CONSTITUTIONAL GOVERNANCE AND
THE FUTURE OF ISLAMIC CIVILISATION

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Abstract: The article advances the argument that Islamic law, more than a mere legal system, represents a legal tradition. A legal tradition stands at the heart of civilisations generally, and Islamic civilisation particularly. Constitutional design in Muslim states must have this backdrop in mind because modern constitutionalism is typically carried out within the framework of modern nation-states, instead of civilisations. The danger then is that the constitution may end up as a kind of “fiat constitution”. By excavating the historical and philosophical foundations of the modern constitution, the article then shows that the very idea of constitutionalism itself actually accommodates the idea of legal tradition, but unfortunately in practice, it is often ignored when designing the constitution of Muslim states. The article also identifies six core constitutional fault lines of contemporary Islamic civilisation, areas which are most vulnerable to conflicts.

Introduction

“In the emerging era, clashes of civilisations are the greatest threat to world peace, and an international order based on civilisations is the surest safeguard against world war.” Samuel Huntington’s controversial thesis about the clash of civilisations nervously portends an impending Hobbesian state of war of all against all. But critics miss the finer point of Huntington’s argument, namely about an international order based on civilisations, instead of nation-states which typify conventional political science. His whole point of discussion is to prevent such a clash of civilisations. Indeed, international order was based on civilisations but today we speak of a community of nation-states alone, as if to vindicate the philosopher and Nobel Laureate, Albert Schweitzer’s contention that nations are destroyers of civilisations. In the beginning was Islamic civilisation, alongside other civilisations, but the advent of colonialism partitioned the Muslim world into nation-states. Now we have two perspectives of looking at the world, either through the prism of civilisation or through the prism of the modern state – the latter has no doubt prevailed. Indeed, Ali Allawi saw the nation-state as “the most enduring of modern transplants into the world of Islam”. Wael Hallaq even censured the modern state as the very antithesis to the Shari‘ah and to Islamic governance. The primary instrument by which the modern state operates is constitutional law, “the state’s internal instrument of rationality”. By means of
constitutional law, the Muslim society is shaped and molded in a certain direction (e.g. attempts to bring together communities of different backgrounds, such as in Bosnia Herzegovina, China, and the Philippines). A great deal of the crises and calamities confronting the contemporary Islamic civilisation from East to West are those that can justly be described as constitutional (especially in the light of the six fault lines that we identify below), for constitutional law has implications beyond the territorial boundaries of the state to include Islamic civilisation, one core element of which is the legal tradition. Yet they cannot be resolved within the national domestic framework: for one, constitutional developments around the world indicate a shift away from state centeredness towards a more diffused structure.

It follows therefore, that law cannot be seen the way it has been, i.e. as nationalised within a particular national legal system. Instead, it has to be restored as a legal tradition within a civilisation, beyond the confines and contours of the state. Once we have placed Islamic law within the context of Islamic legal tradition, then we can understand constitutional law of Muslim states against such background. The purpose, among others, is to restore the sense of unity and commonality of Muslim experiences worldwide and to furnish common vocabularies for them derived from within Islamic legal tradition. This contrasts with the present approach to constitutional reforms which have only been evaluated by the standards of modern liberal thought such that the “progress” of constitutional reforms is judged squarely by the extent to which they conform to modern features, even if those features themselves are undergoing change and transformation, and no longer deemed to be adequate for the changing world that we are living in. It seems that Islamic legal tradition has not been able to carve for itself a space in constitutional discourse, and instead has to be filtered through modern vocabularies, i.e. Islamic law has to be reconstructed. It is for instance especially worrying when calls were made to cast aside religion from the constitution (in Egypt and Turkey), especially when those societies are historically religious, when the people consciously practise their religion and even identify themselves more by their religion than by their citizenship. Once we situate constitutional law against the backdrop of the legal tradition, we will then inquire into the nature and philosophy of constitutionalism. By this method we shall be able to contextualise constitutional governance of particular Muslim nation-states within the family of Islamic legal tradition – and consequently part of Islamic civilisation, even when the apparent claim of the “supremacy” of the constitution seems to preclude that possibility. On the contrary, a constitution is never meant to be self-referential but always interacts with higher levels of constitutionality, and, even moral principles – so a constitution is supposed to be built on existing moral and political structures that have already commanded
authority from the people. But for this to be possible, we must return to the key feature of Islamic governance, namely that external governance is supported by and indeed, organically grows from internal governance. Failing this, the constitution that is adopted can be justly described as “fiat constitution”.

**Constitutional Governance in Islamic Civilisation and Legal Tradition**

By appealing to the concept of “legal tradition” rather than “legal system”, we place Islamic law firmly within a civilisational context, rather than in the context of specific nation-states, which the Muslim world has been consigned to. The latter approach practically nationalises legal and constitutional questions. Legal tradition is different from legal system. Legal tradition transcends particular nation-states and is more at home with a view that regards the Muslim world as belonging to one Islamic civilisation. Legal tradition is more at home with contemporary trends that move away from the nation-state paradigm, including trans-constitutionalism, post-constitutionalism and global constitutionalism (at the political level), and “trans-systemic legal teaching” at the educational level. These trends at the moment only affect the Western and industrialised world but sooner or later the Muslim world is pressed to follow. On top of this global trend, there are also specific developments such as conflicts, human rights and technological progress, which render the old view of constitutional law as anchored in the nation-state to be outmoded. However, the present tendency within Islamic discourses is to turn a blind eye to these contemporary developments, so that constitutional debates in the Muslim world are still carried out as if the present Westphalian political arrangement is the irrevocably sealed fate of everyone, the Muslim world included. The only way to cushion the impact of these developments is by returning to the concept of legal tradition, which Islamic law beyond any doubt is, because it is beyond any particular state, is epistemically and morally grounded, and is still practised by so much of the Muslim world in the “religious” dimension of their lives, and indeed, there are other developments that give ability for Muslims to extend this to the public sphere, e.g. in Islamic banking and finance. The epistemic and moral (rather than political) basis of Islamic legal tradition is why historically Islamic civilisation developed a different constitutional model of governance than from what we are accustomed to in the present world (i.e. as modern written constitutions). It is also why, notwithstanding the rise of the modern state, the legal tradition has been kept intact, so that, according to Abdal-Hakim Murad, reflecting on the primacy of the legal schools (madhāhib) the ummah’s greatest achievement over the last millennium has been its “internal intellectual cohesion”.

At one level, the Prophet’s (peace be upon him) age is always deemed to be the Golden Age, with the Prophet himself setting the “excellent example” (‘uswah
ḥasanah) according to the Qur’an. As per one hadith, “the best of my generations is the one to which I was sent”. Absent the Prophet, subsequent thinkers have sought to theorise the best way re-enact the splendour of prophetic governance, yet realism soon sets in and they realise the impossibility of such a scenario. Sunni thinkers such as Abu Hamid al-Ghazali, Fakhr al-Din al-Razi and Ibn Khaldun have thus formulated models of governance (siyāsah) which could best capture the Qur’anic spirit. They divided governance into two types: external or outward (ẓāhir) and internal or inward (bāṭin), the former being the province of rulers and kings, the latter being the province of scholars. While external governance worked in the empirical realm, in the form of laws, institutions and policies, internal governance is operative in the domain of thought, i.e. in the form of unity and cohesion in terms of philosophy, knowledge and principles. Al-Razi’s concern was to preserve the conception of the ideal imām while acknowledging the reality of dissociation of religious and political power. Consequently, he argued that the ideal ruler (sāyis al-muṭlaq) and the one worthy of the vicegerency of him who brought the Sharīʿah (i.e. Muhammad) was the one who was perfect in knowledge and in kingship. Al-Ghazali before him classified governance into four types, according to the influence it wields on the masses (ʿāmmah) or elite (khāṣṣah), and in accordance with the internal-external governance framework. The four types of governance are: (1) Prophetic governance; (2) scholarly governance; (3) kingly governance; and (4) governance by preachers – the first type governs the internal and external lives of both the masses and elite; the second type governs the internal lives of the elite alone; the third type governs the external lives of both elite and masses; and the fourth type governs the internal lives of the masses.

Ibn Khaldun also wrote about the distinction between the caliphate and imamate. Ibn Khaldun is optimistic about the religious law, yet evinces scepticism towards political laws (what we may today call positive law). “The decisions of the ruler,” he wrote, “will... as a rule, deviate from what is right.”

The distinction between internal and external governance is helpful in understanding the crises afflicting contemporary Islamic civilisation. Ali Allawi in The Crisis of Islamic Civilization notes that “any civilisation has an inner and outer aspect: an inner aspect of beliefs, ideas and values which inform the outer aspect of institutions, laws, government and culture”. He lamented over the fact that “the inner dimensions of Islam no longer have the significance or power to affect the outer world in which most Muslims live”. This has partly to do with the fact that the Muslim world has suffered bitter experience of colonisation and imperialism, after which followed systems and modes of governance which were imposed on them from the top and from an entirely foreign origin. “Probably the most enduring of the modern transplants into Islam,” he wrote, “was the idea of the nation-state.” The challenge today thus seems to be the calibration of the
internal and external dimensions, especially in the context of democracies: when we look at the philosophers’ deliberation on the “democratic city” (al-madinah al-jamā’īyyah or siyāsatul jamā’ah), such as that by Abu Nasr al-Farabi, Ibn Rushd and Nasir al-Din al-Tusi, we could see the basic constitutional structure underlying democracies that they were precisely the type of “city” which allows for the flourishing of many different “cities”, i.e. when internal governance and external governance evolve along separate lines. Charles Butterworth argued that the concern of Farabi and the philosophers, very much like Plato, was to rest political theory on metaphysics, to link statecraft with soul-craft, to link what is transient, temporary and changeable back to what is unchangeable and permanent.\(^{21}\) This is a pertinent point: for we are so accustomed to hearing claims that governance and politics belongs exclusively to what may be called the changeable (mutaghāyarāt) aspect of Islam, as contrasted with the fixed, immutable and unchangeable (thawābit) elements which are usually the articles of faith and belief (‘aqīdah) or matters of devotion and worship (‘ibādah).\(^{22}\) Yet such a claim, even if it is true, risks drawing a stark discontinuity between “religion” and “ordinary life” such that religion becomes completely transcendentalised as a total “ideal” thereby minimising the significance of personal religious experiences. It is precisely in the domain of thought, ideas and knowledge – the “internal governance” as we have seen – which are immutable that governance of Islamic civilisation beyond state boundaries should rest upon. As we shall see later below, parallel to the distinction between external and internal governance have been several other transformations, for instance, with regards to human development as contrasted with state development, and human security as contrasted with state security, both concepts advanced by the economist, Mahbubul Haq. That means it is possible to carve out a model of “human governance” as complementary to state governance.

These are of course, as far as the theoretical dimension goes; in practice too such constitutional structure was realised. Today the restraint and constraint of the ruler’s authority and power have been so synonymous with the adoption of a written constitution, such that the absence of a written constitution is sometimes taken to be indicative of arbitrary if not authoritarian rule. To the contrary, a written constitution represents only one mode of constitutional governance, and one that is very recent. Muslim societies have also developed constitutional structures but without necessarily having a written constitution. One model was the constitutional balance of power between the rulers and the scholars as an informal, loosely organised class or social institution. The basic idea of constitutionalism – the restraint of sultanic power – was of course recognised even then: as most succinctly expressed by the jurist Shams al-Din al-Sarakhsi, “the ruler is like others before the Sharī’ah” (al-sulṭānu ka-ghayrihī sharʿan).\(^{23}\)
The “higher law” that stood over and above sultanic decrees and regulations were none other than the Sharīʿah itself. The actions of the ruler, where they went against the Sharīʿah – i.e. where they went “unconstitutional” – could be reviewed and declared invalid by the judges, whose appointment came from among the rank of scholars. The popularity of scholars over rulers could be illustrated by an incident about the caliph Harun al-Rashid, who organised an event but could not attract a crowd as most attended an event organised at the same time by the jurist Ibn al-Mubarak. This prompted the caliph’s wife to comment that real authority belongs to the scholars while Harun commands allegiance only through the force of arms and the police. The scholarly class could even strip the rulers of their legitimacy, thereby justifying popular revolt (which nonetheless, rarely happened in practice). In a sense, the influence of the scholarly class over the rulers could be considered akin to the authority of the Church over the royal class in medieval Europe, but whereas the Church was a formally institutionalised body (especially after the Gregorian Reforms in the 11th and 12th centuries), the Muslim scholarly class was not institutionalised; whereas the authority of the Church was theological, the authority of the scholars was epistemic; whereas the Church could enforce its authority, the authority of the scholars was largely persuasive (this is especially so in the case of fatwā, which in the context of the modern state system, has been made into part of state bureaucracy).

What made that possible was partly the fact that the community was united by faith and lived by the Law. Most of the changes and transformations occur due to encounter with the West, for instance, the Ottomans decided to undertake reforms along European lines called the Tanzimat (Reorganisation) in the 19th century, during which, not only the scholarly class was formally incorporated as part of the state bureaucracy, but also codified laws (such as the Mecelle) and written constitution were introduced. But above all else, it was colonialism that effected the greatest transformation. Through colonialism, the very props that secured the primacy of the Sharīʿah, namely educational institutions, underwent reform along European lines. Even when the country was not colonised, such as Iran, the reform even took Europe as the source of inspiration. A prominent Shiʿi scholar, ʿAbd al-ʿAzim ʿImad al-Khalkhali thus wrote of constitutions, “Today all European states have established constitutions and treat their nations in accordance with them. Perhaps it can be said that today, the Europeans are better and more intelligent than we Iranians. If this Constitutionalism is nonsense and useless, why is it that they have adopted it? And if it is beneficial, why should the Iranians abandon it?” The first constitution of Iran, which was adopted during the Iranian Constitutional Revolution, was drafted with the inspiration of the Belgian Constitution.
Nation-States and the Rise of Modern Constitutionalism

The above discussion elaborates the constitutional structure and governance of political entities with the Islamic legal tradition as the overarching backdrop. One major hurdle is the fact that the idea of a modern constitution seems to render the return to the concept of legal tradition impossible, confining itself instead to the legal system within the state. After all, a constitution is regarded as the highest law of the land, and if Islamic law does have any role to play, it is only because the constitution stipulates a provision for it. That is why, not surprisingly, many Muslim scholars (like Shaykh Fadzlullah Nuri) have voiced serious objections to the introduction of constitutions in Muslim lands. Some observers even argued that the introduction of a written constitution is precisely the end of the Islamic state.

However, a constitution is in fact not meant to work that way. If we explore the philosophical foundations of constitutionalism, there are elements which sustain the idea of the constitution itself. Even the application of positive law is often vitiated or mitigated by appeal to moral principles, such as the doctrine of equity in English law. The modern constitution may have its antecedents in the social contract theory or even the teachings of the medieval Christian church. Modern constitutional scholars have also insisted that the written constitution has a long pedigree of “constitutions”, a hierarchy of constitutionality of sorts. The American legal philosopher, Ronald Dworkin argued for the marriage of constitutional law with political philosophy. But Dworkin is not alone in this respect, for many scholars before him have argued that constitutional law cannot be considered law in the strict positivist sense of the term, the sense which is most familiar to our contemporaries.

Theories of constitution typically invoke several moral and historical bases for the validity of a constitution. This involves transition from the Greek (particularly Aristotelian) idea of politeia, the Roman idea of incorporation, the idea of covenant between God and man in medieval Christendom and evolved into secular doctrines of social contract between members of a society as exemplified by the likes of Thomas Hobbes, John Locke and Jean-Jacques Rousseau. Orestes Augustus Brownson, an American constitutional theorist, in elaborating the foundations of the American Constitution, explained three levels of constitutionality, namely, the constitution of nature, the constitution of society, and the constitution of government. What we designate today as the “constitution” in reality only belongs to the third layer of constitution, i.e. the constitution of government. And the constitution of government itself depends on the constitution of society, which in turn depends on the constitution of nature. Edmund Burke once described “society” as the “partnership of those
are living, those who are dead, and those who are to be born.”

This hints at the continuity of the legal tradition, upon which the survival of a civilisation itself depends. The continuity is impossible if the legal tradition rests on what is ultimately particularistic, localised or changeable, such as political institutions – like the state. It has to be based ultimately in the final analysis on immutable principles. The ability to formulate a legal tradition independent of this or that political regime is precisely one of the key features of Islamic law that enabled it to permeate any society. That is why Ronald Dworkin identifies constitutional law as the intersection of moral and political theory. All of the above points to the fact that a constitution, at least in its proper and original formulation, is not meant to be self-referential: rather, it recognises levels of constitutionality and ways to interpret the “constitution of government” in conformity with higher levels of constitutionality. Indeed, one may even speak of the need for a ‘theology of constitutionalism’. Otherwise, the constitution in question can aptly be called a ‘fiat constitution’, a constitution that is considered valid and upheld as the highest law of the land for no other reason than the mere fact that the constitution declares itself to be so. “The constitution is the highest law of the land.” Why?—because it says so. In other words, constitutions depend for their validity on other factors, not exhausted by the mere fact of it being a constitution.

Modern constitutional doctrines such as the rule of law, separation of powers and judicial independence developed out of political theories. This distinctive character of constitutional law is why the famous jurist John Austin denied it legal status, claiming that “constitutional law is positive morality merely”, and thus infringements of constitutional law are not called “illegal” but “unconstitutional”. Similarly, Friedrich Hayek argued that constitutional law is law merely in the formal, not material sense, for it is not a law among laws but a “superstructure erected to secure the maintenance of the law”. Hayek distinguished between rules of just conduct and rules of organisation, and claimed that constitutional law belongs to the latter: i.e., it maintains, indeed constitutes, the organisation itself (in this case, that political community which we call “state”). In cases of revolution resulting in the adoption of a new constitution, for example, while rules of just conduct, such as criminal law or property law, remain intact, constitutional law changes. And the nature of this change is what determines the direction of the nation as a whole.

More so when we look at a central pillar of constitutionalism, namely rule of law, i.e. the essence of the rule of law is that the people should obey the law even before states come into being. In this regard, a distinction has been drawn between law and legislation, a distinction which challenges popular positivist-saturated notions of law as equivalent to, if not synonymous with, legislation. Law is considered to be the norms which people live by and respect as binding upon them.
The idea that society could be changed, or indeed a norm could qualify as “law” merely by passing a piece of legislation is a novel concept. This is especially the case with constitutions, for indeed, it would be ironic that the highest and most basic law of the land could be described as such merely by declaring itself to be so. In the early years of their independence from Spain, most Latin American countries adopted constitutions similar to that of the United States. But since they lack the background that had produced the American Constitution, including the English common law, most of their efforts at constitutional engineering were unsuccessful. A written constitution may not stipulate, for instance, that “justice” should be the basis of law, but on no account should this disqualify “justice” from being the basis of law. Likewise a constitution does not stipulate “rational argument” to be a source of law, but resorting to reason does not by that very fact alone contradict the constitution. According to Hayek, societies typically have their own norms, values and principles. ‘Law’ is only one aspect of the many ways by which order is established. Hayek distinguished between law and legislation, maintaining that the former is prior to the latter. Indeed, legislation came late in human history but it is an invention which has more far-reaching effects than fire and gun-powder because it grants human beings enormous power to effectuate social control. Law in the sense of enforced rules of conduct is coeval with society itself, and thus existed long before the very idea of writing them down came about. He further argues that we use the same word ‘law’ to designate both rules that govern nature (i.e. laws of nature) and man’s conduct because originally they both meant to refer to something existing independent of human will. Order is best achieved in society when it is self-governing, when it generates its own norms which its members agree and commit to. In this sense, order in society can be said to arise spontaneously, not through the imposed will of a centralised legislative assembly. The latter position is born of the Enlightenment conceit that society can be re-engineered along ‘rationalist’ lines.

The Constitutional Fault Lines of Contemporary Islamic Civilisation

As we have mentioned briefly earlier, there are six core constitutional fault lines of contemporary Islamic civilisation. We say “fault lines” instead of “elements” or “features” to highlight their vulnerability to crisis. By “fault lines” here we mean those areas which if not addressed correctly, will likely cause serious constitutional crises and potentially threaten the fabric of Islamic civilisation. When not resolved, the constitution that is produced is likely to be a “fiat constitution”, whose dangers we have alluded to above. When correctly addressed, these secure the stability of the political regime and can forge unity with other Muslim states within Islamic civilisation. More importantly, these
are the hinges on which the legal tradition rests today. These fault lines do not work independently of one another. Instead, it is their interaction, synergies and syntheses that produce the peculiar effects, positive or negative.

The six constitutional fault lines that we have identified are that the constitution (1) establishes a state; (2) regulates the organs and institutions of government; (3) is the highest or supreme law of the land; (4) creates citizenship; (5) by extension of the former, also creates a nation; and (6) protects the fundamental rights and liberties of individuals. These can be described as the characteristic features of a modern written constitution. The origins of each of these elements can be traced back to European thought and history. One source, for example, identifies the modern constitution as “an offspring of nationalism”\(^{34}\), a distinctly European phenomenon. Individually of course, some of these features may find their equivalent in other civilisations, but in their unique and distinct combination, they belong exclusively to Europe. Even individually, some do not even have precedence. For instance, the concept of citizen is so new such that new words in the languages of Muslims have to be invented, such as \textit{muwāṭin} (Arabic), \textit{shahr-vand} (Persian) and \textit{vatandas} (Turkish).\(^{35}\) So too with nation: since nation is understood as a community of individuals who share common citizenship, by extension then nation too is new. The Qur’an speaks of \textit{ummah} and \textit{qawm}, but nothing equivalent to nation, nationality or nationalism.\(^{36}\) On the question of constitution as the highest law of the land, this only works in a certain context. In principle, what it means is that this law overrides all other legislation, and all other forms of law that contradict the constitution are considered invalid. The constitutional structure of traditional Muslim political societies is marked by a balance of power between the class of rulers and that of scholars as an informally organised institution.\(^{37}\) Such a provision also creates an awkward relationship with the \textit{Sharīʿah}. In some cases, the constitution completely ignores the \textit{Sharīʿah}, despite the fact that the community has been governed by it for centuries. Yet in other cases, some provisions are made for the \textit{Sharīʿah} to be applicable in the legal system, but this creates an odd situation implying that the \textit{Sharīʿah} derives its validity from the constitution, instead of the other way around. Perhaps the most major point here is on the establishment of a state by the constitution. Hallaq thus saw the modern state as the very antithesis of the \textit{Sharīʿah}, and enlisted seven main areas of conflict between the state and the \textit{Sharīʿah}.\(^{38}\)

Now when we consider the various conflicts and crises that presently afflict Islamic civilisation, especially when they occur at the political or state level, many of these can be subsumed under one or more of the six headings that we have identified. Thus the category “nation” includes difficulties stemming from integration and assimilation of Muslim minorities into non-Muslim societies, or
vice versa, as in most of the West. It also includes the partitioning of organic societies into new “nations” arbitrarily drawn for the sake of political convenience and expediency. An example that comes to mind is the “integration” of Muslims of the province of Mindanao into the state of Philippines, when in fact they were never part of it. This is all the more difficult when nationalism is built upon racial or ethnic foundations, which, when promoted at the dawn of the end of the 19th and early 20th centuries, attracted revulsion from Muslim intellectuals like Bediuzzaman Said Nursi and Musa Jarullah. After the formal abolition of the Ottoman caliphate by Mustafa Kemal Ataturk, the new constitution of Turkey declared sovereignty to belong to the Turkish nation. In other parts of the Muslim world, however, the idea of nationalism was invoked precisely as an antidote to racism, the classic instance being the left-wing intellectual and politician in pre-Independence Malaya (now Malaysia) Burhanuddin al-Helmy. Al-Helmy, who once headed the Pan-Malaysian Islamic Party (PAS), redefined “Malay” in non-racial terms, infused nationalism with Islamic universalism and asserted that the anti-colonialist struggle of him and PAS epitomises “Malay nationalism with Islamic aspirations”.

What is especially noteworthy here is that, by identifying these six elements, it becomes evident that the regulation and limitation of government authority is only one of its features. This contrasts sharply with the commonplace assumption that a constitution is synonymous with limitation of the ruler’s power, for indeed, pre-modern societies – Islamic included – do place a check on the authority of the ruler, even if they “lack” a written constitution. Limitation of power has been taken to be virtually equal to adopting a constitution that today one can hardly conceive of other ways of doing the same job. Why not limit the ruler’s authority by ordinary legislation, instead of a constitution, for example? Why not by rule of law? A constitution is sometimes not drafted by popularly elected representatives, such as the Parliament. After all, Parliament itself derives its authority from the constitution. Ironically, in democratic societies, especially Muslim democracies, the highest law of the land is not drafted by the popular assembly yet stands superior to the voice of the people and over and above legislation passed by elected representatives. The Tunisian reformist scholar, Khayr al-Din al-Tunisi (d. 1889) equated the juristic concept of ahl al-ḥall wa-al-ʿaqd with a European-style Parliament. James Madison expressed it neatly, “It is not a little remarkable that in every case reported by ancient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of pre-eminent wisdom and approved integrity.” This problem may well play out if and when rival versions of a constitution are produced in a country, each claiming itself to be the valid one for the community. Worse, rival institutions
of government are set up – “alternative” cabinet, “alternative” judiciary, even “alternative” Parliament or, possibly, “alternative” elections. Empirically, this is not at all impossible, given the recent trends in challenging the outcomes of general elections in different parts of the world.

Conclusion and Recommendations

To conclude: a common constitutional theory for all Muslim societies should be formulated building upon the religious and moral foundations of Islam. This means, it should be constructed, at its fundamental level, upon the immutable and unchangeable principles (thawābit) concerning the nature of man in society, and taking into account the six core constitutional fault lines that we have discussed above.

To prevent a constitution from degenerating into a fiat constitution, and especially to stop any attempt at designing fiat constitution, the six core constitutional fault lines should be addressed by resting on the rule of law established by the Islamic legal tradition.

Notes

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6. For example, see George N. Sfeir, “The Saudi Approach to Law Reform”, The American Journal of Comparative Law, Vol. 36 No. 4, Autumn 1988, 729. The author states that Saudi Arabia has made “considerable progress in the modernization of its legal system” because it has decided to use statutory law in regulating social affairs rather than “traditional Islamic law” in which the government generally plays a minimal role. It is indeed ironic that at a time when authoritarianism is all-pervasive in the Muslim world, granting more power to the government than it traditionally wields is taken to be an indicator of “progress”!
19. Ibid.