



# The Islamic Republic of Iran<sup>1</sup>

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## Abstract

Contemporary Iran plays a special role in the history of Islamic constitutionalism, as the constitution of 1979 was the first attempt since the debates over Pakistan's Islamic Republic to derive the basic law of a modern state from Islamic principles. The Islamic Republic that came into being that year combines, as the name implies, Islamic and republican principles, which find institutional expression in a state that combines theocratic and republican organs. Iran was thus the first state in modern times in which sections of the ulema took direct control of the state. In this article we will first provide a historical context for the emergence of the idea of an Islamic state and its central principle, the dominion of the Shi'i jurist or *velāyat-e faqih* (from Arabic *wilāyat al-faqih*). This will be followed by a discussion of the process of constitution making, leading to a close examination of the constitution itself and the debates to which its various parts gave rise.

## Keywords

Iran, revolution, constitution, Shi'ism, republic, theocracy, Islam, semi-presidentialism, ulema, shari'a

## Ayatollah Khomeini and the Islamic State

When the Pahlavi regime was overthrown in 1979, the idea of an Islamic state was quite recent in Iran, for until the early 1970s the constitution of 1906–07 had been a common reference for all political actors in Iran. The two Pahlavi shahs never bothered to abrogate the constitution even though they did not abide by it most of the time, and the opposition, whether leftist, nationalist, or religious, demanded that the rulers respect the limitations that it put on their prerogatives. Shortly after Reza Shah's forced abdication in 1941,

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Ruhollah Khomeini, then a junior cleric, stated in a book written as a systematic defense of the ulema against anti-clerical accusations:

The only government that reason accepts as legitimate and welcomes freely and happily is the government of God... The duty of our government... is to conform to this legitimate government by making the laws passed by the Majlis a kind of commentary on divine law. It will thus become apparent that the law of Islam is the most advanced law in the world, and that its implementation will lead to the establishment of the Virtuous City. We do not say that government must be in the hands of the *faqih*; rather we say that government must be run in accordance with God's law... and [this] is not feasible except with the supervision of the religious leaders. In fact, this principle has been approved and ratified in the constitution... If it were implemented, everyone in the country... would cooperate with the government and strive earnestly to attain the independence and greatness of the nation (Khomeini in Algar, 170f).

This lengthy quote shows that at the dawn of Mohammad Reza Shah's reign, Khomeini still accepted the legitimacy of the 1906 constitution, provided its Article 2, which established a council of *mojtaheds* to examine legislation for its conformity with the shari'a, was implemented. (It never was.) But it also shows Khomeini's commitment to the nation-state of Iran, whose greatness he desires, and his preoccupation with the utopian "Virtuous City" of the Islamic philosophers even at a time when he did not yet contest the constitution of 1906.

In the 1950s the radical Fada'iān-e Eslām organization paid grudging lip service to the constitution (Kazemi, 171), and as late as the 1960s even Ayatollah Khomeini, by then the most prominent of the shah's clerical opponents, implicitly recognized the constitution's authority when he did not call for the ruler's overthrow but instead summoned him to change his policies, or risk ending like his father—in exile (Khomeini in Algar, 178).

But the shah did not listen to Khomeini, and instead sent him into exile first to Bursa in Turkey then to Najaf in Iraq. There, in early 1970, Khomeini gave a series of lectures on Islamic governance that were collected in a book and published first in Arabic as *al-Hukumah al-islāmiyah* and then in Persian as *Hokumat-e eslāmi*. It argued that monarchy was contrary to Islam, and that God had revealed his laws to humanity so that they could guide Muslims. Therefore the application of divine law could not wait until the coming of the Twelfth Imam, and in his absence it was for those who know the law, i.e., the *fuqahā'* (jurists), not only to guide the affairs of the Muslim state, but actually to exercise executive power. To quote Khomeini, "the true rulers are the *fuqahā'* themselves, and rulership ought officially to be theirs," to the point where they must even "attend to the penal provisions of Islam." Experts would run the

day-to-day aspects of government but would be supervised by a *faqih*. There would be no need for a true parliament, although some sort of assembly would assist the government: “if laws are needed, Islam has established them all. There is no need . . . , after establishing a government, to sit down and draw up laws . . . Everything is ready and waiting. All that remains is to draw up ministerial programs, and that can be accomplished with the help of consultants and advisers who are experts in different fields, gathered together in a consultative assembly” (Khomeini in Algar, 60, 63, 137f; see also *Shoʻun va ekhtiārāt*). In January 1979, Khomeini said in a private interview that the role of parliament was to supervise government, not to legislate. At most, it could concern itself with matters that are beneath the dignity of Islam to concern itself with, such as urban planning and traffic regulations (Arjomand 1987, 148f).

Khomeini did not invent the concept of *velāyat-e faqih*. As Louise Marlow shows in her article in this issue, it did appear in the medieval period, but had only a limited *judicial* application and did not connote that the *faqih* assume the mantle of the Imam during the Occultation. This extension of the jurist’s prerogatives was argued by Mullah Ahmad Narāqi (1771-1829), who asserted that the dominion of the *foqahāʾ* was general, in support of which claim he quoted hadith to the effect that the ulema were successors to the Prophet Muhammad and like the prophets before him. However, his theoretical claims did not prevent Narāqi from maintaining courteous relations with his ruler, Fath-ʿAli Shah (r. 1797-1834; Dabashi), who was his follower in religious law (*moqalled*; Hāʿeri 1988, 332-46). Nor did it affect Narāqi’s traditional view of monarchy as the agency for the maintenance of order in the world (Arjomand 2005).

Later *mojtaheds* disputed Narāqi’s view of the ulema’s dominion. One of the most prominent among them, Shaykh Morteżā Ansāri, explicitly rejected Narāqi’s view, and limited the domain of the *faqih*’s dominion to those Muslims who are “unable to administer their own affairs, such as the minor, the insane, the ailing, and the beneficiaries of public endowments” (Enayat, 162). Khomeini revived Narāqi’s reading of *velāyat-e faqih*, and, under the influence of philosophical ideas about the Virtuous City as expounded by Fārābi and others, drew on such Shiʿi philosophers as Mollā Sadrā to turn it from a judicial principle into a political doctrine when the Pahlavi monarchy lost all legitimacy in his eyes and had to be replaced by something new: a political system wherein the ulema, or one of them, rule as “philosopher kings.”<sup>22</sup>

<sup>22</sup> It is beyond our competence critically to analyze this intellectual filiation. For detailed discussions, see Martin 1996; idem 2000, chapter 2; Knysh. For a study of Khomeini’s own philosophical ideas, see Bonaud.

Khomeini's book circulated underground in Iran, but even within the religiously inspired opposition it did not meet with unanimity. For the vast majority of the leading ulema, most of whom were not actively opposing the shah anyway, Khomeini's reading of *velāyat-e faqih* was insufficiently supported by tradition and thus suspect (Fischer and Abedi, 128-43). As for the more liberal lay Islamists, such as the remnants of the then long-defunct Liberation Movement of Iran, *velāyat-e faqih* negated popular sovereignty, in the name of which they were opposing the shah. They tended to interpret Khomeini's treatise as a scholarly statement of the principles on which the *ideal* Islamic state should be based, with little practical relevance to the situation at hand—a situation which called for compromise with other, non-religious, groups. Outside religious circles, the book was hardly known.

The opposition movement that culminated in the overthrow of the monarchy began in 1977, when dissidents published a number of open letters in which they criticized the record of the government. The very fact that these letters were mostly addressed to the prime minister shows that in the early stages of the revolution most of the opposition, including liberal Islamists but not leftists, tacitly acknowledged the validity of the 1906 constitution, under which the shah was above politics. Of course this was by measure of precaution, as direct criticism of Mohammad Reza Shah would almost certainly have led to the arrest of the letter writers, but it signaled that at that early point the opposition wished to work within the existing constitutional framework, not change it.

In the course of 1978 the opposition became more radical, as Khomeini and his hard-line followers increasingly came to dominate the streets (Ashraf and Banuazizi). When the departure of the shah became probable in the autumn, the different components of the revolutionary coalition agreed on the need for a new constitution to replace the old one, but differed on its shape. Moderates strove for the realization of the ideals of 1906, with or (more likely) without a monarch; Marxist-Leninists and leftist Islamists called for a people's democracy or an Islamic council republic that would correspond to the needs and aspirations of a socialist society; and Khomeini and his followers advocated an Islamic state legitimated by the promise to apply the shari'a. But all agreed that the country needed to be governed by a constitution; even the most radical advocates of a shari'a-based Islamic state considered themselves constitutionalists by equating the shari'a and the principles and regulations that they ascribed to it with a modern constitution.

## Genesis of the Islamic Constitution

In October 1978 Khomeini left Iraq for Paris, where he charged one of his followers, Hasan Habibi, with drafting a new constitution.<sup>3</sup> Habibi finished his draft on 22 January 1979, and presented it to Khomeini, who took it with him when he went to Tehran on 1 February. Three days later, in his decree appointing Mehdi Bazargān prime minister of the provisional government, he charged the new transitional administration with organizing elections to a constitutional assembly. Bazargān, for his part, reminded everyone that until a new constitutional framework was in place, his government would act under the provisions of the old basic law, which he considered valid except for the monarchy (Chehabi 1990, 253f). The provisional government received orders to finalize Habibi's draft and present it to the constitutional assembly as the basis for its deliberations. To this purpose, it appointed a commission consisting solely of lay lawyers. On 30 and 31 March Iranians were asked in a plebiscite to approve the abolition of the monarchy and the establishment of an "Islamic republic," and according to official figures, 98.2 percent of the voters did. This improbable unanimity reflected not only the popularity of the revolutionary authorities, but also the practical impossibility, under revolutionary conditions, to opt for the *status quo ante*, to which one must add the vagueness of the term "Islamic republic," which had not been defined. Meanwhile the commission named by the provisional government was doing its task, and after Khomeini had approved the fruit of its endeavors, it was published on 14 June 1979 as the "Preliminary Draft of the Constitution."<sup>4</sup>

This document reflected the ideas and ideals of those who had struggled for decades to make Iran's political system conform to the constitution of 1906. In light of the prevalent revolutionary atmosphere and the ascendancy of Islamist forces, they conceded to give their proposal an Islamic coloring. It began with a Preamble that established Islam as the basis of the new constitutional order, but assigned no privileged place to the ulema: while it called for a kind of constitutional court called "Council of Guardians" (*Shurā-ye negahbān*) to examine the conformity of legislation with Islam, members of the ulema were not a majority on it. Rather, five of them were to face six secular members, three judges and three university professors—which meant that

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<sup>3</sup> Hasan Habibi, a sociologist, in 1989 became Executive Vice President under President 'Ali-Akbar Hāshemi Rafsanjāni, a post he kept under President Mohammad Khātami's first term (1997-2001).

<sup>4</sup> Interview of Asghar Schirazi with 'Abd al-Karim Lāhiji, a member of the commission, and interviews with Nāser Mināchi, Ahmad Sadr Hāj-Sayyed-Javādi, and 'Ezzat-Allāh Sahābi in *Irān-e fardā*, ser. no. 51 (1999), 11-17, 24f.

the draft gave the ulema *less* of an oversight over legislation than the Supplement to the Constitution of 1907, which provided for a committee of five *majtabeds*. Most importantly, there was no provision for *velāyat-e faqih*, and sovereignty ultimately rested with the people. Perhaps reflecting the French education of its initial architect, the preliminary draft established a semi-presidential regime with a dual executive composed of an elected president and a prime minister chosen by an elected parliament.<sup>5</sup> In light of Khomeini's theocratic ideas, his initial acceptance of the draft is puzzling, and was probably due to his uncertainty as to whether, given the constellation of revolutionary forces, he could impose the ideas contained in *Hokumat-e eslāmi* on society.

Both Khomeini and members of the provisional government wanted the nation's new constitutional framework to become operational as soon as possible; the former because he and his clerical supporters hoped that this would strengthen the Islamic Republic vis-à-vis counterrevolutionaries and their presumed foreign allies, and the latter because they hoped that the final adoption of a constitution would normalize the political situation, which would enable them to give full attention to the reforms and policies they wished to implement. Khomeini preferred the preliminary draft to be submitted directly to popular approval, but the provisional government stood by its promise to convene a constituent assembly. As a compromise, a smaller body of seventy-two Muslims and four non-Muslims (one each for the Armenian, Chaldaeo-Assyrian, Jewish, and Zoroastrian minorities) to be called "Assembly for the final examination of the preliminary draft of the Constitution of the Islamic Republic of Iran," was agreed upon between the revolutionary leadership and the provisional government, its function being to examine the draft and put final touches on it before submitting it to the people in a plebiscite. At this point, Mehdi Hā'eri Yazdi, the son of the founder of the Qom seminaries, suggested to Khomeini that neither a constituent assembly nor an Assembly of Experts was needed, as Islamic jurisprudence contained a provision which made it possible to retain the 1906 constitution minus the monarchy. According to Hā'eri, Khomeini welcomed the suggestion but did not act upon it (Lājevardi, 119f). Be this as it may, elections for the assembly, which soon became known as the "Assembly of Experts" (*Majles-e khebragān*), were held on 3 August 1979. Of its final membership, fifty-five were ulema, and of those who were not, only very few were non-Islamists.

As already mentioned, different political and religious groupings had different conceptions about what kind of constitution should replace the one of 1906. Public debate about the issue was vigorous in 1979, and focused on the

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<sup>5</sup> On this form of government, see Elgie.

draft after it was published. Thousands of proposals for amending, changing, or replacing the document were formulated and publicized in the press. When the Assembly of Experts started its deliberations, the proposals were directly sent to it.

Although Khomeini had accepted the preliminary draft, his clerical supporters pressed for a clerically dominated state based on *velāyat-e faqih* in which lay experts would have only consultative functions. Many articles and books were published expounding on the idea (Kadivar 1999). But not all politically active ulema were in favor of it, far from it. One of the most respected of them, Ayatollah Rezā Zanjāni, held that,

according to the unanimous opinion of the Imami Koranic interpreters and theologians, *velāyat-e faqih* in an unrestricted form based upon the Koranic verse about the *ul-u'l-amr* is exclusively reserved for the rightly guided Imams (peace be upon them!). For it does not stand to reason that God, the all-wise, would bestow the powers of the infallible Imam upon fallible human beings. (*Khalq-e mosalmān*, 28 October 1979)

Similar opinions were voiced by Grand Ayatollahs Hāj Āqā Hoseyn Qomi and Kāzem Shari'atmadāri (*Khalq-e mosalmān* 23 September; 7, 14, 18, and 21 October 1979) who drew attention to the contradiction between the concept of *velāyat-e faqih* and the fact that the founding of the Islamic republic and the composition of the Assembly of Experts had been decided by the people themselves in a plebiscite and an election, pointing to popular sovereignty as a basis for legitimacy (Shari'atmadāri's interview in *Ettelā'āt*, 23 September and 10 October 1979).

Leftist Islamists continued advocating a republic based on councils. Five left-leaning Islamist organizations issued a communiqué in which they declared the council system to be "the form of the Islamic state" (Sāzmān-e Mojāhedīn-e Khalq-e Irān 1979). As for non-religious forces, the pro-Soviet Communist Tuda (Tudeh) Party had begun advocating a "national coalition government" on 4 September 1978 (Shirāzi, 267f), months before the shah's overthrow, in the hope of transforming the government into a "people's democracy" along East European lines. More radical Marxist-Leninist groupings and the autonomist organizations of Iran's ethnic minorities opposed any role for religion in the constitution.

When the Assembly of Experts met, it became clear that advocates of *velāyat-e faqih* were in a majority. They did not feel bound by the agreement, and proceeded to change the very nature of the draft. Indeed, Khomeini himself seemed to suggest this about-face when he said in his message to the assembly:

If the Islamic jurists present in the assembly find contradictions to Islam in any of the articles of the preliminary draft or in the adopted amendments, they must declare this openly and not have fear of the uproar this may cause in the press or amongst westernized writers. (*Surat IV*, 319f)

He added that “determining whether [principles laid down in the constitution] are or are not in conformity with Islamic requirements is exclusively reserved for the revered [ulema] who, thanks to God, form a particular group in the assembly” (*ibid.*). In the end, supporters of clerical domination were more numerous in the Assembly. While it maintained the semi-presidentialism of the preliminary draft (albeit with drastically curtailed powers of the presidency), the principle of *velāyat-e faqih* was grafted onto the republican structure, producing a document that conferred ultimate authority on Shi‘i ulema.<sup>6</sup> Ayatollah Khomeini himself became the first incumbent of the future office of *rahbar* “Leader” (Saffari 1993).

The Assembly of Experts ended its deliberations on 15 November 1979. As might be imagined, these deliberations had often resorted to scripture. According to a list that was compiled later, a total of 180 Koranic verse and 128 quotations from the Sunna of the Prophet and the infallible Imams were invoked (*Surat IV*, 287-306). In the final document, however, we find only six verses and a few hadith.

Another plebiscite was organized on 2 and 3 December; again over 99 percent of those who voted gave their approval, but participation was lower and 4.7 million fewer Iranians, who were probably disenchanting with the *form* the Islamic Republic had taken, turned out to cast their ballots. Many groups had been critical of the theocratic components of the text, including the Liberation Movement of Iran (LMI), the National Front, and the Muslim People’s Republic Party (MPRP), a grouping close to Grand Ayatollah Shari‘atmadāri. The LMI called for a Yes vote, while the National Front and the MPRP called for a No vote. On the left, most parties called for a No vote or a blank vote, but the pro-Moscow Tuda party and one faction of the Maoists, the Ranjbarān party, called for a Yes vote. These parties explained their decisions with the necessity of avoiding internal rifts at a time when the nation had to stand united in the face of imperialist conspiracies. American diplomats had been taken hostage only a few weeks earlier, the specter of US reprisals haunted the revolutionaries, and “anti-Imperialism” was a powerful force at the time.

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<sup>6</sup> Chibli Mallat has made the intriguing suggestion that the constitution was inspired by a treatise written by the Iraqi cleric Ayatollah Muhammad Bāqer al-Sadr in February 1979, and shows that the actual wording of the constitution often follows this treatise; see Mallat, 69-78.

The constitution of 1979 was in many ways tailor-made for Khomeini. Faced with the difficulty of replacing him as he reached the end of his life, the leaders of the state decided to amend the constitution. Consequently, in the spring of 1989, shortly before his death, Khomeini named a council of twenty-five men to propose changes to it. This council eliminated the position of prime minister and conferred more powers to the hitherto almost ceremonial presidency (Milani 1993), and incorporated Khomeini's then recent reformulation of *velāyat-e faqih* as *velāyat-e motlaqa-ye faqih*, i.e., "Absolute Dominion of the Jurist," into the pertinent articles (Milani 1992b). The attributes of the state's religious leadership were also changed, as we shall see below. On 3 June 1989 the charismatic founder of the Islamic Republic of Iran died, and one month later, on 2 July 1989, a plebiscite was held to gain popular approval for the changes. This plebiscite coincided with the fifth presidential election, as the outgoing president, 'Ali Khāmena'i, had been chosen to succeed Khomeini. Let us now turn to the details of the constitution. We will first examine some of its general characteristics, and then turn to a detailed account of its provisions regarding the various branches of government.

### **An Islamic Constitution in the Modern World**

The constitution of 1979, amended in 1989, was an attempt to enunciate in the international language of constitutionalism the rather vague principles of Islamic government as defined by Ayatollah Khomeini. We will begin by discussing how the tension between the universalist claims of Islam and the need to provide a constitution for an existing nation-state was addressed, then look at what the constitution means by "Islamic government," and end with a discussion of the ways in which the legal framework was embedded in the shari'a.

#### *Umma versus Nation-State*

Like other revolutions before it, the Iranian revolution of 1979 had pretensions of universality. The revolutionaries saw themselves as the vanguard of a movement destined to engulf the entire Muslim world, and the tension between these ambitions and the need to fashion a fundamental law for an existing nation-state is echoed in the text of the constitution. Its Preamble begins thus: "The constitution of the Islamic Republic of Iran sets forth the cultural, social, political, and economic institutions of Iranian society on the basis of Islamic principles and norms, which represent the earnest

aspirations of the Islamic Umma.” The Preamble later avers that the “constitution provides the necessary basis for ensuring the continuation of the revolution at home and abroad. In particular, in the development of international relations, the constitution will strive with other Islamic and popular movements to prepare the way for the formation of a single world Umma (in accordance with the Koranic verse: ‘This your community is a single community, and I am your lord, so worship me’ [21:92]).” Article 11 of the constitution repeats this obligation. The armed forces are given a special role in this outward-looking foreign policy, for in the Preamble we also read that the “army of the Islamic Republic of Iran and the Islamic Revolutionary Guards Corps . . . will be responsible not only for guarding and preserving the frontiers of the country, but also for fulfilling the ideological mission of jihad in God’s way, that is, extending the sovereignty of God’s word throughout the world.” (This is in accordance with the Koranic verse “Prepare against them whatever force you are capable to muster, and strings of horses, striking fear into the enemy of God and your enemy, and others besides them” [8:60]).<sup>7</sup> The chapter on foreign policy is less belligerent. Article 152 commits the government to non-alignment and “the defense of the rights of all Muslims,” and Article 154 simultaneously pledges scrupulous non-interference in other nations’ internal affairs and support for the just struggles of the oppressed (*mostaz’afin*) against the oppressors (*mostakberin*).

However, as early as Chapter II (Articles 15-18) of the constitution, the attributes and symbols of the Iranian nation-state are listed. Persian is the official language of the country, but unlike the constitution of 1906, that of 1979 also recognizes the existence of regional and ethnic languages; it allows the use of minority languages in the media and the teaching of minority languages and literatures in schools (Article 15). Clearly, the emphasis on religion in defining the Iranian polity made it possible to be more accommodating to Iran’s ethnic minorities. Another innovation is that the teaching of Arabic is made obligatory in secondary education on account of its importance for Islamic sciences and the fact that Persian is permeated by it (Article 16). Article 18 maintains the old tricolor flag but replaces the lion and sun symbol with the motto *Allahu akbar* (God is greatest), which is repeated in various forms on the flag.

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<sup>7</sup> It is worth noting that the constitution does *not* bind the government to the international agreements signed and ratified by Iran, as many other constitutions (including the American) do. Many of these international treaties such as the Charter of the United Nations are incompatible with spreading one’s own religious conceptions throughout the world by force.

*The Aims of Islamic Government*

According to the Preamble, the constitution provides “for the consolidation of the foundations of Islamic government.” It states that in the view of Islam, “government does not derive from the interests of a class, nor does it serve the domination of an individual or a group. It represents rather the crystallization of the political ideal of a nation (*mellat*) who bear a common faith and a common outlook, taking an organized form in order to initiate the process of intellectual and ideological evolution towards the final goal, i.e., movement toward Allah,” and a few paragraphs later it justifies this view with the Koranic verse “And Toward God is the journeying” (3:28).

Given this definition, it is the mission of the constitution “to create conditions conducive to the development of humans in accordance with the noble and universal values of Islam.” To this end, “the righteous will assume the responsibility of governing and administering the country” (in accordance with the Koranic verse “Verily my righteous servants shall inherit the earth” [21:105]). The aim of the government being “to create favorable conditions for the emergence and blossoming of humans’ innate capacities, so that [their theomorphic dimensions] are manifested (in accordance with the injunction of the Prophet, ‘Mold yourselves according to the Divine morality’), this goal cannot be attained without the active and broad participation of all segments of society in the process of social development.” This means not only formal participation in elections and referenda, which will be discussed below, for Article 8 declares the important Muslim principle of *al-amr bi'l-ma'ruf wa naby 'an al-munkar* (based on the verse: “The believers, men and women, are guardians of one another; they enjoin the good and forbid the evil” [9:71]) to be a “universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government.”<sup>8</sup>

The constitution affirms its own legitimacy both on religious grounds and in view of the fact that it was approved by the people in the abovementioned plebiscites (Preamble, *passim*, and Article 1). The result is ambiguity surrounding the question of sovereignty. According to Article 2, sovereignty belongs exclusively to God, but Chapter V (Articles 56-61) is titled “The Rights of National Sovereignty and the Powers Deriving Therefrom.” The contradiction is addressed and rhetorically resolved in Article 56, which specifies that God made humans “master over their social destiny,” and that no one can deprive them of this divine right.

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<sup>8</sup> On this principle, see Cook, especially pp. 530-60, on contemporary Shi'ism and Iran.

The constitution of 1979 is therefore, like most recent constitutions, more than a guide to who does what and how in the state. It has a clearly ideological content, but this content reflects not only the theocratic vision of Ayatollah Khomeini and his followers, but also the beliefs and preferences of leftist Islamists who had allied themselves with him. The dedication to human development that the document ascribes to Islam finds expression in a number of principles and commitments to which the constitution binds future governments. Thus a large role is assigned to the state in economic life (Article 44), and the state is enjoined to provide for a social safety net, education, and housing (Articles 29-31, 43). Article 104 gives a nod to codetermination, and declares that in order to ensure Islamic equity, councils consisting of representatives of workers, peasants, employees, and managers will be formed for all units of production, both industrial and agricultural. The constitution even protects the environment, going so far as to forbid economic activities that “inevitably involve pollution and cause irreparable damage to the environment” (Article 50).

Given these dual desires of complying completely with Islam and reflecting the needs of the modern world, the constitution devotes considerable space to the role of women in society. The Preamble claims that under Islamic government women will “benefit from a particularly large augmentation of their rights,” and then goes on to state that, since the family is “the fundamental unit of society” and the “main center for the growth and edification of the human being,” women recover their “momentous and precious function of motherhood, rearing ideologically committed human beings” and also “assume a pioneering social role and become the fellow struggler” of men. Article 20 proclaims men and women to “equally enjoy the protection of the law,” but in conformity with Islamic criteria. Article 21 deals directly with women. It commits the government to creating a favorable environment for the growth of women, protecting mothers, establishing family courts, and providing special insurance for widows and aged women without support. But it also awards the guardianship of children only to “worthy” mothers in the absence of a “legal guardian,”<sup>9</sup> which is a most unambiguous statement of inequality between the sexes.<sup>10</sup>

Given the premise that Islamic government must be in the service of the people, the constitution devotes Chapter III (Articles 19-40) to “the rights of

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<sup>9</sup> When this point was discussed in the Assembly of Experts, Ayatollah Hoseyn-'Ali Montazeri disagreed with conferring guardianship of a child to the mother in the absence of another legal guardian, because it was possible that a *majtabed* might find someone who could fulfill this duty better (*Surat* III, 1741).

<sup>10</sup> For an analysis of what this means concretely see Hoodfar, 295-307.

the people.” In addition to the socio-economic rights mentioned above, these articles guarantee citizens’ political and legal rights, though mostly with restrictions. Citizens’ dignity, life, property, residence, and occupation are protected (Article 22), and nobody may take them to task simply for holding a belief (Article 23).<sup>11</sup> They have a right to form parties and associations (Article 26) and hold marches (Article 27). The press is free if it does not go against the fundamental principles of Islam (Article 24). Surveillance of private letters, eavesdropping, covert investigation, and censorship are forbidden—unless provided by law (Article 25). Torture and affronts to the dignity of arrested persons are forbidden (Articles 38 and 39), and a citizen is to be considered innocent until proven guilty (Article 37). Whatever rights citizens have, therefore, are always circumscribed by the shari’a. And since the determination of what is, or is not, in accordance with divine law is ultimately the prerogative of the ulema, headed by the Leader for the purposes of Iran’s political institutions, the enumeration of these rights does not constitute a true bill of rights.

The original 1979 Constitution did not contain provisions for its amendment, and the initiative for changing this in 1989 came from the leaders of the regime. On that occasion, this lacuna was filled by adding Article 177, which stipulates that when the need for revision arises, the Leader will consult with the Expediency Council (on which more below) and issue an edict to the president, whereupon a “Council for Revision of the Constitution” will take up the matter. The members of this council represent the various organs of the state, but also include three representatives from among university professors; they are all named, directly or indirectly, by the Leader. Both the Leader and the nation in a referendum must approve any change proposed by this Council, but the “Islamic nature” of the system of government is unalterable, as is its “democratic character.”

### *Official State Religion*

Like its predecessor of 1906, the Constitution of 1979 proclaims Twelver Shi’ism to be the official religion of the state (Article 12) and emphasizes that this religious definition of the state can never be altered. Moreover, it ascribes a “common faith” to the “people” in the Preamble, implying that Twelver Shi’is are Iran’s *staatsvolk*. While this has been the case sociologically for a few centuries, its inclusion in the Constitution provides a legal basis for the marginalization of all other Iranians.

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<sup>11</sup> Oddly enough, the Koranic verse “There is no compulsion in religion” (2:256) is not mentioned here.

Some of these “other” Iranians are, however, mentioned in the constitution. Unlike its predecessor, it acknowledges the existence of not only the four Sunni *madhhabs*,<sup>12</sup> but also Zaidism, another branch of Shi‘ism.<sup>13</sup> Followers of these denominations “are free to act in accordance with their own jurisprudence in performing their religious rites,” and where they form a regional majority, “local regulations, within the bounds of the jurisdiction of local councils are to be in accordance with the respective school of *fiqh*.” As in the previous constitution, only three non-Muslim religions, the so-called “peoples of the book,” are officially recognized: Zoroastrians, Jews, and Christians, “who within the limits of the law, are free to perform their religious rites and ceremonies” (Article 13). Iran’s largest non-Muslim minority, the adherents of the Baha’i faith,<sup>14</sup> receive no recognition, and neither do Mandaeans, Sikhs, or Yezidis.<sup>15</sup> As a nod to non-Muslim minorities not explicitly mentioned, Article 14 proclaims that non-Muslims must be treated kindly by the government and by Muslims in general, in accordance with the Koranic verse “God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes” (60:8).

To its credit, the constitution does not pretend not to discriminate on the basis of religion.<sup>16</sup> Article 19 grants all Iranian citizens equal rights, whatever their ethnic group, tribe, color, race, and language, but not whatever their religion.<sup>17</sup> Nor does the constitution explicitly grant citizens freedom of conscience to choose their religion or to be without one altogether. Although Article 23 states that people may not be taken to task for their beliefs, apostasy

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<sup>12</sup> Sunnis constitute about ten percent of Iran’s population, if not more, and most belong to ethnic minorities. Kurds and other Sunnis of Western Iran are Shafi‘is, while Turkomans, the Baloch, and other Sunnis of eastern Iran are Hanafis. There is a small Maliki community on the island of Qeshm in the Persian Gulf. For a study of the situation of Sunnis in contemporary Iran see Dudoignon.

<sup>13</sup> Zaidis live in Yemen. That the constitution should mention them is puzzling in light of the fact that Shi‘is of the Nizari Isma‘ili persuasion, who number in the thousands in Iran, and the far more numerous *abl-e haqq*, receive no official recognition.

<sup>14</sup> The Baha’i faith negates the finality of the Prophet Muhammad’s revelation, and for this reason its adherents are heretics from a Muslim point of view. The religion had no official standing under the old constitution either, which made it even less likely to be recognized in an Islamic Republic. See Brookshaw and Fazel.

<sup>15</sup> For a history of religious minorities under the Islamic Republic, see Sanasarian. In 1996 Ayatollah Khāmena‘i issued a fatwa recognizing the Mandaeans as a “people of the book” (Foruzanda, 156). On the Yezidis of Kurdistan, see Safizāda, 208-31.

<sup>16</sup> For a human rights lawyer’s analysis of the various legal discriminations to which non-Muslims are subjected, see Lāhiji 2001, 7-40.

<sup>17</sup> For glimpses of the actual discrimination practiced by the state, see Sciolino, chapter 11.

from Islam, while not explicitly mentioned in the constitution, is punishable by death according to the sacred law of Islam, which is the basis of the law of the land.

Although the Republic is called *Islamic*, its constitution is couched in terminology that is unmistakably *Twelver Shi'i*. The principles on which the Islamic Republic is based, as enumerated in Article 2, include belief in “continuous leadership (*imāma*)” and “recourse to a continuous *ejteḥād* of the *foqahā'* . . . exercised on the basis of the Koran and the *Sunna* of the *Mā'sumun*” (i.e., the Prophet and the Imams). Moreover, many of the state's leadership positions are reserved for the Shi'i clergy.

It would be unfair to interpret use of the term *Islamic* as hypocritical, however, for in the minds of its adherents, Twelver Shi'ism *is* true Islam.<sup>18</sup> Shi'ism being part of the wider world of Islam, Article 11 affirms that “all Muslims belong to a single community” and stipulates that the government of the Islamic Republic must work for the unification of all Muslim peoples.

### *The Place of Islamic Law*

A constitution is a legal document, and Islam is a religion of law. The Preamble states that “Legislation setting forth regulations for the administration of society will revolve around the Koran and the Sunna. Accordingly, the exercise of meticulous and earnest supervision by just, pious, and committed scholars of Islam (*al-foqahā' al-'odol*) is an absolute necessity.” The Islamic nature of the state, so often affirmed, finds its most concrete reflection in the many articles that deal with legislation. Article 2 states that legislation is a power reserved for God and must be based on divine revelation, and Article 4 stipulates that “all civil, penal, financial, economic, administrative, cultural, military, political and other laws must be based on Islamic criteria,” and adds that this principle also “applies absolutely and generally to all articles of the constitution . . . and [the *foqahā'* of the Council of Guardians] are judges in this matter.” By allowing the Council of Guardians to suspend not only laws (see below) but also the constitution itself, this article negates the status of the constitution as “the higher law” (Arjomand 2001, 306f).

Article 72 states that parliament cannot enact laws contrary to the *osul* and *ahkām* of the official religion of the state. Local councils, too, must not take decisions “contrary to the criteria of Islam” (Article 105) and judges are obliged

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<sup>18</sup> As G.K. Chesterton observed, every believer thinks of himself as orthodox, even if others see him as unorthodox. See Chesterton, 11.

to refrain from executing government statutes that contravene the norms of Islam (Article 170).

The shari'a either forms the foundation on which legislation is based, or defines the boundaries beyond which it may not proceed, in the sense that legislation may not contradict the shari'a. The shari'a's stipulations are designated in the constitution by the following terms, usually put in the plural: *ahkām* (ordinances), *moqarrarāt* (regulations), *qavānin* (laws), *osul* or *mabāni* (principles), *mā'āyer* (criteria), *asās* (foundations), *zavābet* (guidelines), and *mavāzin* (standards). In some cases the stipulations are quite explicit, for example in the prohibition of usury or the establishment of *hodud* (physical punishments). In other cases these stipulations determine the content of the relevant principles of the constitution, as seen in the limitations placed on the rights of the people, as discussed above.

## The Institutions of the State

At the apex of Iran's political structure stands the *rahbar-e enqelāb*, or "Leader of the Revolution" (hereafter "Leader"), whose position translates into institutional reality the theocratic notion of *velāyat-e faqih*. The supremacy of this office is underscored by placing the three branches of government under its supervision (Article 57).<sup>19</sup> We will examine them in turn.

### *The Leadership*

In the Assembly of Experts there was much debate about the extent of the Leader's powers. Some delegates pleaded for his authority to equal that which the Prophet Muhammad had exercised in his own lifetime as God's apostle. One of them, Mohammad Rashidiān, went so far as to object to the fact that it was the assembly that defined the extent of the *faqih's* powers (*Surat* II, 1065). But there were also ulema within the assembly who cautioned against giving the *faqih* too many powers. For example, as the delegates were debating the supreme command of the armed forces, Ayatollah Nāser Makārem Shirāzi expressed the view that it should be vested in the presidency, rather than the *faqih*. In his reasoning, he referred to the impression that too much clerical power would make on the "world at large":

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<sup>19</sup> The original constitution of 1979 had vested the task of coordinating the three branches of government in the presidency, but when the president became the head of the executive in 1989, the Leader assumed this role.

Bear in mind that our domestic and foreign enemies will accuse us of dictatorship and hostility to the sovereignty of the people... They will say that a small handful of religious scholars have gathered together in the Assembly of Experts and framed a constitution that establishes their own dominion. By God, see that you do not do this...! It is possible that the people will remain silent today, but tomorrow they will abolish the constitution (*Surat*, II, 1114f).<sup>20</sup>

Another cleric, Mohammad-Javād Hojjati Kermāni, warned that “Signs of a negative reaction in society have already appeared... Rumors concerning the dictatorship of the mullahs and the despotism of the clergy have been spread throughout the country... With this constitution we are provoking dissatisfaction among many intellectuals... Tomorrow the mass of the homeless, the unemployed, the hungry and the discontent will join with the disgruntled intellectuals.” To remedy this, he suggested combining the offices of the president and the *faqih*, so that the shift to *velāyat-e faqih* would not ignore the effects of “sociological and mass-psychological mechanisms” (*Surat* II, 1122f).

When these debates took place, it was obvious who the *faqih* would be. But it was also obvious that none of Ayatollah Khomeini’s putative successors would inherit his charisma, and so it was pointed out in the Assembly that endowing the *faqih* with too much power would be dangerous. But this argument became widely discussed only ten years later, when the assembly for the revision of the constitution met to amend the basic law, as we shall see later.

According to the Preamble, “In keeping with the principle of governance (*wilāyat al-amr*) and the perpetual necessity of leadership (*imāma*) the constitution provides for the establishment for leadership by a *faqih* possessing the necessary qualifications and recognized as leader by the people (this is in accordance with the hadith ‘The direction of [public affairs] is in the hands of those who are learned concerning God and are trustworthy in matters pertaining to what He permits and forbids’). Such leadership will prevent any deviation by the various organs of the state from their essential Islamic duties.” Articles 5 and 109 reiterate that during the occultation of the Twelfth Imam, the leadership of the Umma devolves on the just and pious *faqih* who is aware of the circumstances of the age, courageous, resourceful, and possessed of administrative ability. In the original constitution of 1979, the Leader had to be a

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<sup>20</sup> Makārem Shirāzi was not at all an opponent of *velāyat-e faqih* per se. In his book on the Islamic state published in 1979, he rejected the accusation that Islamic government means that the clergy (*ruhāniyūn*) monopolize power, and instead wrote that Islamic government belonged to all and meant that Islamic policies were followed—and this because the great majority of the people wanted it that way, not because there was any compulsion (Makārem Shirāzi, 70f).

*marja'-e taqlid*, i.e., one of the top leaders of the clergy,<sup>21</sup> and ideally be recognized by a majority of the population as such (if not, the Assembly of Leadership Experts would choose a *marja'* and appoint him as Leader). However, by the late 1980s it became clear that none of Khomeini's peers agreed with the principle of *velāyat-e faqih* or were acceptable politically to the top leadership of the Islamic Republic (Chehabi 1991), and so the precondition of *marja'iyat* and any reference to acceptance by a majority of the population were removed in the revisions of 1989. This paved the way for President Khāmena'i's elevation to the Leadership. According to Article 107, beginning with Khomeini's successor, the Leader is chosen by an Assembly of Leadership Experts, about which, however, the constitution says almost nothing. In the course of the discussions Rafsanjāni proposed a ten-year term of the Leader, but this proposal was not retained (Milani 1992b, 182f). The Leader's term of office is not limited, but he can be removed by the Assembly of Leadership Experts in case he no longer fulfills the conditions specified in Articles 5 and 109 (Article 111). The Assembly set up a seven-man investigation committee that monitors the Leader's comportment on a continuous basis (Arjomand 2001, 316), but this committee has not done anything of the sort.

The powers of the Leader, enumerated in Article 110, were great to begin with, and they were actually increased in 1989. He delineates "the general policies of the Islamic Republic" after consultation with the Expediency Council—a body whose membership he determines—and also supervises the enactment of these policies (Article 112). He is commander-in-chief of the armed forces, issues decrees for referenda, and pardons convicts. He appoints the head of the state radio and television network, the chief of the joint staff, the commander of the Revolutionary Guards, and the heads of the various branches of the armed forces. He chooses the head of the judiciary branch, who must be a cleric, and the six clerical members of the Council of Guardians (about which more below). In addition, he—directly or indirectly—names most members of the Assembly for the Revising of the Constitution (Article 177), and about half the members of the National Security Council (Article 176). He has the right to confirm the suitability of presidential candidates (except that of a sitting president running for reelection). Finally, he can issue executive orders (*hokm-e hokumati*) and presides over a number of

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<sup>21</sup> The *marja'-e taqlid* (Arabic *marje' al-taqlid*) "source of imitation," is the highest religious authority in Twelver Shi'ism. Traditionally, he is the most learned, pious, and just of the *mojtaheds*, and believers turn to him in religious matters. However, most of the time there is no consensus as to who the most "learned, pious, and just" person is, leading to a multiplicity of leaders among whom believers can choose. For how this system developed, see Cole; Amanat; Kazemi Moussavi 1996.

institutions that are not named in the constitution. In sum, the Leader has most of the prerogatives of an executive head of state, but there are no checks on his power, other than the remote possibility that the Assembly of Leadership Experts might find him unfit for the office.

### *The Executive*

Iran is the only republic in the world whose president is not head of state, for according to Article 113, "After the office of Leadership, the President is the highest official of the country." He is the "head of the executive, except in matters directly concerned with the [office of] Leadership." He must be a pious Shi'i man (Article 115),<sup>22</sup> and he is elected by universal suffrage for a maximum of two four-year terms. He is responsible to the people, the Leader, and parliament (Articles 114-22), and the Leader can dismiss him if he is found guilty of violating his constitutional duties by the Supreme Court or if parliament votes a no-confidence motion by a majority of two thirds (Articles 110 and 89). The only presidential prerogatives explicitly mentioned in the constitution are the signing of international treaties after they have received parliament's approval (Article 125), "national planning, budget, and state employment affairs" (Article 126), "appointing ambassadors and receiving the credentials of foreign ambassadors" (Article 128), and the awarding of decorations (Article 129).

The president also chooses the members of the Council of Ministers (cabinet), who must be individually approved by parliament. He heads the cabinet, and together with it "determines the program and policies of the government and implements the laws" (Article 134). According to Article 113, he supervises the application of the constitution, but in practice he has not had the means to rise to the task.<sup>23</sup>

### *The Legislative*

Iran's constitutional tradition began with the call for an elected parliament, and the original constitution of 1906 was little more than a law setting one up.

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<sup>22</sup> The text of this article says that he must be chosen from among "religious and political *rejāl*." *Rejāl* is the broken plural of *rajol*, which in Arabic means "man." In Persian, *rejāl* connotes men of importance or statesmen, but the official English translation of the constitution renders the term as "personalities." This is also the view taken by all the women who have tried to become presidential candidates in Iran. None has succeeded so far, although none has ever been explicitly told that this is because of the gendered meaning of the word *rejāl*.

<sup>23</sup> For Mohammad Khātami's attempts to implement Article 113, see Shirāzi. 2008, 100-03.

In 1979 the concept of an elected parliament was too entrenched in Iran's political culture to be dispensed with in an Islamic Republic, Khomeini's dismissive remarks, quoted earlier, notwithstanding. So it was inevitable that the draft contain extensive provisions for an elected legislature. However, in the Assembly of Experts some objected to the idea.

The delegate 'Abd-Allāh Ziā'iniā declared: "We all know that parliament was forcibly imposed on the shari'a . . . It has no legal foundation in the shari'a." He did not reject the idea completely, however, suggesting instead an assembly consisting of a small number of delegates whose task it would be to conform to the law of God (*Surat* III, 1668f).

Another delegate, Jalāl al-Din Fārsi, proposed the creation of two parliaments, one made up of Islamic jurists who would formulate, codify and pass laws on the basis of the shari'a, the other comprised of practical experts whose task would be to draw up plans for ministries and to choose officials for government administration and the executive (*Surat* I, 77). According to yet another delegate, Mohammad-Mehdi Rabbāni Amlashi, parliament should be granted an advisory function which would be at the disposal of the ruling jurists. Such a parliament would be made up of well-informed advisers who would also have the capacity to "derive relevant present-day laws from Islamic law" (*idem*, 62). The delegate Mohammad Karami considered any legislation other than what was laid down in the shari'a to be apostasy (*idem*, 39).

Outside the assembly similar voices were heard. In a lengthy letter to the editor of the newspaper *Āyandagān*, the lawyer Gholām-Rezā Rezānezhād wrote that the Koranic passages quoted to sanction *shurās* (councils) did not apply to matters of government, only to private matters. He concluded: "if sovereignty belongs to the people, then it does not belong to God, and if it belongs to God, what right do the people have to choose representatives who will pass laws that have authority over Muslims?" (*Āyandagān*, 3, 19, and 30 July 1979). During a "Congress of Muslims who are critical of the constitution," the convener of the meeting, Mohammad Sadduqi, demanded, among other things, that parliament's only function be the practical application of God's laws, for which reason it should consist of jurists and the representatives of the sources of imitation (*Āyandagān*, 27 June 1979). In an open letter to Khomeini, the cleric Hoseyni Tehrāni spoke out against a republic, as this form of government based its support on the approval of the majority, whereas the Islamic state was based on divine right (*haqq*). The right to rule in an Islamic state, he averred, belonged to the most prominent, wise, intelligent, and pious jurist who was to be chosen by a commission of wise men (*ahl-e hall va 'aql*) for the duration of his life or for as long as he possessed the qualifications necessary for his office. In this scheme, parliament's function was merely

that of consultation, and the results of its deliberations should be presented to the wise jurist who was free of lust and passion, and who would base his decisions on the Koran and the Sunna. After having considered the circumstances and the demands of the time, he would take the necessary decisions and issue the appropriate decrees (*Keyhān*, 27 June 1979).

The weight of Iran's constitutional heritage was such, however, that such views did not prevail. In the constitution of 1979, Article 7 reiterates the often quoted verse "Their affairs are by consultations among them" (Koran 42:38) and "Consult them in affairs" (3:159). On that basis it provides for a popularly elected unicameral parliament, called "Islamic Consultative Assembly," to be elected every four years.

Parliament can "establish laws on all matters within the limits of its competence" (Article 71), but these must not contradict the principles and ordinances (*osul* and *ahkām*) of the official state religion, as determined by the Council of Guardians (Article 72).<sup>24</sup> In addition, parliament also acts as a check on the executive; it has "the right to investigate and examine all affairs of the country" (Article 76), and all international agreements need its approval before ratification (Article 77). Parliament confirms ministers chosen by the president, and it can interpellate both ministers and the president, and vote on motions of no-confidence (Articles 87-89). But, as already mentioned, the legislative powers of the Islamic Consultative Assembly are circumscribed by the "Council of Guardians," whose functions are described in Articles 91-98 of the constitution. This Council consists of six *foqahā'* chosen by the Leader, and six lay jurists elected by parliament from among names submitted to it by the head of the judiciary. The council as a whole examines laws for their compatibility with the constitution, but its clerical members alone determine legislation for its compatibility with Islam. This council also has the task of supervising elections (Article 99), which it has broadly interpreted as approving candidacies, thus further limiting popular sovereignty.

At the Assembly of Experts, some members objected to the presence of non-clerical jurists on the Council of Guardians. Hojjat al-Eslām 'Ali Khāmena'i pointed out that with the fall of the shah, the previous regime's legal system, which was based on the French system, had become superfluous, for which reason experts in that system should not be given any function in the Islamic Republic (*Surat* II, 948-49). Ayatollah Lotf-Allāh Sāfi, for his part,

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<sup>24</sup> In practice, other *unelected* bodies have taken on legislative functions as well. Examples are the Expediency Council and the Supreme Council of the Cultural Revolution. Within the logic of the Islamic Republic, they derive their legitimacy from the Leader, who appoints most of their members (Schirazi, 65).

argued that the presence of such jurists on the Council “could give the impression that Islam was deficient and that there were problems which could only be solved by turning to a system of jurisprudence other than the Islamic one” (idem, 951).

Institutions take on a life on their own,<sup>25</sup> and from the very beginning Parliament and the Council of Guardians often disagreed. Parliament was faced with the necessity of addressing pressing problems and passing laws, but the more conservative Council of Guardians often deemed these laws insufficiently in compliance with the shari‘a. Ayatollah Khomeini tried on a number of occasions to arbitrate between the two institutions, but when his attempts proved unsuccessful, he took a radical measure to break the deadlock. In a decree of 7 January 1988, Khomeini declared that government rule derived from “the absolute dominion of the Prophet of God.” This, he stated, was “the most important of God’s ordinances” (*ahkām-e elāhi*) and stood above all other ordinances that were derived or directly commanded by God.” An Islamic state thus had the right to disregard Islamic ordinances, even prayer, fasting, and the pilgrimage to Mecca, when passing resolutions and passing laws. The only principle to be followed was “what is in the interest (*maslaha[t]*) of maintaining [the ruling] order.” This innovation was called *velāyat-e mot-laqa-ye faqih*, “absolute dominion of the jurisprudent” (Reissner; Moroni) and with it *maslaha[t]* entered Shi‘i jurisprudence. One commentator went so far as to declare: “An ordinance (*hokm*) deriving from *velāyat-e faqih* counts as a divine ordinance (*hokm Allāh*) and obeisance to it amounts to obeying God, and opposing it counts as rebellion against God” (Shirāzi 2008, 232).

To determine what was in the interest of the “ruling order,” Khomeini created a body with the unwieldy name “Council for determining what is in the interest of the ruling order,” naming all its members himself. It was for this Expediency Council, as it has come to be known in English, to be the final arbiter between Parliament and Council of Guardians, and its decisions were law; in addition it could also legislate by itself. In the course of the constitutional revisions of 1989, the Expediency Council was added—over the objections of members of the Council of Guardians—to the nation’s official institutions in the rewritten Article 112 (Schirazi, 234-37).

Khomeini’s notion of absolute *velāyat-e faqih* is incompatible with the most basic notions of constitutionalism, as it subordinates decisions to what is convenient for the state’s survival—as assessed by one man and members of a Council named by him. It has raised many eyebrows among Muslims for

<sup>25</sup> On the Iranian parliament, see Baktiari; on the Council of Guardians, see Mehrpur; Samii.

whom the purpose of an Islamic state was to uphold and apply Islamic law, not to break it in the name of *raison d'état*.

Khomeini was a quintessential charismatic leader, and his claim to supersede the ordinances of religion conformed to the pattern described by Max Weber: "in a revolutionary and sovereign manner, charismatic domination transforms all values and breaks all traditional and rational norms. 'It has been written, but I say unto you...'" (Weber, 1115). His successor, however, lacks this charisma, and far from invoking the absolute *velāyat-e faqih*, has in fact tried to rule according to a more conservative interpretation of Islam. The Expediency Council has come to have a role similar to that of the old Soviet politburo, as it is the nation's top decision-making body, of course as long as the Leader agrees with the decisions. That it is unelected and not accountable to anyone is a powerful reminder of the limitations of parliament as an institution representing popular sovereignty.

### *The Judiciary*

When the Islamic Republic was founded in 1979, the bureaucratic structures of the judiciary had been in place for many decades. The constitution-makers of 1979 had no choice but to take this legacy into account, but attempted to imbue the existing public institutions with the spirit of Islamic law. The difficulty of doing so was revealed in the discussions in the Assembly of Experts.

During the discussion of Article 21, which deals with the rights of women, Lotf-Allāh Sāfi, citing relevant Islamic regulations, characterized as un-Islamic the stipulation that the protection of the family was a matter for the courts. This, he averred, was solely a matter for a *mojtahed* who would have to be consulted on a case-by-case basis. He also claimed that the permanence and the institutionalization of courts lacked any basis in shari'a, which conceives of courts as being of temporary duration (*Surat* III, 1738).

According to Article 61, the functions of the judiciary are to be performed by courts that are to be formed "in accordance with the criteria of Islam" and which, among other things, must implement the "divine *hodud*" (physical punishments). Articles 156-174 provide more detail on the judiciary. They frequently discuss the limits placed upon its organization and functions by the regulations of the shari'a. In the constitution of 1979, the judiciary was headed by a "High Judicial Council" comprised of the head of the supreme court, the prosecutor-general, and three *mojtahed* judges elected by the country's judges, but the 1989 revisions provides for the judiciary to be headed by a *mojtahed* named for ten years by the Leader (Article 157). This head of the judiciary has inherited the functions of the old Council, which consist of

organizing the court system, appointing and dismissing judges, and “drafting judiciary bills appropriate for the Islamic Republic” (Article 158), and proposing a list of names to the president from among whom he chooses the minister of justice (Article 160). Both the chief of the supreme court and the prosecutor-general must be *mojtaheds*, and they are named by the Leader (Article 162). Judges’ qualifications are determined by the criteria of *fiqh* (Article 163).

Since the entire legal system and all legal codes of the Islamic Republic are allegedly based on the *shari’a*, the constitution does not mention any other type of law. Two articles, however, hint at possible shortcoming in the process of codification. Article 167 requires judges to base their judgments on codified law as much as possible, but obliges them to ground their judgments in “authoritative Islamic sources and authentic fatwas” in the absence of codified law. Moreover, judges are “obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws and norms of Islam” (Article 170).

Some stipulations of the new judiciary had no precedent in Islamic law, and were contested on these grounds in the Assembly of Experts. The juries which, according to Article 168, were to be present in trials involving “political and press offenses” were deemed unnecessary by ‘Ali Khāmēnā’i (the later Leader), for whom passing sentence on these matters was a prerogative of the *mojtahed*. The latter did not need any other body unless it were in an advisory capacity (*Surat* III, 1677, 1679). Likewise, the public character of court proceedings, as stipulated in Articles 165 and 168, was also contested in the Assembly of Experts. The delegate Hoseyn-‘Ali Rahmāni asked the assembly to consider the fact that this regulation was neither approved by the Koran nor in *fiqh*. His colleague Ziā’iniā replied that what mattered was not previous approval, but whether there was an explicit prohibition of the regulation. He argued that Islamic jurisprudence aimed at establishing what is permitted, not on prohibitions, adding that in the Prophet’s time court proceedings did not exclude the public (*idem*, 1621-23).

It is important to note that while the original constitution of 1979 conferred a degree of independence on the judiciary by placing at its head a council of five, only two of whose members were appointed by the Leader, the revised constitution of 1989 subordinates this branch of government completely to his office. That is how it became possible for the judiciary systematically to undermine the actions of the elected branches of the government, when these were in the hands of reformers, the presidency 1997-2005 and parliament 2000-04.

## Constitutional Contradictions and Iranian Politics

While the constitution of the Islamic Republic obligated Iran's rulers to govern the country according to Islamic criteria and principles, it became clear as the new regime became consolidated that this was easier said than done. On the one hand, Islamic criteria and principles could be invoked for a variety of contradictory policies, and on the other hand, the new government had to grapple with problems for the solution of which the shari'a did not yield any insights. That is why from very early on ways had to be found to circumvent the shari'a in practice. This took a number of forms, such as invoking the rule of emergency (*zarurat/darura*) or the so-called "binding secondary contractual conditions (*shart-e zemn-e 'aqd*)," and soon led to conflicts between Parliament and the Council of Guardians.<sup>26</sup> Ultimately, the difficulty of applying the shari'a in a modern state led to a major effort by Shi'i intellectuals, among whom 'Abd al-Karim Soroush is the most well known, to rethink the whole notion of shari'a, an effort which was a major contributor to the reform movement of the 1990s.<sup>27</sup>

In institutional terms, the contradictions of the constitution led to two series of problems, one centering on the religious leadership, the other on the respective weight of clerical and republican institutions in Iran. Already when the constitution was being revised in 1989, some members of the Assembly of the Revision of the Constitution worried that by separating the office of Leader, a state position, from the position of source of imitation, which was purely religious and not anchored in the constitution, believers might be put in a situation where the nation's political and the Shi'i community's religious leaders disagree (Milani 1992b, 181). The bifurcation of Iran's top religious leadership after Khomeini's death into a "political" and a "purely religious" authority threatened to undo the union of "church and state" on which the Islamic Republic was premised, and led to attempts to declare the Leader, Ayatollah Khāmena'i, a source of imitation (Buchta, Gieling). This was resisted by many senior clerics, including some who had been founders of the Islamic regime, and led to renewed discussions of *velāyat-e faqih*, discussions that filled innumerable books and articles in the 1990s. The thrust of most of these new treatises was the need to render the actual constitutional embodiment of the principle more democratic, for instance by having the Leader elected directly by the people (Kazemi Moussavi; Arjomand 2001, 323-30). Mohsen Kadivar,

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<sup>26</sup> For details, see Schirazi, Part 3; Chehabi 1996.

<sup>27</sup> See Schirazi, Part 4, for details.

a dissident cleric, went so far as to refute the entire notion of *velāyat-e faqih* in a thick tome, upon which he was forced into exile (Kadivar 1998).<sup>28</sup>

These discussions combined with other factors—such as rising dissatisfaction with the economic performance of the regime, the de-legitimation of the very idea of an ideological state brought about by the demise of Soviet communism, and the coming of age of millions of young Iranians impatient with the puritanism of the Islamic regime—to give rise to a reform movement whose major themes have been the call for the rule of law, civil society, and the strengthening of the nation's republican institutions vis-à-vis the unelected ones. Proponents of this reform movement won four consecutive elections: presidential in 1997 and 2001, local in 1999, and parliamentary in 2000. While they achieved some temporary successes in rendering Iranian political life more open and participatory, the attempt to complete a transition to democracy while remaining *within* the confines of the constitution amounts to an attempt at squaring the circle, as we hope to have shown in our analysis of the constitution. The reformists' inability to institutionalize the liberalization of Iranian political life was demonstrated when most of them were unceremoniously barred by the Council of Guardians from contesting the 2004 parliamentary elections. The election of Mahmud Ahmadinezhād to the presidency in 2005 and his widely contested reelection in 2009, which almost eliminated the reformists from political society, did not lead to more streamlined government, far from it. Although in the summer of 2009 the Leader decisively backed Ahmadinezhād after millions of citizens protested against the official elections results in what came to be known as the Green Movement, Ahmadinezhād went farther in challenging the prerogatives of the Leader than either Khātami or Rafsanjāni. However, using the considerable powers the constitution gives the Leader, Khāmena'i reduced him to a lame duck status by 2011, and in March 2012 the president's supporters won only a minority of seats in the parliamentary elections.

## Conclusion

It was Sasanian Iran that gave later Muslim writers the idea that in a well ordered state religion and politics must be allied, and that temporal and spiritual authorities must be separate but dependant on each other;<sup>29</sup> thus the

<sup>28</sup> For a discussion, see Matsunaga.

<sup>29</sup> *The Letter of Tansar*. For the influence of this idea on subsequent Muslim thinking on governance, see Noah Feldman's article.

irony that it was precisely in Iran that the first modern theocracy of the Muslim world was established. The de-legitimation of the monarchy, perhaps accelerated by the two Pahlavi Shahs' over-emphasis on pre-Islamic symbolism and concomitant indifference to the legitimizing resources offered a monarchy by the Islamic traditions of statecraft, coincided with a revolutionary change in Shi'i thinking about government to beget a state in which a segment of the clergy assumed the mantle of the Prophet. But the constitutional traditions and aspirations of Iranians could not be ignored in 1979, and so the political system that was created put some limitations on the power of rulers and offered citizens a certain degree of participation. Whatever its shortcomings from a liberal constitutionalist point of view, the Islamic Republic is not a totalitarian state; in fact, a "political society" has come into being in Iran.<sup>30</sup> Not everybody has equal access to this political society, however: one of the key features of modern constitutionalism, namely the equality of rights for all citizens, is missing. In the words of a prominent Iranian human rights lawyer, in the Islamic Republic "the rights of the clerics do not equal those of non-clerics, the rights of Twelver Shi'is do not equal those of non-Twelver Shi'is, the rights of Shi'is do not equal those of Sunnis, the rights of Muslims do not equal those of non-Muslims, the rights of 'recognized religious minorities' do not equal those of other 'minorities,' and the rights of men do not equal the rights of women" (Lāhiji, 19).

The Islamic Republic promised that all aspects of public life in Iran would be governed by Islamic rules and criteria, but the rule of law, first demanded in its contemporary form by the modernists of the nineteenth century, still eludes Iran.

The Islamic Republic proclaims the supremacy of Islamic rules and criteria over all aspects of policy, but invests a small group of men with the right to decide what these rules and criteria entail in practice. And as an Anglican cleric put it two centuries ago: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver . . . and not the person who spoke or wrote them" (Bishop Hoadly's sermon preached before the King, 31 March 1717, quoted in Mallat, 79). Such a state of affairs is neither inherent in Shi'i Islam nor historically inevitable, to wit Ayatollah Nā'ini's warning in 1909: "Just as submission to the arbitrary will of kings amounts to worshipping them, submission to the arbitrary rulings of religious leaders which they present as religion is also tantamount to

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<sup>30</sup> On the concept of "political society" (as distinct from "civil society"), see Linz and Stepan, 8-15. For an analysis of the limited pluralism of the Islamic Republic, see Chehabi 2001.

worshipping them... The former type of subjugation is based on force, the latter on deception... The former appropriates bodies, the latter appropriates hearts" (Nā'ini, 27).

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