also Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, NY: SUNY Press, 2002), chap. 1, "Early Constitutional Documents in the Middle East," 15-34.
3. See Roger Owen, *The Middle East in the World Economy 1800-1914* (London: IB Tauris, 1981).
4. On Sunni theories of legitimate governance, the source of rulers' authority, and the division of authority between the ruler, the scholars and other elites, see Ovamir Anjum, *Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment* (New York: Cambridge University Press, 2012). On my understanding of the "traditional" Islamic constitutional ideal, see *The Caliphate of Man*, chap. 2, "The Question of Sovereignty in Classical Islamic Political Thought," 17-37.
5. The Gülhane Decree was issued during the reign of Sultan Abdülmecid (ʿAbd al-Majīd) I (r. 1839-1861), but was principally drafted by his Minister of Foreign Affairs at the time, Mustafa Reşid Pasha. On Ottoman reform, see Şerif Mardin, *The Genesis of Young Ottoman Thought* (Syracuse, NY: Syracuse University Press, 2000), and M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton, NJ: Princeton University Press, 2008).
6. Incomplete English translation in J.C. Hurewitz (ed.), *The Middle East and North Africa in World Politics* (New York: Columbia University Press, 1975), 269-271.
7. On this theme, see Butrus Abu-Manneh, "The Islamic Roots of the Gülhane Rescript," *Die Welt des Islams* 34 (1994): 173-203.
8. From ʿAbd al-Majīd's "Imperial Edict" (*Khaṭṭ-i Humāyūn*) addressed to his Grand Vizier shortly after his assumption of the sultanate (quoted in Abu-Manneh, "Islamic Roots," 189).
9. Khayr al-Dīn Pasha (c. 1820-1890), born in Abkhazia to a Circassian family, was one of the most important Ottoman statesmen of the nineteenth century, serving as president of the Supreme Assembly (*al-Majlis al-Akbar*) of Tunisia under the first promulgated constitution in a Muslim country, as Grand Vizier/Wazīr (Prime Minister) of the Beylik of Tunis and, briefly, as

Grand Vizier of the Ottoman Empire (1878-79). He wrote a work (discussed at some length below) entitled *Aqwam al-masālik fī maʿrifat aḥwāl al-mamālik* [*The Surest Path in Knowing the Conditions of States*] (1867), which is mostly concerned with providing an account of the history, structure, and strength of European states, although his introduction makes clear that his purpose was to persuade fellow Muslims of the need and permissibility of learning from non-Muslims.

10. The Arabic text runs to three pages and is available at http://www.e-justice.tn/index.php?id=432. Translations are my own from this source. An English translation of this text can be found in Ahmad ibn Abi Diyaf, *Consult Them in the Matter: A Nineteenth-Century Islamic Argument for Constitutional Government*, trans. L. Carl Brown (Fayetteville: The University of Arkansas Press, 2005).
11. The British and French counsels sent letters to the Tunisian government suggesting language for the document four days before it was issued (Brown, *Consult them in the Matter*, 131).
12. Brown, *Constitutions in a Nonconstitutional World*, 16.
13. The available text of the Pact refers to a "majlis al-sharīʿa." In Ḥusaynid Tunisia, there was a "majlis sharʿī" that was composed of all the chief religious judges (*qāḍīs*) and top muftis from the two legal schools operative in Tunisia at that time (the Mālikī and the Ḥanafī schools) for a total of ten members. This group "met with the Bey every Sunday to render justice" (L. Carl Brown, *The Tunisia of Ahmad Bey: 1837-1855* (Princeton, NJ: Princeton University Press, 1974), 149). While *sharʿī* can carry a broader meaning than simply the adjectival form of *sharīʿa* and refer to something like "legitimate," with a particular implication of legitimacy as understood by the revealed law, I think "Sharīʿa Council" is fair here insofar as it refers to the body of religious official who consulted the Bey while dispensing justice.
14. See Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge, UK: Cambridge University Press, 2003); Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (New York: Oxford University Press, 2012); and Andrew F. March, "Sources of Moral Obligation to Non-Muslims in the 'Jurisprudence of Muslim Minorities' (*Fiqh al-aqalliyyat*) Discourse," *Islamic Law and Society* 16, no. 1 (February 2009): 34–94.
15. Translation from *The Study Quran*.
16. Arabic text of the 1861 constitution available at http://www.e-justice.tn/index.php?id=434.
17. Brown, *Consult Them in the Matter*, 9.
18. See above for a discussion of the translation of the name of this Council. This body is mentioned once in the document, in the context of the ruler's oath

before the "people who loose and bind." It is not mentioned again and no explicit constitutional powers are granted to it.

19. Again the broader political motivations of the elites around the court (such as the long-serving Prime Minister and son-in-law of Aḥmad Bey, the Greek Mamlūk Muṣṭafā Khaznadār, and Khayr al-Dīn) must be kept in focus. The "most fundamental [concerns of constitution-writing elites at the time] was the rationalization of the administration of the country. Much attention is given to chains of command, definitions of responsibilities, and proper procedure. The constitution is especially detailed on fiscal practices, displaying a probable concern by its authors with accountable and dear procedures for use of public funds" (Brown, *Constitutions in a Nonconstitutional World*, 19).
20. Ministers and other functionaries are also required by the constitution to swear in their oaths fidelity to the laws emerging from the Pact of Security Art. 10 (II.2).
21. I think Nathan Brown exaggerates slightly in writing that "the Tunisian constitution appears to be an attempt to develop a constitutionalist system that is Islamic but not democratic. The point is to render authority accountable to the *sharīʿa* and to an elite that keeps the interests of the community in mind" (*Constitutions in a Nonconstitutional World*, 20). It is not entirely an anachronism to expect some kind of declaration of the intent to guarantee that all laws will be harmonious with the *sharīʿa*. As we saw, the Pact of Security contained explicit language to this effect, and we will see that the 1876 Ottoman Constitution did as well. Thus I regard the 1861 constitution's absence of references to Islam and *sharīʿa* noteworthy, almost ostentatiously so.
22. Aḥmad Ibn Abī al-Ḍiyāf, *Itḥāf ahl al-zamān bi-akhbār mulūk Tūnis wa-ʿahd al-amān* (Tūnis: al-Dār al-Tūnisiyya, 1976), vol. 1. L. Carl Brown's *Consult them in the Matter* is an English translation of this Introduction.
23. See the English translation of the *Muqaddima* by Franz Rosenthal: *The Muqaddimah: An Introduction to History*, 3 vols. (Princeton: Princeton University Press, 1967).
24. Recall that Māwardī's *al-Aḥkām al-sulṭāniyya* began with the exact same language. The discussion here and in the following paragraphs draws from Bin Ḍiyāf, *Itḥāf ahl al-zamān*, 7-9.
25. Bin Ḍiyāf, *Itḥāf ahl al-zamān*, 11.
26. Ibid., 14.
27. Ibid., 17.
28. "O David! Truly We have appointed Thee as a vicegerent (*khalīfa*) upon the earth; so judge among the people with truth and follow not caprice, lest it lead thee astray from the way of God. Truly those who stray from the way of God, theirs shall be a severe punishment for having forgotten the Day of Reckoning" (*The Study Quran*).
29. Bin Ḍiyāf, *Itḥāf ahl al-zamān*, 19.

30. The word for "anger" (*ghaḍab*) is also the word used in premodern Islamic philosophical and theological ethics for spirited desire, in the sense of *thumos*. Thus, we might see the juxtaposition of "anger and the animal faculty" (*ghaḍab wa'l-quwwa al-ḥayawāniyya*) not as a rhetorical duplication of a single idea but rather the conjoining of the two sub-rational parts of the soul, a theory of psychology that made its way not only into Arabic philosophy but also into Islamic theological ethics. Bin Ḍiyāf would at least have encountered this through his reading of Ibn Khaldūn.
31. Bin Ḍiyāf, *Itḥāf ahl al-zamān*, 19-20.
32. Ibid., 20.
33. Ibid., 30.
34. Ibid., 31.
35. Ibid., 32.
36. Ibid., 37.
37. Up until the period of Muḥammad Bey, Friday prayers were said only in the name of the Ottoman sultan and coins were struck in his name as well, rather than the name of the local Ḥusaynid Bey. (These are the two traditional markers of worldly sovereignty for Muslim rulers: Brown, *The Tunisia of Ahmad Bey*, 32.) Moreover, while de facto succession and legitimacy were always attained through a two-stage sequence of securing first the allegiance of the close members of the royal family and leading ministers (the *bayʿa khāṣṣa*) and then the allegiance of a wider group of leading scholars, ranking army officers, and other notables (the *bayʿa ʿāmma*), this was always followed by the request for a mandate (*firmān*) of investiture from Istanbul, which of course took weeks or months to arrive (Brown, *The Tunisia of Ahmad Bey*, 105-107).
38. Bin Ḍiyāf, *Itḥāf ahl al-zamān*, 40.
39. Ibid., 43-45.
40. Ibid., 45.
41. Ibid.
42. Ibid., 48. The text in question is *Bashā'ir ahl al-īmān bi-futūḥāt Āl ʿUthmān* by one Abū ʿAbd Allāh Ḥusayn Khūjā.
43. Ibid., 51.
44. Ibid., 59.
45. Ibid., 66.
46. Ibid., 69-70.
47. Ibid., 43.
48. Ibid., 56-58.
49. Khayr al-Dīn al-Tūnisī, *Aqwam al-masālik fī maʿrifat aḥwāl al-mamālik* (Cairo: Dār al-Kitāb al-Miṣrī, 2012), 6. An English translation of the introduction to this text was published as Khayr al-Din Tunisi, *The Surest Path: The Political Treatise of a Nineteenth-Century Muslim Statesman*, trans. Leon

Carl Brown, Harvard Middle Eastern monographs, 16 (Cambridge, MA: Center for Middle Eastern Studies of Harvard University, 1967).

50. "The world is a garden, hedged in by sovereignty/Sovereignty is lordship, preserved by law/Law is administration, governed by the king/The king is a shepherd, supported by the army/The army are soldiers, fed by money/Money is revenue, gathered by the people/The people are servants, subjected by justice/Justice is happiness, the well-being of the world." See Linda Darling, *A History of Social Justice and Political Power in the Middle East: The Circle of Justice from Mesopotamia to Globalization* (New York: Routledge, 2012) and Jennifer London, "Circle of Justice," *History of Political Thought* 32, no. 3 (2011): 425-447.
51. These were dominant ideas on the part of reformist bureaucrats and statesmen of the Tanẓīmāt period. See, for example, Şerif Mardin, *The Genesis of Young Ottoman Thought*, chap. 6: "Sadık Rifat Paşa: The Introduction of New Ideas at the Governmental Level." Sadık Rifat Paşa was the mentee and close collaborator of the architect of the Tamẓimāt reforms, Muṣṭafā Reṣid Paşa. According to Mardin, the core of Rifat's ideology rested on the premise that "a state flourished wherever its subjects were provided with the opportunity to reap to the fullest extent the fruit of their daily labor. This, in turn, was only possible where the individual benefitted from the extirpation of arbitrary rule. Wherever the people were given the assurance that no unforeseen circumstances would interfere in their life, and agriculture and commerce were protected, then the state would flourish too," noting that Rifat "clothed [these ideas] in the garb of the classical Islamic-Ottoman 'circle of justice,' linking the well-being of the state with the prosperity and the contentment of its subjects" (180).
52. Khayr al-Dīn al-Tūnisī, *Aqwam al-masālik*, 4.
53. Ibid., 11-12.
54. While conservative and clerical opposition to Tanẓimāt reforms often made reference to the authority of traditional religion and the *sharīʿa* (for example, they successfully delayed the application of the new commercial code drafted under the Tanẓīmāt, claiming that it dealt with a sphere of life in regard to which the rulings of the *sharīʿa* were detailed and precise enough to remain in force), the practical demand associated with this position took the form of asserting the right of the sultan or ruler to resist restrictions on his right to command and his responsibility to guide his subjects toward happiness in this world. Mardin writes, for example, that "during the nineteenth century a new significance was added to the survival of Islamic-Ottoman political ideals, since, by insisting on the 'right' of the Ottomans not to bow to the will of reformist sultans and statesmen, the reactionary ulema could now pose as the advocates of Islamic 'natural rights' and as the idealist foes of autocracy" (*The Genesis of Young Ottoman Thought*, 199).

55. Khayr al-Dīn al-Tūnisī, *Aqwam al-masālik*, 13.
56. Ibid., 16.
57. Ibid., 18.
58. Ibid., 17.
59. Ibn Khaldūn, *al-Muqaddima: al-juzʾ al-awwal min Kitāb al-ʿibar* (Beirut: Dār al-Qalam, 1977), 227.
60. Khayr al-Dīn al-Tūnisī, *Aqwam al-masālik*, 18-19.
61. Ibid., 20.
62. Ibid., 21.
63. Ibid., 25.
64. Ibid., 49. Here he compares the status of the scholars and ministers of the Ottoman state with the representative assemblies that had been established in Europe.
65. Ibid., 25.
66. Ibid., 26.
67. Ibid., 27.
68. Ibid., 28.
69. Ibid., 32.
70. Ibid., 49.
71. Ibid., 61.
72. Ibid., emphasis added.
73. Ibid., 62.
74. Ibid., 67.
75. See, for example, Muhammad Qasim Zaman, "The Sovereignty of God in Modern Islamic Thought," *Journal of the Royal Asiatic Society* 25, no. 3 (2015): 389-418.
76. See, for example, Hiba Raʾūf ʿIzzat, *al-Khiyāl al-siyāsī liʾl-Islāmiyyīn: mā qabl al-dawla wa mā baʿduhā* (al-Shabaka al-ʿarabiyya, 2015), which is a study of the "Islamist political imagination" before and after the state, and the earlier cited Jāsir ʿAwda, *al-Dawla al-madaniyya,* which offers less a traditional claim that the Islamic state *is* a civil state and more that a non-authoritarian, civil state is what will make society safe for the development of Islamic ethics.

doi: 10.35632/ajiss.v37i1-2.609