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Sovereignty-Political Power Distinction as the Theoretical Basis of the Concept of the State of Law

A Comparative Study in the Context of Islamic and Western Legal Thought

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ABSTRACT

Although the concept of the state of law represents a very significant value that has been achieved for humanity over a long period in the history of legal thought, the doctrine has not yet reached a consensus on the criteria taken as basis to define it, and the criteria put forward do not seem to be sufficient as well. Establishing the concept of the state of law on a coherent theoretical basis, requires not only recognising that the term law in the phrase refers to a whole of values and principles independent of, prior to and above the sovereign will, but also clearly defining the distinction between sovereignty and political power. For, no normative order, the source of which is the sovereign will, can guarantee the limitation of state supreme authority and political power. The concept of the state of law can only be defined by adhering to the rule of law in its stated sense and the principle of sovereignty within law. In addition, it is impossible to talk about the rule of law in an order where there is no distinction between sovereign will and political power. In this study, based on the determinations mentioned above, it is argued that Islamic legal thought can contribute to the concept of the state of law on the theoretical level, since it has defined sovereignty as a limited will within the law and achieved the distinction between sovereignty and political power in a period that can be considered quite early.

Hukuk Devleti Kavramının Teorik Temeli Olarak Egemenlik-Siyasî İktidar Ayrımı

İslam ve Batı Hukuk Düşüncesi Bağlamında Karşılaştırmalı Bir İnceleme

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ÖZET

Hukuk devleti kavramı, insanlık adına hukuk düşünce tarihinde uzun bir süreçte ulaşılmış çok önemli bir değeri temsil etmekle birlikte, onu tanımlamak için başvurulan kriterler üzerinde doktrin bütünüyle görüş birliğine varamamış olduğu gibi, ileri sürülen kriterler de yeterli görünmemektedir. Hukuk devleti kavramını tutarlı teorik bir zemine oturtmak, tamlamadaki hukuk tabiri ile egemen iradeden bağımsız, onun öncesinde ve üstünde bir değerler ve ilkeler bütününün kastedildiğinin kabul edilmesi yanında, egemenlik ve siyasi iktidar ayrımının da açık bir biçimde yapılmasından geçmektedir. Zira, kaynağında egemen iradenin olduğu hiçbir normatif düzen, devlet kudretinin ve siyasî iktidarın sınırlanmasını garanti edemez. Hukuk devleti kavramı, ancak belirtilen anlamında bir 'hukukun üstünlüğü' ve 'hukuk içinde egemenlik' ilkelerine bağlı kalınarak tanımlanabilir. Ayrıca egemen irade ve siyasî iktidar ayrımının yapılamadığı bir düzende hukuk devletinden söz edilemez. Elinizdeki çalışmada, zikredilen tespitler bağlamında, İslam hukuk düşüncesinin, egemenliği hukuk içinde sınırlı bir irade olarak tanımlamış ve oldukça erken sayılabilecek bir dönemde egemenlik-siyasî iktidar ayrımını başarabilmiş olmasından ötürü, hukuk devleti kavramına teorik düzeyde katkı verebileceği ileri sürülmektedir.

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INTRODUCTION

The state of law (or the rule of law)[1] is a magic term invented in legal thought, but what it means is unclear due to the difficulty in defining the concept of law. In fact, this uncertainty stems from the inability to define law in terms of its nature (essence/whatness). Since law can only be defined in terms of its functions, whichever function is taken as the center, a different perception of the concept of law is formed and various tendencies towards the understanding of law emerge. The concept of the state of law has also undergone some transformations throughout the historical process, depending on the meaning attributed to the law, which should be considered natural. Indeed, the term *Rechtsstaat* (state of law) was originally developed in the 19th century by the German jurists[2] to denote to a state order in which the rulers, like the ruled, are bound by the rules of positive law. The German jurists used the term *Rechtsstaat* (state of law) to distinguish the state order in question from the police state, where the rulers do not consider themselves bound by the rules of law and can act arbitrarily. Apparently, the concept of the state of law, in its initial definition,[3] corresponds to the concept of the legal state.[4] For, also in the legal state, those who govern have no privileges over those who are governed before the law and there is no arbitrariness in the execution of the legal rules. Nevertheless, as follows below, the legal state order does not include restrictive legal measures to prevent the possible arbitrariness of the legislator, nor does it assume the violation of rights arising from the law.

As for the term rule of law, although its use as a phrase is older, its conceptual definition emerged in the 19th century.[5] The English jurist A. V. Dicey managed to define the concept on a level that can be considered advanced and mentioned the basic elements of the definition. According to him, the rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government, and refers

[1] State orders in which the law-making sovereign will is bound to the values and principles of universal law and the fundamental rights and freedoms of those governed are protected are nowadays expressed as the state of law or the rule of law. To indicate the same conceptual content, the term "state of law" is used by the Continental European legal environment and the term "rule of law" is used by the Anglo-Saxon legal environment. Leaving aside the historical factors affecting the adoption of the terms, it can be said that the relationship between them is the relationship of principle and organization. Accordingly, the state of law can be defined as a state order organized on the basis of the principle of the rule of law. See Türcan, Talip. "İslâm Hukukunda Hukuk Devleti Kavramının Teorik Temelleri Üzerine", *İslâmî Araştırmalar*, Vol. 14, No. 2, 2001, p. 245.
A similar relationship is established between the concepts of supremacy of law and rule of law. See Beyoğlu, Cem Ümit. "Hukukun Üstünlüğü Perspektifinden Uluslararası Ceza Yargısının Tarihsel Gelişimi", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 6, No. 2, 2023, pp. 707-709.

[2] See Mohl, Robert von. *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, Erster Band, Zweite umgearbeitete Auflage, Tübingen 1844, 6-9; Carré de Malberg, R. *Contribution à la Théorie Générale de l'État*, 2 Vols., Librairie de la Société du Recueil Sirey, Paris 1920-1922, Vol. 1, pp. 488-489 (postscript 5).

[3] On the view that the legal state, as a legicentric state, constituted, for Carré de Malberg, only the first version of the state of law, see Mockle, Daniel. "L'État de Droit et la Théorie de la Rule of Law", *Les Cahiers de droit*, Vol. 35, No. 4, 1994, p. 854.

[4] Here we use the term *legal state* in accordance with Carré de Malberg's tripartite classification of states as *l'État de police*, *l'État légal* and *l'État de droit*. Accordingly, legal state corresponds to l'État légal. It should also be noted that the terms *legicentric state* and *state of statute* are used instead of legal state. For this tripartite classification, see Carré de Malberg, Vol. 1, pp. 488-494.

[5] Malcolm, Joyce Lee. "Freedom and the Rule of Law: The Ingenious English Legacy", *Freedom and the Rule of Law*, ed. Anthony A. Peacock, Lexington Books, Maryland 2010, p. 24; Burnay, Matthieu. *Chinese Perspectives on the International Rule of Law*, Edward Elgar Publishing Limited, UK 2018, p. 13.

to the equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts, and expresses that the law of the constitution are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[6] The English rule of law initially appeared as a concept defined according to the pragmatism of English legal system, based on the unlimited legislative sovereignty of the parliament, which we will discuss below, and the authority of the judge to create common law.[7] As can be seen, the English rule of law could only be defined according to the law revealed in practice and in terms of the absoluteness of the sovereign will, corresponds to the concept of the legal state.

I. RELATIONSHIP BETWEEN LAW AND STATE OF LAW

In the doctrine, some criteria were determined in order to define the state of law. However, it does not seem possible to say that the developed criteria are completely sufficient to distinguish the state of law from the legal state, for they cannot resolve the problem of the absoluteness of the sovereign will, which gives rise to the legal state. Unless the concept of law is defined separately from the meaning of the whole of legal rules legislated by the authorized bodies, the conformity of laws to the constitution and judicial review of their conformity, the observance of the principles of generality and equality in the application of laws, the independent exercise of judicial power, the state's compliance with the constitution and laws in its transactions and actions, and the establishment of an organisation to achieve all these are not sufficient to reveal the difference of the state of law from the legal state and to define it as a superior order. The concept of a state adhering to the principle of rule of law, as an additional and higher value to the legal state in which the rulers also obey the legal rules enacted by themselves, can only be defined by recognising that the sovereign will, which embodies the state and its legal order on the positive level, is limited within the legal values that exist outside itself. In other words, when the sovereign will which makes the laws cannot be restricted within a law in the sense of a whole of higher values which does not owe its existence to a certain human will and which is independent of the rules of positive law on all levels, the mere compliance of the rulers with them does not constitute a sufficient guarantee for the protection of the rights of individuals. Therefore, the term "law" in the phrase "state of law" should not refer to the rules created by the sovereign will in a country, but to universal legal principles and values that do not originate from the sovereign will, that are independent of and above it, and that include the rights and freedoms that people have by virtue of being human. This also indicates that the rule of law can only be realized provided that the sovereign will is limited within the law.

[6] Dicey, A. V. *Introduction to the Study of the Law of the Constitution*, Liberty Classics, Indianapolis 1982, pp. 120-121.
[7] Cf. Malcolm, pp. 14-15.

II. THEORIES OF SOVEREIGNTY

The limitation of sovereignty within the law took place over a long period of time, through various stages. Sovereignty, in the sense of a will that is not subject to any limitation and that derives its authority to command directly from itself, is an extra-legal, political and ideological concept, which was effective in a certain historical process and was made functional in achieving some political and ideological goals.[8] In fact, the classical doctrine fell into an inconsistency by asserting that sovereignty, on the one hand, is a concept related to the political existence of a certain country and a certain community of people living in that country, and on the other hand, that it indicates a will that creates legal rules and executes them without any restrictions. To attribute a sovereignty of this nature not to a particular person, institution or society, but even to the whole of humanity, means to endow it with a supra-legal status.

In Western legal thought, three different theories were put forward, which follow each other historically, regarding the owner (subject) of the right of sovereignty:

The first theory to emerge in the historical process accepts the ruler or body of rulers who actually hold the power as the owner of sovereignty. The governing body might consist of a single king or emperor, or more than one person, such as a parliament. This theory, which is characterised by the concept of proprietary sovereignty (la souveraineté propriétaire), is based on the fact that public power (potestas and imperium), which belonged to the Roman people and was delegated to the emperor by proxy, became over time a particular power of the emperor himself. The European kingdoms that emerged in later periods considered the concept of proprietary sovereignty as a basis of legitimacy for themselves. For, this consideration recognised only the king himself to be sovereign. Just as a person has an absolute right of ownership over his own property, the king also had an absolute sovereignty (imperium). As a natural consequence of the theory based on the concept of proprietary sovereignty, it was accepted that, like property, the right to sovereignty could be abdicated through contracts and acquired through inheritance. The conception of proprietary sovereignty, which granted political power holders absolute power, was abandoned especially after J. J. Rousseau established the conception of national sovereignty. However, at the end of the 19th century, some German jurists, who put the state and therefore the rulers (Herrscher) before the law, tried to revive the abandoned conception of proprietary sovereignty.[9] In our opinion, the principle of parliamentary sovereignty in English legal system can be evaluated within the scope of this theory. Parliament means, under English constitution, the King, the House of Lords, and the House of Commons. It has been said that these three bodies together may be described as the 'King in Parliament' and constitute the parliament. The principle of parliamentary sovereignty refers to the right of the parliament to make or not to make any law whatever. The legislative authority of the parliament is absolute. The unlimitness of legislative authority is expressed as

[8] See Teziç, Erdoğan. *Anayasa Hukuku*, Beta Yayınları, İstanbul, 1991, p. 94. For detailed knowledge about the concept of sovereignty, see. Laski, Harold, J. *A Grammar of Politics*, George Allen and Unwin Ltd., London 1938, pp. 44 etc.; Türcan, Talip. *Devletin Egemenlik Unsuru ve Egemenlikten Kaynaklanan Yetkileri*, Ankara Okulu Yayınları, Ankara 2001, pp. 77-120; Kaya, Mevlüt Alper. "Egemenlik Kavramı ve Siyasi Düşünürler", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 5, No. 1, 2022, pp. 213-232.

[9] On the theory based on the proprietary sovereignty (the theory of the patrimonial state), see, Duguit, Léon. *Traité de Droit Constitutionnel*, Tome Premier (*la Règle de Droit - le Problème de l'État*), Deuxième Édition, Ancienne Librairie Fontemoing & Cie, Éditeurs, E. de Boccard, Successeur, Paris 1921, pp. 444-452.

'parliament can do everything but make a woman a man, and a man a woman'. According to the English Constitution, no person or body has the power to override or abrogate the right of parliament to legislate.[10] Although it has been claimed that the parliament's right to legislate is limited on the grounds such as opposition to morality or international law, royal prerogative or that an existing parliament does not have the right to touch the laws enacted by any previous parliament, these limitations have not become established in traditional doctrine.[11] However, it is now recognised by some that, even though there is no mechanism in the constitution which can prevent the parliament from exceeding, its legislative sovereignty is limited by universally accepted fundamental principles or for reasons arising from the internal functioning of the legal system.[12]

The second theory, which was developed on the issue of to whom sovereignty belongs or who is sovereign, attributes sovereignty to the nation itself. According to the theory, which is characterised as the French theory in the classical doctrine, the owner (subject) of sovereignty is the abstract personality of the nation. In fact, the conception of national sovereignty is based on the theory of proprietary sovereignty.[13] That is to say, the only difference in the theory of national sovereignty, the principles of which were laid down by Rousseau, consists in the fact that sovereignty, which was previously considered a right belonging to the king, was ascribed to a nation personality independent, separate and distinct from the individuals who constitute it. In short, the king was replaced by the personality of the nation.[14] Accordingly, sovereignty is nothing other than the will of the nation. Sovereignty is no longer a right of the king, but of the nation. The nation exercises its sovereignty not directly but through its representatives.[15]

The third theory regarding who owns sovereignty was defended by German jurists. The German theory, which was established in a period corresponding to the end of the 19th century and the beginning of the 20th century,[16] considers the state as the sole source of law. The natural and necessary consequence of this consideration is that the state itself is recognised as sovereign. According to this theory, the owner of sovereignty, even in the beginning, is not the nation but the state. The state and its sovereignty exist by themselves.[17]

The adoption of the idea that the state is the owner of sovereignty by itself and alone eliminates the problem of nation-state dualism in the French theory, but fails to explain why the state is sovereign. In fact, the question of why the nation is considered sovereign cannot be

[10] Dicey, pp. 3-18. Also see Duguit, I, p. 488.
[11] See Dicey, pp. 18-35.
[12] For example see Goodhart, Arthur L. "*Rule of Law and Absolute Sovereignty", University of Pennsylvania Law Review*, Vol. 106, No. 7, (1958), pp. 943-963; McGarry, John. "The Principle of Parliamentary Sovereignty", *Legal Studies*, Vol. 32, No. 4, (2012), pp. 577-599. Hiebert, Janet L. "The Human Rights Act: Ambiguity about Parliamentary Sovereignty", *German Law Journal*, Vol. 14 , No. 12, (2013) , pp. 2253 – 2274; Deb, Anurag. "Parliamentary Sovereignty and the Protocol Pincer", *Legal Studies*, Vol. 43, No. 1 , (2023), pp. 47-65.
[13] In the French Constitution of 1791, this theory was explicitly included: "La Souveraineté est une, indivisible, inaliénable et imprescriptible. Elle appartient à la Nation; aucune section du peuple, ni aucun individu, ne peut s'en attribuer l'exercice (Sovereignty is one, indivisible, inalienable and imprescriptible. It belongs to the Nation; no section of the people, nor any individual, can claim to exercise it)" (Constitution de 1791, Titre III, Article 1).
[14] Duguit, Vol. 1, p. 443.
[15] On the theory of national sovereignty (the French theory), see, Duguit, Vol. 1, pp. 452-459.
[16] Duguit, Vol. 1, p. 444; Coker, Francis W. "Sovereignty", *Encyclopaedia of the Social Sciences*, 15 Vols., The MacMillan Company, New York 1957, Vol. 14, p. 267.
[17] On the theory of state sovereignty (German theory), see Duguit, Vol. 1, pp. 444, 460-464.

answered satisfactorily in terms of national sovereignty. The difference is that the German theory, as in the Hegelian approach, deifies the state as self-sovereign and absolute sovereign.

As can be understood, three different theories were defended in classical doctrine about who is sovereign, considering the rulers, the nation or the state as the sovereigns.

III. SOVEREIGNTY WITHIN LAW AND POLITICAL POWER

In our opinion, the definition of sovereignty within the law depends on accepting that its owner and source are different and on being able to determine them within a legal hierarchy. Islamic law has made a great contribution to universal legal thought by developing the unique theory that distinguishes the owner and source of sovereignty. In Islamic law, the principle that the nation is the owner of sovereignty was prescribed not by the nation itself, but by the divine will. In other words, the sovereignty of the Islamic society is not an inherent right of the Islamic society, but a legal authorisation granted by Allah. The sovereignisation of the will of the Islamic society as a whole (not of individuals) on earth, provided that it is exercised in accordance with the values whose source is the divine will, is called istikhlāf. *Istikhlāf* means that the society represents Allah on earth.[18] In this respect, in order to correctly comprehend the legal nature of sovereignty in Islamic law, the terms source of sovereignty (masdar al-siyāda) and the owner of sovereignty (sāhib al-siyāda) should be used by considering their differences in meaning and should not be confused. It is clear that being the owner or proprietor of something does not mean being the source of that thing at the same time, just as the possession of a property right does not make a person the source of the thing or right subject to the property.[19] Accordingly, the owner of sovereignty in Islamic law is the Islamic society as a whole. Its source is the divine will in terms of authorisation. On the other hand, the theories of human sovereignty cannot develop a meaningful answer to the question of why the sovereign is sovereign, since they do not distinguish the source and the owner of sovereignty.

When we want to define sovereignty as a concept within law, we can say that it is the supreme will that gives political character to a community of people living on a certain territory, that creates the state and all institutions within the state and grants them legitimacy, and that constitutes the authoritative source of the positive law of the society on the constitutional and legal level and the execution of this law. In this definition, sovereignty is given as a legal concept. Sovereignty is not above/outside the law, but within the law and limited.

Sovereignty within law refers to the will that makes it possible to create and execute positive legal rules in a country. Accordingly, it is understood that sovereignty has two aspects, one legal and the other political, which cannot be separated from each other. The legal aspect of sovereignty is the creation of the positive law of the country and the political aspect is the

[18] Ibn al-Arabī, Abū Bakr Muhammad b. Abd Allāh. *Ahkām al-Qur'ān*, 4 Vols., Dār al-Kutub al-Ilmiyya, Beirut 1408/1988, Vol. 4, p. 59.
For detailed knowledge about istikhlāf, see al-Najjār, Abd al-Majīd. *Hilāfat al-Insān bayn al-Wahy wa al-Aql (Bahs fī Jadaliyyat al-Nass wa al-Aql wa al-Wāqi')*, al-Ma'had al-Alamī li al-Fikr al-İslāmī, Herndon 1413/1993, pp. 61-62.
[19] Mutawallī, Abd al-Hamīd. *al-Islām wa Mabādiu Nizām al-Hukm fī al-Marksiyya wa al-Dimuqratiyya al-Gharbiyya*, Munshaat al-Maārif, Alexandria n.d., p. 122 (postscript 42).

execution of the legal rules established by the sovereign will. Therefore, not only those who establish the legal rules, but also those who execute them derive their authority from the sovereign will.

Political power, on the other hand, means power that is valid and effective over the whole country and society.[20] It is not sufficient for any government to have a political character to be qualified as a political power. The most important quality that distinguishes political power from other types of social power is its breadth in terms of scope. Political power is the only power that encompasses the country and its inhabitants as a whole. Only the political power has the ability to make and execute decisions that are binding on all people and groups in the country.[21] Political power differs from other types of power in that it is the supreme power within the country. There is not equality but a hierarchical relationship between political power and other social powers. Naturally, this supreme characteristic of political power does not mean absolute supremacy.[22] Otherwise, it would not be possible to define the concept of political power within law.

In Islamic law, the concept of political power is expressed with the carefully chosen term *wilāya āmma* (al-wilāya al-āmma),[23] which includes an emphasis that the rulers are not the source of the powers they have. In order to understand the relationship of wilāya āmma with sovereignty and its contribution to the concept of the state of law, we need to briefly touch upon the parts of *wilāya* or *walāya* in Islamic law. Accordingly, wilāya is divided into two parts in terms of its scope and source:

a. Wilāya is either wilāya khāssa or wilāya āmma in its scope:

Wilāya khāssa is the type of wilāya that is valid in the field of private law and means custody or guardianship. This is the case with the father's custody (wilāya) over his child, that is, his right to dispose of the child's personal rights and financial affairs, or the guardian's power (wisāya or wasāya) of disposition over a person's financial affairs.[24]

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[20] Kapani, Münci. *Politika Bilimine Giriş*, Bilgi Yayınevi, Ankara 1992, p. 48. On the concepts of power and political power, see also Zorlu, Süleyman Emre."Eski Türklerde ve Osmanlı Devletinde Meşruiyet İnancı Bağlamında Devlet Başkanının Belirlenmesi", *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 5, No. 2, 2022, pp. 503-505.

[21] Heller, Hermann. "Power, Political", *Encyclopaedia of the Social Sciences*, 15 Vols., The MacMillan Company, New York 1957, Vol. 13, p. 301; Kapani, p. 48.

[22] Kapani, pp. 48-49.

[23] Özçelik states that in Islamic law, the term *âmme velâyeti* (wilāya āmma) refers to the supreme power of the state (that is, sovereignty according to him). See Özçelik, A. Selçuk. "İslâm Hukukuna Göre Devlet ve Ferd Münasebetleri", *A. Samim Gönensay'a Armağan*, İstanbul Üniversitesi Hukuk Fakültesi Yayınları, İstanbul 1955, pp. 542 etc. This approach, in our opinion, stems from the fact that the classical doctrine fails to adequately distinguish between political power and sovereignty. However, as will be explained below, wilāya āmma means the whole of authority exercised by the rulers, which does not arise from their own personalities. On the other hand, Tunaya's defining the term âmme velâyeti (wilāya āmma) with the term political power is in accordance with the legal reality. See Tunaya, Tarık Zafer. *Türkiye'nin Siyasî Gelişmeleri (Eski Türkler, İslâm Devleti, Osmanlı Devletinin Kuruluşu)*, Baha Matbaası, İstanbul 1970, pp. 115 etc.

[24] For detailed knowledge about *wilāya khāssa*, see Efendizāde Alī Haydar, Hoca Emīn. *Durar al-Hukkām Sharh Majalla al-Ahkām*, 4 Vols., Matbaa-i Tevsī-i Tibāat, İstanbul 1330, Vol. 1, pp. 130-132; al-Zarqā, Mustafā Ahmad. *al-Fiqh al-Islāmī fī Sawbih al-Jadīd*, 3 Vols., Dār al-Fikr, Damascus 1967-1968, Vol. 2, pp. 816-828; Şener, Mehmet. "İslâm Hukukunda Velâyet I", *Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi*, No. 2, 1985, pp. 203-221; Şener, Mehmet. "İslâm Hukukunda Velâyet II", *Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi*, No. 3, 1986, pp. 161-180.

Wilāya āmma, which concerns our subject, means a general power of disposition belonging to the head of state, valid over the entire country and society, and over all affairs that constitute the subject of state powers.[25] Wilāya āmma is the authority to exercise state powers within the limits of the legal order and corresponds to the concept of political power.[26] All the powers used in the execution of state affairs, that is, the powers (wilāyas) of state officials such as vizier, wālī (governor) and qādī (judge), to use the terminology of classical fiqh, derive entirely from wilāya āmma.[27]

b. Wilāya is also divided into two parts in terms of its source (origin): wilāya zātiyya and wilāya tafwīziyya (al-wilāya ghayr al-zātiyya):

Wilāya zātiyya is a quality that arises from the person himself and is permanent with him, and it cannot be separated from the person, nor can it be waived. For example, the father's custody is like this. A person can be deprived of his/her custody only in cases where the duty required by parental authority is not fulfilled or is abused. This is because wilāya zātiyya is an authority arising from the law.[28]

Wilāya tafwīziyya, on the other hand, is an authority arising from a legal transaction, not from the person himself. The powers possessed by wakīl (representative, deputy), wasī (guardian), qādī (judge), wālī (governor), state officials and mutawallī (trustee) are of the type of wilāya tafwīziyya. Since wilāya tafwīziyya does not originate from the person himself, it can be separated from him. For example, the dismissal and resignation of state officials are legitimate and valid due to this nature of their wilāya. The most comprehensive form of wilāya tafwīziyya is the political power vested in the head of state, that is, the authority to exercise state powers.[29]

From all these, it is understood that the political power in Islamic law is the most extensive (āmm) and non-personal (tafwīzī/ghayr al-zātī) wilāya over the country. Therefore, the fact that the head of state (imām/khalīfa) has wilāya āmma (general political power) means that he has the most comprehensive and hierarchically superior power over the country and nation.

Classifying wilāya āmma as wilāya tafwīziyya is of great importance in terms of revealing the nature of the relationship between sovereignty and political power in Islamic law. That

[25] For detailed knowledge about *wilāya āmma*, see Seyyid Bey. *Hilâfetin Mahiyyet-i Şer'iyyesi*, TBMM Matbaası, Ankara 1340, pp. 35 etc.; Miras, Kâmil. "Âmme Velâyeti", *İslâm-Türk Ansiklopedisi (Muhitü'l-Maârif)*, İstanbul 1360/1941, Vol. 1, pp. 444-449; Berki, Ali Himmet. "Âmme Velâyeti", *Türk Hukuk Ansiklopedisi*, 2 Vols., Ankara 1962, Vol. 2, pp. 932-933; Heffening, [Wilhelm]. "Vilâyet", *MEB İslâm Ansiklopedisi*, 13 Vols., İstanbul 1993, Vol. 13, pp. 316-317; Eskicioğlu, Osman. "Âmme Velâyeti", *Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi*, No. 6, 1989, pp. 415-447; Hammād, Nezīh. *Nazariyya al-Wilāya fī al-Sharīa al-İslāmiyya*, Dār al-Qalam and al-Dār al-Shāmiyya, Damascus/Beirut 1414/1994, pp. 17 etc.

[26] Tunaya, *Türkiye'nin Siyasî Gelişmeleri*, pp. 115-117.

[27] al-Māwardī, Abū al-Hasan Alī b.Muhammad b. Habīb. *al-Ahkām al-Sultāniyya wa al-Wilāyāt al-Dīniyya*, ed. Ahmad Mubārak al-Baghdādī, Maktaba Dār Ibn Qutayba, Kuwait 1409/1989, p. 29; Abū Ya'lā, Muhammad b. al-Husayn al-Farrā. *el-Ahkām al-Sultāniyya*, Dār al-Kutub al-Ilmiyya, Beirut 1403/1983, p. 28. Also see Ibn al-Arabī, Vol. 4, pp. 59-63.

[28] al-Kāsānī, Alāuddīn Abū Bakr b. Mas'ūd. *Badāi' al-Sanāi' fī Tartīb al-Sharāi'*, 7 Vols., Dār al-Kutub al-Ilmiyya, Beirut n.d., Vol. 5, p. 152; Berki, Ali Himmet. *Hukuk Tarihinden İslâm Hukuku I*, Diyanet İşleri Reisliği Yayınları, Ankara 1955, p. 139.

[29] Berki, *Hukuk Tarihinden İslâm Hukuku*, p. 139; Berki, "Âmme Velâyeti", Vol. 2, p. 933; Zaydān, Abd al-Karīm. *al-Madkhal li Dirāsa al-Sharīa al-Islāmiyya*, Dersaadet Basım ve Dağıtım, İstanbul n.d., p. 280 (Under the title of wilāya niyābiyya).

wilāya āmma is in nature of wilāya tafwīziyya indicates that according to Islamic law, political power does not originate from the personalities and will of the rulers and that it is an authority granted to them from outside and does not constitute a subjective right for them. Hence, political power is a power in the nature of representation or deputation and of a revocable authority.[30] This determination points to the fact that the concepts of sovereignty and political power in Islamic law have been distinguished from each other since the beginning. Wilāya āmma (political power) consists of an authority that the rulers receive from the sovereign will, that is, the will of the nation. The rulers, through political power, have the right to exercise state powers on behalf of society, as its representatives and proxies. As a matter of fact, in Islamic law, the relationship between the sovereignty of the society and the political power is characterised as a contract (aqd).[31]

The concept of political power defined in Islamic law also demonstrates that the generalist determination that the distinction between sovereignty and power could not be made in the past[32] and that the distinction in question is a result of contemporary state thought[33] is incorrect. It is true that until recently, sovereignty was considered the same as political power in Western legal thought. However, from the very beginning, Islamic law has clearly established that sovereignty and the political power derived from it are separate concepts.[34] This fact proves that the historical priority in distinguishing the concepts of sovereignty and power belongs to Islamic law.

CONCLUSION

The determining constituent in defining the concept of the state of law is what is meant by the term law in the phrase. Unless law is accepted as a whole of values and principles independent of, above and prioritising to the sovereign will, whether this will belongs to a monarch, an oligarch or a society, any criterion to be developed to define the state of law will be inadequate. Accordingly, it is understood that the principle of sovereignty within the law is the most fundamental criterion for the state of law. We believe that Islamic legal thought, by defining sovereignty as a limited authority within 'the law not created by itself', can make a significant contribution to the principle of the rule of law, which faces a philosophical justification dilemma in Western legal thought.

In Islamic legal thought, the distinction between sovereignty and political power, which is another indispensable criterion in terms of the state of law, has also been clearly determined from the beginning, at least on a principled level. In the public law doctrine of Islam, political

[30] Tunaya, *Türkiye'nin Siyasî Gelişmeleri*, pp. 116-117.
[31] By this we mean the imamate contract (aqd al-imāma). See al-Juwaynī, Imām al-Haramayn Abū al-Maālī Abd al-Malik b. Abd Allāh. *Ghiyās al-Umam fī Iltiyās al-Zulam*, Maktaba Imām al-Haramayn, Matbaa Nahda, Egypt 1401, p. 27; al-Juwaynī, Imām al-Haramayn Abū al-Maālī Abd al-Malik b. Abd Allāh. *Kitāb al-Irshād ilā Qavāti' al-Adilla fī Usūl al-I'tiqād*, Muassasa al-Kutub al-Saqāfiyya, Beirut 1413/1992, pp. 357-358; al-Māwardī, p. 9.
[32] Burdeau, Georges. *Traité de Science Politique*, Tome II, Librairie Générale de Droit et de Jurisprudence, Paris 1949, pp. 260 etc. Also see. Tunaya, *Türkiye'nin Siyasî Gelişmeleri*, p. 115.
[33] See Tunaya, Tarık Zafer. *Siyasal Kurumlar ve Anayasa Hukuku*, İstanbul Üniversitesi Hukuk Fakültesi Yayınları, İstanbul 1980, p. 152; Özek, Çetin. *Siyasî İktidar Düzeni ve Fonksiyonları Aleyhine Cürümler*, İstanbul Üniversitesi Hukuk Fakültesi Yayınları, İstanbul 1967, p. 43.
[34] Cf. Tunaya, *Türkiye'nin Siyasi Gelişmeleri*, p. 117.

power is not a subjective right that the rulers have of their own accord, but an authority based on the will of the sovereign, representing the society and exercised by proxy. The relationship between the sovereign will and political power is a contract (aqd) in its legal sense. In Western legal thought, on the other hand, the distinction in question was reached at a rather late period. This determination also proves that the generalising approach, which centres on the development of legal thought in the West and argues that the distinction between sovereignty and political power is only a consequence of the contemporary concept of the state, is not accurate. In this respect, the importance of explaining and emphasising the principles developed in Islamic legal thought regarding sovereignty, political power and their distinction cannot be denied, not only in terms of contribution to universal legal thought, but also in terms of Muslim societies' internalisation of the concept of the state of law.

Conflict of Interest

There is no conflict of interest.

Author Contributions

The authors did not specify the contribution rate.

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