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EARLY CONSTITUTIONAL DOCUMENTS IN THE MIDDLE EAST

IN THE NINETEENTH CENTURY, a remarkably similar sequence of events occurred in several Middle Eastern polities. Autocratic rulers, operating under severe fiscal and foreign pressures, issued constitutional documents containing limited promises of constitutional government, representative assemblies, and individual rights. While these documents might appear to a current-day audience to be incomplete and circumscribed, they proved to be the object of intense political struggle. All were abandoned—at least in part—within a short period after they were promulgated.

In this chapter, we will try to uncover why these documents were issued, what impact they had, and why their viable lives were so short. The focus is not on the Arab world alone, because the Arab experience in this period shows little difference from the broader Middle Eastern experience; indeed, much of the Arab world was governed by the Ottoman Empire (and thus by the Ottoman constitution). The three nineteenth century constitutions that will draw attention are the Tunisian, Ottoman, and Egyptian. Two twentieth-century constitutions that followed a similar pattern, the Iranian and Kuwaiti, are also considered. In addition to considering the origins, workings, and fate of these constitutions, we also examine the political systems that eschewed any constitutional documents in order to test and refine our explanation of the motivations for and meanings of constitutional texts.

The experiences of the countries presented in this chapter will show that the origins of Arab constitutions lie in attempts to build political systems that were more efficient, fiscally responsible, and better ordered. While often dismissed as

alien implants, these constitutions were far more likely to be designed to shore up the state from the inside than satisfy European audiences. For some architects of these documents, constitutionalism (but not democracy) was an additional goal. However, the more that constitutionalism was present as a motive, the more likely it was to prove fatal the effort to write a basic law.

Tunisia

The *qanun al-dawla al-tunisiyya* [law of the Tunisian state or dynasty] of 1861 was the first written constitution in the Arab world.¹ The document was issued in the midst of a period of political changes introduced by an ambitious centralizing administration at a time of increased European influence.² At the time, Tunisia formed a virtually independent province within the Ottoman Empire; the reform program followed by the country's rulers loosely followed the Ottoman *tanzimat* (nineteenth-century political reform program) in content and vocabulary. It involved an assertion of central control over loosely administered outlying areas and construction of a more powerful military. The program was pursued unevenly at best, encountering difficulties because of the rudimentary administrative structure as well as fiscal constraints. Growing European (especially French and British) interest in Tunisia affected the course of political reform: an outbreak of Muslim-Jewish tension in Tunis led the European powers to demand that the Tunisian *bey* (hereditary governor) adopt some of the reforms recently promulgated in the Ottoman Empire.³ Thus, in 1857, the *bey* issued the *'ahd al-iman* [Charter of Faith], which promised protection of persons and property, regularization of taxation, military service, and justice, and concessions to non-Muslims in the adjudication of disputes.⁴

Shortly after the issuance of the *'ahd al-iman*, the *bey* formed a commission of Tunisian officials to study the application of Ottoman legal reforms and draft a constitution. The group worked for close to three years before producing a draft.⁵ However, the *bey* waited until he could present the document to Napoleon III before promulgating it.⁶ While there was much European interest in the document, the Tunisian constitution of 1861 actually reflects European structure and practice less than almost any other Middle Eastern constitutional text (only the laconic Kuwaiti constitutional document of 1938 and perhaps the constitution of the Hijaz appear to be less European in style and content). The Tunisian constitution is rooted partly in Islamic terminology (members of the Grand Council, for instance, are referred to as *ahl al-hall wa-l-'aqd*, literally, the people who loosen and bind; the population was gen-

erally referred to as *ra'ayana*, literally, our flock), though some European usage is also adopted (the ruler is referred to as the king—*al-malik*—rather than *bey*—perhaps an implicit assertion of Tunisian sovereignty).

The constitution consists of thirteen sections. The first two deal with the king and the ruling family and not only require the king to act through his ministers but also absolves the community of loyalty to him if he violates the law. The third section established a Grand Council; other councils were also established for administration and adjudication. While the mixture of these two functions violated emerging European conceptions of the separation of powers, it was quite standard for Middle Eastern governments in the nineteenth century to blend judicial and administrative functions. The Tunisian constitution steered these bodies to acting on the basis of written law. Members of these councils were to be dismissed only for cause and then only by the council itself.

The fourth section of the constitution designated some state income directly for the king and another portion for the family of the king; the rest was to be the responsibility of the bureaucracy. The fifth section covered the ministries, dividing the authority of the minister among those things that he was authorized to do by himself, those things that required the king's agreement, and those things that required the Grand Council's agreement. While ministers were responsible to the king, they were also responsible for his actions to the Grand Council. Only written communications between the king and the ministries and councils were accorded validity.

The sixth and seventh sections concerned the Grand Council itself. One third consisted of ministers and officials; the others were notables initially selected by the king with the approval of his ministers. New members of the Grand Council were to be selected from a list drawn up by the Council with the king's approval. A section of the Grand Council functioned as a standing executive committee. The Council was charged generally with protecting the rights of the people and equality among them; more specifically, its assent was required for all laws and changes in expenditures. The Council was given some limited judicial and investigatory authority and was allowed to review the annual accounting of the ministers.

The following three sections dealt with state employees, budgets, revenues, and ranks of government service; employees could not be dismissed without cause. The twelfth section covered the rights and duties of Tunisians, and affirmed the guarantees of the *'ahd al-iman* for legal equality regardless of residence, social position, and religion. Very few of the economic and civil rights customarily mentioned in twentieth-century constitutions appeared in the Tunisian constitution: there was no mention of freedom of expression or

association, for instance. Yet the right to security of person, honor, and fortune were guaranteed; Tunisian subjects could not be forced to do anything against their will except for military service in accordance with the law. Taxation must be established according to law as well. The thirteenth and final section dealt with residents of Tunisia who were subjects of friendly states, granting them many of the same rights and guarantees.

The Tunisian constitution of 1861 was in force for only three years. During that period, the Grand Council operated as intended; that is, as a body combining legislative, administrative, fiscal, and judicial functions. A recent study of the work of the Council reveals both the extent of its activities and the serious nature of some of its debates.⁷ Yet foreign support for the constitution and the political reforms fell victim to British-French rivalry.⁸ More important, the growing ambitions of the Tunisian state had led to an increasingly onerous tax burden; this was aggravated by foreign loans, which, when they came due, increased already heavy taxation. The reform program—including the constitution—became an issue in a rebellion that compelled the political leadership of Tunisia to beat a hasty retreat.⁹ In April 1864 the *bey* rescinded both a tax increase and the constitution. The rebellion was still not suppressed until the summer, however, after the *bey* accepted help from the Ottoman government.

The constitution's short life span and the foreign involvement led to its frequent characterization as either inappropriate to Tunisian conditions or as a facade. L. Carl Brown, for instance, likens the constitution to a "hothouse plant" and writes that it was composed:

more to curry favor and suppress criticism from abroad than to regularize the actual balance of political forces within Tunisia. Moreover, those immediately in charge—and Tunisia was still very much in the hands of Mustafa Khaznadar and his entourage—had little interest in it beyond exploiting the facade of modern, Western constitutionalism and continuing governmental operations along the old lines of private enrichment in the absence of accountability.¹⁰

Brown's observation that the constitution was partly designed to obtain European support is difficult to question, because of both the circumstances surrounding its adoption and the guarantees for foreign subjects contained in the document itself. Similarly, it is clear that the constitution was designed to serve the political elite, given the self-perpetuating nature of political authority envisioned in the document. But designating the Tunisian constitution as a "facade" seems to judge it by twentieth-century constitutionalist and demo-

cratic standards unsupported by the document itself. A reading of the Tunisian constitution reveals that it promises no democracy and that authority is to be held accountable only to the existing political elite. It supports the rule of law but not of the people.

The structure and content of the Tunisian constitution suggests that its authors had specific concerns. Most fundamental 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 clear procedures for use of public funds. While the Grand Council was clearly conceived as representing the Tunisian population, it was not to do so through any recognizably democratic procedures; it was an appointed and partly self-perpetuating body. Its clear purposes involved consultation and some measure of accountability; popular sovereignty was not even considered. The Tunisian constitution seems to have been designed to serve constitutionalist ends in limited but real ways: political authority was to be rendered more accountable and effective. Constitutionalism was not blended with any democratic elements.

This understanding of the purposes of the constitution is based simply on extrapolation from the text itself. But it can be measured against the writings of a leading Tunisian politician of the period. Khayr al-Din al-Tunisi was a minister and the president of the Grand Council during the constitutional period until his falling out with his father-in-law, Mustafa Khaznadar, the bey's chief minister. Khayr al-Din later replaced Khaznadar and also briefly served as the grand wazir of the Ottoman Empire. Khayr al-Din was therefore involved in the writing and operation of the constitution but not in its abrogation. A few years after the end of the Tunisian constitutional experiment he wrote an extended treatise on government. While he did not mention the Tunisian constitution, he provided a thorough ideological justification for its structure and content. The treatise advances a powerful argument for a constitutionalist polity, and locates constitutionalism not only in European practice but also in the Islamic tradition. While his vocabulary was Islamic, his argument was reminiscent of the *Federalist Papers*: human beings need government to restrain them, but those who exercise power are themselves human and need to be restrained.

[S]ome form of restraint is essential for the maintenance of the human species, but if the person exercising this restraint were left to do as he pleases and rule as he sees fit the fruits to be expected from

this need to have a restrainer would not appear to the *umma* [community], and the original state of neglect would remain unheeded. It is essential that the restrainer should have *his* restrainer to check him either in the form of a heavenly *shari'a* or a policy based on reason, but neither of these can defend its rights if they be violated. For this reason it is incumbent upon the *'ulama* [Islamic scholars] and the notables of the *umma* to resist evil. The Europeans have established councils and have given freedom to the printing presses. In the Islamic *umma* the kings fear those who resist evil just as the kings of Europe fear the councils and the opinions of the masses that proceed from them and form the freedom of the press. The aim of the two [i.e., European and Muslim] is the same—to demand an accounting from the state in order that its conduct may be upright, even if the roads leading to this end may differ.¹¹

Khayr al-Din therefore argued for a political system in which rulers would be required to account for their actions to the *ahl al-hall wa-l-'aqd* (the people who loosen and bind; the identical phrase was used in the Tunisian constitution for the members of the Grand Council). For Khayr al-Din, such people would include both notables and the *'ulama*. From his writings it is clear that he viewed the rulers as merely one obstacle to the construction of such a system; the *'ulama* themselves were little trained to play such a role and suspicious of a seeming European import. Khayr al-Din argued that such accountability served Europe well and was thoroughly in keeping with traditional Islamic conceptions of the role for the *shari'a* (Islamic law) and the *'ulama*. The *umma* could prosper only if it rediscovered such practices.

Viewed in light of Khayr al-Din's writings, 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 *shari'a* and to an elite that keeps the interests of the community in mind. The argument for an Islamic constitutionalism hardly died with Khayr al-Din, as will become clear in Chapter Six. Yet the attempt to put such a constitutionalism into practice proved abortive not only in Tunisia but elsewhere.

Ottoman Empire

The Ottoman constitution of 1876 was issued in circumstances quite similar to those surrounding the Tunisian constitution of 1861.¹² Its fate initially

seemed quite similar as well, because it was suspended after only a short period of operation. In the longer term, however, not only was it eventually revived for the Ottoman Empire in its final decade; it also served as the basis for most Arab constitution writing in the twentieth century.

The Ottoman Empire faced a profound crisis in the mid-1870s. Like Tunisia, it had embarked on a program of administrative centralization and rationalization coupled with an attempt to build a powerful standing military force. The Ottoman program was far more extensive and sustained than its Tunisian counterpart (indeed, the Tunisian program was partly modeled on the Ottoman), but by 1875 the Ottoman government faced a series of related problems. Internally, several provinces in the Balkans were in open revolt. The political and military program had been expensive, leading the government to borrow so extensively that it could not avoid bankruptcy. Externally, the military position of the Empire had so eroded that it could not resist European encroachment without diplomatic maneuvering designed to solicit European support and play European powers off against each other.

In this environment, a group among the political elite of the Empire evinced increasing interest in constitutional government as the key to political and fiscal rationalization and reform. The idea was controversial, partly because a constitution had the potential to encroach on the prerogatives of powerful individuals and groups. Not only might it restrict the authority of the sultan; it might also further the legal equality between Muslims and non-Muslims and diminish the role for *shari'a*-based law in the administration of justice.

A group of senior officials, military leaders, and *'ulama* was appointed to draft a constitution; they considered a number of drafts and proposals. The draft they finally submitted to the sultan most closely resembled the Belgian constitution of 1831; others noted parallels with the Prussian constitution, itself a more royalist version of the Belgian model. The sultan submitted the draft to the cabinet, which made some changes before promulgation.

As finally adopted, the Ottoman constitution of 1876 had twelve sections. The first defined the nature of the state and of the sultan, designating him as caliph and enumerating his prerogatives (without limiting his authority to those designated in the constitution). The second section granted Ottoman subjects rights and equality under the law. The third and fourth sections dealt with the cabinet and public officials. The fifth, sixth, and seventh sections established an elected parliament and an appointed senate. The eighth and ninth sections dealt with the judiciary, guaranteeing the irremovability of judges and establishing a high court for offenses involving ministers, judges, and treason.

The final three sections established the necessity for a budget, provincial government, and emergency and amendment provisions.

The procedure for drafting the constitution, coupled with its content, made clear that many key issues related to constitutionalism were left ambiguous. On the one hand, the Ottoman constitution seemed to mimic constitutional forms while avoiding constitutionalist substance. It was drafted by a narrow group and issued by the sultan. Thus, the constitution would seem to draw authority from—rather than grant authority to—the sultan and the political elite. While the constitution did create an elected parliament, deputies had very limited rights to initiate legislation; for the most part its legislative authority was restricted to reviewing drafts submitted by the ministers. The constitution also failed to specify that only legislation approved by parliament was valid; the authors, relying on European constitutional tradition, took this for granted (with the exception that the constitution expressly gave the sultan and the cabinet such a right when parliament was not in session so long as the laws were presented to parliament at its next meeting). The sultan, however, exploited the silence to claim the authority to issue decrees with the force of law regardless of the parliament, arguing in effect that the authority that issued the constitution could hardly be bound by that document. The sultan's claim would have seemed highly dubious in a nineteenth-century European context (and indeed hearkened back to some early modern European political debates), but it was authoritative in the Ottoman Empire.

Under the constitution, ministers were politically responsible to the sultan; their responsibility to the parliament was limited. The constitution did contain some provisions for individual rights, but it followed the European practice that generally allows such rights to be defined by statute. Only torture was absolutely prohibited; all other rights depended on legislation that could be in practice quite limiting. And the sultan was granted a virtually unlimited right to order exile; the first victim of this provision was Midhat, the politician most influential in securing the adoption of the constitution.

On the other hand, the constitution was not without concessions to parliamentary prerogative and constitutional government. While ministers were politically responsible to the sultan, the parliament was granted some authority over them. The parliament could try ministers for criminal offenses with the sultan's permission. It could also direct questions to them and force their resignation by rejecting their legislative initiatives. While the text of the constitution seemed at first glance to render parliament quite weak, it must be borne in mind that ministerial responsibility to parliament was generally secured in nineteenth-century Europe by political practice rather than constitutional

text (see Part Two). The Ottoman constitution did give the parliament some tools if it wished to pursue such a goal. The constitution gave the parliament some genuine (though hardly absolute) control over the budget; it also insisted that taxation be carried out on a legal and equitable basis. Finally, the constitution allowed judges to be removed only if condemned by their colleagues. Special courts were prohibited, robbing a would-be authoritarian government of an important instrument.

The Ottoman constitution thus left much to be determined by law and practice. While it allowed many avenues for avoiding its provisions and left the parliament only a few crude ways of enforcing limits on executive authority, an assertive parliament did have the potential to obstruct government action (if not determine policy), question ministers, and call them to account. Indeed, it was precisely the attempt of some parliamentarians to realize the constitutionalist potential of the 1876 constitution that led to the suspension of the document.¹³

Given the crises faced by the Ottoman government—bankruptcy, military weakness, internal rebellion, and European diplomatic pressure—it was natural that the newly created parliament would take its oversight responsibilities fairly seriously. This soon led to a clash between the cabinet (and implicitly the sultan) and the parliament. The clash began when some deputies succeeded in inserting veiled criticisms of the government into the parliamentary reply to the speech from the throne. It became more serious in a dispute over essential legislation mandated by the constitution. In its first session, the parliament passed three laws related to the press, provincial administration, and provisions for a state of siege. Rather than approve the laws, the cabinet revised them and resubmitted them to parliament. The parliament indicated its displeasure by not acting on the resubmitted drafts. The confrontation reached its peak when the parliament prepared to vote no confidence in five ministers and request the trial of a former grand *wazir* (the highest official under the sultan), citing the military defeats.¹⁴ The sultan reacted by appointing a new cabinet, but the parliament still asked that the constitutional provisions to try ministers for criminal offenses be activated against the former grand *wazir*. When the sultan moved to transform the position of grand *wazir* into a prime ministership (as will be seen, this was a key part of the program of the constitutionalists), deputies objected, pointing out that this violated explicit constitutional provisions for the appointment of a grand *wazir*.

In short, the Ottoman parliament had begun to turn fairly weak constitutional provisions into real mechanisms of accountability; it even seemed to be moving toward forcing ministerial responsibility to the parliament. Rather

than accept the parliamentary effort to transform the constitution into the basis for a constitutionalist system, the sultan disbanded the parliament, ordering all deputies to leave the city. Parliament was not reconvened for three decades.

The Ottoman constitution thus had a far more contentious history than its equally short-lived Tunisian predecessor. It was written to conform to conflicting visions of the proper political order; some of the nature of this conflict can be discovered by an examination of the matters that provoked the greatest controversy in the writing of the document. Four issues proved especially divisive in the process of drafting the Ottoman constitution of 1876. First, some members of the *'ulama* so bitterly and publicly opposed the entrance of non-Muslims into the Parliament that they were exiled. Yet while these opponents lost the battle over the constitutional text, the victors were far from secularists. The final draft clearly established Islam as the state religion in various institutional and symbolic ways. The authors of the constitution most likely sought to further legitimate positive legislation alongside the Islamic *shari'a*; they also probably wished to wean non-Muslims away from separatist hopes. (Indeed, an earlier proposal had been based on federalizing the government of the Empire.)

The other controversies focused directly or indirectly on attempts to restrict and regularize the authority of the sultan and the government. Most directly, the precise nature of ministerial responsibility was debated. While the final draft provided for ministers to be appointed by and responsible to the sultan, not all elements of parliamentary authority over ministers were removed, as was made clear in practice. The sultan also insisted that he be granted the authority to order the exile of persons deemed dangerous, a claim unsuccessfully but bitterly resisted by leading constitutionalist political leaders. A dispute over the position of the grand *wazir* was more subtle: the sultan successfully resisted attempts to replace the grand *wazir* with a prime minister. This step would have introduced real cabinet government by having ministers report to the sultan through the prime minister; it might have brought about a stronger measure of collective responsibility and diminished the role of the sultan in day-to-day governance.

Equally interesting is the lack of controversy over two seemingly essential innovations. The rights provisions of the constitution occasioned less debate because they deferred the most critical issues to subsequent legislation. And the demand for regularization and legalization of taxation and fiscal affairs provoked little dissent.

The nature of these debates—and the short history of the constitution itself—suggest that the Ottoman political elite was badly divided in the 1870s.

The constitution served only to focus these divisions rather than resolve them. On the one hand stood constitutionalist politicians. While they were anxious to establish an assembly, the goal was less to provide for an element of democracy in Ottoman governance than it was to provide for a measure of accountability. The authority of state actors was not to be diminished, but it was to operate on a more legal and rationalized basis. Accountability, fiscal reform, and rationalization would serve as tools to strengthen the Empire and enable it to face its formidable domestic and international challenges. Robert Devereux writes:

As crisis followed crisis the liberals became convinced that the safety, if not the very existence, of the Empire lay in a radical reshaping of its faulty government structure. Above all they perceived a need to end the absolute rule of the sultan and to substitute a constitutional form of government. Although they viewed non-Muslim co-operation and participation as an essential element of the new regime, they were by no means advocates of abandonment of Turkish-Muslim supremacy. They appear to have been constitutionalists not because they desired a constitution as an end in itself but because they saw in a constitution the best hope for the regeneration of the Empire. Comparing the strength and vigor of the Western European states and impressed by the form without fully understanding its basis, they appear to have become imbued with the idea that the creation in Turkey of a regime patterned on those of Europe would *ipso facto* restore to their country its vanished strength and vigor.¹⁵

Devereux's description of the motivations of the constitutionalists is accurate, though it considerably exaggerates their naivete. More to the point, however, his description of this group as "liberals" needs to be qualified: the Ottoman constitutionalists were very much members of the political elite. By trying to regularize the authority of the sultan and introduce a measure of accountability they were, in a sense, attempting only to render their own positions more effective and efficient. The precarious international and domestic position of the government allowed them to negotiate an ambiguous document that secured some of their ends. The constitution that resulted did not emanate from the population of the Empire nor did it really empower any group other than elements of the existing political leadership. When the ambiguous structures and procedures established by the constitution seemed to be leading to real constitutional government, its opponents were powerless to prevent its suspension.

While the Ottoman constitution was suspended after less than two years of operation, it was not forgotten. In 1908, a group of army officers allied themselves with some reform-minded political leaders and compelled the sultan to reinstate the constitution.¹⁶ One year later, they forced the anticonstitutionalist sultan to abdicate and secured several constitutional amendments that seemed to resolve many of the ambiguities of the earlier text in the parliament's favor. It required the sultan to swear an oath to the *shari'a*, constitution, homeland, and nation. Ministers were now responsible to the parliament, both individually and collectively. Parliament also was accorded the right to initiate legislation and could pass legislation over the sultan's veto by a supermajority.

The revised constitution theoretically remained in effect until the collapse of the Ottoman Empire after the First World War, but it ran into early difficulty. On an international level, the new government proved no more able to resist European armies in either Libya or the Balkans; internally, the opposition to the new leadership showed surprising electoral strength. The new government was forced to rely on heavy suppression of the opposition and electoral manipulation to retain control of the parliament that it had brought back into being.

Despite its imperfect record, the reinstatement of the Ottoman constitution had permanent effects, especially on Arab constitutional history. The text provided a starting point for most of the attempts to draft constitutions in the former Ottoman provinces. Its attempt to balance parliamentary authority with a monarchy provided the basis for similar efforts in Syria in 1920, Egypt in 1923, Jordan and Iraq under their British mandates, and Kuwait in 1962.

Egypt

The final constitution promulgated in the Middle East during the nineteenth century was the Egyptian constitution of 1882. It was issued in the midst of the same sort of crises that afflicted Tunisia and the Ottoman Empire during their experiments with constitutions. The country was bankrupt and operating under a degree of European financial control, and there was rising anti-European agitation, military discontent, and an increasingly assertive assembly. Politics in Egypt was even more contentious during the brief constitutional interlude, so much so that the country was occupied and the constitution rendered irrelevant within months of its passage.¹⁷

The first attempt to implement an Egyptian constitution came in 1879. The Consultative Council of Delegates, first convened in 1866, exhibited

increasing resentment toward European financial control and the political influence that came with it. Egyptian bankruptcy had led to the introduction of a French and a British minister into the Egyptian cabinet; these ministers angered the Council of Delegates by refusing to answer questions directed to them. While the Council had little formal power, its members joined with some leading members of the religious and political elites to pressure the government to resist European financial initiatives (particularly those that would have resulted in higher taxation for the notables and landowners who dominated the Council). The Khedive [hereditary governor] Isma‘il, effective ruler of the country, responded favorably to the pressure, most likely delighted to develop a counterweight to European pressure. Isma‘il appointed a new government in which European ministers and non-Europeans deemed excessively accommodationist were excluded. The prime minister, Sharif, prepared a draft constitution with the aim of introducing a measure of parliamentarism, accountability, and limits on the khedive’s authority. The balance between royal prerogatives and parliamentary powers was not altogether different from that in the Ottoman constitution of 1876: the khedive would have retained predominant influence over the cabinet and legislative process, but the parliament did have some tools at its disposal.¹⁸ Isma‘il was deposed, however, and the Council was adjourned before any action could be taken on the draft.

Two years later a military resentful of European influence, discrimination against ethnically Egyptian officers, and arrears in pay demonstrated at ‘Abdin palace where Tawfiq, Isma‘il’s successor as khedive, resided. Under this pressure, Tawfiq agreed to elections for a reconvened Council; he also recalled Sharif to the premiership. Sharif resurrected his draft, which was submitted to the newly elected Council. The Council, anxious to reduce foreign financial control, sought to increase its control over the budget. Sharif insisted that the matter be referred to the European powers, probably not only out of deference to Egypt’s creditors but also in recognition that a greater role for the Council in public finance would further alienate European powers already suspicious of nationalist and anti-European sentiments in Egyptian politics. Angry parliamentarians brought the matter to Tawfiq, insisting that Sharif be dismissed and the draft constitution approved. Tawfiq acceded to both demands. The Council obtained not only a constitution; it also secured the potentially important precedent that a prime minister without the confidence of the parliament was in an untenable position.¹⁹

By twentieth-century standards, the 1882 constitution (termed the Fundamental Ordinance, or *al-la’iha al-asiyya*) was fairly brief, focusing almost all of its fifty-two articles on the Council. An elected body, the Council was given

an extensive role in legislation and in oversight of public finances. Ministers were invited to attend the Council sessions; they could also be summoned. While the constitution stipulated that ministers were responsible to the Council, it also mandated new elections if a difference between the cabinet and the Council could not be resolved. If a newly elected Council insisted on the position of the former Council, its opinion was binding. The few rights provisions were directly related to the Council, covering issues such as petitioning the Council or the immunity of Council members.²⁰

The Egyptian constitution of 1882 may have provided a sounder basis for constitutionalism than the Tunisian constitution of 1861 or the Ottoman constitution of 1876. The difference lay not so much in the text of the document as in the political circumstances surrounding its adoption. All three documents contained tenuous and ambiguous limits on royal authority; the Egyptian constitution was distinctive in that the parliament not only asserted an ambitious interpretation of its prerogatives but did so successfully (and with the backing of the military). Yet shortly after having secured this triumph the parliament went into recess, never to reconvene. Under foreign threats, the political elite of the country split into two hostile camps; Tawfiq fled to the protection of the British fleet. In the summer of 1882, Great Britain occupied Egypt, restored Tawfiq, and allowed the constitution to be forgotten.

The Egyptian constitution of 1882 can thus be seen as a more ambitious effort than its Tunisian and Ottoman counterparts. Nevertheless, it did not start out that way. Juan Cole accurately characterizes Sharif, the political leader most responsible for drafting the constitution and pursuing adoption of the text: "His constitutionalism was of an elitist variety aimed at shifting some power away from the khedive and the Europeans to the nobles."²¹ The agenda of the Council was more ambitious—which is why it successfully demanded Sharif's resignation when he balked at their demands for a stronger role in supervising the budget. But even the constitutional agenda of the members of the Council should not be exaggerated; Alexander Scholch notes:

The delegates thus did not have in mind at all the establishment of a system of 'parliamentary government'. They wanted to control that half of the budget which was at their disposal, to subject fiscal policy to their will, and to shut the door on any further economic and political progress by the Europeans in Egypt.²²

Egyptian constitutionalists therefore should not be seen as fundamentally different in their aims than their Tunisian and Ottoman counterparts. They came from the political elite and saw a constitution as a way of rendering

government more efficient and fiscally responsible. Their aim was not to end all khedival prerogatives—nor did their draft even contain them all within constitutional channels—but to diminish the khedive's discretion and allow him to be as responsive to domestic as to foreign concerns. Once again, democracy was hardly an issue: the Council, though elected, was essentially a way to ensure representation primarily of the provincial notability.

Other Early Constitutional Experiments in the Middle East: Iran and Kuwait

In the early twentieth century, changes in Middle Eastern politics often took the form, at least in part, of constitutional changes. For instance, the collapse of Ottoman rule in the Arab provinces motivated the composition of short-lived and little-remembered constitutional documents in areas that eventually became part of Transjordan and Libya.²³ Two other constitutional experiments bear examination in this analysis of early Middle Eastern experiences with constitutions: the Iranian constitution of 1906 and the Kuwaiti constitution of 1938. In Iran, a constitution was written in 1906 and 1907 under circumstances quite like those in Egypt, Tunisia, and the Ottoman Empire. Such similarities suggest the usefulness of a consideration of the origins of the Iranian constitutional experiment. Despite strong common political and textual origins, however, the Iranian constitution did not prove tremendously influential in the Arab world, so this brief discussion will focus only on the motivations behind the promulgation of the constitution. It is worth noting, however, that the Iranian constitution was in some ways more successful than the experiments analyzed in this chapter. It remained in effect—officially, if only rarely in spirit—until the Islamic revolution of 1979.²⁴

The same combination of fiscal crisis (verging on bankruptcy) and foreign pressure that provoked crises in Egypt and the Ottoman Empire operated in Iran with increasing severity in the late nineteenth century. By the early twentieth century they had provoked sufficient popular unrest that the shah finally allowed a parliament to be convened. A committee was entrusted with drafting a constitution, which the shah approved in 1906; the following year the parliament passed (and the shah ratified) a supplementary text. As with its Egyptian and Ottoman counterparts, the Iranian parliament was especially anxious to secure some control over state finances, treaties, and concessions. The issue of ministerial responsibility was resolved ambiguously, though more favorably to the parliament than in the Ottoman Empire and Egypt: the authority to

appoint ministers clearly lay with the shah, but the parliament could withdraw confidence. Equality and individual rights were provided for, though their precise meaning often depended on implementing legislation. The constitution introduced a potentially important innovation in the attempt to reconcile positive law with the Islamic *shari'a*: a council of *'ulama* was to be established to review matters proposed in the parliament with the power to strike down any proposal not in accordance with the *shari'a*. This provision of the constitution was effectively ignored throughout most of the history of the Iranian constitution.

Despite this attempt to establish its compatibility with Islam, the Iranian constitution soon came under attack from some members of the *'ulama* as an attempt to marginalize the Islamic *shari'a* and replace it with positive law. Iranian monarchs also strained at some of the constitutional limits placed on their authority. While the constitution continued in force, its viability depended on a strong and independent parliament. In the few years after the constitutional revolution, and again in the late 1940s and early 1950s, such a parliament emerged. It might seem ironic that a constitution that was designed to establish a fairly strong parliament instead depended on that parliament for support, but this has not been an unusual pattern in Middle Eastern constitutional history.

The Kuwaiti constitution of 1938 was a brief document with a brief history.²⁵ Like all the other documents, the Kuwaiti constitution was engendered partly by fiscal difficulties, but of a quite different sort. Far from bankrupt, the Kuwaiti government had to deal with the influx of revenues stemming from an oil concession signed with a British company. By later standards, the revenues were modest indeed, but they caused a dispute both within the ruling Al Sabah family and with leading merchants over the division of royalties among the amir, the Al Sabah, and the population. A group of leading merchants allied themselves with a dissident faction of the Al Sabah family and compelled the amir to accept an assembly; that assembly adopted a basic law that was designed to serve as a provisional constitution.

The Kuwaiti constitution of 1938 contained just five articles. The first designated the nation [*umma*] as the source of authority as represented by the assembly. The second listed a series of laws that the assembly should pass. The third article mandated the assembly's responsibility for treaties, concessions, and agreements, banning those that did not obtain the assembly's consent and oversight. The fourth article designated the assembly as a temporary appeals court until an independent court could be formed; the final article designated

the assembly's president as the executive authority in the country.²⁶ The amir resisted the draft but ultimately acceded to it. When the assembly attempted to assert increasing control over revenue, the amir dissolved it and arranged for new elections. He attempted to have the new assembly approve a constitution he found more appropriate but failed. Accusing members of the new assembly of looking to outside powers (especially Iraq) for support, the amir abandoned the experiment altogether.

As with its nineteenth-century predecessors, the Kuwaiti constitution of 1938 was an elitist affair. Only leading merchant families and dissident members of the royal family were included. Far shorter than the earlier documents, the Kuwaiti constitution contained the same ambiguous hints of parliamentary government and foundered when ambitious members of the assembly tried to make those hints the basis for political (and fiscal) authority in the country.

Nineteenth-Century Constitution Writing

Nineteenth-century constitutions were almost always so short-lived that they appear quixotic in retrospect. What were their authors attempting to achieve? And why did they not succeed?

Three possible nonconstitutional motives were suggested in the introduction, related to sovereignty, ideology, and enhancement of state authority. The first of these, sovereignty, implicitly holds that the major audience for a constitution may be external. The international context was critical to all of the efforts examined in this chapter. Despite their short-lived nature, however, nineteenth-century Middle Eastern constitutions cannot be dismissed as mere window-dressing, designed primarily for foreign consumption. In some of the cases, most notably Egypt and Iran, the constitutions were issued in the face of a hostile international environment. In Egypt, the constitution's life was terminated by foreign occupation. Only in the Tunisian case was there clear European support for the constitution. Nineteenth-century constitutions were generally written primarily for local, rather than foreign, consumption (though in the Tunisian and Ottoman cases, some clearly hoped that European powers would be favorably impressed by the local efforts). Nor can the constitutions be seen merely as accouterments of sovereignty; in several of the cases (Tunisia, Egypt, and Kuwait) the political systems involved had not yet clearly established their own sovereign natures, despite the proclamations of constitutional texts. Nevertheless, the constitutions were designed to establish sovereignty (or something close to it), but not in a merely symbolic way. The

constitutions were to be more than the equivalent of flags or postage stamps: in all cases except the Kuwaiti, the constitution was designed to support a state more able to resist foreign penetration. Constitutions were designed to establish the autonomy of the state in the international arena.

The second, ideological motive suggested in the introduction does not seem to fit the nineteenth-century Middle Eastern experience: the constitutions did little to proclaim new ideological orientations. It would be difficult to deny that there was a real ideological ferment involving issues of Islam, nationalism, and constitutionalism. But the constitutions analyzed here seemed better designed to hide innovations rather than proclaim them. As opposed to more recent constitutions, there is little in these documents of a direct or explicit ideological nature: there is no statement of basic principles, no declaration of policy direction, and no programmatic content. Instead the constitutions are phrased in preexisting ideological terms. They generally present themselves as the will of the ruler rather than the people or the nation. There is explicit (and genuine) obeisance to Islamic vocabulary of governance. This takes several forms: reference to the *shari'ā*; the official establishment of Islam; provision for Islamic institutions; and the use of Islamic terminology. Nineteenth-century constitutions did not seem to serve the purpose of proclaiming new principles; they generally dressed in the guise of old ones.²⁷

Finally, a striking similarity in political circumstances surrounding these attempts at writing constitutions suggests that the fundamental purpose was to reform state authority in an attempt to make it more effective. First, almost all constitutions were issued during a period of fiscal crisis and devoted much language to establishing clear procedures for determining the budget. And nineteenth-century constitutions seemed far more focused on taxation than any of the traditional liberal rights: subjects were generally given surer guarantees against any tax not imposed by law than they were given to freedom of expression or association. Coming in the wake of fiscal crisis, bankruptcy, and pressure to grant economic concessions, such constitutions are best conceived—at least in part—as attempts to put the fiscal house in order. Autocracy had led to fiscal irresponsibility; clear legal procedures for fiscal matters could help the state operate on a sounder basis.

Second, all the constitutions discussed here (with the partial exception of the Iranian) originated very much within the governing elite. They were not composed by constituent assemblies seeking to define the nature of the political community but by individuals or small groups of politicians who generally occupied very senior positions. Often little public discussion surrounded their composition, even when they occasioned sharp private debate within the

elite. And they were promulgated by rulers who made clear—though not always explicitly—that they could be taken away in the same manner that they were given. That is, the ruler or governing elite granted legitimacy to—rather than drew legitimacy from—the constitutional document.

In short, nineteenth-century Middle Eastern constitutions represented attempts by some members of the governing elite to find a formula for more accountable, regularized, and effective government. The goal was to strengthen the authority of the state in the face of internal rebellion, fiscal crisis, and external penetration. Nineteenth-century constitutions were not always designed to strengthen the authority of the ruler, but they were uniformly designed to strengthen and order the state apparatus.

This purpose becomes even more clear if we consider the areas of the Middle East that completely avoided any constitutional document. Despite the fleeting lives of nineteenth-century constitutions, their geographic reach was wide indeed. Only two regions escaped any attempt at issuing a constitution: Morocco and the Arabian peninsula (the only exceptions for the Arabian peninsula were Kuwait, discussed above, and the Hijaz, which briefly had a constitution in the 1920s).

Not coincidentally, these regions managed to avoid the acute crisis of governance that afflicted Tunisia, the Ottoman Empire, Egypt, and Iran. This is not to say that they avoided political problems altogether, only that they lacked the existence of a political elite fending off a simultaneous internal and external challenge, linked to and compounded by fiscal crisis. The Arabian peninsula lacked the bureaucratic state that existed in the other cases, and while its rulers were certainly poor they were not caught between the requirement to repay foreign loans and resistance to rising tax rates. For the most part, their fiscal appetites were more limited.

Morocco was less exceptional. The country certainly attracted European attention (and eventually French rule). But for a long time Morocco's rulers managed to avoid the pattern of rising debt, taxation, and discontent that led their counterparts elsewhere in the Middle East to the desperate measure of a constitution. Moroccan exceptionalism did not survive the nineteenth century, however, and by the early twentieth century it had begun to follow the pattern so familiar in Tunisia, Egypt, the Ottoman Empire, and Iran. It should therefore be no surprise that it was precisely at such a period that the idea of a written constitution was first mooted in Morocco. In the first decade of the twentieth century, a series of draft plans was developed, and in 1908 a complete constitution was drafted by some intellectuals and published. Their draft followed the Ottoman model in broad outline. The effort to establish some

sort of constitution was given a boost by the decision of the *'ulama* to condition their pledge of obedience [*bay'a*] to the new sultan, 'Abd al-Hafiz, on his defending the kingdom and consulting the population.²⁸ Given the experience of other Middle Eastern countries, it may be surmised that a Moroccan constitution was forestalled by the coming of the French protectorate.

Why were the constitutional experiments of the period so short-lived? The principal problem was that the documents served not only the nonconstitutional motives described thus far; they also could serve constitutionalist ends. Generally, constitutionalists focused their attentions on the new assemblies, hoping they would hold government accountable. Indeed, it was precisely on this point that nineteenth-century constitutionalism tended to break down. The documents described here did not determine all issues related to political structure; indeed, they generally set off new battles. The new constitutions were clearly designed to render state authority more effective, but were they also designed to restrict the authority of the ruler and allow him to act only through constitutional channels? Some would-be constitutionalists worked precisely for this end. Constitutionalism—and not simply writing a constitution—was very much on the agenda of some Tunisian, Egyptian, Ottoman, and Iranian reformers. Yet the constitutions that were promulgated were uncertain instruments even in the hands of the constitutionalists. In cases where they began to serve constitutionalist ends, they often provoked severe political crises; the constitutions themselves were often the victims. Given that the attempts to write constitutions were often connected with struggles to ward off European penetration, the constitutionalists often found that they had powerful enemies both inside and outside the countries. Thus, even where the constitutions survived—in Iran and the Ottoman Empire—the effective period of constitutionalist government can be numbered in months.