



The Iranian Constitution: An Exercise in Contradictions

S. Waqar Hasib

I. Introduction

Since the overthrow of Shah Mohammed Reza Pahlevi in 1979, Iran can best be described as a nation of contradictions. Iranians are often shown on U.S. television burning American flags and chanting “death to America,” while behind the camera they listen to Madonna, wear Tommy Hilfiger jeans and watch the latest Los Angeles Lakers games on satellite dishes.¹ Iran ranks at the top of the U.S. State Department’s list of nations that sponsor terrorism,² yet Iranians lit candles and held mass impromptu vigils in the streets of Tehran for the victims of the September 11 attacks.³

Often a nation’s externally visible characteristics are a result of its internal political structures. My goal in this paper is to identify and analyze the internal contradictions inherent in the Iranian constitution that may be contributing to Iran’s externally visible inconsistencies. This is an important exercise for two reasons. First, from a microscopic level, it offers an excellent opportunity to apply the concepts of constitutionalism that we have developed in class to a real life situation. Second, from a macroscopic level, for better or worse the U.S. in recent months has adopted a new proactive approach to promote democracy in Southwest Asia. U.S. policymakers must have a keen understanding of the complexities of Iran’s political structure if this new policy is to succeed.

II. The History Behind the Iranian Constitution

A constitution is not merely a document, nor a set of laws. Rather, in many ways a constitution is an expression of the values, needs, and desires of a particular community. Thus it is important to examine not only the actual content of a constitution, but also the particular historical context in which it was created. One could not properly study the U.S. constitution with out at least a basic understanding of the history of the British Empire in North America, the American Revolution, and the Articles of Confederation. Likewise, one cannot properly study the Iranian constitution without first examining the chain of events that led to its creation.

A. From the Qajars to Reza Khan – 1826 to 1941

The roots of the current Iranian constitution ratified in 1980 can be traced back over a century earlier to 1826, when Russia invaded Iran. Until that point, Iran had largely remained free of foreign influences since 1220 A.D., when Gengis Khan and the Mongols invaded what was then known as Persia. In the 19th century, the Russian Empire sought to expand its territory and gain access to a southern seaport in the Persian Gulf, thus becoming the first of several nations to intervene in Iranian domestic affairs to advance their own geopolitical and strategic interests.⁵ Soon thereafter, the British Empire, which already controlled Afghanistan in the north and the Indian subcontinent to the east, took advantage of Iran’s military weakness to exact a number of economic concessions and trading privileges. Most importantly, the Qajar family, which then

ruled Iran, granted to the British the right to build communications and rail links from Turkey throughout all of Iran, thus connecting Britain's European and Middle Eastern possessions to the jewel of its colonial crown in India.

Iran remained neutral during World War I, though it was used as a battlefield by the British, the Turks, the Germans, and the Russians, with devastating results on the Iranian people. By 1918 the British were able to turn it into a de facto protectorate or colony. Iranian opposition to the British presence intensified, supported in no small part by the United States and President Woodrow Wilson's policy of promoting ethnic self-determination. Reza Khan, a young but charismatic general in the Iranian army, seized control of this nationalist sentiment to reform the Iranian armed forces and lead them on a series of military victories against Iranian tribal groups and ethnic minorities, eventually building enough momentum to oust the Qajars and crown himself as the Shah of Iran in 1925.

But Reza Khan was no less immune to foreign pressures than his predecessors. Though he embarked on an ambitious plan of social and economic reform modeled after a similar attempt in neighboring Turkey to jumpstart the industrialization process, he was forced out of power at the height of World War II, when he refused to grant the British and the Russians access to the Trans-Iranian railway. The British invaded in 1941 and installed his son, Mohammed Reza Pahlevi, as the new Shah.

B. The Reign of Mohammed Reza Pahlevi – 1941 to 1978

Pahlevi allowed the British a great deal of autonomy both during and after World War II. Angered by Pahlevi's submission, Mohammed Mossadegh, the democratically-elected prime minister and leader of Iran's Nationalist Front party, led a movement to nationalize Iran's lucrative oil industry in 1951. This caused a great deal of concern both to Britain, which controlled most of Iran's oilfields, and the United States, which was looking to expand its supply of energy resources to sustain its burgeoning post-war economy. Before Mossadegh could succeed in

nationalizing the oil industry, however, Britain and the United States successfully conducted a covert operation in 1953, and, with Pahlevi's assistance, dissolved Parliament, overthrew Mossadegh, and installed a pro-Pahlevi and pro-Western government (see Appendix A).⁶

As a result of the 1953 coup, Iran under Pahlevi became an increasingly totalitarian, anti-democratic state. To prevent another unruly, Mossadegh-like Parliament from being elected, Pahlevi cancelled most popular elections, and rigged the few that he allowed. To monitor and suppress any significant political opposition from developing, he created a secret police force known as SAVAK. "SAVAK personnel were trained in the United States and Israel, where they learned 'scientific' methods to prevent unwanted deaths from "brute force" [including]... sleep deprivation, extensive solitary confinement, and an electric chair with a large metal mask to muffle screams while amplifying them for the victim."⁷ Thus, SAVAK was synonymous not only with foreign intervention in Iran, but with torture and oppression as well. Moreover, during Pahlevi's reign, most major decisions regarding Iran's oil output were made by a consortium of Western oil companies known as the "Seven Sisters." Pahlevi increased military spending substantially, thereby furthering Iran's reliance on Western military-exporting nations such as the United States, Britain, and France.

In 1962, Jalal al-e-Ahmad, a prominent Iranian philosopher, published *Gharbzadegi*, a book some believe was as important to the Iranian Revolution as the Communist Manifesto was to Marxism. Loosely translated as "westoxication," al-e-Ahmad criticized Iranian leaders and intellectuals for succumbing to the empty promises offered by Western-style industrialization and capitalism, losing any sense of their Iranian identity in the process. Summarizing the frustration that many Iranians felt after decades of foreign intervention in their country, al-e-Ahmad wrote

[a] westoxicated man who is a member of the ruling establishment [in Iran] has no place to stand. He is like a dust

particle floating in space, or a straw floating on water. He has severed his ties with the essence of society, culture, and custom. He is not a bond between antiquity and modernity. He is not a dividing line between the old and the new. He is something unrelated to the past and someone with no understanding of the future. He is not a point on a line, but an imaginary point on a plane or in space – just like that dust particle....

The westoxicated man never takes his eyes off the West. He does not care what happens in his cozy little part of the world, in this corner of the East. If by chance he is interested in politics, he is aware of the slightest shift to the right or left on the part of the English Labour Party and he knows the names of American Senators better than he knows the names of ministers in his own country's government. He knows more about the commentators in *Time* and the *News Chronicle* than he does about his cousin in Khorasan.⁸

Around the same time as Ahmad and gharbzadegi, another figure in Iranian politics was beginning to gain influence. Starting in 1960, Ayatollah Ruhollah Khomeini, a Shi'i Islamic cleric, led protests and resistance against the Pahlevi regime, appealing not only to religious conservatives and scholars but also to a wide base of Iranians who felt disenchanting by the government's pro-Western policies and the vast wealth of the political elite. Though exiled by Pahlevi in 1964 for leading anti-government protests, Khomeini remained an immensely popular figure in Iranian politics, even from France, as his followers distributed audiotapes of his speeches advocating the overthrow of Pahlevi and the creation of a popularly chosen, Islamic-oriented regime. His book, "Iranian Government," covered three main topics. First, it was a radical condemnation of the Pahlevi regime; second, it said that Islam gave man all the laws he needed for his happiness; third, following along the lines of gharbzadegi to some degree, Khomeini wrote that Islam is in danger, under attack from Western and other regimes that are diluting its values.

Meanwhile, as Khomeini and gharbzadegi attracted more and more followers, Pahlevi's social and economic policies had driven the country to the brink of disaster. By 1978, on the eve of the Iranian Revolution, "an economic recession, inflation, urban overcrowding, government policies that hurt the bazaar classes, glaring income gaps, and conspicuous Western-style consumption by the elite and the lack of political freedom or participation were all widely felt and belied the numerous official predictions that the "Great Civilization" was just around the corner."⁹

C. The Revolution, the Drafting, and the Redrafting of the Iranian Constitution—1978 to 1980

At the end of 1978, Pahlevi's regime finally began to crumble. Though many of the protests and demonstrations that took place had strong pro-Islamist elements, criticism of Pahlevi emanated from all quarters of the population, from the working class to professionals to students, from Marxists to socialists to industrialists. In January of 1979, Pahlevi left for the United States, ostensibly to obtain medical treatment but presumably under the assumption that calls for his ouster would not cease. Pahlevi's appointed prime minister could do little to stop the strikes and demonstrations that Khomeini had called for from France, and by February 1, 1979, Khomeini was able to return to Iran to a hero's welcome, with thousands of Iranians lining the streets on the road to the airport. On February 11, 1979, Khomeini and his followers took control of the government.

Initial proposals of a constitution had already been circulated prior to Khomeini's return, and by early 1979 a commission of Islamic scholars and civil jurists had a preliminary official draft ready for approval. This official draft contained a number of notable features:

- A popularly elected Parliament which had exclusive power to pass laws
- No "supreme leaders" or any other type of supra-constitutional body

- Adherence to shari'a law, but no suggestion that shari'a was infallible or immutable
- A "Guardian Council" of six civil scholars and five Islamic scholars, who would exercise only appellate jurisdiction to examine whether laws passed by Parliament conformed with shari'a¹⁰

Khomeini initially supported this constitution. He declared to reporters on several occasions that he had no intention to participate in governing Iran, but instead sought to be a kind of spiritual advisor to the nation. According to his representatives, the clergy neither deserved nor sought any role in the new constitution. Moreover, it was to be one of the world's most "progressive" constitutions. "As the representative of God, who is the true leader, the public will govern the state... the freedom of individuals and groups will be guaranteed."¹¹ A leading Iranian newspaper concurred that the new constitution would "take into account of those freedoms that are based on the U.N. Charter of Human Rights... women can hold the highest government... they can even become President. In this respect the Islamic Republic will in no way resemble Saudi Arabia. If the Republic is called Islamic that is simply because the official religion of the country is Shi'ism."¹²

Over the course of the next two years, though, it became increasingly obvious that Khomeini's support for this preliminary constitution was purely superficial and based on political expediency. Just two months after ousting Pahlevi, Khomeini organized a popular referendum asking voters to decide on the single question of "whether the form of the future state would be the Islamic Republic or not."¹³ Turnout was extremely high and the referendum was approved by 98.2 percent of the electorate. Though that number seems artificially high, given the widespread disgust with the former regime and Khomeini's immense popularity at the time, it seems highly probable at the very least that the referendum would have passed by a wide margin, even in the most transparent of elections.

Regardless of the validity of the vote tally, though, Khomeini used the passage of the referendum as a kind of mandate to overhaul the proposed constitution, centralizing political power in the hands of the clergy and, most importantly, himself. First he and his followers withdrew their support for the "Constituent Assembly," a kind of constitutional convention whose purpose was to ratify the proposed constitution. Khomeini attacked the members of this assembly as enemies of Islam, declaring that "'we wish to create an Islamic constitution,' for which no 'Westernised' jurists [are] needed but only 'noble members of the clergy' and other 'knowers' of Islam."¹⁴ Given the appeal of gharbzadegi, this kind of anti-Western rhetoric proved to be extremely popular.

Instead of the now-defunct Constituent Assembly, Khomeini pushed for the creation of an "Assembly of Experts" in its place. This assembly, though popularly elected, was much smaller than the Constituent Assembly, and Khomeini was able to impose much stricter requirements for candidacy. Not surprisingly, when elections were held on August 3, 1979, 55 of the 72 delegates were religious clerics "who, with few exceptions, followed the so-called 'line of the Imam.'" Moreover, unlike the referendum held a few months earlier, this time there were widespread allegations of voter intimidation, ballot fraud, and election rigging. Nevertheless, the new assembly immediately set to work discrediting the proposed constitution, recommending instead a new version that called for much greater consolidation of power in the hands of Khomeini and the clergy.

Armed now with at least a cursory understanding of the historical genesis of the Iranian constitution, I turn now to the text of the Assembly of Experts' constitution, ultimately implemented in 1980. ⁴

III. The Iranian Constitution and its Inherent Contradictions

The 1980 constitution is a document of both massive scope and minute detail, declaring broad ideological visions for the nation as a whole,

while delegating powers to branches of government and describing specific procedures for those branches to carry out their functions. It is divided into 15 sections: the first section is a lengthy preamble explaining the roots of the Iranian Revolution and its overall goals, while the latter 14 sections contain 145 articles that delegate specific powers to various branches of government, provide individual citizens with various freedoms, and allow the government the ability to infringe on those freedoms in certain situations. In the interest of brevity, the basic structure of government is depicted in an organizational chart in Appendix B.¹⁵ Below, however, I discuss how some of the most fundamental features of this constitution contradict each other.

A. Velayat-i-Faqih versus Separation of Powers

1. Dominance of the Leader over the Political Institutions

Perhaps the most important contradiction in the Iranian Constitution lies in the concept of “velayat-i-faqih,” roughly translated as rule by an Islamic jurist.¹⁶ Khomeini urged the Assembly of Experts to adopt velayat-i-faqih as the basis for all other distributions of power under the Constitution. They obliged in Chapter V, Article 57, entitled “Separation of Powers,” which states that the Islamic Republic consists of three branches of government, a legislature, judiciary, and executive branch, but that all three “function under the supervision of the absolute religious Leader.”¹⁷ (The reader may be more familiar with the Arabic and Persian term “Imam,” rather than its English translation as “leader.”) Clearly, no one branch can be separate from the other two, as the title of the article suggests, when all three are subject to absolute supervision by the Leader.

In fact, when comparing the specific powers delegated to each of the “separate” branches to the broad powers granted to the Leader, one wonders why the Assembly of Experts found any need for the three inferior branches at all. For instance, according to Chapter VI, Section 2, Article 71, the legislature can “establish laws on all matters” as long as those laws comport with Islamic law.¹⁸ However, this law-making power

seems to directly conflict with the powers of the Leader, enumerated in Chapter VII, Article 110, which direct the Leader to “delineate... the general policies of the Islamic Republic,” “supervise[] over the proper execution of the general policies,” and “issue[] decrees for national referenda.”¹⁹ According to one scholar on Iranian constitutional law, while Khomeini was Leader he issued fatwas, or religious decrees, that were treated as legislation on issues ranging from the outlawing of warrantless searches and seizures to the establishment of domestic consumption levels for caviar, among many other topics.²⁰ Similar contradictions exist between the Leader’s powers and those granted to the executive branch. For example, the powers to raise armies are listed under Chapter X, along with the rest of the executive’s power. But Chapter VII, Article 110 states that the Leader is supreme commander of the armed forces, and he alone holds the power to mobilize for war.

Perhaps the most striking example of the incompatibility of velayat-i-faqih and the notion of separation of powers occurred during the Iran-Contra Affair in 1986. At the height of the Iran-Iraq War, Khomeini purchased arms from the U.S., even though it appears that most of the powers to conduct foreign affairs are granted by the Constitution to the executive branch. When details of the scandal surfaced in Iran, a handful of members of Parliament demanded an explanation. “Khomeini... vented his anger against them and condemned their demand as an act that would only serve Iran’s enemies.”²¹ The MPs quickly apologized in a letter to the president of parliament, stating that “the question which we put to the minister of foreign affairs was based on the belief that discussion of these problems in parliament would be in the interest of the Revolution and would meet with the approval of the Imam. Now that we have learned the wishes of the Imam and been instructed as to the interests of the nation, we are aware that there is no longer any reason for our question.”²²

2. The Political Institutions Strike Back

Despite the authoritarian rule of Khomeini, there have been some promising signs in the past

few years that the branches of government may in fact be able to exercise power independently and separately of each other, and more importantly, independently and separately from the Leader. Khomeini died in 1989 and was replaced as Leader by Ali Khameini, who wields far less personal charm and popularity. More recently, Mohammed Khatami, a liberal cleric who promised political and social reforms, was elected President in regularly scheduled popular elections in 1997 and again in 2001. That such elections took place at all suggests that velayat-i-faqih is not as powerful a tool for Khameini as it was for Khomeini. Moreover, since taking power Khatami has engaged in a number of policies that have irked the clergy and Khameini, policies that would have been virtually unthinkable under Khomeini. For instance, in 1998 in a globally-televised interview with CNN's Christiane Amanpour he declared his respect and admiration for the "American civilization," and offered to open at the very least an unofficial dialogue between the two countries.²³ He has also taken steps, albeit limited ones, to promote greater freedom of the press, even though the constitution specifically delegates ultimate authority over radio and television to the Leader.²⁴ Elaine Sciolino, who covers Iran for the New York Times, said of Khatami, "[h]e didn't just charm me, he charmed the whole country - and that's why he was elected in 1997... This is a man who went on public buses. He's the kind of baby-kissing politician we're used to here in the United States. He rolled up his sleeves publicly and gave blood. He tries to straddle the world of Islam and Islamic clericalism, and the world of the people."²⁵

Along with the rise of the executive branch under Khatami, the legislative branch in recent years also exhibited an increasing power to question the concept of velayat-i-faqih and a willingness to act as its own independent branch of government. In February of 2000, reformists aligned with President Khatami won a majority of seats in Parliament, including 27 of 30 seats in the capital, Tehran.²⁶ Like Khatami, many of the reformist candidates relied on savvy electoral tactics one sees in liberal democracies. Their

campaigns were "complete with catchy placards and slogans. They mastered the art of making whirlwind stops around the country and pressing the flesh with the voters. They even learned to flatter the packs of western journalists who descended on Tehran: a lavish press breakfast was held in honour of the foreign guests."²⁷ Economist. Once in power, they displayed no qualms questioning the power of Khameini and the clergy. For example, in June of 2001 they opened a public investigation into the state media company, which falls squarely under the control of the Leader. Perhaps even more surprising, and indicative of the changing balance of power after the death of Khomeini, Khameini acquiesced to the investigation and even commended the Parliament for "protecting the health" of the institutions under his control.²⁸

B. Power to the People... Except, Not Really.

Closely related to the issue of velayat-i-faqih is the question of who ultimately holds power under the constitution. If the most basic form of power in any constitutional state is the power to create a constitution, then whoever holds that power could be described as the constitution's ultimate sovereign. In the U.S., for example, ultimate sovereignty over the constitution emanates from the people. In contrast, in Iran ultimate sovereignty appears to emanate from at least four distinct sources: the people, Khomeini, other Leaders after Khomeini, and God.

1. Sovereignty of the people

Ultimate sovereignty of the people is recognized in the lengthy preamble of the constitution. In a section entitled "The Wrath of the People," the preamble stresses the popular roots of the revolution. Efforts by Pahlevi to maintain power "caused an outburst of popular outrage across the country. The regime attempted to quiet the heat of the people's anger by drowning the protest and uprising in blood, but the bloodshed only quickened the pulse rate of the Revolution.... In the course of this popular movement, the employees of all government establishments took an active part... The widespread solidarity of men and women of all

segments of society and of all political and religious factions, played a clearly determining role in the struggle.”²⁹ Further along, in a section entitled “The Price the Nation Paid,” the preamble recognizes that its existence is based on the “final and firm decision” of the Iranian people “to bring about a new political system, that of the Islamic Republic. A majority of 98.2 percent of the people voted for this system.”³⁰ Thus, although the language might be more ornate than “We the People of the United States... do ordain and establish this Constitution,” the end result appears to establish popular sovereignty as the basis for the constitution just the same.

2. Sovereignty of Khomeini

The same preamble also seems to suggest that ultimate responsibility for creating the constitution lay with Khomeini, and that the people merely followed his lead. For instance, describing the roots of the concept of Islamic government, the preamble states “[t]he plan...proposed by [Khomeini] at the height of the period of repression and strangulation practiced by the despotic regime, produced a new specific, and streamlined motive for the Muslim people, opening up before them the true path of Islamic ideological struggle.” Later, “the people, aroused, conscious, and resolute under the decisive and unfaltering leadership of [Khomeini], embarked on a triumphant, unified, comprehensive and countrywide uprising,” (emphasis added).³¹

3. Sovereignty of the Leader

Yet another potential source of ultimate sovereignty under the constitution lies not in Khomeini personally, but in the office of the Leader in general. Chapter II, Article 5 establishes this office and declares that exclusive leadership over the ummah, or community, falls upon this “just and pious person,” the Leader.³² Moreover, as described above, the concept of velayat-i-faqih grants the Leader supervisory authority over all the other branches of government, suggesting that it is the office, not Khomeini in particular, that possesses ultimate constitutional authority.

4. Sovereignty of God

Finally, there lies the possibility that ultimate constitutional authority may lie directly with God, rather than in the hands of any mortal beings. Naturally, placing ultimate sovereignty in a supernatural being creates a host of practical and theoretical problems. Can God amend His (Her?) own constitution, or would doing so acknowledge fallibility? If the constitution comes from God, why did the Iranian people need to vote on whether they wanted an Islamic Republic or not? And, at the risk of sounding flippant, does God have judicial review, and if so, how is it exercised?

The Iranian constitution attempts to resolve some of these dilemmas. Article 56, entitled “The Divine Right of Sovereignty,” states that “[a]bsolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.”³³

But rather than resolve dilemmas, Article 56 only creates more contradictions. For example, if the people are the terrestrial representatives of God’s constitutional sovereignty, then neither the Leader nor velayat-i-faqih should be necessary. In fact, since there is virtually no role for the people in selecting the Leader, the entire notion of velayat-i-faqih quite possibly violates Article 56.

C. Substantive Rights That Lack Substance

The Iranian Constitution contains an impressive list of individual rights, much broader in scope and detail than our own Bill of Rights. For example, the constitution at least nominally grants full equal protection to women, obliges the government to provide every citizen the opportunity to work, provides for free education, guarantees housing, and protects the rights of the accused to be represented by counsel in all circumstances. Yet a number of these provisions are self-contradictory. For example, “publications and the press have freedom of expression, except when it is detrimental to the fundamental

principles of Islam or the rights of the public,”³⁴ leaving one to wonder what exactly “freedom of expression” entails under Iranian constitutional law. Similarly, the Constitution guarantees a right to “freedom” of association, where parties, societies, and professional associations are permitted, provided “they do not violate the principles of independence, freedom, national unity, the criteria of Islam, or the basis of the Islamic Republic.”³⁵

Other individual rights directly conflict with articles elsewhere in the Constitution. For instance, Article 19 says that “[a]ll people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights.”³⁶ At the same time, according to Article 64, Zoroastrians, Jews, and Armenian Christians are each allowed only one representative in the legislature, while Assyrian and Chaldean Christians are allowed only one between them, which hardly seems compatible with the concept of equal rights.

The limits on “freedoms” enumerated in the constitution extend also to the economic sphere. For example, Articles 46 and 47 declare that “everyone is the owner of the fruits of his legitimate business and labor” and that “[p]rivate ownership, legitimately acquired, is to be respected.”³⁷ At the same time, Article 43 declares that one of the overall goals of the national economy is the “the prohibition of extravagance and wastefulness in all matters related to the economy, including consumption, investment, production, distribution, and services.”³⁸ Clearly, a conflict inevitably arises if a person consumes the fruits of his legitimate business and labor in an extravagant manner.

IV. Constitutionalism and the Iranian Constitution

What impact do these contradictions have on Iran as a constitutionalist state? Below I apply some of the theories of constitutionalism that we have discussed in class to the Iranian constitution.

A. Is the Iranian Constitution a “sham” constitution?

Walter Murphy writes that some constitutions are “shams,” intended to deceive

their subjects that some form of political order exists, when in fact power is exercised arbitrarily to suit the particular needs of a political elite. Murphy cites constitutions under Stalin and Mao as typical “sham” constitutions.³⁹ Certainly, under Khomeini one could make the case that the Iranian constitution was little more than a symbolic piece of paper, and that any power it purported to distribute to individual branches of government was completely neutralized by Khomeini’s centralized, autocratic regime. But Khomeini has been dead for nearly 15 years, yet Iranian politics continues to function in accordance with the constitution. For example, as described above President Khatami and the members reformist Parliament both came to power through constitutionally mandated elections. Voter turnout was very high in both elections, higher even than most U.S. elections, suggesting that the average Iranian citizen believes that the constitution offers a real and meaningful framework for Iran’s political culture. Indeed, the Economist describes Khatami not as a “Gorbachev, a man who would make possible the end of a system, let alone a Yeltsin, a man who might precipitate that end,” but rather “a reformer, one who can improve and thereby safeguard the system by bringing about limited change, not one who would tear it down.”⁴⁰ At the very least, that a reformer such as Khatami could come to power in Iran through constitutional means suggests that Iran’s constitution is more than a mere “sham.”

The work of Iranian lawyer Shireen Ebadi, who recently won the Nobel Peace Prize, also suggests that the Iranian constitution is more than just a “sham.” The cornerstone of Ebadi’s efforts is to use Iranian laws and Iranian institutions to advance Iranian human rights. She believes in “piecemeal legal reform, underpinned by an enlightened approach to Shia jurisprudence, [to] solve women’s problems” in Iran.⁴¹ Commentators describe her in sharp contrast to other reformers in Iran who take “issue less with laws than with the whole legal superstructure.”⁴² Clearly, if the Iranian constitution were a sham, women like Ebadi would not employ it to advance their causes.

B. Is the Iranian Constitution an Expression of the People?

One school of thought suggests that in order to be legitimate, a constitution requires at a minimum some sort of authorization for a transfer of power from the citizens it seeks to govern into the governing institutions it seeks to establish. Under this theory, the Iranian constitution was clearly flawed from its inception. Though there can be no doubt that Khomeini enjoyed broad popular support throughout the Revolution, the manner in which he disbanded the Constituent Assembly and replaced it with the Assembly of Experts substantially restricted the opportunities for any non-religious sectors of the population to comment on or contribute to the new constitution. Certainly, the referendum on the Islamic Republic that passed with a 98.2% majority suggests that many Iranians might have supported the constitution had they been given a chance. But such speculation is moot, and does not change the fact that Khomeini largely engineered the ratification of the constitution by the Assembly of Experts. Under this theory, the Iranian constitution is about as legitimate as the U.S. constitution would be had Madison, Hamilton, and Jay handpicked the majority of constitutional delegates and then ratified it themselves, without any input from the states.

C. Does the Iranian Constitution “entrench” any values?

Cass Sunstein writes that one of the most basic functions of a constitution is to “entrench” certain basic rights and arrangements. In other words, some issues are so important to the viability of a nation that they must be taken off the “ordinary political agenda” and “entrenched” in a constitution.⁴³ Constitutions “create rights and institutions that follow from some independent theory of what individuals are owed by government.”⁴⁴ Here one could argue that Iranian constitution has been a resounding success. After nearly 200 years of foreign intervention, punctuated by the brutal tactics of the foreign-supported Pahlavi regime, the single most important issue to the Iranian people in the wake of the Revolution was the right to be free

from foreign influence. This right is entrenched in numerous provisions of the Iranian constitution, including:

Preamble: “Our nation, in the course of its revolutionary developments, has cleansed itself of the dust and impurities that accumulated during the past and purged itself of foreign ideological influences”

Article 3(5) (State Goals): “[t]he government of the Islamic Republic of Iran has the duty of directing all its resources to... (5) the complete elimination of imperialism and the prevention of foreign influence.”⁹

Article 43(8) (Economic Principles): “The economy of the Islamic Republic of Iran... is based on the following criteria... (8) prevention of foreign economic domination over the country's economy.”

Article 153 (Foreign Control): Any form of agreement resulting in foreign control over the natural resources, economy, army, or culture of the country, as well as other aspects of the national life, is forbidden.

Oddly, perhaps the best indicator of the success of the Iranian constitution in entrenching the right to be free from foreign influence is the fact that, apart from a few isolated incidents, Iran has had virtually no contact with the U.S. since its constitution was implemented.

D. Is the Iranian Constitution “autochthonous?”

H.W.O. Okoth-Ogendo writes that many African nations have constitutions, but lack constitutionalism. He explains that many such nations are struggling to find an “autochthonous” constitution. “This search for autochthony involves not only the rejection of external (‘specifically ‘western’) institutions and constitutional ‘devices’,” but also a distribution of power that reflects the needs and goals of underdeveloped, recently decolonized African nations.⁴⁵ Applying Okoth-Ogendo’s definition of “autochthony” to Iran yields mixed results. It seems clear that Iran has rejected “western” institutions by creating an Islamic Republic and placing broad supervisory authority over the three branches of government in the hands of the Leader and the clergy. But it is not as clear that

Iran this distribution of power accurately reflects the needs and goals of the nation. Rather, more than anything else the centralization of power in the hands of the clergy reflects Khomeini's immense popularity after the revolution and his ability to impose the concept of *velayat-i-faqih* into the new constitution. Thus, Iran seems to be struggling with the same dilemma as many of the nations Okoth-Ogendo describes: how to create a constitutionalist state without creating a "western" style of government.

V. Conclusion—What do Contradictions in the Constitution Mean to Iran Today?

The Iranian constitution is full of contradictions. It purports to allocate power in three separate branches, but then unifies those branches under the supervisory authority of the Leader and the concept of *velayat-i-faqih*. Ultimate sovereignty under the constitution emanates from at least four distinct sources that conflict with each other: the people, Khomeini, the office of the Leader, and God. The constitution grants individuals broad freedoms but then limits those freedoms to values that are consistent with Islam, leaving one to wonder what "freedom" really means in Iran. The constitution has allowed for popular reformers to come to power through regularly scheduled democratic elections, yet the constitution itself was forged largely under the direction of Khomeini in a most undemocratic manner. The Economist summarized the effects that these paradoxes are having on Iranian political life today:

Not far to the south-west of Tehran stands the holy shrine of Imam Ruhollah Khomeini, the ayatollah who inspired, led and largely created the modern world's only theocracy. The site is well chosen. To the north is Tehran, the city that swept the ayatollah to power in the revolution of 1979. To the south is Qom, the sun-baked seminary town where he had studied, preached and challenged the rule of Shah Mohammad Reza Pahlevi, and which is now the theological heart of Shia Islam. Next door is Behesht-e Zahra, the main cemetery for Tehran and the resting-place, too, for about 30,000 Iranian soldiers killed in the

1980-88 war with Iraq. Soon, if all goes to plan, a new international airport will open nearby, bearing the ayatollah's name. Here, if anywhere, it seems, you can appreciate the transformation of Iran from an American-manipulated dependency to a proud, self-sufficient Islamic republic. 10

At a distance the shrine, a vast edifice with huge courtyards, towering minarets and blue-tiled domes, is certainly impressive. But on closer inspection this is not a building throbbing with life, or even quiet contemplation. True, on official mourning days, and especially on June 4th, the anniversary of the ayatollah's death, the multitudes appear. But usually the buildings are quiet, the pilgrims few and, in the cavernous, alabaster-floored hall where a green-bulbed chandelier shines down on the ayatollah's tomb, only a trickle of devotees come to pay their respects. Most of the shops are unlet, the snack bars unpatronised, and the travertine steps are beginning to break up. Even before it is finished, the shrine is becoming dilapidated. So it is with the Islamic republic itself.

The most striking aspect of this decay is the virtual paralysis of government, a consequence at one level of the power struggle that convulses the country. At a deeper level, though, it is a consequence of the contradiction embedded in a constitution that stipulates for Iran both religious and democratic rule. After nearly 24 post-revolutionary years, it has become apparent, if not admitted, that a government cannot be satisfactorily run both by the elected representatives of the people and by the unelected representatives of God.⁴⁶

I concur with the Economist's bleak outlook for Iran. True, the Iranian constitution allows reformers such as Mohammed Khatami and Shireen Ebadi to encourage Iranian political progress from within, and not outside of, its institutions. But the same constitution could just as easily give rise to another autocratic regime like Khomeini's. In the end, I believe that this constitution will not be able to withstand its own internal inconsistencies.

The views and opinions expressed in articles are strictly the author's own, and do not necessarily

represent those of *Al Nakhlah*, its Advisory and Editorial Boards, or the Program on Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.

- 1 See, e.g., Ingwerson, Martin. "Iran's Next Revolution? Not by Zeal Alone," *Christian Sci. Monitor*, pg. unavailable online (August 28, 1997) (available at <http://search.csmonitor.com/durable/1997/08/28/intl/intl.7.html>).
- 2 Wolfe, Richard. "U.S. Names Iran as Chief Sponsor of Terror," *Fin. Times*, pg. unavailable online (May 21, 2002) (available at 2002 WL 19893785).
- 3 Barzegar, Jamshid. "September 11, One Year ON: Iran Mistrust Remains." *BBCnews.com* (September 2, 2002) (available at http://news.bbc.co.uk/1/hi/in_depth/world/2002/september_11_one_year_on/2233280.stm).
- 4 I relied heavily in this section on an excellent history of Iran by Nikkie Keddie, a leading scholar on Iranian politics. See Keddie, Nikkie. "Modern Iran: Roots and Results of Revolution," pgs 1-104. New Haven: Yale University Press, 2003.
- 5 Foreshadowing events that would occur over 150 years later, Iranians reacted to Russian interference in their domestic affairs by storming the Russian Embassy and taking hostages.
- 6 Documents recently declassified by the U.S. government confirm the CIA's instrumental role in overthrowing Mossadegh. Available at George Washington University National Security Archive at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB28/index.html#documents>
- 7 Marouf, Fatima. Review of "Tortured Confessions," by Abrahmian, Ervand, Berkeley: University of California Press, 1999, in *Harvard Human Rights J.*, Vol. 13, Spring 2000.
- 8 al-e-Ahmad, Jalal. Translated by Sprachman, Paul. "Plagued by the West," pgs. 67-75, New York: Caravan Books, 1981. 11
- 9 "Modern Iran: Roots and Results of Revolution," pg. 96, supra. n. 4.
- 10 Schirazi, Ashghar. Translated by O'Kane, John. "The Constitution of Iran: Politics and the State in the Islamic Republic," pgs. 22-35, London: I.B. Tauris & Co., Ltd., 1997.
- 11 *Id.* at pg 27.
- 12 *Id.* at pg 26.
- 13 *Id.* at pg 24
- 14 *Id.* at pg 30.
- 15 "The Surreal World of Iranian Politics: Anatomy of a Power Struggle." *Economist*, pg. unavailable online (January 16, 2003).
- 16 Schirazi, supra. n. 9, at pg. 12.
- 17 Iranian Const., Chapter V., Art. 57.
- 18 *Id.*, Chapter VI, Sec. 2, Art. 71.
- 19 *Id.*, Chapter VII, Art. 110.
- 20 Schirazi, supra. n. 9, at pg. 68.
- 21 *Id.* at pg. 70.
- 22 *Id.*
- 23 Interview with Pres. Mohammed Khatami by Christiane Amanpour (January 7, 1998) (available at <http://edition.cnn.com/WORLD/9801/07/iran/interview>).
- 24 "God's Rule, or Man's?" *Economist*, pg. unavailable online (January 16, 2003).
- 25 "Profile: Mohammed Khatami," *BBCNews.com* (June 6, 2001) (available at http://news.bbc.co.uk/1/hi/world/middle_east/1373476.stm).
- 26 "Iran's Reformers Vault to Victory," *Economist*, pg. unavailable online (February 24, 2000).
- 27 *Id.*

- 28 “Iran’s Parliament: Reforms, but only as Largesse,” *Economist*, pg. unavailable online (June 21, 2001).
- 29 Iranian Const., Chapter I.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*, Chapter II, Art. 5.
- 33 *Id.*, Chapter V, Art. 56. 12
- 34 *Id.*, Chapter II, Art. 24
- 35 *Id.*, Chapter II, Art. 26
- 36 *Id.*, Chapter II, Art. 19
- 37 *Id.*, Chapter II, Art. 46-47
- 38 *Id.*, Chapter II, Art. 43
- 39 Murphy, Walter, “Constitutions, Constitutionalism, and Democracy” in Jackson, Vickie and Tushnet, Mark. “Comparative Constitutional Law,” pg. 197, New York: Foundation Press, 1999.
- 40 “God’s Rule, or Man’s?” *supra.*, n. 22
- 41 “Shorn of Dignity and Equality,” *Economist*, pg. Unavailable online (October 16, 2003)
- 42 *Id.*
- 43 Sunstein, Cass, “Constitutionalism and Secession” in Jackson, Vicki and Tushnet, Mark. “Comparative Constitutional Law,” pg. 190, New York: Foundation Press, 1999.
- 44 *Id.*
- 45 Okoth-Ogendo, H.W.O., “Constitutions without Constitutionalism: Reflections on an African Political Paradox,” in Jackson, Vicki and Tushnet, Mark. “Comparative Constitutional Law,” pg. 190, New York: Foundation Press, 1999.
- 46 “God’s Rule, or Man’s?” *supra.*, n. 22 13