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Constitution-Making in Islamic Iran: The Impact of Theocracy on the Legal Order of a Nation-State

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Max Weber noted that the rationalization of sacred laws is substantive in character because there is no interest in separating law and ethics. Therefore, the theocratic influence produces legal systems that are combinations of legal rules and ethical demands. The result is a specifically nonformal type of legal system (Weber 1978:810–811). Islamic law (*shari‘a*) is a good example. Furthermore, the ideal character of Islamic law predominated over its practical aspect from the very inception of its development in the eighth century. In this period, when “religious people were pushed into the background by the rulers, they, like the Jewish rabbis under Roman rule, occupied themselves with research into the law, which had no validity for the real circumstances of life but represented for themselves the law of their ideal society” (Goldziher 1971, 2:41–42). Despite gigantic strides in subsequent centuries to embrace various areas of social and economic practice, the ideal character of Islamic law remained pronounced, and many pious jurists would question the propriety of using the sacred law for the purpose of reconstructing social and political practice.

After a notable attempt by Ibn al-Muqaffa‘ to incorporate Islamic law into the state failed in the mid-eighth century (see Goitein 1968), the sacred law became largely theoretical and the state developed a secular jurisdiction of its own. Consequently, the sacred law of Islam became a

“jurists’ law” instead of a “judges’ law” (see Weber 1978:820 and Schacht 1950:95,102). In practice, “public law” remained the province of the ruler and his tribunals. The jurists thus tacitly ceded administrative, fiscal, and criminal law to the state. However, the theoretical supremacy of the *shari’a* as God’s command was never questioned. This theoretical supremacy introduced the possibility of invidious contrasts between custom and secular law, on the one hand, and the sacred law, on the other.

Being a “jurists’ law” reinforced the infusion of Islamic law with ethical considerations and the relative indifference of Islamic law to the administration of justice. The medieval legal literature abounds with expressions of distaste on the part of the jurists for the office of judge (Coulson 1969:58–60). The moralistic antipathy of the pious jurists to the administration of justice militated against any *procedural* rationalization of Islamic law (Schacht 1935:222), and the result was the informality Weber singled out and used for the designation of his category of “*qadi*-justice.” The administration of Islamic law—*qadi*-justice—was marked by the absence of procedural formalism. A perceptive French observer of seventeenth-century Iran was struck by the informality of the procedure at the *qadi*’s home, the lack of coordination between judges, and the absence of hierarchical rationality in the judiciary organization (Arjomand 1984:209).

The procedural informality of *qadi*-justice went hand in hand with the dubious status of written documents. The decisive factor in establishing evidence in Islamic law is the oral testimony of a witness. “The existence of a document constitutes, at best, only corroborative evidence” (Udovitch 1985:460). Its value as evidence derives from the moral probity of the individual who testifies to its authenticity. Citing Wakin (1972) and Rosen (1980–81), Geertz (1983:190–191) singles out this concern with “normative witnessing” as the most striking characteristic of the Islamic judiciary procedure, thus emphasizing the *personal* character of the Islamic administration of justice.

Historically, Shi’ite law has shared all the above characteristics—moral idealism in jurisprudence, and informality and personalism in the administration of justice—with Sunni Islamic law. Furthermore, its exclusion from the domains of public law and criminal justice was more pronounced than was the case with Sunni Islam generally (Arjomand 1984). The revolutionary break with this past came in 1979, when the Shi’ite hierarchy (the *‘ulama*) inherited the political and judiciary organization of the Iranian nation-state as formally rationalized by seven

decades of Western-inspired modernization. The declared aim of the Ayatollah Khomeini had been to transform the Pahlavi state into a theocracy and to Islamize its judiciary system. I suspect that, before embarking on this project, Khomeini and his clerical followers did not realize that attainment of these goals would entail a legal revolution in Shi'ism. But embark on their project they did, and the legal revolution they thus initiated is in full swing.

As is well known, Weber saw the modern state as the typical societal organization of rational-legal domination. The true Islamicization of the modern state into a Shi'ite theocracy required a drastic transformation of the Shi'ite sacred law. From being a "jurists' law" it was to be transformed into the law of the state. Law-finding, the typical activity of the Islamic jurists, was to be replaced by legislation and codification. Shi'ite law was to be extended to cover public law fully. It was also to cover criminal justice. Its penal provisions, never enforced in a millennium, were to become fully operative. Procedurally, Shi'ite law was to be enforced through the modified mechanism of the inherited formally rationalized and hierarchical judiciary organization modeled on the West European civil law systems. All this meant that the moral idealism of Shi'ite law had to give way, at least partly, to practical realism, that its procedural informality had to yield to a formally rationalized bureaucratic court system, and that its often unpractical personalism had to succumb to more impersonal and efficient procedures involving much greater reliance on written documents and impersonal forms of evidence. With firm determination, the clerical rulers of Iran have embarked on a historically unprecedented comprehensive program of codification of Shi'ite law in all spheres, including criminal law. They have operated the bureaucratic judiciary system, bringing it under gradually increasing control as trained Islamic jurists become available for its offices, and they have sought to facilitate the use of documents and impersonal evidence by shifting the emphasis from "normative witnessing" to the knowledge (*ilm*) of the judge as the crucial factor in establishing the facts pertinent to a case (see Arjomand 1988:184–188).

It is impossible to cover all aspects of this thorough legal revolution in a single chapter. I therefore propose to cover the first and perhaps the fundamental step in this legal revolution. This fundamental step was taken when Khomeini and his followers decided, partly through the force of circumstances, that their Shi'ite theocracy was at the same time to be a constitutional state. The principles of theocracy, with their full implications within the framework of the rational-legal order of the

modern nation-state, were to be worked out and embodied in the Constitution of the Islamic Republic of Iran.

The Iranian Constitution of 1979 in the Legal History of the Modern Middle East

The history of constitutionalism in the Middle East and in North Africa begins in the 1860s with the Tunisian Constitution of January 1861 and the establishment of a parliament (Majlis Shura al-Nuwwab) and promulgation of a fundamental law (*la'iha asasiyya*) by Khedive Isma'il of Egypt in October 1866 (Khadduri 1966:24ff.). The first Ottoman constitution was promulgated by Sultan 'Abd al-Hamid in December 1876, only to be suspended in February 1878 (Lewis 1966:14). The second wave of constitutionalism was ushered in by Iran in 1906. In August 1906 a National Consultative Assembly was set up by a royal decree. It drew up and passed a "Fundamental Law," ratified by the monarch on December 30, 1906, and a "Supplementary Fundamental Law," ratified on October 7, 1907.

The ideas and terminology of constitutionalism traveled from western Europe to Iran through the Ottoman Empire. The term for "constitution" in the Ottoman Empire and Iran, *qanun-e asasi* (*esasi* in Turkish), is indicative of its mode of accommodation in the Muslim legal universe. The word *qanun* entered into Arabic in the early Middle Ages. It retained its original Greek fiscal connotations as regulation of land taxes, but also acquired the more general sense of a code of regulations and state law. From very early in the Islamic period, the penal system and the maintenance of order became subject to "regulations" (*qawanin*) of the rulers (Linant de Bellefonds 1978, 4:556). Somewhat later, in financial and public administration, *qanun* came to mean regulations laid down by the ruler independently of the Sacred Law. This development came about partly because with the emergence of the science of jurisprudence (*usul al-fiqh*) in the ninth century the boundaries of jurisprudence were so narrowly drawn that administrative regulations were not included. In any event, new administrative regulations became the exclusive province of the ruler's law or state law. After the Mongol invasion, the notion of independent state law was greatly strengthened. This development culminated in the promulgation of the great *qanuns* of the late fifteenth and early sixteenth centuries, notably that of Uzun Hasan in Iran and those of the Sultans, Mehmed the Conqueror, Bayezid,

Selim, and Süleyman the Lawgiver (Qanuni) in the Ottoman Empire (Inalcik 1978, 4:558–559,566). In the latter part of the sixteenth century and early in the seventeenth, regulations promulgated by the Sultans became increasingly couched in *shar‘i* terms and incorporated rulings of the foremost religious dignitary of the empire, the *shaykhül-Islam* (Inalcik 1969:136; 1978, 4:560,566). This last trend did not have a counterpart in Iran, where Shi‘ism had been established as the state religion in 1501.

Against this background, *qanun*, as state law, constituted the precedent for the adoption of European legal codes in the modern Middle East. *Qanun* came to refer to the codes inspired by European legislation and introduced by the state, and the constitution, as the foundation of public law, was naturally regarded as “the fundamental *qanun*.” Nevertheless, owing to the alliance between the constitutionalists and some of the Shi‘ite religious leaders, the “rule of law” had also been equated with Islam in the Iranian constitutionalist ideology. The Sacred Law was conceived as an unalterable fundamental law within the framework of which parliamentary legislation ought to take place. Therefore, though heavily influenced by Belgian and French models, the Iranian Constitution of 1906–7 was by no means un-Islamic. The preamble to the Fundamental Law states that the purpose of the Parliament was “to promote the progress and happiness of our kingdom and people, strengthen the foundations of our government, and give effect to the enactment of the Sacred Law of His Holiness the Prophet.” Article 1 of the Supplementary Fundamental Law states that the official religion of Iran is Shi‘ite Islam, and article 2 declares: “At no time must any legal enactment of the sacred National Consultative Assembly . . . be at variance with the sacred principles of Islam, or the laws established by His Holiness the Best of Mankind.” Furthermore, a committee of no less than five authoritative jurists (*mujtahids*) was to be set up with veto power over parliamentary legislation to “reject and repudiate, wholly or in part, any proposal which is at variance with the sacred laws of Islam, so that it shall not obtain the title of legality. In such matters the decision of this committee of ‘*ulama* shall be followed and obeyed, and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age [i.e., the Hidden Imam].” Finally, as in the Ottoman Constitution of 1876 (Lewis 1966:12), the duality of the traditional legal system was recognized and endorsed by article 27 of the Supplementary Fundamental Law, which stated that the judicial power “belongs to the *shar‘i* courts in matters pertaining to the Sacred Law (*shar‘iyyat*) and to civil

courts in matters pertaining to customary law (*'urfyyat*)" (Lambton 1966:43–44).

The Shi'ite *'ulama* did participate in the legislation of the early parliaments, and their influence was reflected in some of the laws enacted in this period. For instance, the first civil code, promulgated in 1911, not only acknowledges the traditional dual judiciary system but also made the *shar'i* courts superior to the civil courts in many ways:

Article 146. When there is a dispute over whether a case falls under the *shari'a* or the *'urf*, it may not be referred to a state court of law without the agreement of a competent *mujtahid*.

Article 149. The state courts may not hear appeals from the verdicts of the *shar'i* courts. Such appeals must be referred to the assembly of *mujtahids*.

(Banani 1961:77–78)

However, far from continuing unchanged until the reappearance of the Hidden Imam at the End of Time, article 2 of the Supplementary Fundamental Law soon became a dead letter, and the judiciary reforms of the 1920s and 1930s step-by-step reduced the competence of the *shar'i* courts until the civil and penal codes of 1939 and 1940 finally omitted all reference to the Sacred Law and to *shar'i* courts (Banani 1961:78–79; Greenfield 1934).

Drafting the Constitution

Khomeini's ideas on theocracy were set forth in a series of lectures published as a book in 1971. It is significant that in the book, *Islamic Government*, there is no mention of an Islamic *republic*. There is reason to believe that Khomeini considered the Islamic republic to be the appropriate form of government only for the period of transition to the truly Islamic government. In that final stage, sovereignty would belong to the hierocracy on behalf of God and there would be no room for sovereignty of the people or for the supremacy of the state as the presumed embodiment of the national will. Khomeini's project required a drastic withering of the state to an appropriate size. The judiciary system was to be desecularized and brought under the control of the hierocracy, and the jurisdiction of the state was to be restricted to matters "which are beneath the dignity of Islam to concern itself with," such as traffic regulations and the running of the economy (Personal

interview with Khomeini, January 1979). The legislative branch would pass laws regarding these matters and these matters only, and the executive branch would implement them and manage the day-to-day affairs of the country. Beyond this, Khomeini had given little thought to the exact nature of a modern theocratic state.

The political and “publicistic” activities of the militant Shi’ite clerics in the 1960s and 1970s impressed on its leading elements, such as the late Ayatollahs Motahhari and Beheshti, the need for a distinct Islamic ideology. In this enterprise they were decisively aided by such Islamic “modernists” as Bazargan, Shari’ati (d. 1977), and Bani-Sadr. These modernist laymen were their masters in the art of formulating and elaborating a coherent ideology. Nevertheless, deep down the Shi’ite hierocracy was suspicious of the modernist lay ideologies and considered them somewhat contaminated by the secular ideologies of liberalism, nationalism, and socialism. This is especially true of Khomeini himself, who wanted his movement to remain purely Islamic in orientation and membership. In 1972, in a typical statement that demonstrates his resolve on the creation of a theocracy, Khomeini warned that the problems of Iran would not be solved so long as “the nation of Islam” remained attached to “these colonial schools of thought [i.e., political philosophies] and compared them to divine laws [of Islam].” The differences between the militant Shi’ite clerics and the Islamic “modernists,” who variously accepted elements of nationalism, liberalism, and socialism, did not take long to surface during the revolution. The militant clerics attacked the liberal nationalists first, and then the Islamic modernists.

Already in 1978, Ayatollah Motahhari had stressed the need for vigilance lest the nationalist and liberal intellectuals attract the clerical elite as they had done during the Constitutional Revolution. In May 1979, less than five months after the revolution, the Ayatollah Beheshti considered the time ripe for openly fighting nationalism and liberal democracy in the person of Hasan Nazih, president of the Bar Association. In a speech demanding the trial of Nazih for treason, Beheshti referred to the years 1962–63, and especially June 1963, as the turning point in Iranian history at which the direction of “the pure Islamic revolution” was determined in clear contradistinction to nationalism and liberal democracy. A few months later, Beheshti incorporated this view of the militant hierocracy into the preamble to the Constitution of the Islamic Republic:

Although the Islamic way of thinking and militant clerical leadership played a major and fundamental role in [the constitutional and the

nationalist/anti-imperialist] movements, these movements rapidly disintegrated because they became increasingly distant from the true Islamic position.

At this point, the alert conscience of the nation, led by . . . the Grand Ayatollah Imam Khomeini, realized the necessity of adhering to the true ideological and Islamic path of struggle.

The plan for an Islamic Government based on the concept of the "Governance of the Jurist" (*velayat-e faqih*), which was introduced by Imam Khomeini . . . gave a fresh, strong incentive to the Muslim people and opened the way for a genuine ideological Islamic struggle. This plan consolidated the efforts of those dedicated Muslims who were fighting both at home and abroad.

As one of the most articulate representatives of the militant Shi'ite hierocracy, Beheshti attacked "modernist" attempts to reconcile nationalism, liberal democracy, and socialism with Islam as "syncretic thought" (*elteqati*) and presented the theory of "Governance (or Mandate) of the Jurist," said to be the result of research by the militant hierocracy on the issue of Islamic government since the 1960s, as the purely Islamic alternative. There can be no doubt that Khomeini and his followers did not have clear plans for Islamic government in the 1960s. The only concrete proposal put forward by Khomeini in 1963 was that the government hand over the responsibility for national education and the pious endowments to the hierocracy and allow them a few hours on the national radio (Bakhash 1984:32). Although Khomeini did put forward the idea of *velayat-e faqih* around 1970, as indicated in his interview with the author, he had not worked out the institutional and constitutional implications of the idea by January 1979. It is amply clear that he wanted the state to be subordinate to the hierocracy and that he was firm and careful in this regard. However, he attached little significance to constitution-making and was prepared to accept in draft a constitution approved by the cabinet and the Revolutionary Council in June 1979 with only minor changes. In fact, he proposed to bypass the promised constituent assembly and submit the draft directly to a referendum. It is highly significant that Bazargan and Bani-Sadr insisted on the election of a constituent assembly while Hojjatol-Islam Hashemi-Rafsanjani asked the latter, "Who do you think will be elected to a constituent assembly? A fistful of ignorant and fanatic fundamentalists who will do such damage that you will regret ever having convened them" (*ibid.*, pp. 74-75).

It was decided to hold elections of an Assembly of Experts on Au-

gust 3, and the draft constitution instantly became the subject of debate by various secular parties and organizations. These debates alarmed Khomeini. At the end of June, he told the Shi'ite clerics that revision of the draft had to be undertaken from an Islamic perspective and was their exclusive prerogative:

This right belongs to you. It is those knowledgeable in Islam who may express an opinion on the law of Islam. The constitution of the Islamic Republic means the constitution of Islam. Don't sit back while foreignized intellectuals, who have no faith in Islam, give their views and write the things they write. Pick up your pens and in the mosques, from the altars, in the streets and bazaars, speak of the things that in your view should be included in the constitution. (Ibid., p. 78)

And they did. At this point, a process largely independent of the personal inclination of the participating Ayatollahs was set in motion—that of working out the full logical and institutional implications of Khomeini's theocratic idea in the framework of the modern nation-state. This impersonal process, a novel rationalization of the political order (Arjomand 1985), unfolded in the form of the constitution-making of the clerically dominated Assembly of Experts, which concluded its deliberations in mid-October 1979. Their proposed draft was ratified by the referendum of December 2–3, 1979.

Theocratic Government in the Constitution of 1979

The Constitution of the Islamic Republic of Iran is an astounding document, perhaps without parallel since the writings of thirteenth-century canonistic advocates of papal monarchy and Pope Boniface VIII's bull of November 1302, *Unam Sanctam*. It places the judiciary system under the exclusive control of the hierocracy, with provision for extensive revision of the legal codes to render them Islamic. The constitution is also remarkable in being related to Qur'anic verses and to Traditions as sources of the Shi'ite sacred law in an appendix. Furthermore, putting a doctrinally new emphasis on the continuous quality of Imamate (*imamat-e mostamarr*), it endows the jurist, as the representative of the Hidden Imam, with supreme power over men and responsibility only to God. Finally, it sets up a clerically controlled Council of the Guardians (Articles 91–99) with inordinately extensive powers to represent the Shi'ite religious institution and to ensure that the legisla-

tive and executive branches of the state remain within the straitjacket tailored for it.

Fully aware of their historic mission, and considering their enterprise of global significance and importance (*Ettela'at*, 20, 22, and 29 Shahrivar 1363), the clerical members of the Assembly of Experts aired a wide variety of ideas on precisely how the *velayat-e faqih* should be implemented. The version that carried the day was the one put forward by the president of the assembly, Ayatollah Montazeri, in July 1979. Montazeri argued that, according to the Shi'ite beliefs, government and the law pertain to the "just jurists" on behalf of the Hidden Imam, of the Prophet, and of God and that therefore "the enactment of general and detailed laws" is the prerogative of the Shi'ite jurists. Furthermore, "the executive power should also be under their supervision and command, and in reality the Executive are their [the religious jurists'] representatives and not independent. Judging is also the right of the jurist or whoever is appointed by him. Therefore, the three powers—the legislative, the executive, and the judiciary—are interlinked and are not separated, and all three lead to the just jurist" (Izadi 1980:275–276).

Montazeri's ideas on the implementation of theocracy shaped the constitution drawn up by the clerically dominated Assembly of Experts. Its central idea was enunciated in the preamble as "governance of the Just *Faqih*":

In keeping with the principle of governance (*velayat-e amr*) and the continuous (*mostamarr*) Imamate, the Constitution provides for the establishment of leadership by a *faqih* possessing the necessary qualifications and recognized as leader of the people. This is in accordance with the Tradition "The conduct of affairs is to be in the hands of those who are learned concerning God and are trustworthy guardians of that which he has permitted and that which he has forbidden." Such leadership will prevent any deviation by the various organs of government from their essential Islamic duties.

The idea was translated into law as follows:

Article 5. During the Occultation of the Lord of the Age (may God hasten his renewed manifestation!), the governance (*velayat-e amr*) and leadership (*imamat*) of the community of believers devolve upon the just and pious *faqih* who is acquainted with the circumstances of his age; courageous, resourceful, and possessed of administrative ability; and recognized and accepted as leader by the majority of the people. In the event that no *faqih* should be so recognized by the majority, the leader,

or the Leadership Council, composed of *fuqaha* possessing the aforementioned qualifications, will assume these responsibilities in accordance with Article 107.

Article 107. Whenever one of the *fuqaha* possessing the qualifications specified in Article 5 of the Constitution is recognized and accepted as *marja'* and leader by a decisive majority of the people—as has been the case with the exalted *marja'-i taqlid* (source of emulation) and leader of the revolution, the Grand Ayatollah Imam Khomeini—he is to exercise governance and all the responsibilities arising therefrom. If such should not be the case, experts elected by the people will review and consult among themselves concerning all persons qualified to act as *marja'* and leader. If they discern outstanding capacity for leadership in a certain *marja'*, they will present him to the people as their leader; if not, they will appoint either three or five *marja's* possessing the necessary qualifications for leadership and present them as members of the Leadership Council.

Article 110. The leadership is to be assigned the following duties and powers:

- a. appointment of the *fuqaha* on the Council of Guardians;
- b. appointment of the supreme judicial authority of the country;
- c. supreme command of the armed forces, exercised in the following manner:
 - (i) appointment and dismissal of the chief of the general staff;
 - (ii) appointment and dismissal of the commander-in-chief of the Corps of Guards of the Islamic Revolution;
 - (iii) the formation of a Supreme National Defense Council, composed of the following seven members:
 - the President
 - the Prime Minister
 - the minister of defense
 - the chief of the general staff
 - the commander-in-chief of the Corps of Guards of the Islamic Revolution
 - two advisers appointed by the leader
 - (iv) appointment of the supreme commanders of the three branches of the armed forces, based upon the recommendation of the Supreme National Defense Council;
 - (v) the declaration of war and peace, and the mobilization of the armed forces, based on the recommendation of the Supreme National Defense Council;
- d. signing the decree [formalizing the election] of the President of the Republic after his election by the people. The suitability of candidates for the presidency of the Republic, with respect to the qualifications specified in the Constitution, must be confirmed before elec-

- tions take place by the Council of Guardians, and, in the case of the first term, by the leadership.
- e. dismissal of the President of the Republic, with due regard for the interests of the country, after the issue of a judgment by the Supreme Court convicting him of failure to fulfill his legal duties, or a vote of the National Consultative Assembly testifying to his political incompetence;
 - f. pardoning or reducing the sentences of convicts, within the bounds of Islamic criteria, after receiving a recommendation [to that effect] from the Supreme Court.

On the issue of legislation, Montazeri and the clerics were prepared to compromise over their alleged right to enact “general and detailed laws” with the democratic principle of popular sovereignty. The legislature was to consist of a popularly elected parliament, the Majlis. Its legislation, however, was conditional upon the approval of the Council of Guardians and, materially, of the clerics in that Council:

Article 91. In order to protect the ordinances of Islam and the Constitution by assuring that legislation passed by the National Consultative Assembly does not conflict with them, a council to be known as the Council of Guardians is to be established with the following composition:

- a. six just *fuqaha*, conscious of current needs and the issues of the day, to be selected by the leader or the Leadership Council; and
- b. six jurists, specializing in different areas of law, to be elected by the National Consultative Assembly from among the Muslim jurists presented to it by the Supreme Judicial Council.

Article 96. The determination of whether legislation passed by the National Consultative Assembly is compatible with the ordinances of Islam depends on a majority vote by the *fuqaha* on the Council of Guardians; and the determination that it is compatible with the Constitution requires a majority vote by all members of the Council of Guardians.

Article 98. The interpretation of the Constitution is the responsibility of the Council of Guardians, and depends on the approval of three-fourths of its members.

It is interesting to note that there is no mention of the principle of consultation (*shura*) or democracy as a defining characteristic of the Islamic Republic. The principle of *shura* makes its appearance only in Article 7. The commentator Madani explains the subsidiary role of consultation (*Sorush*, no. 175, January 1, 1983, p. 41). The principle of

consultation is accepted, but as a subsidiary to the principle of Imamate. “Islamic consultation is possible only when Imamate is dominant. In other words, consultation is at the service of Imamate.” The Qur’anic verse III:153 (*wa shawirhum fi’l-amr* etc.) is said to imply that the actual decision-maker is the Prophet, who was also the Imam. The commentator adds that the advocates of the *shura* during the drafting of the constitution either did not firmly believe in Islam or were contaminated by “syncretic” thinking and were trying “to link the *shura* to the principle of national sovereignty.”

Conclusion

As we have seen, the clerical constitution-makers of 1979 not only claimed the judiciary prerogatives and supervisory power over legislation reserved for them in the constitution of 1906–7 with a vengeance, but also added to it their novel clericalist claim: the right to rule on behalf of God. It is this last claim, embodied under the rubric of “Governance of the Jurist” into the articles on leadership (articles 5 and 107–112), which makes the theocratic Constitution of the Islamic Republic of Iran unique in the constitutional history of the Middle East. To appreciate this uniqueness fully, it is instructive to compare Iran’s Constitution of 1979 with the 1956 and 1962 constitutions of the Islamic state of Pakistan. The Pakistani constitutions contained the famous “Repugnancy Clause,” which stated that no law should be enacted “which is repugnant to the Holy *Qur’an* and the *Sunnah* [Tradition of the Prophet].” The provisions made to enforce this article in the 1956 constitution were vague, and the Constitution of 1962 set up an Advisory Council of Islamic Ideology appointed by the president. In January 1953, while the draft constitution was being intensely debated, the *‘ulama* of Pakistan demanded that the religious jurists determine the issue of “repugnancy to Islam.” They proposed that “there should be appointed five *‘ulama* in the Supreme Court who, along with some judge to be nominated for the purpose by the Head of the State in consideration of his *tadayyun* and *taqwa* (religiosity and God-fearing piety) and his knowledge of Islamic law and learning, should decide whether or not the law in dispute is in conformity with the *Qur’an* and the *Sunnah*” (Mawdudi 1960:371). It is interesting to note that even this demand would have made the Pakistani constitution comparable only to the Iranian Constitution of 1907, but in no way could it match the theocratic Constitution of 1979.

This is hardly surprising. The prolonged process of constitution-making in Pakistan was dominated not by the *'ulama* but by the secular political elite. In his comments on the draft constitution of 1956, the leader of the *Jama 'at-e Islami*, Mawlana Abu'l-A'la Mawdudi, even took a step back from the *'ulama*'s position in 1953. Mawdudi's position was remarkably secular in retrospective comparison with the Iranian Constitution of 1979. The recommendation of the conference of *'ulama* in January 1953, he maintained, was still the best solution to the issue of repugnancy of laws to Islam, which "should be decided by the Supreme Court, and for the first 10 or 15 years five *'ulama* should be appointed to help the Supreme Court in deciding such disputes. Anyhow, if the members of the Constituent Assembly are not at all prepared to accept this proposal then *the only acceptable solution is to leave it to the decision of the majority of the total number of Muslim members of the Legislature*" (ibid., p. 401; emphasis in the original).

The clerical rulers of Iran interpret the uniqueness of the theocratic Constitution of 1979 to mean that it is the first and so far the only true Islamic constitution designed to implement the rule of God on earth within the framework of modern nation-states. They are silent over its roots in the distinctive clericalism of Shi'ism, which is not shared by Sunni Islam, and present it as a universal blueprint for Islamic government throughout the world. Whether the Islamic militants of other countries accept this claim and are likely to incorporate it into the goals of their Islamic revolutions is for the future to determine.

REFERENCES

- Algar, H., Trans. 1980. *Constitution of the Islamic Republic of Iran*. Berkeley, Calif.
- Arjomand, S. A. 1984. *The Shadow of God and the Hidden Imam*. Chicago.
- . 1985. "Religion, Political Order, and Societal Change: With Special Reference to Shiite Islam." *Current Perspectives in Social Theory* 4:1–15.
- . 1988. *The Turban for the Crown: The Islamic Revolution in Iran*. New York and Oxford.
- Bakhash, S. 1984. *The Reign of the Ayatollahs*. New York.
- Banani, A. 1961. *The Modernization of Iran, 1921–1941*. Stanford, Calif.
- Coulson, N. J. 1969. *Conflict and Tension in Islamic Jurisprudence*. Chicago.
- Encyclopedia of Islam*. 1954 to present. 2d ed. 6 vols. to date. Leiden.
- Geertz, C. 1983. *Local Knowledge: Further Essays in Interpretative Anthropology*. New York.
- Goitein, S. D. 1968. "A Turning-Point in the History of the Muslim State." In S. D. Goitein, *Studies in Islamic History and Institutions*. Leiden.
- Goldziher, I. 1971. *Muslim Studies*. 2 vols. London.

- Greenfield, J. 1934. "Die geistlichen Scharieegerichte in Persia und die moderne Gesetzgebung." *Zeitschrift für Vergleichende Rechtswissenschaft* 48:157–167.
- Inalcik, H. 1978. "KANUN; Financial and Public Administration." In *Encyclopedia of Islam*, 2d ed., vol. 4:558–562. Leiden, 1954 to present.
- . 1978. "KANUNNAME." In *Encyclopedia of Islam*, 2d ed., vol. 4:562–566. Leiden, 1954 to present.
- . 1969. "Suleiman the Lawgiver and Ottoman Law." *Archivum Ottomanicum* 1:105–138.
- Izadi, M. 1980. *Gozari bar Zendegi va Andiseh-ha-ye Ayatollah Montazeri*. Tehran.
- Khadduri, M. 1966. "Egypt." In *DUSTUR: A Survey of the Constitutions of the Arab and Muslim States*. Reprinted with additional material from *Encyclopedia of Islam*, 2d ed. (Leiden, 1965).
- Khomeini, R. 1971. *Hukumat-e Islami*. Najaf and Tehran.
- Lambton, A. K. S. 1966. "Iran." In *DUSTUR: A Survey of the Constitutions of the Arab and Muslim States*. Reprinted with additional material from *Encyclopedia of Islam*, 2d ed. (Leiden, 1965).
- Lewis, B. 1966. "Turkey." In *DUSTUR: A Survey of the Constitutions of the Arab and Muslim States*. Reprinted with additional material from *Encyclopedia of Islam*, 2d ed. (Leiden, 1965).
- Linant De Bellefonds, Y. 1978. "KANUN; Law." *Encyclopedia of Islam*. 2d ed. Vol. 4:556–557. Leiden, 1954 to present.
- Mawdudi, A. 1960. *Islamic Law and Constitution*. 2d ed. Trans. and ed. Khurshid Ahmad. Karachi and Lahore, Pakistan.
- Rosen, L. 1980–81. "Equity and Discretion in the Modern Islamic Legal System." *Law and Society Review* 14:217–245.
- Schacht, J. 1935. "Zur soziologischen Betrachtung des Islamischen Rechts." *Der Islam* 22:207–238.
- . 1950. *The Origins of Muhammadan Jurisprudence*. Oxford.
- Udovitch, A. 1985. "Islamic Law and the Social Context of Exchange in the Medieval Middle East." *History and Anthropology* 1:445–465.
- Wakin, J. 1972. *Function of Documents in Islamic Law*. Albany, N.Y.
- Weber, M. 1978. *Economy and Society*, ed. G. Roth and C. Wittich. Berkeley and Los Angeles.

