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The Bey, the mufti and the scattered pearls : Shari'a and political leadership in Tunisia's Age of Reform -1800-1864

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Citation

Haven, E. C. van der. (2006, October 26). *The Bey, the mufti and the scattered pearls : Shari'a and political leadership in Tunisia's Age of Reform -1800-1864*. Retrieved from <https://hdl.handle.net/1887/4968>

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CHAPTER THREE

Once more: the *Siyāsa* of the Tunisian Beys *The Decline of an Old Order*

Introduction

With Chapter Three we move into the second phase of a process of change and reform in Tunisia's nineteenth century. This last chapter will serve to analyze the developments eventually leading to the perdition in Tunisia of a traditional Islamic institute, i.e. the political ruler's overarching role in the judiciary, as described in the *Risāla fī-'l-Siyāsāt al-Shar'īyya* of Bayram I and as analyzed in the first chapter. It will portray the Tunisian people's sentiments when confronted with the disappearance of a body of justice that to them represented the most elevated manifestation of the law of Islam.

In particular the subsequent changing position of the '*ulamā*' in the judicial system will be the subject of discussion. In the following pages the question will be raised why in this second period, contrary to what we have seen in the first and second chapter, most of the '*ulamā*' were not prepared to support the reformist initiatives while the avenues available to them through the *siyāsa shar'īyya* concept were there. They could have served the *Tanzīmāt* reforms with their elaborate knowledge of the law's possibilities to accommodate change. They could even have welcomed the curbing of the Bey's often absolutist and arbitrary performance. But they did not.

The year 1846 stands out in the nineteenth-century process of reform as a 'water shed year', a year of transition. The Bey's journey to the land of the Infidel and his visit to the king of France in that year indicates an important turning point in the sequence of nineteenth-century events. That is when 'the sliding scales' of '*ulamā*' participation started to move. Confronted with the growing interference of the Christian powers, they began questioning their own position. They decided to stand by the people in their bewilderment and confusion instead. After the country-wide insurgence of 1864 the old order was restored in 1870.

In this chapter we finally come to a proper acquaintance with the *mamluk* minister and reformer already briefly introduced in the first chapter and mentioned frequently ever since, Khayr al-Dīn. In his *Aqwam al-Masālik* we meet again the first of the Bayram dynasty of legal scholars, Bayram I, to whose work Khayr al-Dīn returned and from whose pages he quoted the great names of Muslim jurisprudence. Was he, as Hourani suggested, the leader of a group of Tunisian thinkers or must his role be appraised in a different manner?

The role of the political ruler in the judicial system as portrayed from Ḥammūda Pācha's reign was still practically unchanged during the reign of Aḥmad Bey. The most visible representation of this role, i.e. his daily court sessions, still convened at the Bey's residence, Le Bardo Palace. Later, in the case of his successor Mḥammad Bey, they took place in La Marsa, a small place north of Tunis at the coast, in a huge and magnificent tent erected in

front of his palace there.¹ Subjects from the entire territory had access to this form of justice and could lodge whatever complaint they had. Those who lacked the opportunity to travel to the capital, waited for the Bey to come to their region, either on an expedition or during the two-yearly *mahalla*.²

There was in the Bey's person no separation of executive and judicial functions. Moreover, he still held a firm grip on all the judicial and on all religious institutions.³ So, in spite of Ibn Abī al-Dyāf's hopeful suggestions in the first paragraphs of his chronicle, that Ḥammūda Pācha was 'like a king bound by constitution'⁴, Aḥmad Bey seems to have persisted as an almost absolute ruler.

This now was going to change, neither because of changing insights on issues of law and state among the Tunisian guardians of this law, the '*ulamā*', nor on account of the Bey's initiative, but under the overwhelming pressure of the Christian nations, France, England, in alliance this time with the Ottoman Sultan.

Tunisia and the Christian Nations

The sixth October of 1971 was a day of festivities throughout Spain: it commemorated the fourth centenary of the Battle of Lepanto (Greece) where the allied forces of Spain, the Holy See and the Venetians had defeated the maritime forces of the Ottomans and the Arabs of the Maghreb. An important part of the 1971 celebrations comprised a solemn ceremony during which Pope Paul VI returned the flag of Lepanto to the assumed heirs of the erstwhile defeated, i.e. the Turkish government.

The battle of Lepanto was seen at the time as the victory of Christianity over Islam which kindled hopes of recapturing Jerusalem, Constantinople and the formerly Christian territory of Ifriqiyya.

How decisive, however, was the Lepanto battle? After October 1571 the road to Ifriqiyya seemed to be open and almost exactly two years after, on the ninth of October 1573, Don Juan of Austria, the commander of the Christian coalition, did indeed enter La Goulette⁵ and claimed Tunis' victory. It was the last of many attempts during the sixteenth century. The Christian coalition, already forged with great solicitude, soon fell apart. And, nine months later, the Ottoman fleet and army with 250 to 300 ships and 70,000 men under the command of Sinān Pācha, dispelled the Christian troops from the city of Tunis and stayed.

¹ R. Brunschvig, 'Justice', 68, quoting from J. Henry Dunant [founder of the Red Cross], *Notice sur la Régence de Tunis*. Geneva 1858, 66-68.

² Id. 39.

³ Not solely by his own volition, but also by instructions from the Sultan who, apparently took an interest in the faithful conduct of his flock down to the finest detail: Sultan Abdūlmecid (1839-1861) recommended the Bey, his judges, soldiers and officers in a *firman*, to keep strictly to their five daily prayers, sanctions would follow otherwise. In: R. Mantran, *Inventaire*, 42.

⁴ *Ithāf* I, 9.

⁵ Originally *Halq al-Oued*.

As from 1574 Tunisia constituted together with Malta, Sicily and Naples the maritime borderline dividing the Mediterranean in a Western basin dominated by the Christian nations of Western Europe and an Eastern basin, the realm of the Sultan. The situation of 'entente' and consolidation remained practically unchanged until well into the eighteenth century. When, however, after 1798, only with the help of the British the Ottoman Sultan could turn the French out of Egypt, relations definitely changed between the East and the West.⁶ The new balance of power was reflected in the interaction between the Bey and the 'ulamā' and in his networking strategies in European milieus of state.

I. *A Turning Point in the Age of Reform: The Bey's State Visit to the King of France*

The Historical Background of the Bey's Visit

Tunisia's networking policies in Europe could claim very old papers: as early as July 1157 Tunis concluded a capitulation with Pisa, one of the oldest commercial treaties between North Africa and, in Brunschvig's words, 'la chrétienté'.⁷

The same policies prevailed with the Ḥusaynīds, in particular with Ḥammūda Pācha, with Aḥmad Bey and under the reigns of both his successors M'ḥammad b. Ḥusayn Bey (1855-1859) and Muḥammad al-Ṣādiq Bey (1859-1882).

Of all the North African Ottoman provinces, Tunisia had the closest contacts with Europe and a network practically as extensive as that of the Sublime Porte. It was this network that gave the country a window on Europe, and, therefore a unique position in the Maghrib.⁸

One important element in Tunisia's foreign policy was the establishing of consulates in European countries, to promote Tunisian trade, to be in the vicinity of international action to collect commercial and political information, and, the ultimate pursuit, to have access to centers of power. Especially with this last aspiration Tunisia had to watch its step: in Europe, all Ottoman provinces, including the Regency of Tunisia, were officially represented through the Ottoman ambassadors.⁹ Only the ambassador's office was embedded in an exequatur, i.e. was recognized by the host country.

In the nineteenth century Tunisia had representatives in a large number of European cities: Candia (present day Iráklion in Crete), Ragusa (Dubrovnik), La Valetta, Gibraltar, Marseille, Trieste, Genoa and Livorno. Tunisia had a consul in Lisbon since 1825, in Florence, Paris, Bordeaux, Toulon and Nice since 1829, in Geneva since 1862, while Vienna since 1867, Stockholm and Copenhagen had honorary consulates.¹⁰ A request to the Belgian government for Tunisian representation was turned down in 1863. A similar request was directed to the

⁶ A. Hourani, *Arabic Thought*, 39.

⁷ R. Brunschvig, *La Berberie Orientale sous les Hafsides*. I, 25.

⁸ D.L. Newman, 'Tunisian Representation Abroad: Overview.' *Les Cahiers de Tunisie* 181, 2002, 30.

⁹ Id., 30.

¹⁰ Id., 29.

Dutch government in 1864 to which the Tunisian Bey did not receive a positive response either.¹¹

France had in all this a special position as had the Tunisian Beys to the French. When in 1777 an embassy of 'Alī Pācha Bey (1759-1782) was received by Louis XIV, court officials were anxious to surround him with all the honors they thought to be due to him. The number of presents should in any case exceed those of the Pācha of Tripolitania: 'le Bey de Tunis ne pouvait être assimilé à ce Pācha et méritait plus de distinction à tous égards.'¹²

In the first half of the nineteenth century the Tunisian Beys continued these same policies of openness towards the countries north of the Mediterranean, in the knowledge that in Tunisia's specific 'weather cock position' they had to be well informed on the movements and alliances in the international scene and gear themselves up accordingly. It is in this context that the decision for the Bey's state visit to France was taken.

The Political Background of the State Visit

Visits by heads of state are a common phenomenon in our time, but in the nineteenth century they very seldom occurred, in particular between the lands of Islam and the West. Tunisian officials were frequent visitors of Istanbul but traveling outside the *umma* was rare. Aḥmad Bey's traveling overseas and his reception by the king of France was even more exceptional, as it could be understood as an overt display of independence *vis à vis* the Ottoman Sultan under whose tutelage he reigned over the Ottoman province of Tunisia: Aḥmad Bey was not a sovereign ruler. Sultan Abdūlazīz made a state visit to France in 1867, which was then the first time an Ottoman sultan came to Europe other than as the leader of an invading army.¹³

Aḥmad Bey's visit to France lasted from the fifth of November to the thirtieth of December 1846 and during these eight weeks he was received with all the honors he had expectantly anticipated. After the glowing reception of the Bey and his delegation in Paris, Versailles and Fontainebleau, France's grip on Tunisia strengthened: it took on another role. From a friend in trade and politics of long time standing, it became an all too imposing neighbor.

Abdesselem characterizes the Bey's state visit to France as 'un acte d'audace sans précédent dans l'histoire de la dynastie ḥusaynide,'¹⁴ substantiating his assertion with an argument in the sphere of domestic politics. The Ḥusaynīds had assumed power only a century and a half

¹¹ Inventarissenkamer Algemeen Rijksarchief Den Haag. Archief Nederlands Gezantschap Turkije 1814-1872. Karton 456 (2.05.12). Rapport R.J. Keun, raad van de Legatie, aan de buitengewoon gezant en gevolmachtigd minister C.M.G.E. Graaf van Bylandt, 'on the dissenting attitude of the Turkish government to the establishment of a Tunisian consulate in Amsterdam.' (1864).

¹² M. Conon et P. Grandchamp, *Journal de l'Ambassade de Suleïman Aga à la Cour de France (Janvier-Mai 1777). Mémoires et Documents Rare ou Inédits relatif à la Tunisie*. Publiés par l'Institut de Carthage. *Revue Tunisienne*. Numémero Spécial – I. 1917, 22. Tunisian pirates when caught in bad weather could even find a refuge on the coasts of the Provence. Id., ii.

¹³ L.C. Brown, *Tunisia Ahmad Bey*, 325.

¹⁴ A. Abdesselem, 'Contribution à l'Étude de la Politique et de l'Administration d'Ahmad Bey (1837-1855). La Délégation de Pouvoirs de 1846.' *Les Cahiers de Tunisie* 1971, 110.

before. Judging from the many, often violent revolts instigated by rivaling parties from among the members of the same dynasty, they were not yet secure in their positions, according to Abdesselem. This was indeed a serious concern to the Bey when leaving his country for eight weeks or more. Hence, the many instructions left by him before stepping aboard the steamer 'Dante'.

To my mind, however, the audacity of the Bey's initiative is not so much in leaving his governing post vacant for such a long period, but rather in the all too overt display of independence *vis à vis* the Ottoman Sultan, which could be detrimental to the Regency's relations to Istanbul as well as to those of France and England who both had formal Ottoman representation on their soil. Both England and France wavered between flattering a Mediterranean partner and reluctance to cause discontent in the offices of the Sublime Porte.

Initially, the Bey's overseas trip had also included London to visit Queen Victoria and to lubricate negotiations to that effect, a Tunisian delegation headed by Giuseppe Raffo, and accompanied by the son of the English consul in Tunis, Richard Wood, had handed over in person Aḥmad Bey's letter to Her Majesty in April of the same year 1846. The letter does not contain any concrete messages, political or otherwise. It was meant to emphasize the bonds of friendship, *al-maḥabba al-wathīqat al-bunyān al-mutakhallaqa ma'a al-qalb wa al-lisān*¹⁵ Some products of Tunisian soil were presented to Queen Victoria

...une bien petite et veritable bagatelle, mais ce qu'il y a de plus précieux deviendrait elle, comparablement à Votre Majesté ; et les plus grands comme les plus petits objets ne peuvent être regardés que de même œil par qui est si haut placé;¹⁶

It was to no avail: Britain was not willing to receive the Bey unless he was formally introduced by the Ottoman ambassador, which was not what Aḥmad envisaged of a state visit to London, and the trip over the Channel was called off. He must have had hopes, though, to carry his London plans through until the very last moment, judging from his farewell words at La Goulette harbor. When back from his journey to France, the Bey wrote another letter to Queen Victoria, to express his regrets not to have visited her. The letter was, once more, handed over personally in London by a delegation of the Bey.¹⁷

British foreign policy in the first half of the nineteenth century, aimed at maintaining the Ottoman Empire's integrity so that it could serve British interests in the balance of power in Eastern Europe, withstand its enemies there, above all, Russia, and keep open the trade routes to India as well as the markets of Greece, Turkey and the Levant.¹⁸

For France other interests were at stake then. There was, as we have seen, this amalgam of commercial considerations and designs in the realm of cultural and religious imperialism that propelled France into a course of openness and benevolence towards the Court of Le Bardo. There was, since France occupied Algiers in 1830, Constantine near Tunisia's border in 1837

¹⁵ O. Kahl, 'A Letter from Ahmad Bey to Queen Victoria of England.' *Journal of Semitic Studies* 1986, 191.

¹⁶ Id., 194.

¹⁷ *Ithāf* IV, 112.

¹⁸ O. Kahl, A 'Letter from Ahmad Bey,' 188.

and the territory of the Nahd tribe in the same year, a third motivation, aptly described in Marcel's 'Histoire':

Ce résultat est pour la France de l'importance la plus haut, puisque'il assure la frontière orientale de nos possessions algériennes, et nous permet ainsi de tourner toute notre attention sur le voisinage inquiétant de Marok : la conservation d'une pareille alliance devra donc paraître bien désirable, malgré *les inconvénients et les ombrages* [my italicization] que pourraient faire naître le penchant d'Ahmad Pacha Bey pour la France, son voyage à Paris, et la manière solennelle dont notre pays a accueilli son hôte africain.¹⁹

In 1835 the Ottoman Sultan regained control of Tripolitania, on Tunisia's eastern border. In 1837 the Sultan's fleet appeared in Tunisia's waters, which sparked off an immediate reaction of the French, forcing their retreat by a naval demonstration.

Tunisia's reaction to the modernization projects of the Sublime Porte had been a much debated issue at Le Bardo in the early years of the Bey's reign, as we have seen in the second chapter. Time and again pressure had been exercised upon the Bey to implement the *Khatt-i sherif* of *Gülkhāne* of 1839 which would require a far-reaching modification of the judicial system and the laws of personal status. However, the Bey was reluctant to follow up the Sultan's orders, dreading the latter's centralization attempts and the resistance he might encounter from the '*ulamā*'.

Thus, the position of Aḥmad Bey depended on the anti-Ottoman policy of the French and the British policy of the *status quo*. Both policies, the French as well as the British, partly coincided with the Bey's interests: what he needed was a large portion of French anti-Ottoman centralization, tempered with a dash of British protection from the French.

Paris did receive the Bey and his delegation in a very friendly and welcoming fashion, in concert with its own agenda. The Sultan was not amused: in Paris there was no contact between the Bey and the Ottoman ambassador: the latter did not wish to receive him.²⁰

While the Bey and his delegation were shown around in Versailles, Fontainebleau, the Hôtel des Invalides, the Louvre, the Sublime Port in Istanbul, to avoid further 'inconvénients et ombrages' sought the help of the Egyptian head of state, the Khedive 'Abbās. He was to persuade Aḥmad Bey to make an official visit to Istanbul directly after his voyage to France and thus officially show his allegiance to the head of the *umma*. The Bey, however, was not to be won over. He did not go to Istanbul, not at that point in time, nor ever afterwards.²¹

Preparatory Measures to the Voyage to France

As we have seen the Bey dispatched an embassy to Queen Victoria, already in April of 1846. Even earlier in September of 1845 one of his trusted agents was sent to Paris to reconnoiter

¹⁹ J.J. Marcel (ed.), *L'Univers : Histoire et description de tous les peuples : Algérie, Etats Tripolitains, Tunis*. Paris (Firmin Didot Frères, Editeurs) 1850, 213.

²⁰ L.C. Brown, *Tunisia Ahmad Bey*, 331.

²¹ Kh. Chater, *Dépendance et Mutations Précoloniales. La Régence de Tunis de 1815 à 1857*. Tunis (Publications de l'Université de Tunis). 1984, 508.

the possibilities for the Bey's visit.²² Moreover, an elaborate plan was made to foresee any contingencies.

Brown's assertion that - in comparison with a modern nation state - Tunisia's governmental organization was one of simplicity,²³ not only puts a question mark at his methodology, it is also defied by his own words in later paragraphs, when he states that 'Ḥusaynīd government was based on a venerable bureaucratic system - a blending of Ottoman rules and practices with an even older Ḥafsīd ruling tradition.'²⁴ Many examples could be brought forward to support this quotation. The letter with instructions left by the Bey upon his departure to France to secure stability in his country is certainly one of them.

On Thursday, the twenty-seventh of October, a few days before his departure the Bey officially announced his journey to 'the Sultan of the French' to his ministers, his provincial governors, other government functionaries, military officials and the *shaykhs* of the most important tribes, assembled in his palace of Muḥammadiyya,²⁵ while at the same time his soldiers were dispatched to the different regions of his land with the explicit order to stay there until further orders.²⁶

Also present among his audience was his mother, the originally Christian slave girl from San Pietro, Lella Djenatti, who voiced as her opinion that any apprehensions her son might have must disappear in view of the political interests involved.²⁷ The ministers and governors declared their adhesion to the project, 'si toutefois Votre Altesse est sure de trouver l'accueil dont elle est digne.'²⁸

The next day the members of the *Majlis al-Shar'*²⁹ assembled in his palace in Le Bardo were informed.³⁰ The number of religious scholars supporting the Bey in his Paris plans, must have been small. Many must have disapproved, few had the courage to say that openly. Ibrāhīm al-Riyāhī, the *bāsh mufti* and the dean of the Mālikī scholars, did. One could have imagined that the one problem troubling the mufti would have been the Bey's venture out of the *Dār al-Islām* into the *Dār al-Harb*, however, I have found no evidence that this particular subject was

²² L.C. Brown, *Tunisia Ahmad Bey*, 327. *Ithāf* IV, 92.

²³ L.C. Brown, *Tunisia Ahmad Bey*, 93,94.

²⁴ *Id.*, 95.

²⁵ The Muḥammadiyya Palace, built by Muḥammad Bey (1756-1759). It had been the country residence of a number of Tunisian ministers. Aḥmad Bey induced Muṣṭafā Khaznadār to accept other property and had the place, an approximate ten miles south of Tunis, on the road to Zaghuan extended, in particularly with military barracks. In: L.C. Brown, *Tunisia Ahmad Bey*, 317.

²⁶ A. Abdesselem, 'La Délégation de Pouvoirs de 1846.' *Les Cahiers de Tunisie* 1971, 111.

²⁷ M.S. Mzali, 'L'Exercice de l'Autorité Suprême en Tunisie durant le Voyage d'Ahmed-Bey en France (5 Novembre-30 Décembre 1846).' *Revue Tunisienne*. July 1918, 1.

²⁸ *Id.* 1.

²⁹ T. Djaziri, *La Régence de Tunis d'après l'action et les œuvres de Sidi Ibrahim al-Riahi (1750-1850)*. Thèse de Doctorat d'Etat. Université de Paris IV - Sorbonne. (1995), II, 522.

³⁰ Although Mzali does not specify this, we assume that they convened in Le Bardo Palace, just outside the medina.

touched upon then. His concerns were – still - the malpractices of the provincial tax collectors, already encountered in Chapter One. He addressed the Bey with the following question:

The tax farmers on leather, tabac and other commodities continue to exercise their exactions and put pressure on God's people. What kind of measures have you taken in this respect during your absence?

The Bey replied that he had given the tax farmers all the necessary instructions. By then a letter with a fifteen points' list of instructions must have been written by the Bey's secretary Ibn Abī al-Dyāf. It was sent to all the parties concerned immediately after the meeting in Muḥammadiyya the day before.

With the beylical missive all cities, townships and tribes were officially informed of the Bey's voyage to Europe and that authority had been delegated to the heir presumptive, M'ḥammad, the cousin of the Bey. A letter in the Bey's own handwriting was written to that effect to the latter. In charge of daily running of affairs was the Minister 'que est digne d'être mon père', Muṣṭafā Ṣāhib al-Ṭābi,³¹ a *mamluk* from Georgia, already in service under Ḥammūda Pācha.

The letter to the cities and the tribes provides a clear demonstration that the overarching function of the Bey and the wide jurisdictions in his *siyāsa*, his political domain, described in the first chapter, still prevailed under Aḥmad Bey. The Bey's missive comprised fifteen points, of which the third and the ninth clause illustrate his exclusive authority in the judicial system, his authority to appoint the judges of the capital and the Imām of the Zaytūna Mosque.

Article Trois: Le très-puissant Notre frère Muḥammad bey tiendra chaque jour une audience dans la salle du pacha au Bardo pour y recevoir les doléances des plaignants, y rendre la justice au profit de l'opprimé et à l'encontre de l'oppresseur en imposant les sanctions légales (al-ḥudūd), en faisant appliquer la loi du talion aux meurtriers, en faisant acquitter ce qui est dû, et en prononçant diverses autres sentences qui lui seront inspirées par Dieu, à Qui il appartiendra de l'assister et de le guider dans la Bonne voie.

(...) prouvé qu'un soldat a commis un meurtre. Dans ce dernier cas, Nous voudrions qu'il soit sursis à l'exécution du meurtrier jusqu'à Notre retour. Si les considérations politiques imposent une exécution rapide, l'affaire sera portée devant Notre frère par le vizir, auquel la condamnation à mort sera signifiée et qui se chargera de la faire exécuter.

Article Neuf : Si l'un des membres du conseil [du ṣar'a] meurt, il ne .. donnera pas de remplaçant : En effet, un mufti peut exercer les attribus d'un autre qāḍī et il y a plusieurs muftis. Par contre, si un qāḍī d'une autre ville que la capitale meurt, il lui désinera un successeur par l'entremise de shaykh al-islām, du premier mufti malékite et de leurs deux adjoints, afin ne soit point interrompu le fonctionnement de la justice religieuse.

Il nommera également de nouveaux directeurs de la prière (...), pour qu'il n'y ait point d'empêchement à l'organisation des prières prescrites par Dieu.³²

³¹ M.S. Mzali, 'L'Exercice de l'Autorité Suprême,' 5.

³² A. Abdesselem, 'Contribution à l'Etude de la Politique et de l'Administration d'Ahmad Bey (1837-1855). La Délégation de Pouvoirs de 1846.' *Les Cahiers de Tunisie* 1971, 114ff. Author's sources are 'Archives Générales du Gouvernement Tunisien. Case 209, dossier 139.' The delegation of powers is mentioned, in a abridged version, in Ibn al-Dyāf's chronicle, in volume IV, page 94.

The malpractices of the tax collecting governors in the country, a serious concern to Hammūda Pācha, were still a factor under Aḥmad Bey and motivated al-Riyāḥī to repeatedly question him. The year before the Bey had – once more – issued new regulations with respect to the prevailing tax collectors’ practices. A tax farmer had been sent in exile to Malta. Al-Riyāḥī had subsequently praised the Bey for his measures in his Friday sermon.³³ In the letter al-Riyāḥī is given the following reassurance:

Il (i.e. the Bey’s deputy) s’intéressera aux apaltateurs qui ont affermé les taxes sur le tabac, le cuir, de l’octroi et autres et les soutiendra. Il veillera à ce que les intérêts de la ferme soient sauvegardés et empêchera qu’ils soient négligés. Il se conformera en cela aux dispositions de la circulaire que nous avons diffusée dans tout le territoire que Nous administrons, à ce qu’il Nous a vu faire et à l’intérêt qu’il sait que Nous porton à ce domaine. Il suivra scrupuleusement Notre exemple.³⁴

The Bey concludes his instructions with the almost fatherly remark that if the ones in charge are confronted with a problem they cannot resolve, to remember that he is never further away than fifteen days, there was a courier service by steamer between Tunis and Toulon, and further to Paris.

While on the point of leaving, addressing the crowds assembled at the harbor of La Goulette, the Bey explains the journey’s purpose in the following terms: “The general interest [of the country] (*maṣlaḥa*) demands that I go myself to France and to England. God knows the passionate love I have for you. It is for the interests of the kingdom that I embark on this venture, worried as I am for your safety, and I have to bear the agonies of the traveling to secure the rest in your homelands (*li-rāḥa auṭānakum*).”³⁵

He finally salutes his people with two quotations from the Qur’ān: ‘He is God in the heavens and the earth; He knows your secrets, and what you publish, and He knows what you are earning.’³⁶ And ‘God changes not what is in a people, until they change what is in themselves.’³⁷

Despite all his circumspect preliminaries the Bey was hesitant to step aboard the ship that would bring him and his delegation to Toulon. He stayed forty-eight hours in the harbor of La Goulette and when no alarming news was reported to him, embarked on Thursday on the steamer (*fābūr*)³⁸ ‘Dante’ the fifth of November 1846,³⁹ and arrived in Toulon in the evening of

³³ *Ithāf* IV, 81,82.

³⁴ A. Abdessellem, ‘Délégation des Pouvoirs 1846’, 117.

³⁵ *Ithāf* IV, 95.

³⁶ *Sūra* 6 : 3.

³⁷ *Sūra* 13, 12. This verse is frequently quoted since Jamāl al-Dīn al-Afghānī used it to encourage political reform. In: *De Koran*. In de vertaling van: Prof.Dr. J.H. Kramers. Amsterdam (AGON) 1992, 198.

³⁸ It cannot be left mentioned here that the Bey’s traveling by steamer was yet another sign of modern times some of his subjects might not have appreciated. Steamships only started to appear in the Ottoman Empire as from 1825 and were certainly not yet a common phenomenon. In 1880 steamships and steam engines were still the object of theological discussions, raising for instance the question ‘why God has created these things only now and has let them come from the hands of the unbelievers.’ In: R. Peters, ‘Religious Attitudes towards Modernization in the Ottoman Empire. A nineteenth century pious text on steamships, factories and the telegraph.’ *Die Welt des Islams* XXVI (1986), 81 ff.

the eighth of November, where the party had to stay in quarantine until the thirteenth of November.⁴⁰

First Impressions of Europe

The delegation of the Bey comprised the following members: the French consul and chargé d'affaires Charles De Lagau, in Tunis since 1839, Giuseppe Raffo, an adviser to successive beys until 1860, remaining a Christian and Sardinian subject throughout his Tunisian career⁴¹, the Bey's personal physician, the Jewish doctor from Livorno, Lumbroso Abramo, Ḥasūna al-Mūrālī, a rear admiral who had spent nine years in Europe, in particular England, for a variety of reasons, two of the Bey's brothers in law, the minister of war Muṣṭafā Bāsh Aghā, and the treasurer Muṣṭafā Khaznadār, the general Muḥammad al-Murābiṭ, belonging to a well-known Tunisian family from Kairouan,⁴² and also a brother in law of the Bey. Further joining the delegation were colonel Ṣalāḥ 'Uthmān Shaybūb, commander of the palace guards⁴³ and colonel Ḥasūna Mattālī.

Also present in the party was Khayr al-Dīn, the *mamluk* from Circassia, who had only recently become colonel in the Bey's army, and the Bey's secretary Aḥmad Ibn Abī al-Ḍyāf, in beylical service since 1827.⁴⁴ They both were to play influential roles in the Tunisia's process of modernization in the second half of the century. Khayr al-Dīn must have been in his early twenties; Ibn Abī al-Ḍyāf was forty-four at the time.

Although it was never far away and certainly present in the minds of Tunisia's political leaders, either for purposes of trade or political negotiations, Europe, as land of the Infidel, remained an unknown and foreign entity to most Tunisians. Aḥmad Bey's state visit to France formed an important turning point in Tunisia's perception of the Christian nations and marked the beginning of a scholarly production of literature on Europe and modernization.

Another factor further enhanced this change in the second half of the nineteenth century: To make the pilgrimage to Mecca via Egypt or Beyruth, people no longer took the traditional caravan route through Tripolitania, but traveled via Italy. From then on not only was Europe included in the *riḥla's* (travel journals), for quite a few travelers the Mecca pilgrimage seems to have been an incentive to travel widely into France, England, the Balkans and Switzerland.⁴⁵

³⁹ M.S. Mzali, *L'Exercice de l'Autorité Suprême*, 3.

⁴⁰ The party was allowed to stay on board their ship. Travelers of an earlier period were transferred to the Toulon lazaret.

⁴¹ In Ibn al-Dyāf's list he appears as minister, *wazīr*. (*Ithāf* IV, 96).

⁴² J.J. Marcel, *Tunis*, 210: According to Marcel he was one of the brothers in law of the Bey. Van Krieken describes him as the governor of Kairouan, 198.

⁴³ Id., 210.

⁴⁴ The list is the result of combined information from Van Krieken, *Ithāf*, L.C. Brown and J.J. Marcel.

⁴⁵ A. Abdesslem, *Les Historiens Tunisiens*, 505.

Of the French journey there is only one eye witness report, that of the Bey's secretary. The pages in his *Ithāf* prove to be – once more- an indispensable treasure trove of information, and in this particular case even more so, since they reproduce the first impressions he took in while watching from his carriage window France and the French on the eight day trip from Toulon to Paris and his feelings of wonder and elation, later in Paris.

They arrived in Paris on the twenty-third of November. The Tunisian delegation was lodged in the Elysée Palace and already the first day after their arrival received by the French king Louis Philippe (reigned from 1830-1848) and the royal family. The reception at the Tuileries must have been the most important event of the Bey's visit and merited to be described accordingly.⁴⁶ The secretary relates - down to the finest detail – who were present, who was at the right hand of the king, who at his left hand and how he was personally greeted by the King, the Queen, their sons and their wives who approached him, all of them with a smiling face....⁴⁷

Although Ibn Abī al-Dyāf's documentation of the events in France were published for the first time in 1872, so twenty-four years afterwards, to his words still cling the freshness of these first hand impressions. His language is simple and direct, in the words of Abdesselem, 'volontairement dépouillée' and close to the language spoken by the Tunisian elite of the period. More in general the *Ithāf* represents a new development in Tunisian historiography. Contrary to previous custom in biographies, al-Dyāf does not limit himself to 'the high and mighty', the magistrates, the religious scholars and the political elite in the capital. Also the names of other people of importance fill his pages, among them leading figures of cities and towns outside Tunis and chiefs of nomadic tribes.⁴⁸

The Paris experience was an important milestone in the personal life of Ibn Abī al-Dyāf. It was his first encounter with Europe and deepened his ideas of reform and modernization he had developed in his discussions on *Tanzīmāt* with 'Arīf Bey, the *shaykh al-Islām* of the Ottoman Empire, while in Istanbul in 1842.⁴⁹ He was certainly more than a secretary to the three Beys he served, as became already clear in the first chapter and which is apparent in for instance his introduction to the abolition fatwas and in his letter to Bayram IV asking his advice in dietary matters, we will analyze later.

As in the abolition literature, also here one is surprised at his eloquent use of new terms, or redefinition of terms from Islam's classical sources. *Waṭan*, for instance, fatherland, one's home country, is in these hopeful years of autonomous reform and modernization a term appearing in the work of Ibn Abī al-Dyāf, of Khayr al-Dīn and later also Bayram V. The notion of *waṭan* had been practically absent in chronicles of the seventeenth and eighteenth century.⁵⁰ It

⁴⁶ Marcel remarks that the Bey acquired Italian and that he was able to speak with the King without an interpreter. (p. 211) That is hardly surprising: Italian was the language most commonly spoken amongst the members of the beylical household, the princes and the *mamluks*. There was evidently also Arabic as the language to communicate with the staff and clerks, and an occasional Ḥanafīyya soldier might still be speaking Turkish. Oral communication from several Tunisian sources.

⁴⁷ *Ithāf* IV, 100.

⁴⁸ A. Abdesselem, *Les Historiens Tunisiens*, 370.

⁴⁹ Id. 347.

⁵⁰ Id. 122.

indicates a departure from the idea of an identity solely related to the *umma* at large. Demeerseman describes the appearance of the word as ‘le clef de voûte du changement en cours.’⁵¹

To Aḥmad Bey Ibn al-Dyāf was a close adviser. He formed part of the small inner circle of *mamluks* and family members of the Bey where matters of state were discussed.⁵² He was needed for his contacts with the ‘world outside’, and as the only one in Le Bardo with a Zaytūna background, the liaison with the ‘*ulamā*’.

Two Fatwas issued at the Occasion of the State Visit

*The Fatwa of Shaykh al-Islām M. Bayram IV (1843-1861) on the Permissibility of Consumption of Food prepared by the Ahl al-Kitāb (1846)*⁵³

Introduction

In the literature on the Bey’s voyage to France in Ibn Abī al-Dyāf’s chronicles, one particular preparatory measure is not discussed, i.e. the problems related to the provision of *ḥalal* food in the land of the Infidel. Only Abdesselem refers in a footnote⁵⁴ to the fatwa of Bayram IV, which will be the subject of our examination below.

The fatwa of Bayram IV ‘On the Permissibility of Consumption of Food prepared by the People of the Book’ is unique in the sense that it was issued at the occasion of the first state visit of a Tunisian Bey to France. The problem was, of course, not new. Tunisian officials did travel from time to time to France or other European countries; we can only speculate how they coped or evaded the impediments of traveling outside the *umma*. Muḥammad al-Sanūsī, a Tunisian scholar who knew about Bayram’s fatwa and his liberal attitude towards the consumption of food prepared by the Christians (he discussed it one of his works⁵⁵) still, to be on the safe side, changed his initial lodgings for a hotel run by a Jewish owner when in Montecatini, Italy, in 1882, 1883.⁵⁶ Food prepared by Jews was a generally accepted phenomenon: Hammūda Pācha, for example, when his nephews were circumcised, hired, as would any middle-class inhabitant of Tunis at the time, Jewish cooks as caterers.⁵⁷

⁵¹ A. Demeerseman, ‘Formulations de l’idée de Patrie en Tunisie (1837-1872),’ *IBLA* 1966, 61.

⁵² A. Abdesselem, *Les Historiens Tunisiens*, 344.

⁵³ See Appendix C for integral translation.

⁵⁴ Abdesselem, *Les Historiens Tunisiens*, 100.

⁵⁵ M. al-Sanūsī, *Al-Rihla al-hijāzīyya I*, 92-97. In: A. Abdesselem, *Les Historiens Tunisiens*, 432.

⁵⁶ A. Abdesselem, *Les Historiens Tunisiens*, 432.

⁵⁷ L. Valensi, *Tunisian Peasants*, 171.

Another example is provided by the case of Suleiman Agha, a nephew of the Bey and a cavalry general, who visited on his behalf the French king Louis XVI (reigned from 1774-1792) and was away from Tunis from January until May in 1777.⁵⁸ He took his own cook – and his own coffeemaker - who had then to barge into the kitchens of Suleiman Agha’s hosts at every occasion the general was officially invited. The cook still faced the problem of acquiring the properly killed meat, which from time to time gave rise to irritations with both host and guest.⁵⁹ When the servants of Suleiman Agha were served a ragout of hare, which they assumed was shot during a hunting party and subsequently left for eight days, it gave rise to a serious conflict between the Tunisian guest and his hosts.⁶⁰

The Fatwa; its analysis

The author of the fatwa, Bayram IV (1805-1874) great-grandchild of Bayram I, the author of the *Risāla* in the first chapter, began his career, like his grandfather Bayram II, as professor at the age of eighteen. At the death of his grandfather, in 1831, he became a mufti. When his father, Bayram III, died, in 1843, he was appointed as great mufti, head of the Ḥanafī chamber of the *Majlis al-Sharʿī*, and *shaykh al-Islām*, a post he occupied until his death in 1861. He played an important role, as a magistrate, and as an adviser to Aḥmad Bey and to his own brother-in-law M’ḥammad Bey. Like his father and grandfather he was a keen historian and author of an (unfinished) biography of the Ḥanafī imams of the most important mosques in Tunis, *Al-Tarājīm al-muhimma li-l-khutabā’ wa-l-a’imma*.⁶¹

As we shall see later, as *shaykh al-Islām* Bayram’s words were decisive in the legislation procedures connected with the proclamation of the *Ahd al-Amān* of 1857 and the following constitutional reforms. Without his formal approbation no bills could be passed and no legislative measures could be implemented. His fatwa giving served then as an indispensable ‘mechanism of religious legitimization.’⁶²

In the case of the fatwa under study his role is of another nature. There were different levels of fatwa giving and not on all levels these learned responsa were equally binding. This is aptly illustrated by Bayram’s remark, after he has presented his answers to the questions formulated⁶³ : ‘This is the answer to the detailed questions I am able to give at this moment.’ Here Bayram takes on the role of the mufti, the jurisconsult, who explains and elucidates the law, who presents the views and opinions of several authorities to the *mustafīlī*, the questioner, but who leaves to the latter the freedom to take his own decision, as there is in Islam no authoritative body to issue religiously sanctioned rules. Ibn Abī al-Dyāf, the Bey and the

⁵⁸ M. Conor et P. Grandchamp, *Journal de l’Ambassade de Suleiman Aga à la Cour de France (Janvier-Mai 1777)*, vi.

⁵⁹ Id., 22.

⁶⁰ Id., 44.

⁶¹ A. Abdesselem, *Les Historiens Tunisiens*, 297.

⁶² M.K. Masud (Ed.), *Islamic Legal Interpretation. Muftis and their Fatwas*. Cambridge, Mass. (Harvard University Press) 1996, 9.

⁶³ Appendix C, 169.

other members of the delegation still had to follow their own conscience and abide by what they believed to be the genuine religious prescript.⁶⁴

The question on the consumption of meat prepared by the People of the Book is put before Bayram IV by Ibn Abī al-Dyāf, who, as we noticed already in the fatwas on the abolition of slavery, supplies Bayram IV with rather circumstantial indications, even suggesting that the Hanafī *shaykh al-Islām* might want to consult the works of the twelfth century' Mālikī jurist Ibn al-'Arabī.

The secretary's request touches upon three issues. First of all, the question is raised whether 'the food of the People of the Book' as mentioned in *Ṣūra* 5 'The food of those who were given the Book is permitted to you' does include the meat slaughtered by them. Secondly, the secretary questions whether their manner of slaughtering animals is in accordance with the Muslim manner of slaughtering. And, thirdly, should prior to consumption be ascertained whether the meat is safe and free of impurity.

Bayram deals in his fatwa with these three issues, all relevant to the question whether the Bey and his delegation when in the land of the Infidel may consume the food offered by their hosts without any objection. He provides a positive response to each one of them and concludes his fatwa with a few illustrative examples of the consumption of food in general, i.e. non-slaughtered food prepared by non-Muslims.

Bayram's positive stand hinges on his interpretation of two all-important concepts in this context, firstly the People of the Book, the Christians and the Jews, and secondly, i.e. purity, *tahāra* and uncleanness, *najāsa*, and their significance in the interaction with the *Ahl al-Kitāb*. The fatwa's length and its many references to the great names in Muslim jurisprudence indicate the seriousness of the problems in Bayram's perception. It is even more extensive than the fatwa Bayram issued earlier that same year, on the abolition of slavery, a beylical decision to which he only reluctantly had agreed. The author's different position now is evident in the nature of reasoning: it is a discussion. Varying points of view are brought to the fore. He even admits that his references are not always compatible with each other.

Ahl al-Kitāb, the People of the Book, appear in the Qur'ān in two different presentations. They are the Jews and the Christians the Prophet met in Mecca and Medina. They are considered to be the repositories of the earlier revealed scriptures, i.e. *al-Tawrāt* (the Torah), *al-Zabūr* (the Psalms) and *al-Injīl* (the Gospel). They are the believers who are favored by God in the same way as the Muslims, who have accepted the new Revelation.

But there is also another presentation of the People of the Book in the Qur'ān. Jews and Christians in a later phase were opposed to Muḥammad and his claim to be a prophet, and they refused to accept the Qur'ān as the ultimate Revelation of the Word of God.⁶⁵ In the last revealed *Ṣūra* 9 a definite separation is drawn between Muslims and the *Ahl al-Kitāb*, i.e. the Jews and the Christians who are then seen as the distorters of the Scriptures and who are bound to pay the poll-tax.⁶⁶

⁶⁴ W.A.R. Shadid and P.S. van Koningsveld (eds.), *Islam in Dutch Society: Current Developments and Future Prospects*. Kampen (Kok Pharos Publishing House) 1992, 11.

⁶⁵ M. Arkoun, 'The Notion of Revelation.' *Die Welt des Islams* XXVIII 1988, 82.

⁶⁶ *Ṣūra* 9, 29.

Against the payment of this poll-tax they, the *dhimmis* as they were called, were granted free public worship and protection. Islam extended in an early phase the circle of the *Ahl al-Kitāb* and the term came to include people of other religions as well. The extension was made, however, only in the realm of religious toleration. The question of the consumption of meat slaughtered by a non-Muslim was never taken into consideration beyond the circle of the original *Ahl al-Kitāb*.⁶⁷ One of the most principal and practical differences between Muslims, Christian and Jews appears in the issue of the so-called *dhabh*, the Muslim way of slaughtering animals, a term frequently employed in the fatwa under study.

In his answer to the first question Bayram states that the text in *Šūra* 5 ‘the food of those who were given the Book is permitted to you’ does indeed include the meat slaughtered by them. It is a logical consequence of the fact that all other food, not related to slaughtering is permitted anyway, states Bayram, finding support with the fourteenth-century’ Hanafī jurist from Ethiopia, Fakhr al-Zailaī and with the author of *Durar al-Hukkām fī Sharḥ Ghurar al-Aḥkām*, the fifteenth-century’ Ottoman *shaykh al-Islām*, Molla Khusrev (d. 885/1480), a scholar well-known among the Tunisian learned. The kind of meat slaughtered by the People of the Book is not qualified in their discussions on this particular verse in the Qur’ān. Muslim scholars have agreed that it applies to food which has not been explicitly forbidden in other verses of the Qur’ān, as is the case with pork.⁶⁸

To the positive answer to the second question, whether the way of slaughtering of the People of the Book is in accordance with the Muslim way, Bayram provides a more elaborate demonstration. When he states that their regulations comply with our regulations, he implicitly refers to the assumption that the Christians and the Jews like the Muslims invoke the name of God over the animal to be slaughtered. For this is a crucial criterion: ‘for meat to be lawful it is not simply enough that the animal has been slaughtered by the People of the Book (...) it is essential that the act of slaughter should be performed according to their prescribed religious rites and practices.’⁶⁹ It is for this reason that Ibn Abī Ḍyāf presents in his question the quotation of the famous judge of Seville, Ibn al-‘Arabī: Although the chicken is not properly killed - it is killed by twisting its neck - it can be eaten because it is the food of a Christian and that of his priests.’ In Ibn al-‘Arabī’s text the ‘priests’ are specified as *‘aḥbārīhi wa ruhbānīhi*,⁷⁰ the highest authorities of both other religions.

No distinction is made in Bayram’s words between a Muslim butcher and a butcher of the People of the Book (*kitābī*)⁷¹ as long as the *kitābī* butcher invokes the name of God over the animal to be killed. The butcher should adhere to one of the monotheistic religious communities (*alā al-millat al-tauḥīd*), either out of conviction or simply because he claims doing so.

⁶⁷ SEI, 17.

⁶⁸ W.A.R. Shadid and P.S. van Koningsveld (eds.), *Islam in Dutch Society*, 12.

⁶⁹ M. Samiullah, ‘The Meat: Lawful and Unlawful in Islam.’ *Islamic Studies* 21, 1982, 76.

⁷⁰ R. Ridā, *Tarīkh al-Ustād al-Imām al-Shaykh Muḥammad ‘Abdūh*. (Cairo 1350,1344,1324) Vol. I, 683.

⁷¹ The term *kitābī* refers to a person following a revealed religion.

It is here that a problem of a theological nature enters the discussion: would the lenient attitude towards the *kitābī* butcher still prevail if he would invoke a name other than God over the animal to be slaughtered? If, for instance, he would include the name of Jesus as the *Masīh* in his invocation?

As for the case he is heard mentioning the name of the *Masīh*, peace be upon him, or only mentioning God's name, praise be unto Him, while at the same time mentioning the *Masīh*, then the meat slaughtered by him should not be eaten.⁷²

Bayram's fatwa is an academic exercise serving to solve a practical problem: it is to provide the Bey and the members of his delegation with a practical code of conduct when invited to the houses of their Christian hosts in France. How could one be sure that indeed the proper procedures were followed? To solve the problem Bayram turns to 'perhaps the most famous and most comprehensive of fatwa collections'⁷³ the *Fatāwā al-ʿĀlamgīriyya al-maʿrūfa bi'l-fatāwā al-hindiyya*, a leading Ḥanafī book of law, composed in the seventeenth century in India and referred to by Bayram as simply *Al-Hindiyya*, in page 3 of his fatwa. It is in these pages that Bayram finds a pragmatic answer, based on the idea of the benefit of the doubt (*taḥsīnan li'l-ẓann bihī*):

In *Al-Hindiyya* [it is mentioned]: 'Therefore, the animal slaughtered by someone of the People of the Book will only be eaten, when the act of slaughtering was not witnessed and nothing of it had been overheard, or, when it was witnessed and when [consequently] the invocation of the name of The Only God Most High had been overheard. In the first case, i.e. when nothing has been heard of it, it will be assumed that he did invoke the name of God Most High, giving him the benefit of the doubt (*taḥsīnan li'l-ẓann bihī*), as if it concerned the case of a Muslim.'⁷⁴

To summarize, says Bayram, quoting the sixteenth-century Ḥanafī Egyptian scholar al-Shurunbulālī,⁷⁵ the meat of animals slaughtered by a Christian butcher is forbidden if he deviates fundamentally from the invocation of God Most High or associates anyone else to Him. But there is no harm [in the fact] that we know, [*my underlining*] in addition to [hearing] his uttering the name of God Most High, that he believes in Christ as God.⁷⁶

Bayram's response to the third question, i.e. should prior to consumption be ascertained whether the meat is safe and free of impurity, follows the same pragmatic line, 'there is no explicit obligation to control.'⁷⁷ Following the words of another source of authority in Ḥanafī *fiqh*, i.e. the eleventh century jurist from Transoxania, Muḥammad, 'Shams al-A'imma', al-

⁷² Appendix C, 167.

⁷³ N.J. Coulson, *A History of Islamic Law*. Edinburgh (At the University Press) 1991, 143.

⁷⁴ I found the same pragmatic solution in a guidebook for Dutch Muslims written by Yoesoef Qardawi (sic) where a hadith of the Prophet is mentioned to buttress the rule: 'We do receive from time to time meat of which we do not know whether they mentioned the name of Allah [over it]. May we eat it? The Prophet answered: Say bismillah and eat.' Y. Qardawi, *Halal en Haram. Wat toegestaan en verboden is in de islam*. Delft (Uitgeverij Noer) 1984, 78.

⁷⁵ Abū al-Ikhlās Hasan b. 'Ammār b. 'Alī al-Shurunbulālī al-Misrī (994/1586-1069/1659). In: N. Penot-Maaded (trad.), *L'explication judiciaire. De Hassan b. 'Ammār al-Shurunbulālī*. Lyon/Paris (Les éditions du Faucon) 1998,5.

⁷⁶ Appendix C, 167.

⁷⁷ *Id.*, 4.

Sarakhsī (d. 483/1090), Bayram states that there is no objection against the consumption of food of the Christians and of the Jews, slaughtered or otherwise.⁷⁸ What is forbidden, according to Bayram, who is quoting a few pages further in the fatwa from *Al-Hindiyya*, the ‘Indian Fatwas’⁷⁹ again:

If one drinks or eats anything, that is forbidden. It is similar to [the case of] of the chicken farmers: if one knows there was dirt in what [the chickens] in the chicken run pecked, it is not permitted [to them] to perform the ritual ablution and the *ṣalāt* in their trousers. Similarly to eating and drinking from their vessels [i.e. the vessels of the polytheists mentioned earlier], if it is known that their trousers are unclean and that it is not permitted to perform the *ṣalāt* in them, [then there is objection], while if one is not aware of the fact that it is loathsome to perform the *ṣalāt* in them [under such circumstances] and one does, then there is no objection.’ End of quotation.⁸⁰

Though the immediate cause of Bayram’s fatwa is the expected interaction with the Christians in France, its text is characterized by a lack of apologetic terms. It is a traditional fatwa. The proper procedure of slaughter to be followed, for instance, is described in centuries old traditional terms: the knife should be sharp, and the cut should be made at one particular spot, i.e. the jugular veins.

If we turn to a similar discussion, a few years later, in Paris, we find a comparable attitude. Sulaymān ibn ‘Alī al-Ḥarā’irī, also a scholar of Tunisian descent, teaching Arabic in the *Ecole des Langues Orientales Vivantes* and confronted with the same problems among Muslim students staying there,⁸¹ issued in 1857 a fatwa stipulating that God allows the food of the Christians without restriction (*mutlaqan*), except for pork (*al-khinzīr*).⁸² He, like Bayram, refers to Qāḍī ibn al-‘Arabī and the example mentioned by him of the chicken in his *tafsīr*. He does not bring forward any other persons of authority.

In a still later discussion on the same subject, in the work *Ṣafwat al-‘tibār* (published in the years 1885-87), written by yet another member of the Bayram family, Bayram V, not only the traditional Muslim method of slaughtering, *dhabḥ*, is dealt with. Bayram V is, forty years later,

⁷⁸ Appendix C, 168.

⁷⁹ C. Imber, *Ebu’s-Su‘ud. The Islamic Legal Tradition*. Edinburgh (University Press) 1997, 34.

⁸⁰ Appendix C, 169..

⁸¹ P.S. van Koningsveld, ‘Between Communalism and Secularism. Modern Sunnite Discussions on Male Head-Gear and Coiffure.’ In: J. Platvoet/K. van den Toorn (eds), *Pluralism and Identity Studies in Ritual Behaviour*. Leiden (E.J. Brill) 1995, 330.

⁸² Sulaymān ibn ‘Alī al-Ḥarā’irī, *Fatwa fi ibāhātī dhakā al-nasārā*. Paris (Impr. De Blot) 1860 (1277), 2. The author was not a ‘*‘ālim* in the strict sense of the word. I have not been able to locate his name in Ibn Abī al-Dyāl’s chronicle, nor is his name mentioned in Abdesselem’s work. He appears to have been closely related to Abbé Bourgade of the Chapel of Saint Louis in Carthage and the latter’s lithographic studio in Tunis, where the very first Tunisian text in Arabic was printed in 1849. This text was the translation in Arabic of Bourgade’s book: *Soirées de Carthage ou dialogues entre un prêtre catholique, un mufti et un cadī*, the translator and calligrapher being al-Ḥarā’irī. This lithographic print was published ten years later in Paris (Libr. Benjamin Duprat), entitled *Kūtāb monsamara kartajiniyya wa hiyya mounadh’ara fi l-qur’ān wa fi-l-‘injīl bayn qadh’i wa moufti wa rahīb* (175 p.) In: A. Demeerseman, ‘Une étape importante de la culture islamique: une parente méconnue de l’imprimerie arabe tunisienne. La lithographie.’ *IBLA* 1953, 370.

apparently confronted with other methods of European origin, slaughter by means of suffocation or strangulation (*al-makhnūq*).⁸³

The issue of the consumption of food prepared by ‘the People of the Book’ is hardly touched upon in the traveling journal. Ibn Abī al-Ḍyāf mentions that one day a general of Napoleon’s army, Maréchal Soult,⁸⁴ visited the Bey and after their conversation the general invited the Bey to his home, where he dined with the general and his wife. There is no indication here of any problems arising at that event.⁸⁵

*The Fatwa of the Bāsh Mufti Ibrāhīm al-Riyāhī [on the usage of] Eau de Cologne (Mā al-Kulūniya) (1847)*⁸⁶

It must have been in the early weeks after his return that the Bey, through his secretary, consulted his *bāsh mufti* on the permissibility of a souvenir he had brought home from France, a bottle of Eau de Cologne. Was the use of these ‘refreshing sprinklings’ allowed? As indicated above in the Bayram case, the *bāsh mufti* al-Riyāhī assumes here a role different from the one in the abolition case. With the words ‘the believer should act according to his faith’ he concludes his reply to the *mustaftī* Ibn Abī al-Ḍyāf, who in his question to the mufti already suggests to consider the cause of the impurity of wine.

Ibn Abī al-Ḍyāf’s quest is here to find the effective cause or rationale (*‘illa*), i.e. the formal ground for the decision whether Eau de Cologne as a fluid containing alcohol is to be considered pure or impure, *hal ḥadhā al-mā’ najasa li-’anna ‘aṣḥīhi al-khamr*,⁸⁷ is the problem he

⁸³ Bayram V brings his ideas to the fore, not in a fatwa, but in what he calls a discussion (*kalām*) on the ‘Consumption of [meat of animals killed by] suffocation (*al-makhnūq*). This Tunisian scholarly exercise became part of the well-known controversy between Muḥammad ‘Abdūh and the Egyptian ‘*ulamā*’ on the so-called Transvaal fatwa. Upon the request from a South African Muslim in Transvaal, ‘Abdūh in his function as Great Mufti of Egypt, had issued a fatwa, allowing Muslims to wear a hat or a beret as worn by the Christians and also to consume meat that was slaughtered by the Christians [even when the slaughtering by Christians, i.e. Europeans] had not taken place in accordance with the Islamic rules and God’s name had not been invoked during the act of slaughtering. In: W.A.R. Shadid and P.S. van Koningsveld (eds.), *Islam in Dutch Society*, 12.] In Egypt these words gave rise to a heated debate and the Khedive ‘Abbās Ḥilmī took the opportunity to lance a campaign against the Mufti. A small group of Tunisian reformists, already in contact with ‘Abdūh since his two visits to Tunisia in 1884 and 1903, aligned themselves to their guide in the new spirit (*ruh ‘aṣīrī*). In *Al-Manār* appeared an anonymous article, written by a Tunisian ‘*alim*, who later appeared to be Shaykh al-Ṭāhir II Ibn ‘Āchour. He corroborated ‘Abdūh’s views in a juridical treatise (*risāla fiqhīyya*) with arguments from the Mālikī *madhhab*. In: A. Chenoufi, ‘Les deux séjours de Muhammad ‘Abdūh en Tunisie.’ *Les Cahiers de Tunisie* 1968, 57. Later, Riḍā mentioned the treatise and also published the text of fatwa of Bayram V in his *Tarīkh al-Ustād al-Imām al-Shaykh Muḥammad ‘Abdūh*. (Cairo 1350,1344,1324. Vol. I, 683).

According to Bayram V, opines Riḍā, the meat slaughtered by the People of the Book is permitted, without any restrictions .

‘Abdūh in his Transvaal fatwa had taken the same point of view.

⁸⁴ Nicolas Jean de Dieu Soult (1769-1851), Napoleon’s famous general at Austerlitz, Spain and Waterloo. He was Minister of War during France’s take over in Algiers (1830-1832).

⁸⁵ *Ithāf* IV, 104.

⁸⁶ T. Djaziri, *La Régence*, III, 70.

⁸⁷ ‘Umar al-Riyāhī, *Ta’līq al-Nawāhī bi-tarjamat al-‘Allāma Ibrāhīm al-Riyāhī*. Tunis (Al-Mashrika al-Tunisiyya li-Funūn al-Rasmi) II,39.

lays before al-Riyāḥī. The consumption of wine is prohibited in the Qurʾān in several places: ‘O believers, wine and (...) idols (...) are an abomination.’⁸⁸

The Qurʾān does not specify why alcohol was not allowed to Muslims. In the course of time, however, scholars unanimously came to the view that it was the ensuing drunkenness that determined its prohibition.⁸⁹ Innumerable are the traditions which only contain this one rule: All drinks which may cause drunkenness are prohibited in any quantity: *ʾkull muskir ḥarām kathīruhu wa qalīluhu*.⁹⁰ Wine drinking is considered a criminal act, one of the six *ḥudūd* offences. Several examples figure in the *Risāla* of Bayram I in the first chapter.⁹¹

The rationale of drunkenness, however, does not apply here, states al-Riyāḥī, as Eau de Cologne is solely applied on the skin. Moreover, the impurity of the alcohol it contains disappears after transformation.

The quality of impurity attached to wine, relates to the effect it produces, which is drunkenness. The moment this effect is no longer there, the impurity vanishes. (...) In the present case, there is reason to consider Eau de Cologne as non-impure and its usage lawful and permitted, because it has distanced itself from its original composition.

Further elaborating on the reasoning that alcohol loses its prohibitive character once the effects of drunkenness no longer play a role, al-Riyāḥī makes the following statement:

In the same manner, the advice given by Sanhoury⁹² should be considered. It corroborates the statement issued by al-Zenaty⁹³, who sees the consumption of wine as lawful and permitted in cases of a medical remedy or as an culinary ingredient, or combined and mixed with other products, losing in the process the volatile components generating drunkenness.

Al-Riyāḥī’s liberal stance to wine is remarkable for a Mālikī scholar: Mālikīs, as a rule, strongly rejected the consumption of alcoholic beverages. Music might have sufficed to them to liven up their parties, as to the Mālikīs music was a legally permitted form of expression! This in contradistinction to the Ḥanafīs who in Abbasīd times did not favor music but were easy going on wine. Later the Ḥanafīs would change their views and in the fatwas of the famous Qāḍī Khān of the twelfth century there is already a certain rigidity emerging.⁹⁴

Another fatwa on the subject of Eau de Cologne was issued by the successor of Bayram IV, the *shaykh al-Islām* Muḥammad b. al-Khūja. Though the text of the fatwa does not give a date, the fatwa is at least of fourteen years later. Al-Khūja was appointed to his post in 1861.⁹⁵

⁸⁸ *Sūra* 5, 90.

⁸⁹ A.K. Reinhart, ‘When Women Went to Mosques: al-Aydini on the Duration of Assessments’. In: M.K. Masud (Ed.), *Islamic Legal Interpretation*, 120.

⁹⁰ A.J. Wensinck, ‘Khamr.’ In: SEI, 244.

⁹¹ See for instance page 17 of the text of the *Risāla*, Appendix A, 143.

⁹² Sālim al-Nagā’ al-Sanhūrī al-Mālikī. (d. 1015-1606). Brockelmann S II, 416.

⁹³ Al-Zanātī, probable author of *Hulal al-Maqāla* (no dates). Brockelmann S I, 302.

⁹⁴ J. Sadan, ‘Vin - fait de Civilization.’ In: M. Rosen-Ayalon, *Studies in Memory of Gaston Wiet*. Institute of Asian and African Studies. Hebrew University of Jerusalem. Jerusalem 1977, vii.

⁹⁵ A. Demeerseman, *Aspects de la Société Tunisienne*, 201.

The two fatwas, those of Bayram IV and of al-Riyāḥī, answers to two seemingly minor issues in relation to the political interests at stake, might well be the most important precautionary measures. They were precautionary not in the first place to ascertain the religiously safe consumption of food, or to avoid discrediting the Bey's faithful behavior by his sprinkling of Eau de Cologne, but precautionary in the sense of giving assurance to conservative - Mālikī - minds at home that the voyage to the land of the Christians did not jeopardize in any way their Muslim ruler. Al-Riyāḥī's critical remarks before and after the French venture (see below) might very well be the 'top of the iceberg' and will have voiced a much broader discontent. As much as the Bey could ill afford to lose the sympathy of the European powers, too much resistance in the sphere of domestic politics would also endanger his position as would be demonstrated later by the 1864 developments.

II. *Loss of Autonomy and the 'Ulamā's Changing Attitudes*

Actors in the Process of Modernization: Mamluks and 'Ulamā'

A striking phenomenon of the nineteenth-century Tunisia's elite is their longevity and their long stay in office. Bayram I was eighty four when he finished his *Risāla* on governance in 1800, al-Riyāḥī already in function under Ḥammūda Pācha Bey, was still Aḥmad Bey's critical gadfly at eighty; Maḥmūd Qābādū was there at the Aḥmad Bey's first attempts at reform, in particular the Military School and still played his part in the second phase of modernization. At the Bey's court Muṣṭafā Khaznadār, the treasurer was forty-three years in office. And there is, of course, Khayr al-Dīn, who as *mamluk* minister embraced the first as well as the second period of modernization. The Bey's *kātib al-sirr*, Ibn Abī Ḍyāf, entered beylical service in 1827 and left his position after thirty-four years, in 1861.⁹⁶ Sālim Bū Ḥājib, the Zaytūna professor who received Muḥammad 'Abdūh in his home in 1903, lived from the first period of reform until well after the French take over, from 1827 until 1924.⁹⁷

Tunisia's actors in the process of change in the second half of the nineteenth century comprised of two factions, i.e. the '*ulamā*' and the *mamluk* ministers. The first had gone through all the institutions of the learned, in particular the university of the Zaytūna Mosque, 'growing up in the seeking of knowledge.'⁹⁸

The latter of Christian origin had come to the Bey's palace at a very early age and were raised in a predominantly military fashion to assume posts in the army or as a minister. Between '*ulamā*' and *mamluks* there was a bond of interdependency: '*ulamā*' could not function without the support, financially and otherwise of at least one of the *mamluk* ministers; the *mamluk* ministers were dependent upon the '*ulamā*' as their middlemen to reach the population and to provide them with the legitimate justification of their modernization plans. There was between the two a supportive relationship, *intisāb*.⁹⁹

⁹⁶ Id., 354.

⁹⁷ S. Zmerli, *Figures Tunisiennes. Les Précurseurs*. Tunis (Editions Bouslama), without date, 93.

⁹⁸ L.C. Brown, *Tunisia Ahmad Bey*, 44.

⁹⁹ A. Green, *Tunisian Ulama*, 90.

A Tunisian *‘alim*, like for instance, al-Riyāhī, coming from a tribal environment in the Testour region, could only seriously contemplate a career when, twenty years after his arrival in Tunis, he finally came under the protection of one of Ḥammūda Pācha’s *mamluk* ministers. Yūsuf Sāhib al-Ṭābi, who, once as a small boy from Moldavia was offered to the Bey by his governor of Sfax. This *mamluk* minister bought him a house in 1803,¹⁰⁰ gave him regular allowance and even arranged a wife for him.¹⁰¹ He became a professor at the Halfaouine mosque in 1814, was appointed Mālikī *bāsh mufti* by the Bey in 1832 and first Imām of the Zaytūna Mosque in 1839.

Ibn Abī al-Dyāf, though a Zaytūna student, did not – properly speaking - belong to the *‘ulamā’*, was not a member of the *ahl al-‘ilm* as he had not specialized either in theology, grammar, astronomy or *fiqh*, Muslim jurisprudence. He belonged to the category *‘rijāl al-dawla’*, the men of the state apparatus and would later in his career acquire a military rank, that of division general. He had come into his function through his father, himself a secretary at the chancellery, who had also enjoyed the protection of Yūsuf Sāhib al-Ṭābi.

The ‘Ulamā’

The scholars held in greatest respect – in the countries of North Africa - were the *‘ulamā’ fuqahā’*, the specialists in Muslim jurisprudence.¹⁰² Brown in his study on the reign of Aḥmad Bey, basing his data on Bayram V’s work *Ṣafwat al-i’tibār*, estimates that there must have been an approximate fifty of these highly educated scholars in Tunis at the time.¹⁰³ According to Tlili there were twenty five *shaykhs* in the government of Aḥmad Bey, a number which he does not specify but which I presume must be understood as referring to the group of *‘ulamā’* regularly invited to Le Bardo for consultation and discussion.¹⁰⁴ For the years between 1814 and 1872 Ibn Abī al-Dyāf mentions 143 biographies of *‘ulamā’*. These must be considered to belong to the *‘ulamā’* leadership and were held in high esteem. The Bey and the government ministers rose to greet them; *‘ulamā’* did not kiss the Bey’s hand.

Outside this group of high prestige, *‘ulamā’* of the lower echelons of learning pervaded the lives of people in many different ways: as teachers of the 111 *katātīb*, the elementary quranic schools with their 3500 students, as imams of the 300 mosques, as leaders of 200 *zawīyas*, in the fifteen madrasas, in their contacts with the - over eight hundred - official witnesses, *‘udūl*. The poor could knock on a *shaykh*’s door and do an appeal on his charity. Some of the *‘ulamā’* were also actively involved in commercial activities, in particular those related to the

¹⁰⁰ The house is still there, in the Rue Sidi Brahim, no. 26. Under Ahmad Bey’s reign al-Riyāhī and his Tijāniyya followers were presented with a *zawīyya* in the same street, on no. 11; the house with the brass doors.

¹⁰¹ T. al-Djaziri, *La Régence de Tunis*, II, 461.

¹⁰² M. El-Aziz Ben Achour, *Les ulamas à Tunis aux XVIIIe et XIXe siècles*. Université Paris. (unpublished dissertation) 1977, 14.

¹⁰³ L.C. Brown, *Tunisia Ahmad Bey*, 150.

¹⁰⁴ B. Tlili, *Les Rapports Culturels et Ideologiques entre l’Orient et l’Occident, en Tunisie, au XIXe Siècle (1830-1880)*. Tunis (Publications de l’Université de Tunis) 1974, 501.

production, sale and export of Tunisia's famous red bonnets, the *chechias* and to the trade in perfume.

At the Zaytūna University 102 teachers, 42 of whom were regular staff, lectured to eight hundred students.¹⁰⁵

Outside Tunis, no village was without a *kuttab*; Brown estimates all in all a number of 12.000 pupils visiting these elementary schools. There were institutes for higher education in some of the larger cities, like Sfax, Sousse and, of course, Kairouan.

The influence of the '*ulamā*' transcended the smaller units of family, tribes and guilds. They, as the custodians of truth, were meant to understand and interpret the Islamic values, thus disseminating their *Weltanschauung*, and giving meaning to the lives of the faithful.

The Mamluks

The employment of white slaves for government purposes and in the military was an element of the Ottoman system that had survived the almost three centuries of 'de-ottomanization' in Tunisia. It was a classical Muslim phenomenon, of antique derivation. The Athens police corps in the fifth century B.C., consisted of slaves who were the city's property. They were Scythians, originating from the region north of the Black Sea,¹⁰⁶ in the nineteenth century still the homeland of most of the Tunisian *mamluks*. Fāris al-Shidyāq, in his article on the inhumanity of white slavery which he published in the sixties of the nineteenth century, relates how many a parent in these regions, living in a condition of abject deprivation, saw the sending off of his son or daughter to Istanbul as offering a perspective of a better life: 'was there a better place to go than to the Abode of the Caliph, this center of power and prominence? More deserving anyway than to raise them under Russian rule.'¹⁰⁷

The *mamluks* for the Tunisian court were purchased at the slave market in Istanbul, or sometimes presented as a gift to the Bey. Most of them were still very young: Aḥmad Bey's Finance Minister Muṣṭafā Khaznadār was born as 'George' on the Greek island of Chios in 1817 and less than ten years old when arriving in Le Bardo.¹⁰⁸ The number of *mamluks*, varying in age from very young to very senior in age, will have been an approximate hundred, no exact data are available. The 'primary school age' group followed their lessons with the *mu'addib* together with the young Ḥusaynīd princes and were introduced in Islam. The older princes and *mamluks* went to the Bardo *madrassa*.

Khayr al-Dīn, the *mamluk* from Circassia, in the Black Sea region, spent his youth in the Istanbul home of the '*ālim* Kibriṣli Taḥsīn Bey, on the Asian coast of the Bosphorus,¹⁰⁹ although there is no exact information on his early years, despite the efforts he undertook

¹⁰⁵ L.C. Brown, *Tunisia Ahmad Bey*, 150 ff.

¹⁰⁶ Finley, M.I., *Ancient Slavery and Modern Ideology*. London (Chatto and Windus Ltd.) 1980, 85.

¹⁰⁷ F. Tarabolsi and A. al-Azmeh, *Unknown Works of Fāris al-Shidyāq*, London (Riad El-Rayyes Books Ltd.) 1995, 243.

¹⁰⁸ L.C. Brown, *Tunisia Ahmad Bey*, 52, n.32.

¹⁰⁹ R. Mantran, *Inventaire des Documents d'Archives turc du Dar el-Bey*. Paris (Presses Universitaires de France) 1961, XXIX.

himself to retrieve some. Supposedly he arrived in Le Bardo Palace in the autumn of 1839, at the age of sixteen, seventeen. The first tangible proof of his existence is a small document signed by himself in his function of *chef de bataillon* (*bīn bāshī*), dated July 25, 1840, in Tunis.¹¹⁰ He quickly moved up in the ranks of government. Early in 1857 he was appointed Minister of the Navy, a post he would occupy until 1862.¹¹¹

Early Educational Initiatives

One of the first initiatives in Aḥmad Bey's modernization program was the upgrading of the education and training of his *mamluk* corps. In March 1840 he founded the *Maktab al-Muhandisīn*, the Polytechnical School that was to replace the *mamluks'* traditional secondary *madrasa* education and that served to train his newly recruited soldiers. This institute would last until 1855 and must be considered the precursor of the Military School, the *Maktab al-Harb*, which was founded in November 1855 and lasted until 1869.¹¹²

The curriculum comprised a.o. mathematics, military history, by the Piemontese Luigi Caligaris, artillery and topography, given by Delcassel, an English officer, French and Italian by an Italian professor by the name of Troani.¹¹³ Although the results left much to be desired, one of the reasons being the low level of pupils entering the school - they were hardly literate - it brought the young students into contact with another world and with different modes of teaching than they were used to. In the first school three languages were taught; Arabic, French and Italian. In the Military School Italian had gone as all the instructors then were French.

Of great influence, in both the Polytechnical and in the Military School was *shaykh* Maḥmūd Qābādū (1813- 1861). He was teaching Arabic and Islamic studies and instilled in his pupils, among whom Khayr al-Dīn, an idea of the erstwhile splendor of Muslim civilization in which the universal sciences (*al-ʿulūm al-kawniyya*) had been cultivated; Europeans had borrowed from the Muslims these sciences, and thus developed their nations, while the lands of Islam had neglected them. Khayr al-Dīn would later further elaborate upon this reasoning and employ them in his arguments,¹¹⁴ as would the Turkish reformer of roughly the same period, Namik Kemal.¹¹⁵ Qābādū, who also became a Zaytūna professor in 1841, was an inspiring tutor, stimulating his pupils into active participation '...L'effort de mémoire était réduit, le *matn* ne

¹¹⁰ G.S. van Krieken, *Khayr al-Dīn*, 9.

¹¹¹ Id., 'Chronologie'.

¹¹² A. Chennoufi, 'L'École de Guerre de Bardo.' *Les Cahiers de Tunisie* 1976, 47.

¹¹³ K. Chater, *Dépendance et Mutations Précoloniales*, 512.

¹¹⁴ A. Green, *The Tunisian Ulama*, 106.

¹¹⁵ B. Lewis, *The Emergence of Modern Turkey*. Oxford (University Press) 1962, 142.

jouant qu'un rôle indicatif...' ¹¹⁶ He must be considered as the scholar who gave the initially mostly practical and technical reforms under Aḥmad Bey a coherent religious ideology.¹¹⁷

Another educational reform the Bey initiated in the early years of his reign, in 1842, concerned the Zaytūna University, which he, through his measures, restored in her primary position of old. With the building of the imposing two-story mosque in Halfaouine, Yūsuf Sāhib al-Ṭābi', out of his ample means, had lured away quite a few of the most learned scholars, among them al-Riyāḥī, who became a professor at the Halfaouine mosque in 1814, at its inauguration.

The Zaytūna reforms of 1842 had a less positive effect as well. There had always been a clear distinction between the 'ālim having an official governmental position, and the 'ālim who devoted himself exclusively to education. The first was well off financially, but held to stay in tune with the ideas of the Bey and his *mamluk* ministers, the other was usually of much slender means, but proud of his independence *vis à vis* the ruling elite. With the new regulations all Zaytūna professors were granted a regular allowance, thereby diminishing, however, the opportunity for a free mind to speak out.¹¹⁸

More 'ulamā' came under full control of the state, which could bring 'the *sharī'a* into the center of state life' as Gerber hopefully suggests in the context of the Sublime Porte.¹¹⁹ I would be inclined to believe the opposite, namely that through these beylical measures an important function of the 'ulamā' became jeopardized, i.e. their role as buffer zone, between Bey and people, with whom they were related through different levels of interaction: education, the judiciary and, most of all, the religious brotherhoods.

Political Consequences of the 1846 State Visit: Changed Relations with France.

Only a few days after the Bey's return from France, on the first of January 1847, the members of the *Maḡlis* were invited to welcome him back and rode their mules¹²⁰ again to Le Bardo Palace. And again it was the Mālikī *bāsh mufti* who voiced a critical note, expressing his doubt about the purpose of the enterprise, the benefits it held for the country: 'the objective you were after was solely to strengthen your position here, on earth,' after which he asked the 'ulamā' assembled to join the sovereign in his prayers, recited the *Fatiha*, and left.¹²¹

¹¹⁶ A. Chennoufi, 'L'Ecole de Guerre de Bardo,' *Les Cahiers de Tunisie* 1976, 74.

¹¹⁷ A. Demeerseman, 'Un grand témoin des premières idées modernisantes en Tunisie.' *IBLA* XIX 76, 1956, 361.

¹¹⁸ Moh. El-Aziz Ben Achour, *Les Ulamas*, 264.

¹¹⁹ H. Gerber, *Islamic Law and Culture 1600-1840*. Leiden (E.J. Brill) 1999, 31.

¹²⁰ Mules were the regular means of transport for the 'ulamā'. To ride a horse permission had to be formally requested from the Bey. In: M. El-Aziz Ben Achour, *Les Ulamas*, 84. The Bey was the only one allowed to ride a horse and carriage.

¹²¹ T. Djaziri, *Le Régence II*, 522.

To strengthen his position as a ruler of a small territory, wedged between the three world powers at the time, was no doubt one of the goals Aḥmad Bey had aimed for when preparing his voyage to France and England. He followed in this respect in the footsteps of his forefathers. His efforts, those of his successors, and, to a certain extent also those of the officials of the Sublime Porte bespeak a certain apprehensive urgency this time: between the years 1859 and 1871 Khayr al-Dīn was sent three times to Istanbul with the same secret mission, i.e. to request the Porte to recognize the autonomy of Tunis and the hereditary right of the Ḥusaynid dynasty, in return for the Bey's acknowledgement of Ottoman sovereignty and the payment of tribute. Only in 1871 could he successfully accomplish his assignment.¹²² The missions were meant to be secret so as not to cause any discontent on the French side. When finally Khayr al-Dīn was successful and left Istanbul 'firman en poche', *The Levant Herald*, apparently not privy to the Tunisian motives, spread the news:

Ayant donc reconnu que cette indépendance n'est qu'une source d'embarras et de vexations, il retourne (...) au toit paternel demandant à être admis au sein d'une famille à laquelle l'unissent des lieux de race et de religion.¹²³

In the same period, however, an alternating movement westwards from the Porte to the Tunis Regency eventuated: between 1839 and 1857 the Bey was urged by the Sultan's personal envoys at least three times to implement the *Khatt-i sherīf*.

The Bey might have had the idea that after the abolition of slavery in his country and after his voyage to the Sultan of the French, he had firmly positioned himself between the great powers. The French had a wholly different view of the situation. From now on, so was their judgment of the facts, Aḥmad Bey was firmly placed under French protection.¹²⁴ And they wasted no time to harvest the results of their politics of charm. Apart from – more – trading concessions, the Bey, through the good offices of the French consul, was urged by the first representative of Pope Georgius XIV in Tunis, Fidèle Sutter, to give permission for the building of four residential missionary posts. They were established in Jerba (1847), Mahdia (1848), Bizerta (1851) and Porto Farina (1853).¹²⁵ The huge Roman-Catholic church, just outside the *Bāb al-Bahr* was then already there, as was the St. Louis Chapel in the Byrsa hills, just outside Carthage.

The objective of these missionary posts was not, at least not in the first place, to promote the initiatives of the 'Oeuvre de la Propagation de la Foi', an organization residing in Paris and Lyon. As we have seen in the previous chapter there had been an enormous influx of Christians, poor fishermen from (English) Malta, or small Italian islands who had an easy access to the country via Tunisia's sandy coasts. In the years 1850, 1852 an approximate nine thousand European Christians had found a place in the capital and in and around the coastal cities. Twenty Italian Capuchin brothers looked after their spiritual welfare in six parishes.¹²⁶

¹²² A. Hourani, *Arabic Thought in the Liberal Age*, 85.

¹²³ *The Levant Herald*, 27 October 1871. Inventarissenkamer Algemeen Rijksarchief Den Haag. Archief Nederlands Gezantschap Turkije (1814-1872) karton 501 (2.05.12).

¹²⁴ J. Ganiage, *Les origines du Protectorat français en Tunisie. 1861-1881*, 20

¹²⁵ K. Chater, *Dépendance*, 525. *Ithāf* IV, 79,80.

¹²⁶ P. Soumille, 'Une Correspondance Inédite entre Ahmad Bey et Le Pape Ie IX (1849-1851):' *Revue d'Histoire Maghrébine* 1975, 99.

From these rapidly growing ethnic minorities the problems of jurisdiction arose that lay at the beginning of the European consuls' mingling in the Bey's administration of justice.

The Preliminaries to the 1857 'Ahd al-Amān

In the meantime, patterns of concord between England, France and the Ottoman Empire had shifted. In the second half of the nineteenth century France decided to adapt its strategy direction Istanbul. From then on, contrary to earlier tactics, both England and France assisted the Sultan in his efforts to defend the Danube principalities and to resist Russian claims of protection over the Ottoman's Christian subjects. It resulted in the Crimean War, that took place from 1853 until 1856 and in which a contingent of freshly trained officers of the Bardo Military School took part.

The initiatives and measures that had been promulgated in 1839 as the *Khatt-i sherif al-Gülkhāne*, were reformulated, supplemented and subsequently presented by the Porte as *Khatt-i humāyūn*, in February 1856.¹²⁷ The Peace Treaty of Paris of the twenty-fifth February 1856 acknowledged in its ninth clause the *Khatt-i humāyūn* proclaimed just a week earlier.

In 1839, and several times afterwards, the Sultan's request to the Bey to implement these *Tanzīmāt* reforms had fallen upon deaf ears, to the chagrin of the Sultan. It was unacceptable for Istanbul that the Bey reigned over Muslims without the *Tanzīmāt* principles: it would inevitably lead to the ruin of the country, according to the Sultan's words, as recorded by Ibn Abī Ḍyāf.¹²⁸

This time the Bey could not turn to France to seek protection from what the Bey experienced as overbearing and centralizing conduct of the Sultan. France had closed ranks with the head of the *umma*, and so had England. There appeared to be no escape for M'hamad Bey, who had assumed power after Aḥmad Bey's death in 1855.

A simple court case of a drunken Jewish coachman put the actors around the promulgation of the *'Ahd al-Amān* in a position of acuteness and lend the negotiations a sense of urgency and agitation.

The Case of Bātū Sfez

In 1857 an incident, similar to that of the Maltese Paolo Xuereb in the second chapter, occurred in Tunis. This time it concerned a Tunisian Jew, 'de très petite condition',¹²⁹ who in a state of drunkenness, had fallen over a Muslim child in the street. In the scuffle that arose in the crowd, he allegedly had abused the Bey's name and the Muslim faith. In the court case that followed he was condemned to death by decapitation, the death sentence for Jews.

¹²⁷ G.S. Van Krieken, *Khayr al-Dīn*, 5.

¹²⁸Id. 5. *Ithāf* IV, 58.

¹²⁹ R. Brunschvig, 'Justice religieuse', 68.

There was an important difference between the two cases. In the Xuereb case Aḥmad Bey and his learned advisers had followed very carefully *sharī'a* procedures. The defendant was granted a fifteen-day delay to get witnesses and prepare his case. Moreover, the parties were given the opportunity to come to a pecuniary settlement, which was, however, refused by the son of the murdered victim.¹³⁰

In the Bāṭū Sfez case, however, thirteen years later, Mḥammad Bey was far less inclined to follow proper procedures and allow for any leniency. He could have saved the life of Sfez – in the particular Tunisian two *madhhab* situation – had he decided to apply Ḥanafī law in stead of Mālīkī law, as only the Mālīkī *madhhab* stipulates the death penalty for blasphemy.¹³¹ But he did not and his Ḥanafī *shaykh al-Islām*, Bayram IV, for some reason, did not want to intervene. Like in the Xuereb case a huge upheaval arose, in particular in the foreign community. The verdict was considered out of proportion for a case of blasphemy: the Bey had abused 'la vieille notion de nécessité politique (*siyāsa*).'¹³² Bāṭū Sfez was decapitated on the twenty-fourth of July 1857.¹³³

The Promulgation of the 'Ahd al-Amān

The Bāṭū Sfez incident accelerated the developments already set in motion by the three great powers. After the twenty-fourth of July a rapid sequence of events propelled the Bey into the proclamation of the *'Ahd al-Amān*, the Tunisian version of the *Khatt-i humāyūn*.

It was not the result of a careful study of Muslim jurisprudence, a weighing and considering of legal alternatives and certainly not the outcome of a long gestation period in Tunisia, but as we shall see the result of strong pressure from the French and English consul, and from the Sublime Porte, Green even employs the term 'bullied by foreign diplomats.'¹³⁴

Three weeks after the Sfez incident, on the thirteenth of August the French consul Léon Roches visited the Bey in Le Bardo, suggesting to the Bey to create mixed tribunals like these already existed in the Ottoman Empire, in order to prevent any more hasty judgments such as those of the Jewish coachman Bāṭū Sfez.¹³⁵ A few days later he came again, now accompanied by his English colleague, Sir Thomas Wood. The two visits had the same purpose: both consuls demanded the immediate implementation of the Ottoman *Khatt-i humāyūn* of 1856. On the thirty-first of August a French squadron appeared at La Goulette and six days later, Admiral Tréhouart of the French vessel, was received at Le Bardo. He explained to the Bey that he did not come to menace him, but to morally support him in implementing the reforms needed for the Tunisian people.¹³⁶

¹³⁰ L.C. Brown, *Tunisia Ahmad Bey*, 249.

¹³¹ A. Green, *Tunisian Ulama*, 126.

¹³² R. Brunschvig, 'Justice religieuse.', 68.

¹³³ G.S. van Krieken, *Khayr al-Dīn*, 3.

¹³⁴ A. Green, *Tunisian Ulama*, 104.

¹³⁵ Id. 5.

¹³⁶ K. Chater, *Dépendance*, 596.

On the eighth of September the Bey gave in: he assembled his advisors, among whom his *shaykh al-Islām*, Bayram IV, who must have realized that there was no other way than to submit to the wishes of the Sultan and his allies, the consuls of England and France, and delivered as his oral fatwa: ‘We are afraid (*nakhshā al-ghaṣb*) of the Porte and the principles of the *Tanzīmāt* are not contrary to our religion (*lā takhālafu dīnīnā*).’¹³⁷ These were the words the Bey needed to hear. Ibn Abī al-Ḍyāf was charged with the drafting of the text of the ‘*Ahd*’.

He wrote it overnight, showed it the next morning to the two consuls and the ‘*Ahd al-Amān*’ was subsequently proclaimed the very same day. The proclamation was read out aloud by Ibn al-Ḍyāf and another secretary in governmental service, Muḥammad al-Bājī al-Mas‘ūdī, before an audience assembled in the great hall of Le Bardo. Members of government, the consuls of the foreign powers, officers of the Tunisian army, ‘*ulamā*’ and other notables, representatives of the Jewish and Christian communities were present.¹³⁸

The text of the ‘*Ahd al-Amān*’ was practically similar to the wording of the Ottoman *Khatt-i humāyūn* of 1856. It comprised eleven points, the most important of which were, the assurance of complete security for life, to all subjects irrespective of their religion, nationality and race. They were meant to be the first steps on the road to a civil society and were a departure from a segmented communalist social order.

The Bey guaranteed equality to all subjects for the law and taxation. If a non-Muslim had to appear before a criminal court, a representative of his religion would join the court to assure an impartial judgment. Mixed commercial tribunals were created to handle disputes between Tunisians and foreigners. Furthermore the Bey decreed to foreigners and Jews the free exercise of their professions and the permission to acquire real estate. A committee to prepare legislation for military conscription would be installed.¹³⁹

The Bey never really made a serious effort to implement the reforms of the ‘*Ahd al-Amān*’. In theory, Muslims, Christian, Jews and also the black slaves of old now all had the same rights. But neither before or after the proclamation of the ‘*Ahd al-Amān*’ did its formal initiator, Mḥammad Bey, himself accept its implications. During his reign more slaves than ever were ushered into his residences. Ibn Abī al-Ḍyāf describes in his chronicle in depreciating terms ‘his obsession for slaves and his passion for women, to such an extent that he finds it difficult to abandon the practices he himself has officially denounced.’¹⁴⁰

Only after the Sultan had once more urged the Bey by sending an envoy in November 1857, did he install a committee to further implement the *Tanzīmāt* principles. The committee consisted of ten members, four of which were religious scholars: Bayram IV, his Mālikī counterpart Aḥmad Ibn Ḥusayn (d. 1861), who had been appointed after the death of al-Riyāḥī in 1850, and the two muftis of the two schools of law.

¹³⁷ *Ithāf* IV, 239.

¹³⁸ B. Tlili, *Rapports Culturels*, 529.

¹³⁹ G.S. van Krieken, *Khayr al-Dīn*, 3.

¹⁴⁰ *Ithāf* IV, 294. Tunis (Maison Tunisienne de l’Edition) 1990.

They assembled in the Dār al-Bey, the Prime Minister Khaznadār presiding the meetings. When Khayr al-Dīn, as one of the members of the committee, laid before the four ‘*ulamā*’ the request to compose a treatise on the juridico-theological principles of the ‘*Ahd*, “*alā al-qawā’id ‘Ahd al-Amān mā yarāhu wa yudāinu Allahu bihi*’¹⁴¹, they answered that they did not want to mingle into political matters.¹⁴² Moreover, they frankly advised the Bey to avoid unnecessary contact with Europe.¹⁴³ They refused their cooperation.

The Impact of the ‘Ahd al-Amān and the 1864 Revolt

Brunschvig, misguidedly, maintains that in the area of religious justice nothing much changed.¹⁴⁴ Did he fully capture people’s sentiments and realize the importance they attached to their Muslim way of life? Even if the nature of ‘*Ahd al-Amān* reforms were not religious, they affected the religious leadership. A separate secular edifice of law and judicial institutions was erected, overshadowing the *sharī’a* mansions. Through the creation of independent secular system, independent of ‘*ulamā*’ participation, civil law became formally separated from the law of Islam, from *sharī’a*.

It is true, that the *Majlis al-Sharī* held every Sunday evening at Le Bardo Palace remained. Just one year before the proclamation of the ‘*Ahd al-Amān*, in 1856, M’hammad Bey had reorganized this institution and gave it the general format it retained for the subsequent century.¹⁴⁵ It consisted of two judges (*qāḍī*), one Ḥanafī and a Mālikī and seven muftis, five Mālikī and two Ḥanafī.¹⁴⁶ The defendants in litigation had the choice of *madhhab*, therefore the two chambers met separately to hear cases. When these scholars, who usually convened in the *medīna*, in the former localities of the Turkish military,¹⁴⁷ met together with the *qāḍī* of Le Bardo in the palace, they made up a kind of religious privy council for the Bey and also presided by him. Then not only judicial matters were discussed but issues of state as well. The Sunday *Majlis al-Sharī* was the place where issues and problems of law were discussed intensively and pros and cons considered at length. It could take weeks, even months before a solution acceptable to both parties involved was arrived at.¹⁴⁸

In the cities and smaller townships in the country the *Majlis*, consisting of a *qāḍī* and two muftis, did not disappear¹⁴⁹ but lost much of influence to the mixed tribunal, in which to the

¹⁴¹ *Ithāf* IV, 247.

¹⁴² G.S. van Krieken, *Khayr al-Dīn*, 39.

¹⁴³ A. Green, *Tunisian Ulama*, 105.

¹⁴⁴ R. Brunschvig, ‘Justice religieuse’, 69.

¹⁴⁵ A. Green, *Tunisian Ulama*, 33.

¹⁴⁶ L.C. Brown, *Tunisia Ahmad Bey*, 149. Green mentions a different number, i.e. two Hanafis and three Malikis, 34.

¹⁴⁷ Rue du Divan, close to the Place Ramadhan Bey. In: M. El-Aziz Ben Achour, ‘L’organisation de la justice religieuse dans la Tunisie husaynite (18^{ème}-19^{ème} siècles)’ *IBLA* 1984, 64.

¹⁴⁸ R. Brunschvig, ‘Justice’, 47.

bewilderment of the local people the cases of Muslims, Christians and Jews were treated on a par. Like the Bardo *Majlis*, the local *Majlis* outside the capital was more than a court for *sharī'a* justice. In an order sent by Aḥmad Bey in 1838/39 (1254 AH) to the governor of Sousse, the Bey required him to convene the *Majlis* once a week as had previously been the custom. It was the practice for the governor to convene the *Majlis* at regular intervals in order to consult its members formally with regard to matters affecting their town.¹⁵⁰ In the year 1864 of violence and insurgence the people of Sousse took the keys of the city from the Bey's envoys and gave them to the *qāḍī* and the religious court.¹⁵¹

There can be no doubt that the Sunday *Majlis al-Sharī'a* at the Bey's palace lost most of its influence in the constitution years between 1857 and 1864 to the Superior Council, the *Majlis al-'Alā*, or *Majlis al-Akbar* that was created in the context of the Constitution of the twentieth of April 1861.¹⁵² In the *Majlis al-Akbar* a first attempt was made at a separation of powers: the judiciary would be independent of 'state intervention', i.e. the Bey, and stripped of the input of its former leaders and custodians of the law of Islam, the '*ulamā*', as they refused to participate in the *majlis al-akbar*, at least in first instance. Just before the courts and assemblies created by the constitution were abolished in 1866, ten or twelve '*ulamā*' were persuaded by Khayr al-Dīn and Ibn Abī al-Ḍyāf to join them.¹⁵³ Executive power remained in the hands of the Bey, legislative power would be the domain of the Superior Council, the non-*sharī'a majlis al-akbar*.

The Superior Council consisted of sixty members, twenty of which were ministers and other government officials. The other forty were chosen from among the notables of the capital and selected on the basis of their merits, their dignity and their '*valeur humaine*'¹⁵⁴ and not specified according to religious affiliation.¹⁵⁵ The *mamluk* General Ḥusayn was – the second - president of the Council. The Council was a legislative body: laws elaborated by the *Majlis al-Akbar* had to be signed by the Bey before they could be officially promulgated. Furthermore, the Council was an auditor general of sorts (*court de comptes*).¹⁵⁶ The Council also served as a Court of Cassation and could re-examine sentences of local (*non-sharī'a*) mixed tribunals, both tasks having previously belonged to the Bey in either his Bardo morning sessions or in the Bardo *Majlis al-Sharī'a*.

¹⁴⁹ Valensi states that in the country the local *sharī'a* judge, the *qāḍī*, was replaced by the mixed tribunals (p.238). I have reason to believe, based on for instance Ben Achour, Brunschvig and Green, that *sharī'a* justice was not abrogated, but still functioned in the realm of family law.

¹⁵⁰ J.M. Abun-Nasr, 'The Mashyakhāt al-Islām in Tunisia.' In: R. Peters, *Proceedings of the Ninth Congress of the Union Européenne des Arabisants et Islamisants. Amsterdam 1-7 September 1978*. Leiden (E.J. Brill) 1981, 7.

¹⁵¹ L. Valensi, *Tunisian Peasants*, 240.

¹⁵² L. Bercher, 'En Marge du Pacte 'Fondamental'. Un Document Inédit.' *Les Cahiers de Tunisie* 1972, 243.

¹⁵³ A. Green, *Tunisian Ulama*, 106.

¹⁵⁴ L. Bercher, 'En Marge Pacte Fondamentale', 252.

¹⁵⁵ There was one Christian among its members, the Minister of Foreign Affairs, Giuseppe Raffo. Ibn Abī al-Ḍyāf, also a member, pleaded in vain for the admittance of a Jewish participant in the Council. In: L. Bercher, 246 ff.

¹⁵⁶ G.S. van Krieken, *Khayr al-Dīn*, 49.

Van Krieken, in his evaluation of the reforms of the judiciary of 1857 and the following years, opines that the ‘*sharī’a* justice of which the Bey was the supreme judge’ had remained until that date ‘sans code’¹⁵⁷, dismissing in two simple words the *siyāsa* jurisdiction the Bey had been by right entitled to since centuries, on the basis of the delegation of power he received from the Sultan. No, there had not been a code. There had been ‘*ulamā*’ who with their elaborate knowledge of Muslim jurisprudence, their erudite ability to find accommodation for changing circumstances had brought the Bey’s measures necessary for the government of the country, in harmony with the law of Islam.

In the new situation the Bey’s *siyāsa* had been ‘divided up’ between a number of different judicial institutions and in 1861 with the proclamation of the new constitution a new code, consisting of no less than 664 articles, described in detail the competences of these new tribunals to avoid conflict of interest between theirs and those of the *sharī’a* courts, thus establishing a clear disjunction between *sharī’a* and non-*sharī’a* jurisdiction, a disjunction that was from then on not bridged anymore by the ‘*ulamā*’ through their fatwas.

The overarching function of the Bey, who held in his political domain, his *siyāsa*, all the different jurisdictions by which the society at large was governed, was gradually diminished by the new institutions, created as a result of these constitutional developments.

The *shaykh al-Islām* Bayram IV, had in a fatwa comprising of no more than one sentence, under obvious pressure, declared that the reforms of the judiciary as proposed in the ‘*Ahd-al-Amān*’ were in harmony with the law of Islam. Contrary to former important legislation, like in for instance, the abolition case, there is no evidence of a formal approbation in the form of a fatwa of his Mālikī counterpart.

The general opinion among the population was, supported by the majority of the Zaytūna teaching staff, that these reforms were not in agreement with the *sharī’a*. Even before the country wide insurgence in 1864 erupted there was a demonstration before Le Bardo palace, the 23th of September 1861. After their *ṣalāt al-‘aṣr* in the Zaytūna Mosque, two to three hundred men under the leadership of Ṭāhir al-Riyāḥī¹⁵⁸ marched with the flags of the Sīdī Maḥriz sanctuary to the palace, demanding, amongst other issues, the abrogation of the recently installed tribunals and a return to the old order in which the Bey rendered justice in person. Twenty nine of them were arrested, two were acquitted, some condemned to two years of forced labor, others got prison sentences in a verdict by the Superior Court. The Bey signed the verdict. The same day, to the surprise of many, he granted them pardon,¹⁵⁹ his personal manifestation of protest?

By then it must have been clear to every Tunisian that the developments set in motion with the proclamation of the ‘*Ahd-al-Amān*’ would eventually lead to the disappearance of the old order. So far, Tunisia had been a communalist society, in which the non-Muslim

¹⁵⁷ Id., 56.

¹⁵⁸ Van Krieken does not indicate the family relationship with the *bāsh mufti* (1766/67-1850. He describes Ṭāhir as a man older than seventy. Green mentions a Ṭāhir al-Riyāḥī, as the son of indeed the Mufti and gives as his year of death 1923. (Green, p. 280). Either Green’s or Van Krieken’s data are not correct or the leader of the demonstration is not the Mufti’s son.

¹⁵⁹ G.S. van Krieken, *Khayr al-Dīn*, 66.

communities, the Jews and the Christians were granted a high degree of internal autonomy. This did not alter the fact, however, that for the Jews and the Christians there were strict rules: some professions could not be exercised by them. They could not acquire real estate, as we have seen. There were specific regulations for clothing and hairstyle; these served as identity markers: the religious affiliation of individuals could be quickly determined from their outer appearance. This was seen as an important injunction based on a tradition of the Prophet, stipulating that Muslims had to act differently from the ways of the Jews and Christians.¹⁶⁰ One of the new prescripts concerned the abrogation of one of these prominent identity markers. As from September 1858 Jews were allowed to wear like their Muslim countrymen, the red *chechia*, whereas before only wearing the black *chechia* had been permitted to them.¹⁶¹

The 1864 rebellion started in the country as a protest against taxes, but it soon became apparent that deeper layers of discontent had to find an outlet. It were not only the ‘*ulamā*’ in the city of Tunis who were affected in their positions in society and felt invaded in their very territory of learning and law. Outside the capital to the people in the smaller cities, townships and tribes this was one of many governmental measures in the past decades that had an alienating effect on the structure of their society, like the heavy taxation and the military draft imposed by Aḥmad Bey.

‘A silent resentment seethed through the countryside.’¹⁶² It not only mobilized the peasantry and the common people; religious groups and jurists also supported the revolt in large numbers. In Sfax the leaders of two well-known *zawiyas* took charge of the insurrection.¹⁶³

It is noteworthy that even in the heat of the 1864 revolt the Bey’s authority was never questioned. His subjects thought him to be ill-advised and surrounded by untrustworthy ministers and Christian collaborators. Only in the end they lost hope and saw as the only alternative an intervention by a higher authority, their leader of the *umma*, the Ottoman Sultan.¹⁶⁴

To the religious establishment as well as to the population it was clear who had been behind these reforms all along: the French and English consuls, the Christians.’[ils] se montraient décidé à lever tous les obstacles juridico-religieux qui freinaient cette expansion européenne.’¹⁶⁵

To the journey of the Bey Muḥammad al-Ṣādiq to Algiers to personally present¹⁶⁶ Napoleon III with a copy of the Tunisian constitution, people will have reacted in disbelief. When,

¹⁶⁰ P.S. van Koningsveld, ‘*Between Communalism and Secularism*,’ 327.

¹⁶¹ G.S. van Krieken, *Khayr al-Dīn*, 36.

¹⁶² L. Valensi, *Tunisian Peasants*, 238.

¹⁶³ Id., 240.

¹⁶⁴ Id., 240.

¹⁶⁵ K. Chater, *Dépendance*, 596, based on correspondence of French merchants (14 July 1857) Archives British Foreign Office 335/109 (4).

¹⁶⁶ G.S. van Krieken, *Khayr al-Dīn*, 48.

moreover, the consuls in the end saw no reason to abandon their consular protection and refused to place their Christian subjects under the new jurisdiction of the Tunisian Constitution,¹⁶⁷ which had been at the basis of the initial *'Ahd-al-Amān* negotiations, the true European motivations must have dawned on the Tunisian population.

So, the question may be raised which category in Tunisia's society at the time of the *'Ahd-al-Amān* proclamation called out for an amelioration of the legal institutions, who in Tunis or in the country strived for a regime of 'liberty' and 'equality' apart from some *mamluk* dignitaries without any real bonds with the country or some secretary at the chancellery who had fallen in love with the West after a visit to France and Paris?¹⁶⁸

Aucun argument ne pouvait empêcher les 'ulamā' de voir dans ces réformes ni plus ni moins qu'une manœuvre de l'Europe Chrétienne et des Infidèles d'une façon générale (...) La modernisation (...) était une agression à laquelle la société n'était guère préparée.¹⁶⁹

III. *The Surest Path of Khayr al-Din*

Introduction

Three years after the 1864 uprising Khayr al-Dīn proposes his plan for change in his *Aqwam al-masālik fī ma'arīfāt aḥwāl al-mamālik* (The Surest Path to the Knowledge of Conditions of Kingdoms). The author does not devote a single word to the developments before and after the proclamation of the *'Ahd-al-Amān* and the 1861 Constitution in his work: its failure might have been too painful to remember. He is heading for a renewed attempt and this time he intends to keep within the Islamic tradition. He adheres to the Muslim ideal of governance¹⁷⁰ according to the *sharī'a* and the unity of command: one ruler. The emphasis is on good government, not on democratic principles: there should be to all subjects equality and security before the law, as also promulgated in the *Khatt-i sherīf* and later in the *Khatt-i humāyūn*, i.e. the security of the subject from arbitrary and illegal actions by the government, but not his right to share in it.¹⁷¹

Khayr al-Dīn wrote his work in his years of retirement from office when he did not have a specific government function. After his first visit to Paris in 1846, he went there again and stayed for four years to attend to some of Tunisia's financial affairs. He traveled widely through Europe in this period: he was 'de loin l'homme le plus européenisé de tous les dirigeants de la Régence

¹⁶⁷ Id., 70.

¹⁶⁸ Moh. El-Aziz Ben Achour, *Les Ulamas*, 259.

¹⁶⁹ Id., 254,260.

¹⁷⁰ Id., 74 (5)

¹⁷¹ B. Lewis, *The Emergence of Modern Turkey*. Oxford (University Press) 1962, 133.

The *Aqwam al-masālik* was first published, with the Bey's consent in 1867 and printed at Tunisia's National Printing Office.¹⁷² A French edition of the work, translated under his own supervision, appeared in Paris¹⁷³ the next year, entitled: '*Réformes nécessaires aux Etats musulmans.*' The work was an incentive for the Ottoman Sultan 'Abdülhamîd II (1876-1909) to invite him to Istanbul in 1878, where he became Grand Vizier for a period of two years.

The *Aqwam al-masālik* consists of three sections: an introduction (*muqaddima*) of eighty-nine pages, followed by a much larger section, comprising a comparative study on European forms of government, dealing with twenty-one European states. It is in the introduction that the writer expounds his views on a reorganization of Muslim political institutions (*Tanzîmât*) and ample comparisons with European institutions and suggestions for their application are proposed

It is sufficiently well-known that the author could not have composed his work without the help of some good friends. Temimi even suggests that Khayr al-Dîn, like most *mamluks* – and the Ḥusaynîd princes for that matter - only had a very superficial knowledge of written Arabic and poorly equipped even to put his ideas on paper.¹⁷⁴ I have not found sufficient proof to share his views. There can be no doubt, however, that Khayr al-Dîn had no access to the classical sources of Muslim jurisprudence. His friend and companion in matters of reform, Ibn Abî al-Dyāf was his regular adviser as were Sālim Abū Ḥājib, professor at the Zaytūna University and Bayram V, who both had an active role in the work's research.¹⁷⁵ They must have led him to the classical works of Muslim jurisprudence mentioned in the *Aqwam al-Masālik*, although the extent of their influence and their practical involvement can not be assessed with any accuracy. Bayram V, in particular will have been the one to have drawn his attention to the *Risāla*, the treatise on the relation of the political ruler's authority and the law of Islam, written in 1800 by one of his ancestors, Bayram I. The *Aqwam al-masālik* is therefore, to a certain extent, a joined learned effort, emanating from the two factions of Tunisian reformists, i.e. the *mamluks* and the '*ulamā*'. To this joined effort may have clung a certain taste of bitterness though: Bayram V and Sālim Abū Ḥājib were aware that had they wished to publish their personal views on reform, they might not have encountered the same willing disposition as Khayr al-Dîn from the Bey.

In view of the extensive studies already undertaken by Van Krieken, Green, Demeerseman and others I will not embark on an analysis of Khayr al-Dîn's work. In the context of this study one particular issue in his work will be the subject of closer observation as it has a bearing, first of all on the events that took place around the year 1857 with the promulgation of the '*Ahd-al-Amān*' and, secondly, on the work mentioned in our first chapter, i.e. the *Risāla fî 'l-Siyāsāt al-Shar'yya*, written in 1800 by the Ḥanafî muftî Abū 'Abd Allah Muḥammad b. Ḥusayn Bayram and a source to Khayr al-Dîn, i.e. the role of the Bey in his political domain, his *siyāsa* and his relation with the heirs of the prophets, the '*ulamā*'.

¹⁷² 'Par la beauté artistique de ses caractères et sa présentation soignée, cet ouvrage de 467 pages faisait honneur à l'Imprimerie gouvernementale de Tunis.' In : A. Demeerseman, 'Un grand témoin des premières idées modernisantes en Tunisie.' *IBLA* XIX no. 76, 1956, 349.

¹⁷³ Imprimerie administrative Paul Dupont, 45 Rue de Grenelle, St. Honoré 45. Paris (1868).

¹⁷⁴ A. Temimi, *Correspondances du grand vizir Khayreddine: l'histoire tunisienne entre la réalité & les interprétations erronées.* Zaghouan 1999, 14.

¹⁷⁵ A. Green, *Tunisian Ulama*, 110.

Khayr al-Dīn and Bayram I

With the *Aqwam al-Masālik* apologetics enter the Tunisian discourse on reform and modernization. The work has in fact two addressees: the European powers and the Tunisian ‘*ulamā*’. To the European powers the author wishes to convey that Tunisia was able to manage its own affairs and was willing to reform and modernize its judicial and state apparatus, thus hoping to forestall European interference. It is in this context that Khayr al-Dīn, though not referring to a specific event, implicitly vents his feelings of frustration about the hidden agenda of the European powers:

....We see, on the contrary, evidence indicating that the aim of most of them is to get rid of the authority of the Ottoman state, for after the liberty now existing was granted there appeared from them no signs of good faith toward the state.¹⁷⁶

He had to convince, as the other addressees, the ‘*ulamā*’ that reform in the realm of governance and legislation was imperative and compatible with the law of Islam. The *Aqwam al-Masālik* was, in the words of Demeerseman, ‘son oeuvre de persuasion.’¹⁷⁷

The point of departure in his study is the inference that the Muslims have lost their erstwhile primary role in the world and are *vis à vis* the European states in a position of backwardness and lack of knowledge. Remembering the teachings of Maḥmud Qābādū from his years at the Military School in the palace, he enumerates the Arabs’ advances in various fields of science. ‘The Islamic state began to lag behind when it split into three states, the Abbasids, the Fatimids and the Umayyads and numerous civil wars followed.’ Another rise to superiority eventuated under the reign of Suleyman ibn Sultan Selim the Magnificent, the Lawgiver.¹⁷⁸ In Khayr al-Dīn’s vision the then following centuries of decline came to a halt in the period of *Tanzīmāt* and the proclamation of the *Khatt-i sherīf al-Gülkhāne* in 1839.

Then, a few pages later, quoting from Montestquieu’s *L’esprit des lois*, the author comes to a categorization of states in three different models, ‘the first is the hereditary state with succession from generation to generation having absolute, unrestricted power. The second is the same type of hereditary state but bound by laws. The third is the republican state also bound by laws.’¹⁷⁹ We find the same definition, in slightly different terms, with Ibn Abī al-Ḍyāf, at the very beginning of his nine volume history of Tunisia, which was written in 1872 but only published in print much later, between the years 1963 and 1966. Khayr al-Dīn’s preference is, like Ibn Abī al-Ḍyāf’s for the second alternative, a hereditary state but bound by law, in which the political ruler would have an executive role. We have seen in the first chapter that Ibn al-Ḍyāf already attributed to Ḥammūda Pācha the role of a constitutional king in the changing format of the Muslim state.

¹⁷⁶ L.C. Brown, *The Surest Path*, 117 (35).

¹⁷⁷ A. Demeerseman, ‘Un grand témoin,’ 351.

¹⁷⁸ L.C. Brown, *The Surest Path*, 112 (32)

¹⁷⁹ Id., 115 (34)

It is in this context that he turns to Bayram's treatise. 'He who leafs through the *Risāla* of the master of Ḥanafī *shaykhs* and the source of fatwa-s in Tunisia – one whose commentaries and interpretations are still to be relied on – Shaykh Sidi Muḥammad Bayram I, will find corroboration of what we have mentioned.'

Although there is a difference in attitude towards the issue of beylical authority, both writers share a common goal: the pursuit of justice through good government in accordance with the law of God.

At the center of both their elaborations is the head of state and how to keep him within the confines of what could be legally justified, how to keep his actions '*muqayyad bi'l-sharī'a*'. This is equally significant to Bayram as to Khayr al-Dīn, to be bound exclusively by God's law in order to sustain the life line with the Sultan. This was still of unyielding importance, at least, that was what Khayr al-Dīn had come to realize after 1864.

What is different between the two is their appreciation of political leadership. To Bayram the Bey is still the person by excellence to assume the full authority of a traditional Muslim ruler, standing in the Ḥafṣīd tradition: a king who employs his own insights to find ways to procure the welfare of the community, or, to follow his own political pursuits. The need was felt at the time to once more define these beylical prerogatives, but that did not diminish his role.

To Khayr al-Dīn, whose thoughts had undergone the influence of the *Tanzīmāt* debates in Istanbul and of his European encounters, the Bey's absolutist performance had become an obstacle in the process of reform, which he deemed necessary for his country. He therefore tries to create conditions for the '*ulamā*' to participate in the political life, thus counterbalancing the Bey's rule and awarding them, in fact, a role they traditionally had but seldom exercised.

For that purpose the '*ulamā*' should 'upgrade' their professional knowledge, not only consider 'the outward sense of the texts', but also 'what is intended by them'. They should explore the legal instruments available to them to the full, certainly when it comes to 'absolutely essential activities relating to the public interest.'

Since it is not easy for most governors to operate the several branches of government in accordance with the *Sharī'a* principles (...) the leading *ulamā*' are properly suited (...) to assist the political leaders in the organization of their *tanzimat* (reform), consistent with the *Sharī'a*.¹⁸⁰

It is for that reason he urges the religious scholars time and again to be aware of the conditions of society, as in his view, they were failing in their duties:

[The reader] will then be saddened to see that certain '*ulamā*' of Islam who are entrusted to take into consideration the changing circumstances of time in the application of the Law are opposed even to learning about domestic events and their minds are empty of any knowledge of the outside world. This is undoubtedly one of the most imposing obstacles to a knowledge of the most appropriate course of action in this world.

He almost cries out: 'Is it fitting that the physicians of the *umma* should be ignorant of its ailments?'¹⁸¹ And, almost as an early champion of historic-critical methods,

¹⁸⁰ L.C. Brown, *The Surest Path*, 125 (42).

¹⁸¹ Id. 72(3).

To demonstrate, just as the administration of *Sharī'a* rulings depends on knowledge of the texts, it depends also upon knowledge of the circumstances surrounding the revelation of these texts.¹⁸²

Khayr al-Dīn quotes, almost literally, a number of paragraphs of Bayram's treatise, i.e. on the pages 2 and 3 and a large section in page 19. Several authoritative names of the Muslim science of jurisprudence are brought to the fore. He mentions two Ḥanbalī scholars, the eleventh-century jurist from Baghdad, Ibn 'Aqīl, and the fourteenth century mufti of Damascus, Ibn Qayyim al-Jawziyya. In particular the quotations of al-Qarāfī in page 19 were of interest to Khayr al-Dīn: '...We may even say that everything in the law changes its rule towards the requirements of the renewed practice, as soon as this old customary practice changes.'

This, undoubtedly, fitted Khayr al-Dīn's aims. And it could very well be that this particular quotation was selected by his learned friends because the fourteenth century Mālikī scholar from Cairo was well-known in Zaytūna circles. Bayram's approach of the changing times and circumstances (*ikhhtilāf al-zamān*) is pragmatic: rules should be adjusted and be less strict, to avoid hardship. His appeal on the 'ulamā' to modify the rules in this sense appears throughout his work.

In their claim for a more active role for the religious scholars Bayram and Khayr al-Dīn show the same determination. The latter, though, with the hot breath of the European powers in his neck, pushes the 'ulamā' just a little bit further.

His aim was – indeed – to introduce European institutions as had been the purpose of the earlier attempts at constitution. These should bring to a halt the process of decline prevailing in Muslim society and create conditions for modernization and improvement of people's conditions. However, wishing to stay within the Muslim tradition of government the writer presents these European institutions in the guise of traditional Muslim concepts: Is a parliament any different from 'those qualified to loosen and bind'?¹⁸³ Speaking of a European governmental system with a Higher Chamber, i.e. 'composed of royal princes and of those notables given life appointments by the king' and a Chamber of Deputies, i.e. 'made up of those elected by the people to defend their rights and to ask an accounting from the state', Khayr al-Dīn states:

The members of these two chambers are to the Europeans the people qualified to loosen and bind. Everything they agree to, provided it does not violate those basic principles which can be changed only with the participation of all the people, becomes part of the kingdom's laws (*min sharā'i al-mamlaka*)¹⁸⁴

¹⁸² Id. 124 (41).

¹⁸³ *Ahl al-hall wa al-'aqd*, those qualified to loosen and bind. In its original legal usage this term designated those qualified to act for the *umma* in appointing and deposing the caliph or any ruler. In fact, the term came to mean a somewhat loosely-defined group of those actually possessing political power plus the eminent religious scholars, leading merchants, and other notables whom the political leadership were likely to consult. In: L.C. Brown, *The Surest Path*, 85.

¹⁸⁴ Id., 171(83).

Once more: the two factions – mamluks and ‘ulamā’

Khayr al-Dīn reproaches the ‘ulamā’ their inactivity, their not being up to date with the matters of the outside world. Green states that the initiative very seldom came from their side: they merely responded to the incentives of the other faction, i.e. the Bey and his *mamluk* ministers. But then, this had always been the case: responding to the ruler’s initiatives. When they did initiate a change, a departure from former custom, it usually was in the field they thought was their particular domain, that of the observance of religious duties. Al-Riyāḥī, for instance, changed the hitherto customary practice of the *mawlid* celebration and did away with the musical parades of the Turkish soldiers on that day.¹⁸⁵ They did raise their voice in the event of injustices by which the population was affected, as we have seen in the repeated appeals to the Beys in the problems with the tax collectors in the country.

But there was, since centuries, among the ‘ulamā’ the apprehension to mingle into political affairs, as we have seen in the case of Bayram I and his refusal to condone Ḥammūda Pācha’s intervention in Tripolitania. And not without a reason. A too liberal expression of one’s mind harbored the danger of imprisonment as we have seen in the case of the father of Bayram I, in the first chapter. It also happened to the father of Ibn Abī al-Ḍyāf, after the violent death of his *mamluk* protector.

Khayr al-Dīn only mentions the names of two ‘ulamā’ of his time in laudable terms: the Ottoman *shaykh al-Islām* ‘Arīf Bey and al-Riyāḥī. To the latter he refers as ‘the pride of the continent of Africa, the dawn of true guidance, whose reputation has reached all ears.’¹⁸⁶ We detect Ibn Abī al-Ḍyāf’s hand here, who had been in personal contact with ‘Arīf Bey and had listened to his exposé’s on *Tanzīmāt*. It was also Ibn Abī al-Ḍyāf who had lamented at the ‘ulamā’’s negative response to the constitutional reforms: ‘If only al-Riyāḥī were still alive! He would have applauded the blessings [bestowed upon us]!’¹⁸⁷

The question may be raised whether indeed al-Riyāḥī would have applauded the 1857 and 1861 reforms. Al-Riyāḥī had traveled widely, to Morocco, Mecca and Istanbul, he understood the political demands of his time. Perhaps more than a reformer was he a diplomat and a strategic thinker. Most of all, however, he was ‘a man of the people’, a scholar and sufi *shaykh*¹⁸⁸ whose daily domain was not the palace of Le Bardo, like in the case of Ibn Abī al-Ḍyāf and Khayr al-Dīn, but the Zaytūna Mosque, the Tijāniyya zawiya where he led the faithful in the *dhikr* and the enumerable encounters with people approaching him for advice in legal matters or issues of religious observance. He, were he indeed still alive in those tumultuous days of the early 1860s, might have been, more than anybody else, aware of the unrest and mayhem among the people. He might have understood the opposition to the military draft, the gaps this selective recruitment created in the local societies: selective because the young men in the capital were exempted. ‘It took soldiers away for a distant army,

¹⁸⁵ Al-Djaziri, *La Régence de Tunis* II, 517.

¹⁸⁶ L.C. Brown, *The Surest Path*, 116 (35).

¹⁸⁷ *Ithāf* IV, 248.

¹⁸⁸ Oral communication Prof.Dr. H’mida Enneifer. 06.04.2000, Tunis.

alien to the communal framework, whereas until then every man had been a potential soldier, capable of taking up arms to defend the interests of his own group.¹⁸⁹

Al-Riyāḥī might have found a reason for non-cooperation in their confusion and fears of the break down of a Muslim social order.

There must have been, however, among the learned in Tunis and the other cities of the country, much more profound concerns when it came to the implementation of the *‘Ahd-al-Amān* of 1857 and the later constitutional reforms of 1861. These concerned the role of the Bey and the rift created between *sharī‘a* and non-*sharī‘a* law by the new regulations. This rift had always been there. We have seen in the first chapter that ‘history would prove that the *sharī‘a* very seldom had an all-inclusive function’. The *sharī‘a* did not provide for all aspects of life and society and by necessity, the Muslim head of state had to attend to this ‘lacuna’ by means of his discrete jurisdiction. Through the centuries the ‘*ulamā*’ had played a crucial role in bringing this discrete legislation in harmony with the law of Islam, through their fatwas or through the writing of a *risāla*, like in the case of Bayram I. They saw it as their pious duty to harmonize the Bey’s actions with the precepts of God’s Divine Order. What they did in fact was to bring together Sadik al-Azm’s dogmatic ‘no’ and his historic ‘yes’, two answers to the question whether the Islam is compatible with a secular system: the dogmatic *no* to any divergence from an order ruled solely by the *sharī‘a* and the *yes* to a system of government that by necessity had to issue legislation in order to maintain a just and orderly society.

Though they were certainly not indifferent to the fact of the arbitrariness of the Bey’s actions, he was to them and to all Muslims on Tunisian soil the link to the Sultan, their means of inclusion in the *umma*. The disappearance of his supreme function in the judicial system, and more in particular, his function as judge (*ḥākim*) in his Bardo sessions every morning, proved to be to the people at large and to the vast majority of the ‘*ulamā*’ an insurmountable impediment, leading to a perdition of the traditional norms and values of Islam. These two factors must be considered the reasons behind the attitude of the ‘*ulamā*’, so negatively appreciated by Khayr al-Dīn and Ibn Abī al-Dyāf.

After the 1864 insurgence the new tribunals were abrogated and in the years after 1870 the old order was re-introduced. Khayr al-Dīn was granted another chance: he became Tunisia’s prime minister in 1873 and Grand Vizier to the Sultan in 1878.

It took twenty years before the *Revue Tunisienne*, in 1896, published some abstracts of Khayr al-Dīn’s *Muqadimma*.¹⁹⁰

Conclusion

The state visit to France led the Bey, his *mamluk* ministers and the Tunisian population into a new phase of modernization. The first period, until 1846, is characterized by autonomous reforms, like the modernization of the army, changes in the field of education and initiatives to start an industrial development of sorts. And although European advisers already then swarmed the place, the Bey was still master in his own house. After the Bey’s sojourn in Paris, this situation changed abruptly.

¹⁸⁹ L. Valensi, *Tunisian Peasants*, 238.

¹⁹⁰ A. Demeerseman, ‘Un grand témoin,’ 350. *Revue Tunisienne* 1896, 501.

Tunisia had always been aware of its midway position on the maritime borderline between the Muslim East and the Christian West. It had to be loyal to the head of the *umma*, the Sultan in Istanbul, it hoped for support from France when the Sultan's grip on his western provinces became too overbearing, it cherished its good relations with England to play down France's ambitions. However, this carefully orchestrated interplay lost its relevance in the fifties of the nineteenth century when the two great European powers sided with the Ottoman Empire.

After the year 1846, and in particular in the fifties, the European consuls' interference in state affairs became overwhelming. The Bey and his entourage, in particular Khayr al-Dīn and Ibn Abī al-Dyāf, seem to have been fairly slow in realizing its danger: did they not recognize the intricacies of the machinery of European infiltration? The obtrusive pressure exercised by the foreign powers and the disdain of the latter for the country's centuries old institutions, the very fabric of its society? Did they still believe they could stem the tide of foreign penetration and ultimate colonization? And ... did they not register the resistance among the '*ulamā*' and the population?

The '*ulamā*' did perceive the 'silent resentment that seethed through the countryside.' This silent resentment burst out into a widespread uprising when the fact of the constitutional reforms brought home to the people that the foundation of their Muslim society was at stake as these reforms could in no way brought in harmony with the *sharī'a*.

There is no question that Khayr al-Dīn with his *Aqwam al-Masālik* made a valuable contribution to the modernization process in the Muslim world. I have always been surprised, however, that with the 'ignorance of hindsight' Khayr al-Dīn came to be memorized in such laudable terms. Now that 'modernity has won', yester years' protestors and their concerns seem to have been forgotten. The Tunisian '*ulamā*' of that period who in their efforts to prevent the perdition of their Muslim institutions and to protect the people against the effects of foreign infiltration are with the same 'ignorance of hindsight' labeled as conservative and non-cooperative.

What should not be left unmentioned here, is that Khayr al-Dīn wrote his work in reaction to what had happened three years before in Tunisia, the outburst of popular resistance to a reform that implied the decline of society's Muslim institutions. The Bey's predominant role in the judiciary undoubtedly being the most important of them: it was the most visible of his functions in the domain of *siyāsa*. In the three years between the 1864 insurgence and the completion of his *Aqwam al-Masālik* in 1867, Khayr al-Dīn's premises took a full turn. In stead of the *majlis al-akbar* with its members selected on the basis of their personal merit and not on their religious and scholarly qualities, Khayr al-Dīn now fervently pleaded for a reintroduction of the '*ahl al-hall wa al-'aqd*, those qualified to loosen and bind, and an active participation of the religious scholars, whom he reproaches as having minds 'empty of knowledge of the outside world.' It must be considered an unjustified recrimination. The outside world of the *mamluk* ministers and the ruling elite in general did not necessarily coincide with the outside world of the '*ulamā*'. There was more than the two and a half kilometers geographical distance between Le Bardo and the *medina*. This time the mechanism of interdependency between the two factions was apparently not in operation.

The fatwas of the two highest religious dignitaries, the *shaykh al-Islām* Bayram IV and the *bāsh mufti* al-Riyāhī provide two more examples of 'being in touch with the outside world.' Bayram and al-Riyāhī were the two highest religious authorities in the country and Bayram in particular in close proximity of reigning power. They were well aware of the Bey's political

ponderings and the resistance his journey to the land of the Infidel might create among the population. Like the *‘ālim* advising the Bey Ḥusayn bin ‘Alī in the first chapter, they understood the demands of politics in their time. They presented the Bey with an advice that accommodated the interests he had in mind for his country. Bayram showed a preference for the internationally renowned Indian Fatwas, al-Riyāḥī found support with a scholar from Sicily. Both showed a liberal stance towards the food and drinks and the Eau de Cologne from the land of the Infidel.

