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## Sharia and national law in Iran<sup>1</sup>

*Ziba Mir-Hosseini*<sup>2</sup>

### **Abstract**

In the nineteenth century, the last of a series of tribal dynasties ruled Iran, and the Shia religious establishment had a monopoly of law, which was based on their interpretations of sharia. The twentieth century opened with the first of two successful revolutions. In the Constitutional Revolution of 1905-1911, democratic nationalists sought an end to absolute monarchy, a constitution, and the rule of law. They succeeded in laying the foundations of an independent judiciary and a parliament with legislative powers. The despotic, but modernising Pahlavi shahs (1925-1979) maintained (though largely ignored) both the constitution and parliament, curtailed the power of the Shia clergy, and put aside sharia in all areas of law apart from family law, in favour of a secular legal system inspired by European codes.

The secularisation of society and legal reforms in the absence of democracy were major factors in the convergence of popular, nationalist, leftist, and Islamist opposition to Pahlavi rule, which led to the 1978-1979 Iranian Revolution under Ayatollah Khomeini. Islamist elements gained the upper hand in the new Islamic Republic. Determined to reestablish sharia as the source of law and the clergy as its official interpreters, they set about undoing the secularisation of the legal system. The new constitution attempted an unusual and contradictory combination of democracy

and theocracy; for three decades Iran has experienced fluctuations, sometimes violent, between emerging democratic and pluralistic popular movements and the dominance of theocratic despotism. The legal system is often the arena for confrontation between more conservative and patriarchal interpretations of the sharia and the more liberal and pragmatic interpretations that see no contradictions between sharia and democracy and human rights.

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*The Islamic Republic of Iran was born in 1979 after a popular revolution that ended more than 2,500 years of monarchy. Iran was never colonised, but for much of the nineteenth and early twentieth century it was a major arena for Great-Power rivalry between Russia and Britain. Iran has a population of over 70 million, of which 89 per cent are Shiite, 9 per cent Sunni and the remaining 1-2 per cent Christians, Jews, Zoroastrians, and Baha'is. Persian-speakers are the dominant and largest ethno-linguistic group (51%), followed by the Azarbayjani Turks (24%), Gilaki and Mazandarani (8%), Kurds (7%), Arabs (3%), Lurs (2%), Baluches (2%), and Turkmen (2%). Seventy per cent of the population speaks Persian or related languages, with 26 per cent speaking Turkish or related languages. More than half the population lives in towns and cities. Eighty per cent of the population are literate; there are 22 million students, including three million enrolled in universities, of whom well over 50 per cent are female. The legal voting age is 16 and approximately 50 per cent of the electorate are under the age of 30.*

(Source: Bartleby 2010)

## 8.1 The period until 1920

### Monarchy versus religious authority

Islam came to Iran, then known abroad as Persia, in the seventh century when the Ummayyad Arabs brought an end to the Zoroastrian Persian Sasanid Empire, though mass conversion to Islam did not occur for some time. After centuries of foreign occupation and short-lived native dynasties, the country was unified in 1501 by Isma'īl, sheikh of the Safavi Sufi order, when he became the first ruler of the Safavid dynasty. Shah Isma'īl declared the state religion to be Twelver Shiism; Iran remains the only country where the official religion is Shia Islam (adherents number 10 per cent of Muslims worldwide). Distinguishing features of this faith relevant to law are the recognition of twelve Imams as legitimate successors of the prophet (the imamate), the occultation (*ghaibat*) of the last Imam, the possibility of reinterpretation (*ejtehad*) by qualified scholars, and emulation (*taqlid*) of supreme religious authority (*marja'iyat*).<sup>3</sup>

For Shia, leadership of the Muslims passed after the Prophet to his descendants, the Imams, rather than to the (elected) Caliphs, as is believed by Sunni Muslims. Each Imam was designated by the previous one, starting with the Prophet's cousin and son-in-law 'Ali and ending with the twelfth Imam, Mohammad Mahdi, the 'Imam of Time', who went into occultation; his return will mark the end of time, but in his

absence, the religious scholars (the ulama<sup>4</sup>) assume the guidance of the Shia. Among the Shia, qualified scholars are known as *mojtahed*, indicating that they are able to exercise judgment, or independent interpretation of the law from the sources (*ejtehad*). According to the Shia theory of *taqlid*<sup>5</sup> any man or woman who has not reached the stage of *ejtehad* is an emulator (*moqalled*) and, as such, must choose a leading *mojtahed* to be their own spiritual guide (*marja'-e taqlid*, 'model/source of emulation'), whose opinions in matters of religious law are binding on those who follow him.<sup>6</sup> A *marja'* (pl. *maraje'*) becomes recognised after a long process of acquiring respect for his teaching and scholarship, especially after qualifying as an ayatollah by writing a legal treatise or manual (*resaleh*) for those who have chosen to follow him in religious matters. One class of treatise is 'Explanation of problems' (*towzih al-masaleh*), a compendium of legal opinions, in a fixed format, starting with rulings about ritual acts such as prayers and fasting, and proceeding to chapters about contracts, such as marriage and divorce. Before the Iranian revolution, no scholar would publish his treatise, or be recognised as an ayatollah, while his own *marja'* was alive.

Annual religious taxes for the Shia include *zakat* (alms for the poor and needy) and *khoms* (one-fifth of income), payable to the *marja'*. Half of the *khoms* goes to Seyyeds, descendants of the Prophet; the other half, the 'Imam's share' (*sahm-e imam*), is considered to be the Imams' inheritance from the Prophet. A *marja'* receives it in his capacity as representative of the Imam of Time; he is free to spend it as he deems suitable. The *sahm-e imam* is, thus, a major source of wealth and power for the religious leaders. The *maraje'* live and teach in seminaries, known collectively as *howzeh* (short for *howzeh 'elmiyeh*, 'Scientific circle/milieu'). The two most important seminaries are in Najaf in Iraq and Qom in Iran; each city has a number of theological colleges, and both have become widely known as centres of not only religious learning but also political Islam.

The relation between religious and worldly power has always been a major source of dispute and difference among the Shia. In theory, in the absence of the Imams, no worldly power is legitimate. The earlier Safavid Shahs, as Sufi sheikhs, enjoyed unchallenged spiritual authority with which to bolster their political power. Since the seventeenth century, however, the relation between the Shahs and the Shia clerics has been complex and difficult.<sup>7</sup> In practice, most leading scholars have been quietist, keeping themselves apart from the world of politics and government, advising the ruler but refraining from action, at least so long as he was felt to be preserving Islam. But other clerics, especially since the nineteenth century, have played an active political role, taking different positions on crucial issues such as the scope of their independent judgement (*ejtehad*) and religious authority (*marja'iyat*), how

injustice and oppression should be opposed, and whether the Shia faith can accommodate man-made laws.

The Safavid dynasty fell in 1722, to be replaced eventually by the Qajars, who ruled from 1779 to 1925. During the nineteenth century, the institution of *marja'iyat* emerged separately from the state, and came to encapsulate the notion of supreme religious authority. The birth of 'modern' Iran is often dated to the early nineteenth century. After two disastrous wars with Russia, Qajar Iran was exposed to a wide range of new ideas, thanks to the increasing presence of European diplomats, merchants, and military advisors, the despatch of elite young men to be educated in France, and not least the translation and publication of European literary and political materials. At the same time, Iran found itself the object of imperial rivalry between Russia and Britain. The Qajar rulers, especially Naser ad-din Shah (1848-1896) and his son Mozaffar ad-din Shah (1896-1907), came under severe pressure and ultimately undertook policies that would compromise the country's integrity. In constant debt, they raised money from foreigners by selling concessions; this was widely interpreted, especially by the religious classes, as selling the country and Islam. One such example, the Tobacco Concession of 1891, led to a massive and successful popular protest, orchestrated by the leading cleric Mirza-ye Shirazi. This was the start of the movement that culminated in the Constitutional Revolution of 1905-1911.

#### *1906-1911: The Constitutional Revolution*

Until the Constitutional Revolution, the source of law in Iran was the sharia as interpreted by the senior clerics. The Shahs had installed a dual court structure. In addition to a system of state (*orfi*) courts supervised by a secular minister of justice, a system of religious sharia courts also functioned. The Shah appointed the head of the justice department and the religious judges, though in many places judges remained self-appointed. In this way, he sought firm control over the entire administration of justice. The sharia courts, presided over by clerics, had jurisdiction over all matters relating to family, inheritance, and civil law; the *orfi* or state courts had jurisdiction over matters involving the state. However, in practice the sharia courts enjoyed almost all judicial power and dealt with cases in accordance with well-developed Shia rules of jurisprudence (*feqh*) (Banani 1961: 68; Amin 1985: 52-60). At the local level, the clergy, together with tribal chiefs, big landowners and merchants, controlled the urban and rural population. Clerics supervised land transactions and provided for both education and social care.

The constitutional movement brought together a wide range of different elements: merchants and clerics, Muslim reformist intellectuals, secular liberals and nationalists. The common aim, if on differing

grounds, was to limit the absolutism of the Shah through a constitution, an elected legislature, and an independent judiciary. Many supporters of the movement did not, however, appreciate the implications of its secularist, liberal, and democratic nature. The leading Shia clerics were ambivalent and took different positions. Mirza Mohammad Hossein Na'ini (1860-1936), the most high-ranking cleric to support the movement, provided for instance religious arguments for the rejection of absolutism and a defence of constitutionalism.<sup>8</sup> In contrast, the main clerical opponent of the constitution, Sheikh Fazlollah Nuri, argued that ideas of democracy and freedom, the reforms advocated by the constitutionalists, and the establishment of a parliament to enact legislation, were in contradiction with Islam. He further maintained that men and women, Muslims and non-Muslims have different status and rights under the sharia, and as such cannot be treated on an equal basis. Nuri was opposed to the establishment of parliament on the grounds that any man-made law would necessarily clash with religious law. In his view, religious scholars must control the process of law-making as well as the judiciary.

In August 1906, Mozaffar ad-din Shah was forced to grant a parliament (National Consultative Assembly, *Majles-e Shura-ye Melli*), and at the end of December, shortly before his death, he signed the first constitution (*Qanun-e Asasi*, 'Fundamental Law'). The constitution, which was largely secular, with an emphasis on popular sovereignty, codified several constitutional rights, such as freedom of expression and equality before the law. Following objections by religious scholars, a Supplement to the Constitution was drafted to include more references to Islam and to the necessity for the scholars to approve all laws. The new Shah, Mohammad 'Ali, signed the Supplement in October 1907; but the following year, with Russian help, he staged a successful coup against the constitutionalists. In 1909, constitutionalist forces advanced on Tehran, deposed the Shah, and executed Sheikh Fazlollah Nuri. Parliament was restored, along with the constitution.

One of the main demands of the constitutionalists was the creation of a House of Justice (*edalatkhaneh*). This was reflected in the 1907 Supplement, nineteen articles of which (Art.s 71-89) define the power, nature, and organisation of the courts, and lay the basis for an independent judiciary and a unified legal system (Amanat 1992). At the same time, the clergy were given a concession in the form of Article 2, which required that parliament's enactments must never be at variance with the sacred precepts of Islam, and established a body of five clerics with veto power over bills deemed to be in contradiction with the sharia. In the same year (1907), a four-tier civil court system was created in Tehran: the Court of Property and Financial Claims, the Criminal Court, the Court of Appeals, and the Supreme Court of Appeals. In

1908, a Dispute Court was created to deal with disagreements between civil and sharia courts. In 1911, parliament set up a temporary committee to consider 'transitional laws', and the French jurist Pierny was charged with designing codes of criminal, trade, and civil law. To contain the opposition of the clerical establishment to these measures, their temporary and experimental nature was stressed (Banani 1961: 69).

But the process of law reform soon ground to a halt, due to skirmishes between parliament and the clergy, who were adamant about retaining the sharia as the only source of law and their power as its sole interpreters. In short, the creation of a new judiciary became entangled in the ideological struggles that remained unresolved in the Constitutional Revolution. The new parliament survived, the foundations of a secular democracy had been laid, and there was evidence of the beginnings of a lively, independent press, but religious elements were still strong factors in governance and daily life, and the potential for monarchical despotism remained.

## 8.2 The period from 1920 until 1965

### Modernisation and authoritarian rule

#### *1920-1926: The rise of Reza Shah Pahlavi*

The early 1920s saw the end of the Qajars and a return to despotism under the new Pahlavi dynasty. During the World War, Russian, Turkish, and British forces occupied much of Iran. Reza Khan, a Cossack officer, rose to prominence while dealing with the disorders that pervaded the provinces in the aftermath of the war. Following a coup d'état in 1921, he became War Minister, then Prime Minister, and in 1925 parliament proclaimed him Shah. The clergy, deeply shaken by developments in neighbouring Turkey and fiercely opposed to his original plan to establish a republic, watched from the sidelines in dismay.

A westernising secular nationalist, Reza Shah formed a strong military and a centralised bureaucracy. He also established both the secular judiciary and the greatly expanded secular educational system that the constitutionalists had wanted. In these and other ways he deprived the clerics of their former monopolies and resources, though he did not go as far as his model Kemal Atatürk in Turkey. Though many of his reforms were popular, he ignored or manipulated the constitution and ruthlessly suppressed dissent. The clerics, labelled fanatical reactionaries in this modernising milieu, were reduced to silence. Upon assuming the throne, Reza Shah amended the 1906 Constitution to ensure that his male descendants would succeed him. Further amendments in 1949, 1957, and 1967 increased the monarch's powers. Although



Article 2 of the Supplement, regarding the primacy of sharia, was retained, the Shah's modernising zeal and the authoritarian nature of the Pahlavi monarchy rendered it irrelevant.

Reform of the legal system, halted a decade earlier, could now be pursued in earnest. A number of measures between 1926 and 1936 led to the establishment of a predominantly secular legal system. Its conceptual and organisational inspiration was the French system, and its architect, 'Ali Akbar Davar, a graduate of law from the University of Geneva. As the new Minister of Justice, Davar dissolved the old judiciary with parliament's approval in 1926. With the aid of French legal experts, he began a radical restructuring and reform of the system, which ultimately resulted in the complete exclusion of the clergy. In 1927 a new Ministry of Justice was created. Consequently, some six hundred newly appointed judges, many with European education, replaced the clerical officials in Tehran.

#### *1926-1941: Reza Shah and the creation of a modern legal system*

In most areas of law, sharia concepts were put aside and European-inspired codes were enacted, including codes of Commercial Law (1932) and Civil Procedure (1939), Criminal Law and Criminal Procedure (1912, 1926, 1940 and 1911, 1932, respectively). Only the new Civil Code retained the sharia. Many of its 1,335 articles are in effect a simplification and codification of majority opinion within Shia jurisprudence. Although the clergy had lost their role in defining and administering family law, as in other areas of the law, the commission appointed by the Ministry of Justice in 1927 to draft the code used the three most authoritative Shia legal texts (namely, Najm ad-din Mohaqqueq Helli's *Sharaye' al-eslam*, Zein ad-din Shahed Sani's *Sharh-e lom'eh*, and Mortaza Khorasani's *Makaseb*) as sources, and the Belgian, French and Swiss codes as models (Mehrpoor 2001: 6).

Parliament approved the civil code in two phases, in 1928 and 1935. Volume 2, dealing with personal status and the family, retained the patriarchal notion of family as constructed in classical Shia jurisprudence. In 1931 a separate marriage law required that all marriages and divorces be registered in civil bureaus to be set up in accordance with the regulations of the Ministry of Justice. In the same year, parliament passed a law defining sharia courts as 'special courts', which not only reduced their jurisdiction to disputes involving the essential validity of marriage and divorce but also placed them under the authority of state courts (Banani 1961: 78-79). In 1932 another law deprived the clerics of one of their main sources of income by relegating to secular courts the registration of legal documents, of ownership, and of other transactions concerning property. The secularisation of the judiciary culminated in 1936

when the employment of clerical judges was terminated, almost overnight, through a law that required serving judges to have a law degree from either Tehran Faculty of Law or a foreign university. It was also in 1936 that Reza Shah's policy of unveiling (*kashf-e hejab*), begun a decade before, reached its zenith with a law prohibiting women's appearance in public wearing a traditional Iranian chador or scarf. This ultimate secularising measure was to send the public a strong message about the emasculation of religious-based law and practice.

Reza Shah's legal reforms, in the words of one of his admirers, 'achieved no less than the Westernisation of the judicial concepts, institutions, and practices of Iran' (Banani 1961: 76). But the authoritarian way in which they were implemented led to further polarisation between sharia and state law; the deliberate exclusion of the clergy alienated them and put them on the defensive. The reforms were not accompanied by the promotion of independent decision-making, democracy, or democratic institutions. Further, Reza Shah's adoption of European legal systems and codes bypassed the philosophy that informed them, as his autocratic rule would not tolerate the impartial operation of the new judiciary.

*1941-1965: Muhammad Reza Shah, Mohammad Mosaddeq, and the rise of Ayatollah Khomeini*

At the start of World War II, Reza Shah clearly favoured Germany, and his reign came to an abrupt end in 1941 when British and Soviet forces occupied Iran and forced him to abdicate in favour of his son Mohammad Reza. Over the next decade renewed political debate and activity, dominated by the communist Tudeh party and the secular National Front, culminated in Mosaddeq's nationalist government of 1951-1953, which initiated grand economic and political reforms and led to the temporary exile of the Shah and the nationalisation of the oil industry. Mosaddeq's secularism antagonised the clerical establishment, while Britain and the USA were frightened by his nationalism and the rise of the Tudeh. In 1953, after a CIA-engineered coup, Mohammad Reza Shah resumed his reign as a U.S.-supported autocrat. During the following years, he alienated much of the country by allowing a massive increase of U.S. influence, and by suppressing further dissent and indeed parliamentary activity.

Following the death of Ayatollah Seyyed Aqa Hossein Qommi in 1947, Ayatollah Hossein bin 'Ali Tabataba'i Borujerdi emerged as the highest religious authority – the sole *marja'* of the Shia. Though opposed to the Tudeh and Mosaddeq, Borujerdi was a political quietist and remained in the Qom seminary, which he is credited with reorganising. Meanwhile, other clergy were planning to resume a more active

political role in opposition to the Shah's policies. Their plans escalated rapidly after Borujerdi's death in 1961, which itself precipitated a crisis in the supreme religious authority (*marja'iyat*) as there was no single scholar prominent enough to succeed him in this capacity. In 1962, in an effort to gain popular support, the Shah instituted his 'White Revolution' or 'Revolution of the Shah and People', including land reform and votes for women. Soon after, Ayatollah Khomeini came to prominence, publicly denouncing the Shah for his attacks on the clergy and his increasing dependence on foreigners. On 5 June 1963, Khomeini was arrested. The authorities violently put down large protest demonstrations in Tehran, Qom, and other cities. Khomeini was released in April 1964, but rearrested in October after a fiery sermon against the Shah. This time, he was exiled to Turkey; in October 1965 he was allowed to change his place of exile to Najaf, where he stayed until 1978 (Martin 2000: 62-64).

### 8.3 The period from 1965 until 1985

From autocratic monarchy to Islamic Republic

*1965-1978: The Family Protection Law, and the revolutionary movement*

Under Mohammad Reza Shah there were few adjustments to the legal system, which was still based on the 1906 Constitution and on the hierarchical French model of the legal system implemented by his father. In 1963, as part of the 'White Revolution', in order to provide accessible and simpler administration of justice, rural tribunals (*khaneh-ye ensaf*) were set up, consisting of five members appointed from among local villagers. They were competent to handle land and water disputes and low-value civil suits. Many thousands of these tribunals were created by 1979; though they further secularised the administration of justice in the villages, there is evidence that they were controlled by the richer peasants (Hooglund 1982: 128).

The major legal reform under Mohammad Reza Shah was the Family Protection Law (FPL) of 1967, which put men and women on the same footing in terms of access to divorce and child custody. Though the initiative for the reform came from the nascent women's movement, by the time it became law it had already been co-opted by the official Women's Organisation of Iran under the patronage of Princess Ashraf, the Shah's twin sister. This compromised the legitimacy and significance of the reforms. The left and the secular opposition identified the FPL with the despotic Pahlavi regime, which had already appropriated the women's movement. The clerical establishment, for its part, was united and vocal in denouncing the reforms; Ayatollah Khomeini issued

a fatwa that any divorce under the FPL was invalid under the sharia (Algar 1980: 441).

The events that led to Ayatollah Khomeini's exile in 1964 marked the start of the revolutionary movement. The independence of the judiciary was further undermined after 1965. Politically significant legal cases were given to government-oriented judges and special tribunals were introduced, weakening the regular administration of justice. Military tribunals, for instance, had jurisdiction in cases of state security and in narcotics cases (Amin 1985: 55-63). Numerous violations of civil and political human rights took place. Meanwhile, the Shah's 'White Revolution' and his ambitious plans for socio-economic development and modernisation focussed on increasing production, land reform, providing credits in the countryside and housing in the rapidly growing cities. Much land was transferred from big landowners and religious endowments (*waqf*) to small farmers, but the agrarian sector barely progressed, and promises to fight poverty and provide social services were not fulfilled. Bad governance, corruption, and extravagance were accompanied by widening wealth and income gaps. By the mid-1970s Iran was in an economic crisis.

#### *1978-1982: The revolution and the establishment of an Islamic Republic*

Opposition to the Shah came from many directions. Among leftist groups, the Tudeh, discredited by their links to the USSR, lost support to the Marxist Fedayin-e Khalq and the Islamist-socialist Mojahedin-e Khalq, whose guerrilla activities against the regime escalated in the early 1970s as the Shah's excesses further alienated the intellectuals and the people. Among the religious opposition, Ayatollahs Mahmud Taleqani, Morteza Motahhari, and Allameh Tabataba'i contributed greatly to the creation of a modernist Islamic political discourse, along with religious intellectuals like Jalal Al-e Ahmad, Mehdi Bazargan, and 'Ali Shariati (Dabashi 1993). A number of Islamic associations of professionals, students, and intellectuals became fora for revolutionary ideas and sought to counter secular or non-Muslim groups. One of the most important religious intellectuals was Mehdi Bazargan, who (with Yadollah Sahabi and Ayatollah Taleqani) in 1961 founded the Liberation Movement (Chehabi 1990). From 1966 until its closure in 1972, the Hosseiniyeh Ershad (a religious meeting-place in north Tehran) was the main forum for the new Islamic discourse. Key Muslim intellectuals lectured there, including Shariati, the most popular and influential Islamic ideologue of the revolution (Rahnema 1998).

By the mid-1970s the opposition came under the leadership of Ayatollah Khomeini from his exile in Iraq and later (in 1978) in Paris. The revolutionary forces were united in their main aim: to reject the

autocratic, unjust, and unaccountable Pahlavi monarchy, the inequalities in society, and the overwhelming influence of the USA. But the alternatives they sought were as multiple and varied (and often contradictory) as they were themselves: a popular democracy; a classless society; a socialist state; national autonomy; an Islamic government, with rulers guided by the ulama and the sharia.

The success of the revolution was assured when on 16 January 1979 the Shah left Iran for good, and on 1 February Ayatollah Khomeini returned in triumph. The first decade after the revolution was a period of establishment of the Islamic Republic, marked by the war with Iraq (1980-1988) and by bitter struggles, first between the different elements that had contributed to the revolution, and then between the proponents of liberal-democratic and theocratic Islam, whose values became jointly enshrined in the constitution.

The Revolutionary Council immediately appointed Mehdi Bazargan to form a provisional government, composed mainly of National Front and Liberation Movement members, moderate non-clerical Islamists, and nationalists, all of whom wanted a secular democratic republic. Khomeini's clerical followers had different ideas. Inspired by Ayatollah Motahhari (Dabashi 1993: 147-215), they soon formed the Islamic Republican Party (IRP), led by Ayatollah Mohammad Beheshti together with Akbar Hashemi Rafsanjani and 'Ali Khamene'i, both of whom were later to be president. These were populist Islamic radicals intent on establishing an Islamic state governed by Islamic law. They were opposed by quietists in the seminaries who wanted the clerics to abstain from government, and who were represented by Ayatollah Kazem Shariat-madari, whose supporters formed the Islamic People's Republican Party. Also contending for power and popular support were the Islamic-socialist Mojahedin-e Khalq (MEK) and leftist groups, such as the communist Tudeh and the Fedayan, who wanted a socialist state and some autonomy for ethnic minorities.

The early months of 1979 were marked by the first 'Reign of Terror', as religious extremists implemented hard-line interpretations of Islamic law. Members of the previous regime (military officers, members of the Shah's court, capitalists), as well as prostitutes, adulterers, and homosexuals, were summarily executed. In May, Ayatollah Motahhari, a leading moderate political cleric close to Khomeini, was assassinated, and in September the death of Ayatollah Taleqani, another influential moderate, was another blow to the progressive and moderate faction in the revolutionary leadership. Amid this violence, the new order took shape. On 30 March a referendum had overwhelmingly approved the formation of an Islamic Republic. Many of the early leaders such as Bazargan wanted it to be called 'Democratic Islamic Republic'; but at Khomeini's insistence the version put to the referendum did not include the term

'democratic'. During the spring, Bazargan's government and the Revolutionary Council prepared a draft constitution, which was approved by Khomeini; at this stage, there was no mention of clerical rule. In August, an assembly of experts – dominated by the IRP – began to produce a final draft that included the notion of 'guardianship of the jurist' (*velayat-e faqih*).<sup>9</sup> A further referendum approved this constitution on 2 December.

On 4 November, radical student 'Followers of the Imam's Line' occupied the U.S. Embassy and took hostages. Bazargan resigned in protest, and the religious hardliners took control of government. They had already begun their offensive against democrats, liberals, secularists, and leftists as well as regional insurgents from the mainly Sunni ethnic minorities (that is, Kurds, Khuzistan Arabs, Turkmen, Baluch). Members of Bazargan's Liberation Movement were removed from the structures of power, though they remained the only tolerated opposition party; they were dismissed as 'liberals', implying they were not Islamic enough. In the 1990s, they would become known as the Nationalist-Religious Alliance.

In January 1980, Abol-Hasan Bani-Sadr, an Islamic modernist who had been among Khomeini's advisors in Paris but was opposed to clerical rule, was elected president; but in March, elections to the new parliament brought the radical IRP to power. The struggle intensified between the main Islamist factions (IRP and the Followers of the Imam's Line), Bani-Sadr's followers, and the MEK, the most prominent and popular Islamic leftist organisation. Then in September, Iraqi forces invaded, starting a war that was to last eight years.

In June 1981 parliament impeached Bani-Sadr and, with Khomeini's agreement, he was dismissed. The MEK were banned, and clashes with them grew more violent. Also in June, a powerful bomb exploded at the IRP headquarters while a meeting of party leaders was in progress, killing a large number of senior government officials. The MEK were blamed for these and other political assassinations, notably, in August, those of newly elected president 'Ali Reja'i and Prime Minister Mohammad Javad Bahonar. In July both former president Bani-Sadr and MEK leader Massoud Rajavi fled to France. Between June 1981 and May 1982, in a second Reign of Terror, most of the MEK were executed or imprisoned; those who survived went into exile (Abrahamian 1989). The Islamic state and clerical government were secured. In a violent return swing of the pendulum, religious despotism had ousted both secularism and democracy.

The unresolved tensions that brought about the revolution were in effect written into the 1979 Constitution, a compromise document with an uneven fusion of democratic and theocratic principles and institutions (Arjomand 1992; Schirazi 1997). On the one hand, it recognises

the people's right to choose who will govern them, establishing democratic and legislative institutions such as the parliament and the presidency, both elected by direct popular vote. On the other hand, it subordinates the people's will to that of the clerical establishment through the institutions of guardianship of the jurist (*velayat-e faqih*) or Leadership (*rahbari*)<sup>10</sup> and the Guardian Council (*shura-ye negahban*), composed of twelve members, six of whom are jurists (*foqaha*; pl. of *faqih*) appointed by the Leader, the other six being laymen nominated by the head of the judiciary and approved by parliament, with a tenure of six years.<sup>11</sup> It grants the Leader a wide mandate and a final say in running the state and charges the Guardian Council, acting as an 'Upper House' with veto powers, with deciding whether laws passed by parliament conform to the sharia and the constitution. In effect, they are the official interpreters of the constitution and sharia.

The constitution names Khomeini as Leader for life, and creates an Assembly of Experts (*Majles-e Khebragan-e Rahbari*) to choose his eventual successor and supervise his activities, to ensure that he complies with his religious and constitutional duties. The 86 members of this Assembly are elected every eight years; only *mojtaheds* are eligible to stand, and from the outset conservative clerics have dominated the Assembly. From its inauguration in 1983 until his death in 2007, the Assembly was headed by Ayatollah 'Ali Meshkini, a powerful conservative who often acted as Friday Prayer Leader in Qom. In practice so far, the Assembly has merely endorsed the actions of the Leader. The constitution allows the Guardian Council to supervise all elections, which they have interpreted as the right to vet candidates' eligibility to stand. This means that, in effect, the Assembly of Experts and the Guardian Council form a closed system that allows the Leader unlimited power. Through his appointees to the Guardian Council, he can control both the legislative and the executive powers (Schirazi 1997; Buchta 2000).

With the merger of religious and political power, the state embarked on a fierce process of islamising law and society that continues today. The ultimate aim has been to return both law-making and the administration of justice to the clerics and to get rid of what they see as the pernicious secularisation of the Pahlavi era. In measures mirroring those of Reza Shah, the courts have been restructured and civil judges gradually purged and replaced by clerical judges. New codes based on *feqh* have been enacted to enable the judiciary to conform to Shia legal norms, replacing codes inspired by European laws. Articles of the civil code that deviated from *feqh* were amended and a High Judicial School was created in Qom to train clerics to serve in the judiciary.<sup>12</sup> The numbers of clerics swelled rapidly, and by the late 1980s hundreds of them had been recognised as ayatollahs; the highest rank was now Grand Ayatollah.

1982-1985: *The Islamisation of the legal system*

From the outset, attention has been focussed on two areas of law – family and criminal laws – where the sharia courts' jurisdiction was terminated in the 1930s. In February 1979, barely two weeks after the collapse of the Pahlavi monarchy, a directive from Ayatollah Khomeini's office declared the Family Protection Law 'non-Islamic' and announced its suspension and the reinstatement of the sharia, that is, articles of the 1935 Civil Code dealing with family. There followed a period of uncertainty until new Special Civil Courts were created by a law with the same name, ratified by the Revolutionary Council in September 1979. These courts were to be presided over by clerical judges free from the provisions of the Civil Procedure Code, hence the term 'Special'. Their establishment was seen as a first step towards the application of sharia in its most important sphere: the family. It was the outcome of a compromise between those who urged the immediate restoration of sharia and those who argued for a gradual approach (Mohaqqeq-Damad 1986: 513-522; Amin 1984: 132-133). It also set the trend for subsequent changes.

'Return to sharia' has not been a return to the classical *feqh* notion of plural and uncodified laws; the judiciary has retained not only many of the legal concepts and laws of the Pahlavi era, but also the notion of a centralised and unified legal system. The most drastic changes, as we shall see, took place in the area of criminal law, where Islamic legal concepts were entirely put aside in the 1920s. The wearing of hijab became compulsory for women. The education system was segregated, and though universities remained mixed, regulations were introduced to separate the sexes in class and on campus. State censorship of the media (familiar under the Pahlavis) intensified. Places of recreation were closed, alcohol, prostitution, and homosexuality were forbidden. The combination of Islamic doctrine, sharia, legislation based on sharia, fatwas, and pre-revolutionary legislation often resulted in confusion. Courts were forced to choose among available legal sources in an eclectic manner (Zubaida 2003: 200).

Alongside the general courts, Islamic Revolutionary Courts also entered the scene, under Khomeini's supervision and with his silent approval. Local *komitehs* (supporters of the Islamic revolution) acted as informal police and took opponents of sharia to court. Government authority was unpredictable and normal procedures were not followed. Closed hearings, secret verdicts, and mass executions resulted. The human rights situation, deplorable under the Shah, did not improve. Khomeini's regime was intolerant of those with different beliefs, and was supported by a callous police force and numerous vigilante groups.



Victims included citizens who did not agree with the new religious ideology, Baha'is, and members of MEK.

Human rights violations by the regime took many forms. Political parties were prohibited, demonstrations were violently broken up, reform-oriented media shut down, and political adversaries locked up indefinitely. Political executions by shooting or hanging also occurred regularly, most often within prisons such as the notorious Evin in Tehran. The right to a fair and open trial was violated by torture, forced confession, denial of legal assistance, and closed proceedings in revolutionary and Islamic courts. The government was also active outside Iran in prosecuting and liquidating adversaries of the regime.<sup>13</sup> Iran did not take a defensive stance in international human rights fora. In 1982 Iran was asked about the role of Islamic law in relation to compliance with the ICCPR, in particular about Articles 20, 21, and 26 of the Constitution, which assimilated human rights. The Iranian representative gave a simple answer: 'In case of conflict between a law and the scope of Islam, priority goes to Islam.'<sup>14</sup>

In order to facilitate legislation considered to be socially necessary, even if it was in conflict with sharia, Khomeini gave a fatwa in 1981 granting parliament the authority to proclaim such legislation with absolute majority votes. Subsequently, the Guardian Council ignored this fatwa and refused to approve much legislation promulgated on the basis of it. Khomeini responded in 1984 with another fatwa authorising parliament to create legislation based on the Islamic principles of social necessity (*zarurat*) and expediency (*maslahat*) with a two-thirds majority. Even this strengthening of parliament's position did not bring the desired changes in the Guardian Council's behaviour (Schirazi 1997: 63-64).

## 8.4 The period from 1985 until the present

### Growing tensions between theocracy and democracy

#### *1985-1989: Khomeini's last years and the constitutional crisis*

In the aftermath of the revolution, the inherent tensions between theocratic and democratic elements in the state, and between the two competing notions of sovereignty embodied in the concepts of *eslamiyat* and *jomhuriyat* (roughly, 'Islamism' and 'republicanism'), had been the main sites of confrontation among the Islamist, nationalist, and leftist forces whose alliance had led to the revolution's success. With secularists and 'liberal' Islamists like Bani-Sadr, the MEK and Bazargan, and the Liberation Movement defeated and excluded from the structures of

power, argument was confined to religious terms and focussed on the issue of the religious legitimacy of political authority.

As long as Ayatollah Khomeini was alive, the basic tensions were managed and did not confront the Islamic Republic with a crisis of legitimacy. There were several reasons for this. First, apart from Khomeini's personal charisma as Leader, and his religious standing as supreme religious authority (*marja'*), his style of leadership helped to bridge the gap between the two sides. Not only was he mindful of – and responsive to – the popular will, he managed to rise above factional politics and to avoid being claimed by any faction. Perhaps the most important reasons were the freshness of the revolutionary momentum and the fact that the politics of the period were preoccupied with the Iran-Iraq war, a unifying force that provided the mechanisms for suppressing dissent.

As the Islamic Republic consolidated itself, a structural contradiction between the two notions of supreme authority – the *marja'iyat* and the *velayat-e faqih* – became increasingly evident. The first has no overt political claims, having evolved through a tacit consensus between Shia masses and clerics; it is democratic in nature in that a *marja'* derives his position from personal recognition by individual followers. The guardianship of the jurist (*velayat-e faqih*), on the other hand, relies on the apparatus of state and demands allegiance from every citizen. In so doing, it not only establishes the authority of one single jurist over all others but also breaks away from orthodox Shia political theory, which denies legitimacy to any form of government in the absence of the twelfth Imam. It invests the Leader with the kind of powers and mandate that Shia theology recognises only for the Prophet and the twelve Infallible Imams (Arjomand 1988; Sachedina 1988; Akhavi 1996), and as Zubaida observes, it is closer to the Sunni political theory of Caliphate than the Shia theory of Imamate (Zubaida 1993).

By 1988, the tension between the two notions of authority intensified and brought about a constitutional crisis. There was conflict not only between the clerical supporters and opponents of *velayat-e faqih*, but also between the factions within the ruling elite, who held differing views of authority and the way the country should be run. In March 1989, Khomeini's dismissal of his designated successor, Grand Ayatollah Hossein 'Ali Montazeri, added a new edge to the tension. Montazeri was the only recognised *marja'* who supported the theory of *velayat-e faqih*. He had impeccable revolutionary credentials: he had spent years in the previous regime's prisons, played an instrumental role in inserting the *velayat-e faqih* into the constitution, and published discussions on the subject from both theoretical and theological angles (Montazeri 1988-1990). But he was also a vocal critic of government policies and practices, unwilling to keep silent in the face of what he saw

to be contrary to his religious beliefs. His dismissal, the outcome of an acrimonious struggle for the succession, was in effect a proof of the impossibility of combining the traditional (*marja'iyat*) and new (*velayat-e faqih*) notions of religious authority.

The crisis was resolved when Ayatollah Khomeini himself gave his blessing to the separation of the two institutions (*velayat-e faqih* and *marja'iyat*) and authorised a committee to revise the constitution. Following his death in June 1989, the Assembly of Experts chose the incumbent president, Seyyed 'Ali Khamene'i, as the new Leader of the Revolution. As a middle-ranking cleric, Khamene'i had no possible claim to spiritual leadership, and he lacked Khomeini's religious authority and charisma. The concept of *velayat-e faqih*, and the legitimacy of its mandate, had to be revised. The committee duly produced a revised constitution, which no longer specifies that the Leader must be a recognised *marja'*, but merely able to issue opinions (fatwas) in all fields of Islamic law (Arjomand 1992).

*1989-1997: Consolidation of the power of the Supreme Leader and growing dissent*

In July 1989, parliament speaker 'Ali Akbar Hashemi Rafsanjani was elected president. A popular referendum ratified the revised constitution, which abolished the office of prime minister (filled since 1981 by Mir-Hossein Mousavi) and transferred its executive powers to the presidency. With Khamene'i as the new Leader and Rafsanjani as president, the Islamic Republic entered a second phase, named 'Reconstruction' by its supporters, 'Mercantile Bourgeois Republic' by others (Ehteshami 1995; Ansari 2000). Rafsanjani's priorities and his pragmatic approach reversed some of the earlier policies, notably in the areas of economy and foreign affairs. The welfare policies of the wartime government under Prime Minister Mousavi were replaced by measures that encouraged the growth of the mercantile bourgeoisie and state-connected entrepreneurs (Ansari 2000: 52-81).

The new phase saw important changes, notably some tactical ideological shifts that accompanied the breakdown of the delicate balance of power and the working relationship that had developed between the two ruling 'factions', the so-called 'Rightists' and 'Leftists'. Although often spoken of as polarised factions, these terms are relative, the Rightists being more conservative and theocratic, the Leftists more progressive and democratic; they were all, of course, Islamists and supporters of Khomeini. Indeed, differences among them are best seen as positions around which people gathered in relation to specific issues, many in the centre shifting position according to the issue (Moslem 2002).

The Leftists, who had dominated the state under Khomeini (Mousavi was one of them) and enjoyed his implicit sanction, were now gradually ousted from the structures of power. Their 'radical' elements – including those who had engineered the seizure of the U.S. Embassy in 1979 – were purged from key positions. A new configuration of 'Islamic republicanism' was forged, facilitated by the revised constitution and the consolidation of the Rightist faction.

The constitutional amendments may have settled the crisis over legitimate authority, but they led to a renewed tension between the two competing notions of sovereignty, which dominated Rafsanjani's presidency (1989-1997) and forced a redefinition of the relationship between religious authority and the state. To resolve the constitutional conflict between *velayat-e faqih* and *marja'iyat*, to defuse the discord between the Guardian Council and parliament, to ensure a more pragmatic approach to the application of Islamic law, and to compensate for the loss of Khomeini's charisma, the revised 1989 Constitution extended the mandate of the Leader. This extension drew sanction from a letter by Khomeini in 1988 in response to a question by Khamene'i, then president, who wanted his consent to oppose the Leftist-dominated policies of parliament and government. Khomeini had written that the Leader's mandate is absolute, that he can even order the suspension of the primary rules of Islam (for example regarding prayer or pilgrimage) if the interests of the Islamic state (*maslahat-e nezam*) demand it. Clearly, when Khomeini had to choose between the sharia and the survival of the state, he chose the latter (Arjomand 1992: 156-158).

This letter revealed the tension between the application of juristic rulings and the demands of running a state. At the time, the Leftists had welcomed it, as they saw the empowerment of the state through a strengthened Leadership as a way of defusing legalistic objections and obstacles coming from the seminaries. Now it was the Rightists, with Khomeini dead and one of their number as Leader, who argued – in an ideological U-turn – for further expansion of the Leader's power (Moslem 2002: 74).

The revised constitution gave the Leader not only the power to determine the general policies of the state and to oversee their implementation, but also control over more institutions, notably Television and Radio (IRIB): compare the revised version of Article 110 with the original. A new body, the Assembly to Discern the Best Interest of the System (*Majma'-e Tashkhis-e Maslehat-e Nezam*), known as the Expediency Council, created by Khomeini in February 1988, was now constitutionally sanctioned (Art.s 110, 112; see Schirazi 1997: 233-247). The Leader appoints the thirty-one members of this council from various ideological factions loyal to the regime. Its mandate is to vet laws passed by parliament (now renamed 'Islamic Consultative Assembly',

*Majles-e Shura-ye Eslami*) but found by the Guardian Council to be in contradiction with the sharia; in other words, to mediate conflict between popular sovereignty (as represented in parliament) and clerical sovereignty (as represented by the Guardian Council). The Expediency Council also has the task of advising the Leader on important issues of national concern (Buchta 2000: 61-63).

The 1989 Constitution increased the power of the non-elected institutions at the expense of the elected ones, and thus came to reflect the views of those who reject the restrictions imposed on *velayat-e faqih* by the 1979 Constitution (Schirazi 1997: 52-55). The Leadership, emptied of the aura of sanctity that believing Shia traditionally associate with the person of the *marja'*, and with its democratic credentials seriously dented, now had to serve the interests of the Rightist faction and to rely more and more on the consensus of the clerical establishment. This, in practice, made Khamene'i, the new Leader, a hostage to the seminary politics in which the most traditional Rightist elements – those connected to the bazaar – had the upper hand.

Rightists came to dominate all those institutions that represented the theocratic side of power in the Islamic Republic, notably the judiciary, whose head is appointed by the Leader, and the Guardian Council. During the first phase of the Islamic Republic when Khomeini was Leader, this council had included both Leftists and Rightists; it had used its constitutional mandate of supervision (*nezarat*) of all elections in the Islamic Republic to allow only insiders ('our people', *khodi*) to run for elected office, excluding secularists, religious liberals, the 'uncommitted', and outsiders ('not our people', *gheyr-e khodi*) generally. In the second phase, the council contained solely Rightists, and during the 1992 parliamentary elections it started to use its power – now reinterpreted as a duty of 'approbatory supervision' (*nezarat-e estesvabi*) – to disqualify candidates from the Left so as effectively to ensure that the Right had a majority in the new parliament (Menashri 1992; Baktiari 1996).

By the mid-1990s the Leftist faction also lost all their influence in the judiciary, and while they kept their middle-rank officials in government, they no longer had ministers. One of the last was Mohammad Khatami, Minister of Culture and Islamic Guidance; he resigned in 1992 under pressure from the Rightist faction, who saw his liberal policies as allowing a form of 'cultural invasion'. But the honeymoon between President Rafsanjani's government and the traditional Right was soon over; and by the time of the fifth parliamentary elections in 1996, a modernist Rightist group, known as Servants of Construction, emerged under Rafsanjani's patronage (Ansari 2000: 82-109; Moslem 2002: 180-251). Meanwhile, set aside from decision-making bodies, some of the senior Leftist clerics retired from politics and returned to the seminaries;

others formed political groups and bodies in the seminaries, or set up research and study groups in Tehran and devoted themselves to 'cultural activities', which in post-revolutionary Iran signifies the independent study of society and politics (Jalaeipour 2003). The Leftists generally entered a period of political retreat and reflection, during which some of them broke away from theocratic and absolutist ideology and started to argue for democratic principles and the rule of law (Ashraf & Banuazizi 2001b). In so doing, they joined the increasing numbers of ordinary citizens disillusioned by the increasing rift between the ideals of the revolution they had supported and the realities of the Islamic state.

Women, more than any other sector, had reasons to be disaffected. They felt the harsh reality of subjection to a patriarchal interpretation of Islamic law when applied by the legal machinery of a modern state. They kept their suffrage rights, but most of the pre-revolutionary legal reforms were abolished. Men regained their rights to unilateral divorce and polygamy, while women's rights to divorce and child custody were limited and they were forbidden to study mining and agriculture, to serve as judges, and to appear in public without hijab. Many Islamist women, who had genuinely, if naively, believed that women's position would automatically improve under an Islamic state, were increasingly disappointed. They included some early activists, who had played instrumental roles in discrediting secular feminists and destroying the pre-revolutionary women's press and organisations, as well as many ordinary women for whom Islam meant justice and fairness (Mir-Hosseini 1996).

Debates about gender issues, harshly suppressed after the revolution, started to resurface. By the early 1990s, there were clear signs of the emergence of an 'Islamic feminism': a new gender consciousness and a critique of the gender biases in Islamic law. Some of the earlier restrictions on subjects women could study were removed (1986); family planning and contraception became freely available (1988); divorce laws were amended so as to curtail men's right to divorce and to compensate women in the face of it (1992); and women were appointed as advisory judges (1992) (Ramazani 1993; Mir-Hosseini 1996). It is certainly true that the Islamic Republic's rhetoric and policies in the 1980s marginalised and excluded so-called 'Westernised' women, but it is also true that they empowered many other women, who came to see themselves as citizens entitled to equal rights. It was becoming increasingly apparent to them that they could not become full citizens unless a modern, democratic reading of Islamic law was accepted.

This reading was what a group of Muslim intellectuals, advocates of what came to be known as 'New Religious Thinking' (*now-andishi-ye dini*), were trying to achieve. The adverse impact of the implementation of Islamic law, as defined in classical texts of traditional jurisprudence

(*feqh-e sonnati*), had already produced a kind of rethinking and reworking among the clerics. A new school of 'Dynamic Jurisprudence' (*feqh-e puyā*) tried to arrive at a new interpretation of Islamic law by taking into account the factors of time and place. This school emerged in the late 1980s, following two rulings by Ayatollah Khomeini making chess games and music permissible (*halal*). It has supporters among the younger generation of clerics, and its senior advocates, such as Ayatollahs Ebrahim Janati, Mousavi-Bojnurdi and Yousef Sane'i, have issued a number of progressive fatwas with regard to women's rights and other social issues. Members of the school have attempted to rethink the assumptions behind the jurisprudential theories that inform classical interpretations of sharia. They have, however, met opposition and sometimes persecution by conservative clerics.

The New Religious Thinkers included laymen and women as well as clerics, all of whom now saw a widening gap between the ideals of the revolution and the realities and policies of the Islamic state in which they lived. Representing various strands of modernist Shia thought that had remained dormant during the war with Iraq, they offered new interpretations of Islam and began to articulate a theoretical critique of the Islamic state from an Islamic perspective (Sadri 2001; Jahanbakhsh 2001). Most prominent was Abdolkarim Soroush, who published a series of controversial articles between 1988 and 1990 on the historicity and relativity of religious knowledge, later developed as a book on 'The Theoretical Contraction and Expansion of Sharia'. In a direct challenge to the religious authority of the clerical establishment, Soroush sought to separate religion from religious knowledge, arguing that, while the first was sacred and immutable, the second was human and evolved over time as a result of forces external to religion itself (Kurzman 1998; Soroush 2000).

Thus, after over a decade of the experience of Islam in power, Islamic dissent began to be voiced among 'insiders' and became a magnet for intellectuals whose ideas and writings now formed the backbone of the New Religious Thinking. Whereas in the 1980s these men and women had seen their role as consolidating the Islamic Republic, in the 1990s, armed with Soroush's theory of the relativity of religious knowledge, they wanted to create a worldview reconciling Islam and modernity, and argued for a demarcation between state and religion. They argued that the human understanding of Islam is flexible, that Islam's tenets can be interpreted to encourage both pluralism and democracy and to allow change according to time, place, and experience. For them, the question was no longer who should rule, but how they should rule, and what mechanisms there should be to curb the excesses of power. In this way, they began to cross the red lines that had previously circumscribed any

critical discussion of the political dogma that sanctioned the concentration of power in the institution of Leadership.

Soroush and his co-thinkers tried to redefine and rework Islamic concepts and succeeded in producing discourses that were to become highly attractive to youth and women. Like 'Ali Shariati, Soroush was immensely popular while being criticised and disdained by secular intellectuals. But there were fundamental differences in their visions and conceptions of Islam, which were undoubtedly shaped by the politics of their own times. Shariati turned Islam into an ideology to challenge the Pahlavi monarchy. For Soroush, Islam is 'richer than ideology', and all his thinking and writing are aimed at separating the two (Cooper 1998; Kurzman 2001; Ghamari-Tabrizi 2004). But he has himself become the ideologue of a reformist, democratic Islam, by his critique of '*feqh*-based Islam', widely read as an attack on the rule of the jurist (*velayat-e faqih*).

The New Religious Thinkers have revived classical debates on the nature of the divine law, which in turn reactivated a crucial distinction that the early wave of Islamic activists distorted and obscured: this is the distinction between the sharia and the science of *feqh*, which lies at the root of the emergence of the various 'orthodox' schools of Islamic law. They contend that, while the sharia is sacred, universal, and eternal, *feqh*, like any other system of jurisprudence, is local, multiple and subject to change in its doctrines and premises.

#### *1997-2005: Reformist governments and the dual state*

In the 1997 presidential elections, a last-minute political alliance between Rafsanjani's pragmatic modernist right and the Islamic left put forward former culture minister Mohammad Khatami to oppose Akbar Nateq-Nuri, the candidate of the traditionalist right. The people voted *en masse* for Khatami, who stood for 'democracy' and 'rule of law', and whose ideas and language were drawn largely from Soroush and his co-thinkers. Once again the popular will began to assert itself, expressing resentment of the injustices brought by the application of pre-modern interpretations of the sharia, and of the undemocratic nature of the current Leadership.

The reformist movement that emerged in the aftermath of this election was the logical and inevitable outcome of the spread of the New Religious Thinking at both popular and political levels (Wells 1999; Moslem 2002). Almost overnight, cleavages shifted and new political alliances were forged. Those who had campaigned for Nateq-Nuri, mainly of the traditionalist right, were labelled 'conservatives'. Those who voted for Khatami and supported his vision called themselves 'reformists', but came to be known as the 'Second Khordad Front' (after the date of



Khatami's election). The reformists were a loose coalition with a wide range of views and little consensus on aims and directions of reform.

The victories of reformist candidates in the municipal and parliamentary elections of 1999 and 2000, and Khatami's re-election in June 2001 with over 77 per cent of the vote, showed the strength of the mass support for the advocates of the new discourse and their vision of Islam. One of Khatami's main supporters, Mehdi Karroubi, head of the main clerical organisation of the Leftist faction, the Society for Militant Clerics (*majma'-e rowhaniyun-e mobarez*)<sup>15</sup>, was elected to the important role of speaker of parliament. But despite these electoral gains, which put them in charge of both executive and legislative powers, the reformists were unable to fulfil their electoral promises. Instead, they became both internally divided and locked in a fierce political battle with their opponents, who now were identified and aligned with the theocratic and unelected side of the Islamic Republic. The unelected bodies succeeded in frustrating most of the government's initiatives and the legislative moves of the reformist parliament (2000-2004). They also silenced key reformist personalities, by assassination, by prosecution and imprisonment, and by closing down the vibrant free press that was one of their main early achievements and platforms.

Bodies under the Leader's control, namely the Guardian Council, the Expediency Council, and the judiciary played the central role in containing and frustrating reformist efforts to translate their vision and programmes into policies. The first two either rejected almost all the bills introduced by reformist members of parliament, or allowed their enactment only after changing them so much that they were emptied of progressive elements. At the same time, the judiciary assigned certain branches of the Press Court and the Revolutionary Courts to restrict the scope of debates by prosecuting reformist intellectuals, journalists, and even members of parliament. The non-constitutional Special Clerical Court, which since 1997 has acted like an inquisition, performed the task of containing clerical proponents of reform.<sup>16</sup>

The resultant situation was a stalemate, a 'dual state' that lasted until the next parliamentary elections in 2004. Divided and unable to deliver on their electoral promises or to bring change in the structure of power, the reformists started to lose popular support. By the time of the February 2003 council elections, the stalemate produced what the reformists had feared most: voter apathy. Conservatives won the major cities by default – in Tehran, the turnout was a mere 14 per cent –, though not the villages and small towns.

For the parliamentary elections the following year, the Guardian Council disqualified a large number of reformist candidates, including eighty sitting members. The reformists protested, members organised a sit-in, and there was talk of President Khatami's resignation, but to no

avail. The election went ahead without the participation of the largest reformist parties. The conservatives won the election, but victory came at a price: in order to appeal to the popular legitimacy on which the Islamic Republic was founded, they had to appropriate the reformist platform, at least its rhetoric. Running under the banner of 'Renovators' (*abadgaran*), they now promised to implement 'religious democracy', economic reforms and prosperity, and to respect the rule of law and young people's desire for change, diversity, and fun. They even refrained from putting the names of their better-known personalities on their lists of candidates, so as not to evoke sour memories. The turnout of around 42 per cent was the lowest for any parliamentary election in the Islamic Republic, though not as low as the reformists had warned. In some constituencies there was no competition, as all reformist candidates were disqualified. Radical elements among the Conservatives, some from the ranks of the Revolutionary Guards, now calling themselves Principlists (*osulgara'ian*) won the majority of seats.

*2005-2009: The dual state ends, theocratic forces predominate*

In June 2005 the theocratic forces brought the 'dual state' to an end, when one of their candidates, the hardliner and former Revolutionary Guard Mahmoud Ahmadinejad, won the presidential election – a victory that astounded both insiders and outsiders. But to achieve this, they had to show their hand. The Guardian Council's disqualification of reformist candidates could not eliminate centrists like Hashemi Rafsanjani and Mehdi Karroubi. To ensure a reasonable turnout, the Leader had to intervene at the last minute to undo the disqualification of Akbar Mo'in, who represented progressive reformists. The means by which the theocratic forces regained the presidency – rigged ballot boxes, interference with the electoral process by organising mass votes for their candidate – further undermined the popular legitimacy and mandate on which the Islamic Republic had rested.

The failure of the reformists in the 2005 election was also one of the unintended consequences of U.S. policy in the Middle East. Despite Iran's assistance in dislodging the Taliban in Afghanistan in 2001, U.S. President Bush included Iran in his 'Axis of Evil' in early 2002. Despite Iran's help in stabilising Iraq following the U.S. invasion in 2003, the Bush administration refused to talk to Iran about nuclear and other issues and appeared determined on regime change in Iran. These rebuffs all had a decisive impact on Iranian internal politics. The conservative and theocratic forces in Iran were able to point to the reformists' foreign policy failures, and to use the threat of invasion to silence voices of dissent and to derail the democratic process. The hardliners had what

they needed internally as well as the opportunity to aim for regional influence and popularity in the Muslim world.

The structural tensions in the Islamic Republic persisted, however, and broke down the conservative alliance behind Ahmadinejad, just as they had divided the coalition that brought Khatami into office. In the December 2006 elections for local councils and the Assembly of Experts, and in the March 2008 parliamentary elections, the hardliners led by Ahmadinejad himself and his mentor, Ayatollah Mohammad Taqi Mesbah-Yazdi, failed to gain any ground; a new alliance of moderate reformists and conservatives won a majority in the Assembly of Experts. The key figures in this alliance were former president Khatami, former speaker of parliament Karroubi, and former president Rafsanjani, now head of the Expediency Council and increasingly leaning towards the reformists. Both Karroubi and Rafsanjani had been defeated by Ahmadinejad in the June 2005 presidential elections. The death in July 2007 of Ayatollah Meshkini, head of the Assembly of Experts since its inception, led to intense competition between hardliners and moderate clerics to replace him. In September the Assembly elected Rafsanjani as their head.

The most – perhaps the only – lasting achievement of the Khatami's two terms of presidency (1997-2005) was to have nurtured and protected a new public sphere, which survived after reformists were ousted from government. It comprised a vocal and dynamic press and virtual media (websites and weblogs), the universities, the seminaries, and parliament, where the ambiguities and contradictions in the original idea of the Islamic state, its translation into law and policy, and the role of Islamic jurisprudence (*fiqh*) in everyday life were all candidly debated. The conservatives closed many reformist publications and prosecuted numerous prominent and outspoken reformists, many of them being jailed for several years; nevertheless, these measures failed to silence the debates and to circumscribe the public sphere, but rather highlighted the urgency of the debates and the necessity for such a sphere.

Indeed, the very fact that the scope of debate is limited to Islam, sharia, and the constitution has resulted in sharpening the contrast between two visions of Islam and the two modes of governance. One is an absolutist and legalistic Islam, premised on a notion of 'duty' that tolerates no dissent and makes little concession to the people's will and contemporary realities. The other is a pluralistic and tolerant Islam, based on human rights and democratic values. The first vision, advocated by hardliners, has an undemocratic reading of the constitution, in which guardianship of the jurist (*velayat-e faqih*) is an element of faith. According to them, the Leader, as ruling jurist, derives his mandate from God and his post through designation (*nasb*); the role of the

Assembly of Experts is confined to 'discovering the will of God'; the Assembly, like other bodies including Parliament, is at the disposal of the Leader, whose powers are not to be limited by human laws but by divine law – the sharia. This view is aired in the sermons and publications of the most radical ideologues among the supporters of the Islamic State, such as Ahmadinejad's mentor Ayatollah Mesbah-Yazdi and his students in Qom; and it is defended by the increasingly powerful Revolutionary Guards.

The second vision, advocated by reformists and, increasingly since 2005, by moderate conservatives, has a more democratic reading of the constitution, in which *velayat-e faqih* is a religio-political theory. According to them, the Leader derives his mandate from the people, who elect him indirectly through the Assembly of Experts and can depose him if he fails to fulfil his constitutional duties or abuses his constitutional powers. They argue that not only does the hardliners' reading of the constitution negate its clear and definite republicanism (*jomhuriyat*), it is a travesty of the ideals and achievements of the 1979 revolution, perpetrated by those who want to reproduce monarchical relations in an Islamic format.

The 2009 presidential election campaign took shape against the background of these debates and developments. Various reformist groups and individuals formed a coalition to mobilise people to vote, and persuaded former President Khatami to run again. Karroubi, who lost the 2005 election to Ahmadinejad, also announced his candidacy; he ran on behalf of the Etemad-e Melli Party, which he had formed in 2005, shortly after resigning from all his governmental posts in protest against what he described, in an open letter, as interference by one of Khamene'i's sons and the Revolutionary Guards in getting Ahmadinejad elected. Then in March, after twenty years of political silence, Mir-Hosseini Mousavi entered the presidential race, and before long Khatami withdrew in his favour. As the last prime minister, who had had both Ayatollah Khomeini's backing and a popular base due to his welfare policies, Mousavi had been urged by the Left/Reformist faction to run for president in both 1997 and 2005, but he had refused. Now, as an independent centrist candidate, his campaign was reminiscent in many ways of Khatami's in 1997. It was run by a group of young activists, who, lacking access to the state-controlled media – in particular TV that was heavily biased toward Ahmadinejad – skilfully used digital media to reach large numbers of people. The polls were ambiguous – and notoriously unreliable – but it was widely expected that either Mousavi would win or the election would go to a second round. Even the conservatives were anxious that Ahmadinejad might not win his second term, and made preparations to ensure that he did.

On election day, 12 June, the turnout throughout the country was high. But it was followed by what many have interpreted as a military coup d'état. From the beginning, numerous serious irregularities were reported: Revolutionary Guards and the Interior Ministry clamped down on Ahmadinejad's opponents; in many cases, they kept their representatives out of both polling booths and counting stations; they attacked Mousavi's campaign headquarters and arrested his aides and other prominent reformists and journalists. The official result was announced on TV only two hours after polling ended, declaring Ahmadinejad the winner with 63 per cent of the votes, Mousavi second with less than half that, and the other two candidates (Karroubi and Mohsen Reza'i, a former head of the Revolutionary Guards) with single figures. There were indications that these proportions had been decided in advance of the polling. Mousavi and Karroubi refused to accept the results, and asked for a recount. On 13 June, Ahmadinejad celebrated his victory, and in a provocative speech referred to those objecting to the poll as 'dirt and dust' that would be soon washed away. On 15 June, an estimated 2 million protesters marched through Tehran with the single slogan, 'Where is my vote?' This was the biggest protest march since the 1979 revolution, and a direct challenge to the theocratic forces. It was followed by more protests, which the government met with violence. In a much-awaited Friday prayer speech on 19 June, Khamene'i, instead of finding a healing formula, threw oil on the fire. He blamed foreign media for 'doubts over election results', dismissed the protesters and warned them of further government violence if they persisted. But the protests continued, leading to the formation of the popular movement for change, which came to be known as the Green Movement, under the joint – but very diffuse – leadership of Mousavi, Karroubi, and Khatami, with Rafsanjani attempting to mediate reconciliation with the Leadership.

## 8.5 Constitutional law

Iran's first constitution was ratified in 1906 following a revolution that ended the absolute monarchy. In 1979, after another popular revolution, a new constitution was adopted, which abolished the monarchy and established an Islamic Republic; it was amended in 1989. As the background and political features of each constitution have been already discussed, this section outlines articles in the current constitution relating to legislative and judicial powers.<sup>17</sup>

The constitution combines religious, ideological, and democratic elements. It consists of 177 articles, divided into fourteen chapters, each on a specific theme. The lengthy preamble tells the story of the 1978-

1979 revolution, stressing the religious and ideological rationale for the merger of religious and political power. The following extract gives a flavour of the document's ideological vision and the primacy it gives to Islam and the clergy, seen as saviours of Islam and the people:

The unique characteristic of this Revolution, as compared with other Iranian movements of the last century, is that it is religious and Islamic. The Muslim people of Iran, after living through an anti-despotic movement for constitutional government, and anti-colonialist movement for the nationalization of petroleum, gained precious experience in that they realized that the basic and specific reason for the failure of those movements was that that they were not religious ones. Although in those movements Islamic thinking and the guidance of a militant clergy played a basic and prominent part, yet they swiftly trailed off into stagnation, because the struggle deviated from the true Islam. But now the nation's conscience has awakened to the leadership of an exalted Authority, His Eminence Ayatollah Imam Khomeini, and has grasped the necessity of following the line of the true religious and Islamic movement. This time the country's militant clergy, which has always been in the front lines of the people's movement, together with writers and committed intellectuals, has gained new strength (lit: impetus) under his leadership.

Chapter I (Art.s 1-14), 'General Principles', continues in the same vein. It outlines the principles of popular and religious sovereignty, Shia doctrines, the form of government, separation of powers, the state goals, the legislature, the judiciary, the source and scope of laws, official religion and language, culture, family, religious minorities, and in short the aims of the revolution. Religious and popular sovereignty are stressed in two contradictory articles. Article 4 states:

All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.

Article 6 declares, however:

In the Islamic Republic of Iran, the affairs of the country must be administered on the basis of public opinion expressed by the means of elections, including the election of the President, the

representatives of the Islamic Consultative Assembly, and the members of councils, or by means of referenda in matters specified in other articles of this Constitution.

Chapter 6 (Art.s 62-99) concerns legislative powers. Articles 62-90 provide for a unicameral parliament, the Islamic Consultative Assembly, consisting of 290 members elected by direct and secret ballot for four years; its consultations must be open and full minutes of them made available to the public by radio and the official gazette. Parliament drafts legislation, ratifies international treaties, approves the country's budget, and has the power to impeach the president and government ministers. It also possesses the right to investigate and oversee all affairs in the country. In terms of legislative authority, Parliament may legislate on all matters within the bounds of Islam and the constitution, but all its legislation must be evaluated and approved by the Guardian Council (Art.s 71, 72).

Articles 91-99 of Chapter 6 provide for the Guardian Council. It consists of twelve members (six clerical and six non-clerical jurists) who serve for six years. The Leader appoints the six clerical jurists, the other six being nominated by the Head of Judiciary and elected by Parliament. The council's role is to ensure that all laws in the country are in line with Islam and the constitution, and it has the authority to interpret the constitution and to supervise all elections – an authority which, as already discussed, ensures the concentration of power in the hands of clerics.

Chapter 8 of the amended constitution states that, following Khomeini's death, the Leader should be chosen by experts, that is an Assembly of clerics, themselves elected by the people but subject to the approval of the Guardian Council (Art.s 107 and 108). The conduct of the Assembly and the mode of popular election are to be determined by the Assembly itself, which also has the duty of reviewing the performance of the Leader, and dismissing him if necessary (Article 111).

The amended version of Article 112 provides for an additional legislative body, the Expediency Council, created by Ayatollah Khomeini in 1988 to resolve disputes between Parliament and the Guardian Council. The Leader appoints members of the Expediency Council; they convene at his orders, and also act as his advisory body. The council's members propose its regulations, which are then ratified by the Leader.

Chapter 11 (Art.s 156-174) provides for an independent judiciary. In the 1979 version, the judiciary was to be run by a High Judicial Council; in the 1989 version, it is to be headed by a senior *feqh*-expert (*mojtahed-e 'adel*), appointed by the Leader for five years. The Minister of Justice, chosen by the president from among candidates recommended by the Head of Judiciary, is responsible for liaising between

the executive and judicial powers. The Supreme Court, formed according to regulations drafted by the Head of Judiciary, is charged with supervising decisions of the lower courts to ensure both conformity with the laws of the country and uniformity in judicial policy. Article 162 requires that the chief of the Supreme Court be a senior *faqh*-expert, appointed by the Head of Judiciary in consultation with the Supreme Court judges for a term of five years.

## 8.6 Personal status and family law

As noted earlier, these laws were codified as part of the legal reforms during the reign of Reza Shah, the first Pahlavi monarch. Until then the clergy had the monopoly of defining and administering family law; they performed marriages and divorces and dealt with disputes relating to marriage and inheritance in sharia courts, in accordance with the principles and procedures of Shia law.

### *Inheritance*

Inheritance law was codified in 1928 as part of the Iranian Civil Code. Part 4 of Book 1 of the Code ('On Wills and Inheritance') sets out various aspects of inheritance law in 124 articles (Art.s 825-949), which remain faithful to Ja'fari or Ithna 'Ashari (Twelver) Shia jurisprudence. Like Sunni law, the Shia law of inheritance is based on a system of rights that grant the legal heirs of the deceased a share of his estate. Its salient features are as follows:

- Surviving relatives of the deceased are grouped in order of precedence, based on class (*tabaqeh*) and degree (*darajeh*) of closeness of blood relationship. As a class, descendants precede antecedents. Within the class, relatives nearer in degree to the deceased exclude more remote ones. In all classes, a male's share is double of that of a female.
- The chief difference between Shia inheritance law and Sunni law is that the former grants a higher status to females as legal heirs. If a deceased person is survived only by daughters (no sons), in Shia law daughters inherit the whole estate, whereas in Sunni law they inherit half the estate and the other half goes to the nearest agnate (s) of the deceased.
- A man or woman can make a will but testamentary power is curtailed in two respects. First, a legal heir cannot be excluded nor can the share to which he or she is entitled be reduced. Secondly, no



more than one-third of the amount of one's net estate can be willed away without the consent of the legal heirs.

In 2007, the Zainab Society, a conservative women's association that supported Ahmadinejad in the 2005 election (several members were elected to Parliament in 2004) presented a bill to Parliament amending Civil Code Article 946; this article, reflecting the majority Shia position, states that a man inherits a share of the entire estate of his wife, but a widow cannot inherit land, only 'moveable property' and a share of the value of any buildings or trees. The amendment proposed to enable a widow, like a widower, to inherit a share of the entire property of her spouse. The bill was ratified by Parliament in 2009, and approved by the Guardian Council in February 2010. This – a small but progressive step by a conservative government – remains the only reform in the area of inheritance law.<sup>18</sup>

### *Marriage and the Civil Code*

Family law, however, has an uneven history of reform. It was codified in 1935 as part of the civil code. Articles 1031-1206 of Volume Two deal with kinship, marriage, termination of marriage, family relations, and children. They retain the patriarchal bias of the sharia. Limited reforms were introduced, adopting principles from other schools of Islamic law so as to extend the grounds upon which a woman could obtain a judicial divorce to include the husband's refusal or inability to provide for her (Art. 1129), his refusal to perform his marital (sexual) duties, his maltreatment of her and his affliction with a disease that could endanger her life (Art. 1130). Otherwise, the only departure from classical Shia law is Article 1041, prohibiting the marriage of girls under thirteen (Banani 1961: 69-84).

Meanwhile, in 1931 a marriage law had been enacted, consisting of 20 articles and 2 notes setting out procedural rules for implementation of the civil code concerning matrimonial transactions. Articles 1 and 2 required that marriages and divorces be registered in civil bureaus set up in accordance with the regulations of the Ministry of Justice. Failure to do so did not affect the validity of the marriage or the divorce, but incurred penalties and the loss of legal recognition by the state, thus reflecting a dual notion of legality: legal/official (*qanuni/rasmi*) as opposed to religious (*shar'i*). Article 3 set financial penalties and prison terms for all those involved in the marriage of girls under thirteen years of age. Articles 4 and 8-17 – all incorporated, in slightly different wording, into the 1935 Civil Code – deal with a wife's right to maintenance and her right to initiate divorce proceedings, requiring that such actions be brought initially to civil courts. In the same year, the jurisdiction of

sharia courts was reduced to disputes involving the essential validity (*asl*) of marriage and divorce (Banani 1961: 78).

### *The 1967 and 1975 Family Protection Laws*

A major change in the sphere of family law occurred in 1967 with the enactment of the Family Protection Law (FPL), which curtailed men's rights to arbitrary divorce and polygamy. The civil code was left intact and reforms were achieved through procedural devices (Hinchcliffe 1968). Comprising 23 articles and 1 note, the FPL introduced new rules for registration of marriage and divorce and set up new courts for dealing with all kinds of familial disputes. All divorcing couples were required to appear in these courts, which had their own procedural rules and were presided over by civil judges, some of them women. In the absence of spouses' mutual consent to divorce, and upon the establishment of certain grounds, the court would issue a certificate referred to as 'Impossibility of Reconciliation'. Grounds available to men were parallel to those available to women; both could apply to the court to appoint arbiters to try to bring about reconciliation, although the final decision on divorce and child custody arrangements rested with the court (Art.s 6-13). Registration of a divorce without a court certificate was made an offence, subject to the penalty of six month's to one year's imprisonment for all parties involved, including the registrar (Art.s 14, 16). To avoid a clash with sharia provisions that recognise divorce as the exclusive right of a man (reflected in Art. 1133 of the 1935 Civil Code: 'A man can divorce his wife whenever he wishes'), the FPL resorted to a legal device: it required that conditions in which a divorce certificate could be requested from the court be included as stipulations in all marriage contracts (Art. 17). Article 4 of the 1931 Marriage Law, repeated in Article 1119 of the Civil Code, also recognises stipulations in marriage contracts, giving a wife, in certain conditions, the right to divorce herself on behalf of her husband after establishing in court the existence of a stipulated condition. Before the FPL, it was up to the woman, in effect her family, to negotiate such a right for her, which seldom happened. The FPL made these stipulations an integral part of every marriage contract. In large urban centres, courts that dealt with family disputes and were regulated by FPL procedural rules became known as 'FPL Courts'.

In 1975, the FPL was replaced by another law with the same title, comprising 28 articles and 19 notes, which extended the reforms of the FPL and formally repealed any prior laws conflicting with its mandate. It increased the minimum age at marriage from 15 to 18 for females and from 18 to 20 for males, placed women on a more equal footing with men with respect to divorce and child custody, and provided the

courts with discretionary powers to grant or withhold divorces and to decide on child custody arrangements.

*Marriage, divorce and polygamy in the Islamic Republic*

In the Islamic Republic, two parallel and opposing developments with respect to family law can be detected: the validation of the patriarchal mandates of classical jurisprudence, and attempts to protect and compensate women in the face of them. The first began with the Special Civil Courts Legislation (SCCL) in September 1979, which created courts by the same name to replace the Family Protection Courts that had been suspended shortly after the victory of the Revolution in February. The SCCL contained twenty articles and three notes, all but one concerned with defining the structure and jurisdiction of its courts, which are invested with the same degree of discretionary power as enjoyed by the FPL courts (Mir-Hosseini 1993: 55-56). It allowed the registration of divorce by mutual consent, but retained an element of the FPL reform: Article 3, Note 2 required that, if a husband wished a divorce, the court must first refer the case to arbitration; if reconciliation proved impossible, the husband should be given 'permission to divorce'. This note was in evident contradiction with the classical Shia position that grants men the right to unilateral and extra-judicial divorce (codified as Art. 1133 of the 1935 Civil Code). The contradiction was resolved by reference to a Koranic verse that speaks of the appointment of arbiters in the event of marital discord.<sup>19</sup>

The FPL was never formally repealed, however, and elements of it have been retained in other areas of family law, although in an *ad hoc* and inconsistent manner. The Guardian Council and the High Judicial Council (until its abolition under the 1989 amended constitution) undertook the revision of laws found to be in contradiction with sharia provisions. In 1982 and 1991, they deleted, amended, or replaced fifty articles of the 1935 Civil Code (Mehrpoor 2001: 8-16). Article 1041, which set a minimum age at marriage (thirteen for females and fifteen for males), was amended in 1982 to prohibit marriage prior to puberty (defined in the amended Article 1210 as nine lunar years for girls and fifteen for boys). The Special Civil Courts can give permission to marry a girl under thirteen; yet Article 3 of the 1931 Marriage Law, which sentences those involved in a marriage of a girl under thirteen to from six months' to two years' imprisonment, has been left intact.

A similar ambiguity informs the law on polygamy. In 1984, the penalty introduced by the 1975 FPL (Art. 17) for registering a polygamous marriage without court permission was declared to be inconsistent with sharia (Guardian Council, Opinion No. 1488, dated 9 Mordad 1363/31 July 1984). Yet Articles 5-7 of the 1931 Marriage Law, requiring a man to

declare his marital status at the time of marriage and fixing a sentence of six months' to two years' imprisonment if the second wife brings a legal action for deception, have not been repealed.

The situation over polygamy becomes more complicated if temporary marriage (commonly known as *mut'a* or *sigheh*; see Haeri 1989) is also taken into consideration. Although the civil code recognises this as a valid marriage, the 1931 marriage law and all subsequent legislation – even after the Revolution – are silent about the formalities of registration. The FPL, by both omission and commission, excluded disputes involving *mut'a* from adjudication on the basis that, not being registered, they were devoid of legal validity. The aim was to discourage, and even to prevent, this type of marriage without directly banning it. After 1979, however, the Special Civil Courts not only heard disputes involving temporary unions but could authorise their registration, thus giving them 'legal' (*qanuni*) status (Mir-Hosseini 1993: 162-171).

With respect to a mother's custody rights and control over her children after divorce or the death of the father, the FPL reforms were severely curtailed. Article 15 of the 1975 FPL, placing a mother on the same level as a paternal grandfather in terms of natural guardianship (*velayat-e qahri*) of her children, was among the first to be repealed in October 1979 (Safa'i & Emami 1995: 164-168). In the event of divorce, the Civil Code gives a mother the right to custody of a daughter until the age of seven and of a son until two (Art. 1169). Although a woman acquires custody of her children if her husband dies (Art. 1170), she loses it if she remarries (Art. 1171) and she must submit to the authority of their paternal grandfather (Art. 1180). A single-article law passed in July 1985 gives the widow of a 'martyr' (killed in the war with Iraq) the right to receive her dead husband's salary and to keep custody of their children even if she remarries.

With the relaxation of restrictions on men's rights to polygamy and unilateral (but not extra-judicial) divorce, attempts were made to compensate and protect women. In 1982, new marriage contracts were issued, carrying two stipulations that marriage notaries are required to read out to couples. The first stipulation entitles a woman to claim half the wealth that her husband acquires during marriage, provided that the divorce is neither initiated by her nor caused by any fault of her own. The second enables women to obtain a judicial divorce on more or less the same grounds available to them under the FPL; the only difference is that, in conformity with the sharia mandate on divorce, the husband can now refrain from signing any of these stipulations. In practice, however, the presence or absence of his signature under each clause has no effect on the woman's right to obtain a divorce, as the decision lies with the judge. Civil Code Article 1130 was amended in 1982 to empower the judge to grant or withhold a divorce requested by a

woman, if he considers that the continuation of marriage would entail 'hardship and harm' (*'osr va haraj*) (Mir-Hosseini 1993: 65-70, 1996, 1997).

In December 1991, following pressure by women and the rising divorce rate, a more radical step was taken with the introduction of the Amendment to Divorce Regulations (ADR), which reinstates the rejected elements of the FPL divorce provisions, but under a different legal logic. ADR, a single-article law with 7 notes, was approved by Parliament in March 1992, but disputed by the Guardian Council. It was eventually ratified in November 1992 by the intervention of the Expediency Council. ADR outlaws the registration of any divorce without a court certificate, requiring all divorcing couples, even those who have reached an agreement, to go through a process of arbitration. If the arbiters, one chosen by each side, fail to reconcile them, the court allows the man to effect and register a divorce only after he has paid his wife all her dues, unless he convinces the court of his inability to pay (Notes 1, 2, and 3). The wife's dues consist of her marriage gift (*mahr*, promised to her on marriage, but normally never given except in case of divorce) and maintenance during the waiting period (*'edda*, a period after divorce or widowhood during which a woman cannot remarry, lasting three menses or, in case of case of pregnancy, until delivery). Note 5 allows for the appointment of women as advisory judges to work in co-operation with the main judge. Note 6 – disputed by the Guardian Council – enables the court to force the husband to pay her 'exemplary wages' (*ojrat al-methl*), monetary compensation for the work she has done during marriage (i.e. raising children and housework, which she is not obliged to do by classical jurisprudence), provided that the divorce is not initiated by her and is not caused by any fault of her own.

In 1994 the Special Civil Courts disappeared, with the enactment of the Law of Formation of General Courts. Until 1999 family disputes were heard in these General Courts, which were presided over by either a senior cleric or a civil judge, with jurisdiction over all types of cases, from criminal to familial. Cases involving a dispute over the essential legality of marriage and divorce were referred to courts whose presiding judge was authorised by the Head of the Judiciary.

In 1996, a bill signed by 150 deputies was presented to Parliament demanding the formation of Family Courts on the basis of Article 21 of the Constitution. These Family Courts were duly formed, and began work in 1999. Following Khatami's 1997 election and the emergence of the reformist movement, family law reform became a major arena of confrontation between Khatami's reformist government and the conservative-controlled Parliament. Then in the 2000 parliamentary election, women's rights and the reform of family law were central to the

successful campaign that led to the reformist domination of the new Parliament. To fulfil their electoral promises, the reformists presented 41 bills that aimed to modify in various ways the inequalities that women face in law. But the Guardian Council rejected almost all of them, including the proposal to join the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Eventually, however, after mediation by the Expediency Council, 21 of the 41 bills were passed into law, albeit in some cases with their gender-egalitarian tone and intent weakened or nullified. The bills passed included amendments to the 1935 Civil Code raising the minimum age of marriage and expanding women's grounds for divorce and custody rights.

### *Family law and women's activism in Ahmadinejad's presidency*

The conservatives regained control of Parliament in 2004, and reform of family laws entered a lull. Meanwhile, women's activism became more radical and daring. In September 2006, following attacks on a peaceful women's gathering in a central Tehran square, a group of activists launched the 'One Million Signatures' campaign to change all laws discriminating against women. Patterned after Moroccan women's activism in the 1990s, this campaign is largely conducted by the activism of young women, and through the internet.<sup>20</sup>

In July 2007 Ahmadinejad's government presented a bill to Parliament that has not yet become law. Entitled 'Protection of the Family', it aims to do away with not only the pre-revolutionary reforms that have been retained in practice, but also the protective measures introduced in the 1980s and 1990s. The bill was originally prepared by the Judiciary to set up procedural rules for the Family Courts, but the government altered some of its articles. Four articles in particular alarmed women's groups and became the focus of protest; they make it easier for men to be polygamous and restrict women's ability to gain compensation. Article 22 relaxes the regulations for the registration of temporary marriages. Article 23 allows a man to contract a second marriage without the consent of his first wife, if the court decides that he can afford it. Article 25 requires the Ministry of Finance to demand tax payments from women at the time of marriage, if they stipulate a marriage gift (*mahr*) that exceeds a certain limit. Above all, Article 52, by repealing all previous laws and acts, in effect dismantles not only the reforms introduced under the FPL that have continued to ban the registration of polygamous marriages without a court order, but also the 1992 Amendment to Divorce Regulations that requires a man to pay compensation to his wife in the form of 'exemplary wages' before he can exercise his unilateral right to divorce.

Women's rights activists, including some conservative groups, joined forces in opposing the 'Protection of the Family' bill. Calling it 'Destruction of the Family', they succeeded in getting the support of progressive and reformist clerics. Grand Ayatollah Sane'i declared that taking another wife without the true consent of the first wife was prohibited (*haram*) according to Islamic law, since polygamy in modern contexts entails 'harm and hardship' for the majority of women. In September 2008, a group of women's rights activists went to Parliament to lobby against the bill, as it was about to be debated. They succeeded in persuading members of Parliament to withdraw the bill, and to send it to the parliamentary commission for legal affairs. It was announced that Article 23, inserted by Ahmadinejad's government, would be removed.

But then, in the heat of the unrest that followed the June 2009 election, Article 23 was reintroduced in modified form: the court may allow a man to register further marriages, if he can establish certain conditions, which are more or less those specified by the 1975 FPL.<sup>21</sup> In January 2010, Parliament ratified the bill, taking advantage of the closure of the reformist press and the arrest of a number of women's rights activists. The fate of the bill remains uncertain, however, as the Guardian Council has returned it to Parliament for revision. A member of the Judicial Commission in Parliament observed that it is unlikely to be debated again soon, as the council considers restrictions on men's right to polygamy to be in contradiction with sharia.<sup>22</sup> Meanwhile, women's rights activists have started a new campaign, 'NO to Anti-Family Bill'.<sup>23</sup>

## 8.7 Criminal law

The first steps at reforming and codifying criminal law in Iran came with the success of the constitutional revolution. The constitutionalists sought an end to the dual sharia and state jurisdictions and the creation of a systematic and secular criminal justice system, inspired by European criminal law. In order to preempt or at least to defuse clerical concerns as to whether the sharia courts would continue to implement Islamic criminal law, they began in 1911 with a Code of Criminal Procedure, approved tentatively by the first Parliament. Then in 1912, Parliament approved a complete Criminal Code, drafted by the French jurist Adolph Pierny, which contained no element of Islamic jurisprudential concepts. This, the first major legal reform in Iran, had a limited impact, since the sharia courts continued to operate until the rise of Reza Shah. The 1912 code was repealed by the 1926 Criminal Code, amended in 1940; the Code of Criminal Procedure was amended in

1932; both then remained in force until the 1979 revolution. Although Islamic concepts were retained intact in the area of family law in the form of substantive law, when it came to criminal law Reza Shah abandoned them, in both substance and procedure (Banani 1961: 69-70; Amin 1985: 113; Faghfour 1993: 284).

A major priority of the clerics who took power after the Revolution was to replace the 1926 Criminal Code by one based on Islamic legal concepts. In 1983, the High Judicial Council codified traditional juristic concepts of crime and punishment in the form of an experimental bill entitled 'Islamic Punishment: Fixed Punishments (*hodud*), Retaliation (*qesas*), Blood Money (*diyyeh*) and Discretionary Punishments (*ta'zirat*)'. The Guardian Council rejected the bill, however, finding it to be inconsistent with sharia; but after Ayatollah Khomeini's intervention, the bill was ratified for an interim period of five years (Mehrpoor 1995: 99-136; Rahami 2005: 593-594). The sections on Discretionary Punishments retained many elements of the Criminal Code but introduced a number of new offences, for instance those related to women's dress and to moral behaviour.

In 1991, a new criminal code was approved by Parliament on an experimental basis for five years (it was renewed twice, in 1996 and 2001). It consists of five Books. Book One is on Generalities (Art.s 1-62). Book Two (Art.s 63-199) concerns *hodud*, crimes considered as violations of God's limits, with mandatory and fixed punishments derived from textual sources (Koran or Sunnah). It contains 8 chapters, each dealing with one class of offence. Chapter One defines the crime of illicit sex (*zina*) and specifies the punishment as 100 lashes, but stoning to death for married offenders. Chapter Two prescribes death as the punishment for sodomy (*lawat*), while Chapter Three lays down 100 lashes as punishment for lesbianism (*mosahaqa*), or death if the offence is repeated after three convictions. Pimping (*qavadi*), defined as bringing two or more persons together for the purpose of *zina* or *lawat*, is punished, according to Chapter Four, by 75 lashes and (for a man) expulsion from his place of residence for three months to one year. A slanderous accusation (*qazf*) of illicit sex (Chapter Five) will be punished by 80 lashes. Chapter Six specifies 80 lashes for a Muslim caught drinking alcohol (*mosker*), and for non-Muslims if they drink in public. Chapter Eight gives amputation as the punishment for theft (*serqat*) but under conditions that are hard to establish.

But the most politically controversial offences, dealt with in Chapter Seven, are waging war against God (*moharebeh*) and corruption on earth (*efsad fi'l-arz*). These are defined together as resorting to arms to create fear and terror among the people, a notion derived from Koran 5: 33; the judge will decide between the following punishments: hanging, severance of the right hand and the left foot, or banishment. Since the



beginning the Islamic regime has used accusations of these offences extensively to justify eliminating adversaries (Zubaida 2003: 194). Disapproved political behaviour, such as membership in a forbidden organisation or activities aimed at overthrowing the regime, are also liable to these charges. And in the aftermath of the disputed June 2009 election, they have been once again widely levelled at members of the opposition who do not accept the election results.

Books Three and Four of the 1991 Code concern crimes against the person, such as bodily harm and homicide. In such cases, the victim or the victim's family can demand either retaliation or blood money. Book Three, on Retaliation, contains two chapters: the first (Art.s 204-268) deals with Retaliation for Life and the second (Art.s 269-293) with Retaliation for Bodily Harm. Book Four is on Blood Money (Art.s 269-497), defined as monetary compensation paid to the injured party or the relatives in case of murder or manslaughter or bodily harm. The sums of compensation that can be demanded are not equal for Muslim and non-Muslim victims.

Book Five, on Discretionary Punishments, reproduces the 1983 law on offences other than those named under 'Hodud, Retaliation and Blood Money'. These constitute the majority of all criminal offences, and include most offences named in the pre-revolutionary criminal code.

From the outset the international human rights community condemned the codification of Islamic criminal justice concepts, in particular stoning as punishment for adultery, and the unequal legal treatment of women and non-Muslims. After Khatami's 1997 election, the reformist press began to air an internal critique too. Though this critique met fierce conservative reaction, leading to the prosecution of its advocates, it has continued unabated and has, in fact, intensified. In 2002, in the course of 'constructive dialogue' with the European Union, Iran issued a kind of moratorium on stoning; the head of the judiciary issued a directive to judges to that effect, while keeping the laws on illicit sex unchanged. The moratorium continued until the hardliners regained control of government under Ahmadinejad.

In May 2006, the execution of a woman by stoning led a group of women and men activists to form the Network of Volunteer Lawyers, who launched a campaign to remove stoning as punishment for adultery from the Criminal Code (Terman 2007). They started to take up and publicise cases of those sentenced to stoning, mainly women from deprived backgrounds and victims of familial disputes. The campaign brought further international and domestic attention to the issue, and succeeded in reversing many convictions and freezing others, as well as engaging the authorities in a dialogue on the need to rethink pre-modern concepts of crime and punishment. In 2007 they became part of a larger international campaign launched by Women Living Under

Muslim Laws.<sup>24</sup> However, as Iran's confrontation with the international community over their 'nuclear ambitions' intensified, hardliners in the judiciary have managed to carry out further stonings, and numerous women remain under sentence.<sup>25</sup>

In 2007, the provisional 1991 Criminal Code had already been renewed twice, and the government published a draft replacement. The new Code became the subject of a great deal of criticism inside and outside Iran for its non-adherence to human rights law. While the bill no longer mentions stoning as a punishment for adultery, it has added apostasy to the Hadd crimes. In 2008, the bill was debated in Parliament, which modified several articles; it was ratified in September, but at the time of writing (February 2010) the Guardian Council had still not approved it.

## 8.8 Other areas of law<sup>26</sup>

### *Money loans*

Since 1979 it has been forbidden for private individuals as well as banks and insurance companies to charge or pay interest on loans. This prohibition is contained in the constitution. Article 49 of the Constitution furthermore states that interest or unjust enrichment (*riba*) is punishable and adds that the government is competent to confiscate property acquired through *riba* and to return this property to the rightful owners, or, in case this is impossible, to add this property to the public goods.

Stipulating interest in money loans is unlawful and punishable. Every agreement, including buying and loaning, whereby an additional favour is stipulated to the advantage of one of the parties, is considered to contain *riba*. The Criminal Code summarises this in Article 595 as a punishable act. The parties in a contract can in this case be punished by imprisonment for six months to three years, or by 74 lashes. Those convicted, moreover, must pay a fine of the same amount as the stipulated *riba*. If it cannot be determined to whom the *riba* is due, then the amount goes to the state. If the payer of *riba* can prove that this was done out of necessity, then punishment will not be imposed.

In the world of banking, charging premiums proportionate to the supplied services is legally permissible. It is also permissible for banks to give a voluntary reward to customers who put their money in the bank. With regard to money loans this is also permissible provided no interest is stipulated. The levels of compensation conform to the percentages of interest that apply for short-term credit in other countries.

There are no legal regulations for exceptions that exist with regard to *riba*; these are determined based on jurisprudence. If *riba* is stipulated in a loan, then the clause is null but the agreement remains intact. It is permissible for the debtor to give the creditor an addition, as long as this happens voluntarily. Banks make use of this possibility to accommodate their clients with their deposits. Everything takes place voluntarily, and thus nobody suffers loss. Muslims are furthermore allowed to stipulate *riba* in contracts with non-Muslims (Ansari-Pour 1995: 165-191).

### *Tax law*

The most important taxes in Iran are profit taxes paid by companies and income taxes for private persons, which are subject to the regime of corporate income tax and the Direct Taxes Law, respectively. These laws have no relation to sharia.<sup>27</sup> *Zakat*, the religious tax on all Muslims, and the special Shia tax (*khoms*), continue to be paid voluntarily on a private and individual basis; while the organisation and finances of the seminaries (which used to be paid for by the *khoms* tax) have come increasingly under control of the state since Khamene'i became Leader in 1989.

## 8.9 International treaty obligations and human rights

Article 4 of the 1979 Constitution sets forth that sharia not only dominates positive law in Iran, but also prevails over every form of customary law and international law, including in the domain of human rights (see 8.5). Consequently, the unequal treatment of men and women and of Muslims and non-Muslims, have been the focus of international criticism, especially regarding the treatment of Baha'is, stoning, and juvenile executions. In the 1980s, during Khomeini's leadership and the war with Iraq (1980-1988), Western governments directly or indirectly supported Saddam Hossein, and Iran took a rejectionist stance towards international human rights treaties. Iranian representatives adopted a confident tone, claiming that since the sharia is the essence of justice, commitment to the sharia and its rules must take precedence over all others. For instance, in July 1982, the leader of the Iranian delegation to the United Nations Human Rights Committee in Geneva said that 'Iran believes in the supremacy of Islamic laws, which are universal.' He went on to clarify that 'Iran would choose the divine laws' in cases where human rights treaties are irreconcilable with sharia on some point (Amin 1985: 106). However, Iran remained a party to the ICCPR, which they joined in 1967; but like the previous regime, the Islamic

Republic did not sign the optional protocols 1 and 2 concerning the individual right of Iranian citizens to complain and the prohibition on the death penalty.

After the end of the war with Iraq and during Rafsanjani's presidency (1989-1997), Iran began to have a more positive attitude towards international human rights law, and pursued a policy of engagement. It joined the Convention on the Rights of the Child (CRC), which went into effect in August 1994, but, like many other Muslim countries, with a general reservation: 'The government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic laws.' In 1997, with the election of Khatami and the emergence of the reform movement, a lively debate emerged on the notion of Islamic human rights, and the government's policy of supporting civil society by allowing the creation of NGOs helped improve the human rights situation to some extent (Mayer 2000; Mokhtari 2004). Nevertheless, there are some important human rights treaties that have still not been ratified, notably the Convention Against Torture (CAT) and the Convention Against Elimination of All Forms of Discrimination against Women (CEDAW). Efforts by Khatami's government and the reformist Parliament (2000-2004) to ratify these conventions were frustrated by the Guardian Council. In 2002, the government presented a bill to Parliament for Iran to join CEDAW; Parliament ratified it, but the Guardian Council rejected it, so it went to the Expediency Council, which still has to issue a decision.

After Ahmadinejad's election in 2005, when the theocratic forces took control over all three branches of government, they embarked on systematic efforts to curb civil society and muzzle the press. They closed down many NGOs and reformist publications, yet debates over human rights have intensified, and many high-ranking clerics and reformists started to publish their views on Islam and human rights. The most significant is a 2007 book by Grand Ayatollah Montazeri, in which, in response to questions posed by senior religious scholars, he makes a juristic case for the compatibility of sharia and international human rights law, arguing that dignity is the entitlement of every human being, because it is part of their humanity, and so the Islamic state must honour and protect it.<sup>28</sup> This is the first time that a Shia supreme religious authority (*marja'*) has argued for human rights from a religious perspective. More significantly, perhaps, Montazeri, who had devoted his scholarship in the 1980s to justifying the rule of the jurist (*velayat-e faqih*), by 2000 had become an advocate of human rights.

The sharia as interpreted by the Guardian Council, and as reflected in the laws of the Islamic Republic of Iran, continues to be in conflict with international human rights law. As evident from the sections on

family and criminal laws, they contain a number of provisions that are in contradiction with customary international human rights law. In addition, many of the numerous human rights provisions in the constitution of the Islamic Republic have never been translated into law. For instance, 'due process' is regulated perfectly on paper. Articles 32 and 34-39 of the constitution specify conditions by which the legal system in Iran must abide: the regulation of prosecution, appearing before the judge, the right to legal assistance, the right to cross-examination of witnesses, and the right of appeal. The Islamic Republic has systematically violated all these conditions from the outset, and violations have multiplied since the disputed 2009 election attracted further international attention.

On 15 February 2010, the Universal Periodic Review, to which all U.N. Members are subjected, severely criticised Iran's human rights record during the past four years.<sup>29</sup> The Iranian delegation, led by Mohammed Larijani, Secretary-General of Iran's High Council for Human Rights, rejected the criticisms and spoke of the 'biting language' of 'Western delegations'; he cited articles of the Iranian Constitution that protect human rights and stated, '[n]o Baha'i is prosecuted because he is a Baha'i' and that prosecuted and jailed demonstrators were guilty of 'terrorist activities'.<sup>30</sup>

## 8.10 Conclusion

### Sharia and national laws in Iran: An unfinished project

Twentieth-century developments in Iran, as elsewhere in the Muslim world, intensified two deep-rooted oppositions in politics and society: between despotism and democracy and between sharia and secular national law. Secular democrats gained the upper hand initially, in the 1905-1911 constitutional revolution, yet the promised democracy and rule of law failed to take root, for a combination of internal and external reasons; the resultant impasse was resolved by the despotic but modernising and secularising Pahlavi monarchy. A brief resurgence of democracy in the late 1940s was again brought to an end by a foreign intervention in 1953; over the next 25 years, both democratic and theocratic opposition to Pahlavi rule grew until the eruption of the 1978-1979 revolution.<sup>31</sup>

The victory of the revolution, and foundation of the Islamic Republic that followed, marked the acme of political Islam, with its slogan of 'return to sharia'. For some it was the beginning of a new dawn, when God's law – the sharia – would bring Muslims the justice and prosperity that secular nation-states failed to deliver. For others, including many of those who had originally participated in the revolution, it was the

undoing of over half a century of state modernisation, and the return of religious fanaticism. Whatever its nature, and however it was perceived, the Iranian Revolution changed the landscape of the Muslim world. It inspired Muslim masses and reinvigorated intellectual debates over the nature and possibilities of the sharia.

Since its birth, the new Islamic Republic has confronted the challenges of all twentieth-century states, yet evolved in ways that inside and outside observers did not predict. Ruled by clerics, it combined not just religion and the state, but also theocracy and democracy. The founders made two broad assumptions: first, that what makes a state 'Islamic' is adherence to and implementation of the sharia; secondly that, given free choice, people will choose 'Islam' and will, thus, vote for clerics as the interpreters and custodians of the sharia. When they framed the constitution, the founders included both theocratic and democratic principles and institutions. The constitution clearly recognises the people's right to choose who will govern them. But some institutions, including Parliament and the presidency, though elected by direct popular vote, are nevertheless subordinated to clerical oversight and veto. This contradiction remained unresolved but unproblematic while Ayatollah Khomeini was alive and able to mediate it.

In practice, as the revolutionary fervour subsided, neither of the initial assumptions proved as valid or as clear-cut as the early revolutionaries and the framers of the constitution had hoped, and soon cracks in the system began to appear. Khomeini's death in 1989 forced a redefinition of the relationship between religious authority and the state. His successor as ruling jurist and Leader, Ali Khamene'i, lacked his religious authority and charisma. There were increasing signs of popular dissatisfaction with state policies. Either the notion of 'Islamic', as defined by the ruling clerics, had to adapt to the political exigencies of a modern democracy, or the people's choice must be restricted or bypassed, which would mean betraying the revolution's democratic ideals and losing the popular support from which the Islamic Republic drew its legitimacy. The Islamic Republic entered a new phase in which the tension between theocracy and democracy intensified. Khamene'i increased the power of the non-elected bodies, which now came to be identified with the theocratic side of the state, at the expense of the elected bodies, representing the democratic side, the republic. Using the institutions at his disposal, Khamene'i expanded his power base and narrowed the scope of democracy, especially by introducing a more stringent vetting of candidates for elected office. This tactic misfired in the 1997 presidential elections, when people rejected the candidate endorsed and supported by the regime, and voted for Mohammad Khatami, the candidate who promised to promote civil society and rule of law.

Khatami's election inaugurated a new round of debates and struggles and a realignment of forces and factions. His government's relatively liberal policies allowed the voices of dissident intellectuals, both lay and clerical, to be aired in the press and reach the public. Prominent among these were the 'New Religious Thinkers', who displayed a refreshingly pragmatic vigour and a willingness to engage with non-religious perspectives. They forced a rethinking and reworking of the founding concepts of the Islamic Republic, and of the stormy and unequal marriage it had made between theocracy and democracy.

Developing a critique of the despotic Islamic state from within an Islamic framework, the 'New Religious Thinkers' sought a rights-based political order that could open Muslim polities to dissent, tolerance, pluralism, and women's rights and civil liberties. They argued – like the great Muslim jurist and philosopher al-Ghazali in the eleventh century – that Islamic jurisprudence (*feqh*) is temporal and changeable; and – like all Muslim reformers since the late nineteenth century – they sought to establish conceptions of Islam and modernity as compatible. But they made and shaped these ideas in a different political context. In the Islamic Republic, as elsewhere when Islamists gained power in the late twentieth century, 'return to sharia' in practice entailed legislating and enforcing rules devised by pre-modern Muslim jurists, i.e. classical *feqh*. The results have been so out of touch with social realities, with the current sense of justice and with people's aspirations, that ordinary people and religious intellectuals alike came to rethink and redefine their notions of sacred and mundane in the sharia. It is not that the sharia has lost its sanctity; rather, the state's ideological use of the sharia and its penetration into the private lives of individuals have brought home the urgent need for legal reform and for the withdrawal of the state from the religious domain.

The 2005 presidential election marked another turning point. Having lost the popular argument to the reformists, but buoyed by the Khatami government's failures in both domestic policy and foreign relations, Khamene'i relied on the Revolutionary Guards to ensure the election of Ahmadinejad and the consolidation of the Leader's control of all the institutions of state. But the demand, particularly by women and the youth, for legal and social reform and restoration of the freedoms they had tasted could not be suppressed, and it erupted in the 2009 presidential election campaign. The Green Movement that emerged after the much-disputed re-election of Ahmadinejad, and the violent attempts by the 'Security Forces' to suppress it, showed clearly the extreme polarisation that has developed, no longer between Islam and secularism, but between despotism and democracy. Before his death in December 2009, Grand Ayatollah Montazeri, one of the founders of the Islamic

Republic, and now the Green Movement's spiritual leader, denounced the state as a religious dictatorship and declared that it was now neither Islamic nor a republic (Torfeh 2009).

Khatami and the reformists failed to bring tangible changes in the structure of power; they lost many battles, and they faced many political setbacks, but they had one major and lasting success: they demystified the power games, which until then had been conducted in a religious language, and the instrumental use of sharia to justify autocratic rule. Now the notion of sharia as an ideal enabled the reformists in Iran to argue for democracy and the rule of law and to challenge patriarchal and despotic laws enacted in the name of Islam. They did so by appealing to Islam's higher values and principles, and by invoking concepts from within Islamic legal theory, notably the distinction between sharia as 'divine law' and jurisprudence (*feqh*) as the human understanding of the requirements of the divine law.

The reformists' successor, the broad-based Green Movement, is still young; at the time of writing (February 2010), it is only eight months old, and its fortunes depend on both internal and global political developments. Some commentators are predicting the imminent collapse of the theocratic regime, others insist that the struggle will be long and painful. The leaders of the Movement, Mousavi, Karroubi and Khatami, as well as different groups of supporters, have issued numerous manifestos and lists of demands. All of them insist on an end to theocratic despotism, free elections, the accountability of those in power, and the abolition of legal and extra-legal discrimination between men and women and between Muslims and non-Muslims; it is too early to expect a detailed programme for legal reform. It remains to be seen whether this latest confrontation, the most violent in the history of the Islamic Republic, can be resolved by a new accommodation between the opposing and contradictory elements in the constitution.

## Notes

- 1 Parts of this chapter (as acknowledged in footnotes) are drawn from an early draft by Albert Dekker and Maarten Barends, to whom I am most grateful. My warmest thanks go to Richard Tapper for his support, comments, and suggestions. I am also indebted to Jan Michiel Otto and Julie Chadbourne for valuable editorial help. Remaining errors are mine.
- 2 Ziba Mir-Hosseini is an independent consultant, researcher, and writer on Middle Eastern issues, based at the London Middle East Institute and the Centre for Middle Eastern and Islamic Law, both at SOAS, University of London; since 2002 she has been Hauser Global Law Visiting Professor at New York University.
- 3 *Taqiyeh* (dissimulation of belief), often identified as a Shia distinguishing feature, is not relevant to the legal system.



- 4 In this chapter, terms of Arabic or Persian origin that are commonly found in English dictionaries, such as *ulama*, *sharia*, *hijab*, *Koran*, are given as English words.
- 5 *Taqlid*: emulation, accepting the views of previous scholars as authoritative.
- 6 This is one aspect in which Shiism has been linked to Sufism, with its core spiritual relationship of teacher-disciple (*pir-morid*).
- 7 See Lambton 1964; Algar 1969; Akhavi 1980; Keddie 1983; Momen 1985; Arjomand 1988; Bayat 1991.
- 8 In his book *Tanbih al-ummah wa tanzih al-millah* (Admonition of the public and refinement of the people), published in 1909.
- 9 A *faqih* is an expert in *feqh*, jurisprudence.
- 10 Art. 110. *Rahbar*, or *rahbar-e enqelab* (Leader of the Revolution), is the term commonly used, both in the constitution and in everyday political discourse in Iran, for the leading jurist (*faqih*).
- 11 Articles 91-99 set out the role, composition, and scope of activity of this council.
- 12 For an analytical and critical account of these processes, see Mohammadi (2008).
- 13 See [http://www.hrw.org/reports/1990/WR90/MIDEAST.BOU-02.htm#P106\\_25125](http://www.hrw.org/reports/1990/WR90/MIDEAST.BOU-02.htm#P106_25125), accessed 14 August 2008. For an analysis see Mayer (2000).
- 14 See summary of records of meetings issued under CCPR A/37/40/1982/no.324, [http://www.bayefsky.com/./html/iran\\_t4\\_ccpr.php](http://www.bayefsky.com/./html/iran_t4_ccpr.php).
- 15 The society was formed in 1988, when a group of clerics clustered around Karroubi and Khatami separated from the Association of Militant Clergy (*jame'eh-ye rowhaniyat-e mobarez*), with Khomeini's blessing. This separation was the result of the debates and disagreements among the clerical ruling elite over approaches to politics, pragmatism, ideological purity, and Iran's relation with the world.
- 16 This court was formed at Ayatollah Khomeini's order in the aftermath of the Revolution in order to try the clerics associated with the previous regime. It was revived in 1987 to try a close associate of Ayatollah Montazeri. Its formation then was disputed as unconstitutional; and in 1988, in a letter to Parliament, Khomeini suggested that the court should be aligned with the mandates of the constitution, but only after the Iraq war ended. After Khomeini's death (and the end of the war) the court continued to function, coming under the control of the conservatives (Baqi 2001; Mir-Hosseini 2002).
- 17 For the text in English, see <http://www.iranchamber.com/government/laws/constitution.php> and for the text before the 1989 amendments, see [http://www.servat.unibe.ch/icl/i000000\\_.html](http://www.servat.unibe.ch/icl/i000000_.html).
- 18 See [http://zeinab.ir/index.php?option=com\\_content&view=frontpage](http://zeinab.ir/index.php?option=com_content&view=frontpage); see also [http://www.iran-zanan.com/point\\_of\\_view/cat\\_6/000659.php](http://www.iran-zanan.com/point_of_view/cat_6/000659.php).
- 19 Surat al-Nisa, verse 35, reads: 'If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; If they wish for peace, Allah will cause their reconciliation' (Yusuf Ali translation). See Mir-Hosseini 1993, 2007 for discussion.
- 20 For the campaign, see <http://www.we-change.org/spip.php?article19> and also <http://www.feministschool.com/english/spip.php?rubrique3>.
- 21 See Change for Equality (2010), 'Women fight polygamy proposal', <http://www.forequality.info/english/spip.php?article645>, dated 8 February; Feminist School (2009), 'Last change on the Family Protection Bill', <http://www.feministschool.com/english/spip.php?article344>, dated 26 November.
- 22 See <http://www.feministschool.com/spip.php?article4148>.
- 23 S. Moqadam (2010), 'No to Anti-Family Bill' (in Persian), <http://www.roozonline.com/persian/news/newsitem/article/2010/february/17//3d95903e6a.html>, dated 26 February [Bahman 1388].
- 24 For the launch of the campaign, see <http://www.wluml.org/node/5621>.

- 25 See Amnesty International (2008), 'Iran: End executions by stoning' <http://www.amnesty.org/library/info/MDEI3/001/2008/en>.
- 26 This section was drafted by Albert Dekker.
- 27 See <http://www.iranworld.com/Laws/ltr-ro96.htm>.
- 28 The book was published by Montzeri's office in Qom and also made available on his website: <http://www.amontazeri.com/farsi/frame4.asp>.
- 29 See <http://www.hrw.org/en/news/2010/02/16/un-council-review-highlights-irans-poor-record>; see Amnesty International's comments, <http://www.amnesty.org/en/library/info/MDEI3/021/2010/en>.
- 30 See 'UN review affirms need for more pressure to improve human rights': <http://www.iranhumanrights.org/2010/02/un-review/> and 'Ebadi appeals to international community to counter Iran's tragedy': [http://www.rferl.org/content/Ebadi\\_Appeals\\_For\\_Help\\_To\\_Counter\\_Iran\\_Crackdown/1956527.html](http://www.rferl.org/content/Ebadi_Appeals_For_Help_To_Counter_Iran_Crackdown/1956527.html).
- 31 For further analysis, see e.g. Farhi 2003; Mir-Hosseini & Tapper 2006.

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