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Islam, Law, and Political Control in Contemporary Iran

MEHRAN TAMADONFAR

Muslims agree that the establishment of an Islamic state requires the implementation of Islamic principles and laws. In Iran, Khomeini and his supporters developed doctrinal justifications for uncontested clerical rule to ensure political order and social conformity. By emphasizing "communal interest" in legislation and establishing an extensive institutional mechanism of legal control, the clerics gradually marginalized the Shari'ah and sacrificed the Islamic notion of universality of law for legal territoriality. This legal trend is separating the clerics from their traditional role and is undermining their legitimacy. Ironically, the current attempts at legal and political reform by the reformers, as harshly opposed by the hard-line clerics, would benefit the clerical class by pursuing a more liberal legal and political agenda consistent with the Shari'ah.

Islamists have always favored the establishment of an "Islamic Order." In their pursuit of an Islamic Order, they have sought to establish an Islamic polity committed to the enforcement of Islamic values and laws. Historically, however, Muslims have lived under all forms of governments that have, at best, paid only scant attention to the social, economic, and political rulings of Islam. In modern times, both monarchic and republican forms of government that have governed Muslim societies have found it increasingly impossible to rule purely and solely based on the Islamic laws and norms that governed early Muslim communities. Both the inadequacy of Islamic laws for modern governments and their inconsistencies with modern-day issues have left leaders of Muslim countries with little choice but to incorporate modern, largely western, legal theories and principles into the traditional Islamic ones.

This infusion of western values has become an easy scapegoat for the ills of today's Muslim societies. Many suggest that the current problems of the Islamic world should be primarily, if not solely, attributed to their regimes' intentional and self-serving deviation from Islam. Thus, according to Islamists, the only solution to the current problems lies in their return to an Islamic Order that is committed to the very same institutions and principles in place during the rule of prophet Muhammad. However, Islamists agree neither on the nature of these values and principles nor the manner by which they should be implemented. To some, the current regimes must recommit themselves to Islamic laws and values through extensive reform strategies. To the more radical, the current political institutions are inherently incompatible with Islam and the only viable solution is a total transformation of these societies through revolutionary means. At the heart of these perspectives is an urgent need to commit to Islamic teachings as the only salvation.

The Islamists dominated the Iranian revolution, which by most accounts was primarily a revolution against the repressive Pahlavi regime, early after the Shah's ouster. Under Khomeini's leadership and uncompromising commitment to the establishment of an Islamic state, the emerging Islamic Republic was established on the basis of the doctrine of Jurisprudent Leadership (*Vilayat-e Faqih*). This doctrine (for a detailed discussion of this doctrine, see Tamadonfar 1989) suggests that a state is Islamic only if it is founded upon Islamic principles and laws, and those trained in Islamic laws (*Shari'ah*) are the only ones qualified to govern. While the idea of the need to rely on Islamic law for managing society is fairly common in mainstream Islamic thought, the doctrine of *Vilayat-e Faqih* seems extreme even among the Shi'i thinkers. The role of the clergy

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is the subject of many debates among all Muslims. The Sunnis, as the majority, have generally limited the clerics' role to the religious sphere. The Shi'is have differed about the scope of the role of the clergy. Even some of the clerics attribute a limited role to their class on both theological and practical grounds. Intent on facilitating rule by the clergy, Khomeini and his supporters exhibited no tolerance and, from the outset, employed legal and political means to suppress any opposition to their rule. Given the inadequate and often contradictory nature of Islamic laws, the regime had to rely increasingly on reinterpretation of these laws and decrees (*Fatwa*) to consolidate and maintain its power. Gradually, and often in violation of even some of the most basic Islamic principles and institutions, the regime devised an institutional and legal framework for political control.

This paper examines the legal and institutional mechanisms of control employed by the regime during and after Khomeini's rule. It is increasingly apparent that the regime is committed to the principle of the clergy's uncontested right to rule as it equates clerical rule with Islamic rule. Khomeini himself explicitly equated Islam with rule by the clerics. Often, Khomeini and his successors violated Islamic principles, institutions, and processes to ensure rule by the Shi'i clergy.

THE CONSTITUTIONAL FRAMEWORK OF CONTROL

Khomeini and his supporters were well aware of the divisions within the revolutionary forces from the beginning. Much to the surprise of the intellectual nationalists, the left, and the so-called Islamic Marxists, the Islamists were keenly aware of the need for a legal and institutional framework if they were to dominate the other revolutionary forces and consolidate their power. With minimal meaningful debate and under politically charged and tense circumstances, on November 15, 1979, they adopted the Constitution of the Islamic Republic, which contained 175 articles. In 1989, largely in response to political schisms within the ruling elite and in an attempt to further centralize power, the regime made major revisions to this document.

The Constitution is filled with contradictions because it attempts to reflect the extraordinary range of revolutionary forces. On the one hand, this document accounts for the secular principles of rights, equality, and justice and, on the other hand, it acknowledges the supremacy of restrictive Islamic views on rights, justice, and equality. It even goes further than mainstream Islamic limitations by recognizing the undisputed right of the clergy to govern and by giving primacy to the interests of the regime.

According to the Constitution, all Iranians are entitled to a wide range of rights, including freedom of speech and assembly; right to private property and choice of occupation; freedom of religion; and rights to education, social security, and a speedy and fair trial. In defining these rights, the Constitution struggles with the dichotomy in Islam between the notions of popular sovereignty and the sovereignty of God. Muslims have always contended that ultimate sovereignty belongs to God. Article 56 of the Constitution explicitly recognizes the sovereignty of God by stipulating that: "Absolute sovereignty over the world and man belongs to God, and it is He who has placed man in charge of his social destiny. No one can deprive man of this God-given right, nor subordinate it to the interests of a given individual or group" (quoted in *Constitution of the Islamic Republic of Iran*, trans. by Algar 1980:49). Thus, immediate sovereignty belongs to man who governs his life on behalf of God. Contrary to this very article of the Constitution, the regime asserts that the sovereignty of God on earth is exercised by his deputies, the Shi'i clergy. This is the constitutional basis of Khomeini's doctrine of *Vilayat-e Faqih*. To justify rule by the clergy, as the learned in Islamic jurisprudence, the Islamists have to insist on the adoption of the *Shari'ah* as the judicial basis for the state. Of course, even the secular Muslim forces had to acknowledge a role for the *Shari'ah*. However, they differed on the scope of this role. To Khomeini and his clerical supporters, for the state to be truly Islamic all its laws should be based on Islam, and those well versed in those laws should govern. This interpretation, which dominates the Constitution, not only gives the Shi'i clergy a monopoly on power, it greatly restricts individual rights by defining these rights

from a Shi'i perspective. Essentially, both in theory and practice, individual rights are restricted by the clergy's understanding of permissible rights, communal unity, and the elite's interests. No rights, policies, or laws should contradict the *Shari'ah*. Article 4 of the Constitution 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 laws and regulation, and the *fuqaha* on the Council of Guardians have the duty of supervising its implementation." Given the inadequacy of the *Shari'ah* and its lack of specificity on the majority of issues, the regime established an extensive institutional mechanism to find, implement, and ensure compliance with Islam, as defined by the clerics.

Individual rights are spelled out in Articles 19–42 of the Constitution. Freedom of expression and assembly are recognized as essential human rights. According to Article 23, people may not be interrogated concerning their opinions, and no one may be abused or taken to task simply for holding a certain opinion. The freedom of press and publication is guaranteed, as long as those activities are not detrimental to the fundamental principles of Islam and the rights of the public (Article 24). Similar restrictions are set for the freedom of assembly. The formation of political and professional parties, whether Islamic or pertaining to one of the recognized religious minorities, is freely permitted on the condition that they do not violate the principles of independence, freedom, national unity, the criteria of Islam, or the basis of the Islamic Republic (Articles 26 and 27). The regime has made every effort, including the adoption of various pieces of legislation, to limit rights under these articles, largely on the grounds of Islam and the interest of the regime (Schirazi 1997:125).

The right to private property and choice of employment are also guaranteed (Articles 28 and 31). Islam attempts to balance the right to property ownership (Article 47) with the principle of social justice. Thus, the Constitution not only recognizes the right to ownership, it explicitly charges the state with the responsibility of facilitating ownership. Article 31 states that every individual and family has the right to a dwelling commensurate with their needs. The government must make land available for the implementation of this principle, according priority to those whose needs are greatest, in particular the rural population and the workers. People are, according to Article 28, entitled to choose their own employment as long as it is not opposed to Islam, the public interest, or the rights of others. Article 49 enumerates some of these restrictions. It states: "The government has the responsibility of confiscating all wealth resulting from usury, usurpation, bribery, embezzlement, theft, gambling, misuse of endowments, misuse of government contracts and transactions, the sale of uncultivated land inherently subject to public ownership, the operation of houses of ill-repute, and other illicit sources . . ." The government is obligated to create work opportunities for all without discrimination. In this pursuit, the government must provide all citizens with free education up to the end of middle school, and must expand higher education as needed for the country's self-sufficiency (Article 30). In the interest of social order, justice, and equality, the Constitution also guarantees the right to benefit from social security with respect to retirement, unemployment, old age disability, and destitution benefits, as well as benefits related to being stranded and emergencies, health services, medicine, and medical care, provided through insurance or other means (Article 29). The Constitution clearly discriminates on religious grounds, although it guarantees limited rights for some religious minorities. Article 12 asserts that the official religion of Iran is Twelver Shi'ism (*Ithna' ashari*). However, it accords other Islamic sects and denominations respect and freedom of action, specifically as such relates to religious education and legal matters of a personal nature, including marriage, divorce, inheritance, and bequests. Similar rights are accorded other recognized religious minorities, including Zoroastrian, Jewish, and Christian Iranians (Article 14). Other religious minorities are generally denied these rights and often persecuted for their beliefs.

The Islamic Republic recognizes the principle of equality of the Iranian Shi'is regardless of their race, color, and language (Article 19). The constitutional assertions of gender equality

continue to be of very little consequence in practice. The constitutional stipulation that the government must assure women's rights in conformity with Islamic principles (Article 21) formalizes the historical scope of gender discrimination in Iran. Women's rights in marriage, divorce, and custody are determined by the clergy's interpretation of the Shi'i traditions, which largely define women's rights in terms of their role as mothers and wives rather than as citizens with full and equal rights. This clearly contradicts Article 3, which calls for the abolition of all forms of impermissible discrimination and the provision of just opportunities for all in both material and nonmaterial matters (section i). Furthermore, this interpretation dilutes the regime's goal of "securing the comprehensive rights of all citizens, both women and men, and the establishment of judicial security for all, as well as the equality of all before the law" (section n).

Preservation of the "permissible" communal and individual rights and equal treatment of Muslims are the core of the Islamic conception of justice. In devising a judicial system, the Iranian regime paid a tremendous amount of lip service to this conception. Justice requires that people be presumed innocent until found guilty by a competent court of law (Article 37). The rights of the accused and due process should be honored. Justice requires that all affronts to the dignity and honor of the persons arrested, detained, imprisoned, or banished in accordance with the law, whatever form they may take, be forbidden and punishable (Article 39). All citizens are entitled to seek justice by having access to competent courts (Article 34) and may expect speedy trial and due process in judicial matters (Article 32). Any form of torture or forced confession for gaining information in a judicial proceeding is impermissible (Article 38).

ISLAMIZATION OF THE LAW

In Islam and Islamic education, law and jurisprudence have taken precedence over theology. As William Montgomery Watt has astutely observed, Islam is more concerned with orthopraxy than it is with orthodoxy (Montgomery Watt 1996:87). Therefore, it is no surprise that Islamists demand a thorough and comprehensive Islamization of the laws in Muslim societies.

The Islamization of the law means a return to the *Shari'ah* and *Fiqh*, and abandoning laws borrowed from western sources. In their modernization efforts, many Muslim countries have incorporated western legal, particularly penal, codes into their laws. Given the limitations of the *Shari'ah* and the need for modern codes governing the political and economic systems of these societies, the modern elites have embraced the western codes and have preserved the pertinent Islamic ones, especially personal status codes. Advocates of Islamization contend that current laws are too secularized (Mayer 1987:150), and push for a return to a *Shari'ah*-based legal code. While in theory this attempt at the codification of Islamic law is expected to result in a more religious legal system, in practice the outcome is not as certain. Referring to the divine origin of Islamic law and man's inability to legislate, some Muslims argue that the codification of the *Shari'ah* does not necessarily result in laws that are based on Islamic principles. Under the current political circumstances, these efforts have turned the *Shari'ah* into an ideological framework used by Muslim political activists in their quest for political control (Mayer 1987:156). Many new Islamic laws adopted in different Muslim countries embody varied sectarian and scholastic positions. Therefore, to the Muslims who do not subscribe to such positions, these efforts are at best not Islamic and, at worst, anti-Islamic. Furthermore, these efforts introduce the principle of "territoriality of law" into Islam, which explicitly contradicts the universalist and supranational character of Islam (Mayer 1987:155).

Undoubtedly, those governments undertaking the Islamization of the law are selective in their choice of *Shari'ah* principles and define them in such a manner to serve their own interests. In the case of Iran, this effort is so pervasive that the government has taken the position that only the laws that it enacts in codified or statutory forms constitute binding statements of the principles of Islamic law in its territory. Khomeini even went as far as contending that laws that violate the *Shari'ah* are binding as long as they serve the interest of the governing elite. It is

increasingly apparent that in the era of Islamization, "the *Shari'ah* requirements are becoming redefined according to what is politically expedient, intelligible and appealing to a mass audience. In the course of this ideologization and the politicization of the *Shari'ah*, the connection to the Islamic Sources are growing more tenuous" (Mayer 1987:155). Furthermore, the ideologization of the *Shari'ah* increasingly intensifies controversies over its nature, scope, and role in public life. Even without the politicization of the Islamization process, the task of returning to the Islamic law is difficult and often impossible, largely due to a lack of consensus about what constitutes the law and where the law originates from. Generally, it is agreed that Islamic law consists of two basic elements: the *Shari'ah* and the *Fiqh*. The *Shari'ah* is the divinely ordained universal law. In contrast, the *Fiqh* has evolved through the contributions of Muslim jurists in their efforts to interpret and apply the *Shari'ah*. Thus, the *Fiqh* lacks the universal validity of the *Shari'ah* and remains temporal (Moten 1996:48–49). The *Shari'ah* has primary and secondary sources. Although there are serious disputes over their authenticity and scope, Muslims agree that the Quran and Muhammad's traditions (*Sunnah*) constitute the primary sources of the *Shari'ah*. Depending on sectarian and denominational traditions, others follow such sources as *Hadith* (Muhammad's sayings), *Ijma* (communal consensus), *Qiyas* (analogy), *Ijtihad* (independent judgement), *Ravayat* (Imams' sayings), *Istihsan* (juristic preference), *Istislah* (public good), *Istishab* (continuance or performance), and *Urf* (customs or usage). While the Shi'i belief in the doctrine of *Imamah* legitimizes reliance on *Ravayah*, the Sunnis reject such a source. Furthermore, many Shi'is limit the range of *Ijtihad*, but Sunnis continue to rely on juristic interpretations due to necessity. Even within the same sectarian tradition, the scope, significance, and meaning of these sources may vary. By *Ijma*, some Shi'i Muslims mean the consensus of the community at large, others the consensus of the clergy. Clearly, the Sunnis and Shi'is have often disagreed on the authoritative interpretation of the Quran (An-Na'im 1990:30), even on such matters as the nature of political authority. Unlike the Sunnis, the Shi'is authenticate the *Sunnah* mainly on the basis of what is reported or acknowledged by one of their Imams. Believing in the right and ability of man to self-govern within the confines of Islam, the Sunnis stress *Ijma* and *Ijtihad*. For the Shi'is to concede the infallibility of the community (in *Ijma*) or the jurists (in *Ijtihad*) undermines the position of the Imam and his power to make law by divine ordinance (An-Na'im 1990:30). This element of the doctrine of *Imamah* makes the concept of law for the majority of the Shi'is more authoritarian and more detached from social reality than the Sunni concept. Given these fundamental disagreements over the hierarchy and nature of the sources of law, efforts at Islamization of the law face serious challenges. Many laws that are passed by legislation in Islamization programs are not accepted by the people as necessarily sanctioned by the *Shari'ah*, and Islamic regimes have not produced a coherent theory explaining why these laws should be treated as authoritative statements of Islamic law (Mayer 1990:187).

Although the Quran is the primary source of law, Quranic legal stipulations are limited both in quality and quantity. The Quran largely deals with the ethical and moral obligations of Muslims. Consequently, the law is permeated by religious and ethical considerations. Each institution, transaction, or obligation is measured by the standards of religious and moral rules, such as the prohibition of interest (*Riba*) and the concern for social justice and equality (Schacht 1966:200–01). Of the 600 verses in the Quran, the majority are concerned with religious duties and ritual practices of prayer, fasting, and pilgrimage. No more than 80 verses deal with legal topics in the strict sense of the term (Amin 1985:9). Obviously, the Quran does not attempt to cover, even in a rudimentary form, all the basic elements of a given legal relationship (Fairchild 1993:40). While many topics are covered, they are not treated comprehensively. One may suggest that this piecemeal nature of Islamic legislation is the consequence of the gradual compilation of the Quran over the years (James 1964:12). In the absence of Quranic injunctions, Muslim societies have relied on their own customary practices in managing their communities.

Much of the *Shari'ah* laws derived from primary sources and were developed by jurists who focused on the area of private law and had very little to say about public law or affairs of the

state. These private laws traditionally formulated rules that could resolve questions of religious rituals and worship, personal status, contracts, sales, property, torts, and the like. In the interest of social order and justice, the jurists also developed some criminal jurisprudence in connection with a small number of criminal injunctions in the Quran and *Hadith*, but by no stretch of the imagination could these rules adequately address the needs of developing Muslim societies in such areas as government, administration, and finance. Therefore, governments were free to adopt and implement their own rules and procedures of public law. Incorporating western concepts of law into the *Shari'ah* often resulted in tensions between these governments and the clerics and their supporters. Normally, the personal status laws were adequate and generally remained intact, because having been treated comprehensively in the Quran and other sources they had gained a divine revelation status (Mayer 1987:140). It was nearly impossible for these regimes to significantly alter such personal status laws covering marriage, divorce, inheritance, and wills. However, while often a major and difficult task, the regimes could successfully modify criminal, administrative, and economic laws because these laws were rooted in denominational traditions and were not divinely ordained.

In Iran, the Shi'i clerics have always asserted their right in legislation. Generally, the political establishment, to one degree or another, has reserved an extensive role for clerics in personal status matters. The clerics frequently rose against governments that attempted to "modernize" these laws by incorporating into them western-style principles and procedures, as exemplified in their harsh reaction to the Family Protection Act of 1975 (modified in 1976), which establishes new rights for women in divorce and custody. During the Constitutional Revolution at the beginning of the last century, the clerics made sure that the new Constitution recognized their rights by stipulating that all laws should conform to the *Shari'ah*, and that the clergy would be the sole judge of what is and is not compatible with the *Shari'ah*. Like many other stipulations in that Constitution, the role of the clergy was gradually diminished as the regimes found it politically convenient to co-opt some clerics and marginalize others. Inspired by the secularization programs in Turkey launched by Kamal Attaturk, and in a concerted effort to consolidate his power, Reza Shah, founder of the Pahlavi dynasty, undertook a series of legislative reforms designed to undermine the role of the clergy. Reza Shah's son, who came to power during World War II, continued the secularization policies even though he often pursued a cooperative rather than a confrontational strategy toward the clergy. The Pahlavis gradually enacted secular laws and an extensive secular court system, at the cost of the religious courts. Tremendously repressive and dysfunctional, these so-called legal reforms succeeded in curtailing the power of the clergy, especially by downgrading *Shari'ah* family laws and moving them to the courts under the jurisdiction of the Ministry of Justice, a secular bureaucracy (Esposito 1998:126). Consequently, in effect, much of the power and revenue of the ulama as judges, legal experts, notary publics, and registrars of deeds were gradually brought under governmental control and put in the hands of modern secular judges, lawyers, and civil servants. These reforms were never genuinely accepted by Iranians, largely due to the regime's growing legitimacy crisis and the clerics' relentless opposition.

While at the outset the Iranian revolution was not a struggle for return to Islamic rule and the reenactment of Islamic jurisprudence, the revolution gave the clerics an opportunity to reassert the rule of the *Shari'ah* and their own role as the guardians of Islamic law. As discussed in detail earlier, the Constitution of the Islamic Republic explicitly, frequently, and directly requires that all laws and policies be in conformity with the *Shari'ah* and Islamic rulings. Consistent with traditional Islamic practices, this document, however, accounts for a certain degree of tolerance toward Islamic denominations such as Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi with respect to the practice of their personal status laws (Article 12). Other recognized religious minorities (mainly Christians and Jews) are also granted some freedom to exercise their own religious laws. This freedom is, however, curtailed, as required by communal interest. In contemporary Iran, communal interest is largely defined in terms of the regime's ability to maintain its control. Faced with the realities of modern government, the regime has had to gradually move away from

traditional *Shari'ah* and rely on revisionist doctrines that enable the government to enact laws as it sees fit, no matter what the connection with the *Shari'ah*. This trend is apparent in all aspects of the law, including personal status and administrative, economic, and penal codes. To no one's surprise and despite opposition from women and their supporters, the clerics promptly nullified the Family Protection Act on the grounds of its incompatibility with the *Shari'ah*, and to date have resisted meaningful revisions to the Shi'a-based family law. The clerics' Islamization of women's rights has entailed the adoption of such ancillary measures as mandatory gender segregation in public, professional exclusion of women from certain positions, restricted access to education, and a forced dress code (Mayer 1987:176). These measures are fairly consistent with the traditional Islamic practices that assign women an inferior status to men in society. The Islamic Republic's Constitution reaffirms this inequality by guaranteeing women's rights in accordance with "Islamic standards"(Articles 20–21).

The clerics' proclamation of commitment to the ideal of social justice and the demands of their natural constituents, the downtrodden, confronted them with a harsh reality as far as economic policies and laws were concerned. As Islam explicitly advocates the right to private property, the clerics historically had opposed the land reform policies of the Pahlavis in the 1960s. Under the Islamic Republic some continued their vehement objection to such policies and called for respect of private property. Others, who emphasize social justice, have continued to suggest that land reform policies that involve redistribution are integral to the Islamization process (Mayer 1987:166). Due to these disagreements, Islamization in the field of economics has been slow and piecemeal. Limited land redistribution policies and some reforms in the banking system have been accomplished.

The Penal Codes

In many Muslim societies, there is a great deal of popular enthusiasm for strengthening criminal codes by relying on the *Shari'ah* rulings. This enthusiasm is rooted not only in respect for Islam but also in the pragmatic view that the reinstatement of harsh punishments would deter criminal conduct. While the criminal penalties in the Quran are limited in quantity, they are harsh and often effective in deterring criminals. Islamic penal codes cover three categories of punishments: determined (*Hudud*), retaliation (*Qesas*), and discretionary (*Ta'azir*). The *Hudud* punishments are explicitly identified in the Quran, while retaliation entitles the victim or his or her relatives to retaliate in the form of an eye for an eye and a tooth for a tooth (*lex talionis*). *Ta'azir* can be defined as supporting or strengthening, that is, the purpose of punishing the criminal is to support, strengthen, and lead him or her to take the right path (Fluehr-Lobbans 1998:99).

There are some disagreements among Muslim scholars about the types of crimes that are covered by the fixed *Hudud* punishments. It is basically accepted that these punishments are not only integral to the Islamic penal codes but also very effective in combating serious crimes that threaten the peace, security, and stability of society. The effectiveness of these punishments is due to their severe nature, which causes great physical pain to the criminal by flogging, amputation, or death (Mansour 1982:195). Generally, the areas that fall within the scope of *Hudud* include:

- Apostasy (rejecting Islam by word, deed, or omission), for which the death penalty is established.
- Transgression (violent revolt against the legitimate leader), which under some circumstances is subject to a *Hudud* punishment.
- Theft, which, if proven, subjects the criminal to the amputation of a hand.
- *Haraba* (highway robbery, also war against God and his prophet), for which the penalty varies with the circumstances.
- Fornication, for which the penalty varies depending on the gender of the criminal and his or her marital status.
- Drinking of alcohol, which subjects the person to punishment by whipping (Mansour 1982:196–200).

Other sources include unproven accusations of fornication as a *Hudud* violation (An-Na'im 1990:108), whereas some exempt fornication and drinking from the *Hudud* injunctions (Fluehr 1998:101). It is important to note that certain conditions need to be met for the application of *Hudud*. These conditions include the use of "proper procedures" and the determination of the "circumstances" of the case. The proper procedure requires just judges and fair and reliable witnesses in the case. As to the circumstances of the case, for instance in regards to theft, there is no amputation of hands if robbery is due to "need" (Fluehr 1998:101).

The word *Qesas* means "equality" or "equivalence." It implies that a person who has committed a given violation will be punished in the same way and by the same means that he or she used in harming another person. Basically, there are five *Qesas* crimes: murder, voluntary killing (similar to intentional killing or voluntary manslaughter), involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming. The penalties for such crimes include: retaliation, compensation (*Diyya*), exile, and, under certain circumstance, prohibition from inheritance and the right to dispose of one's property by testamentary disposition (Bassiouni 1982:203-04)

All the major Islamic schools of law accept the legitimacy of the discretionary (*Ta'azir*) law because they contend that Islamic law intends to individualize punishment. Contrary to *Hudud*, *Ta'azir* law is not fixed; it is determined by the judge or the ruler. Punishment of these crimes, then, proceeds from the discretionary authority of the ruler (who exercises God's sovereignty on earth) as delegated to the judge. Given the limitations of the other categories of penal laws, *Ta'azir* encompasses a wide range of offenses for which the *Shari'ah* does not prescribe a penalty (for a detailed discussion of these penalties, see Benmehla 1982:211-25).

Contrary to their piecemeal approach to the economic and personal status laws, the ruling clerics in Iran have Islamized the penal code comprehensively and decisively. Faced with the penal code inherited from the *ancien regime*, the clerics identified five categories of laws in the Islamization process:

1. Laws that were already based on the *Shari'ah* and therefore underwent very little change.
2. Laws that contradicted the *Shari'ah* and were therefore completely or partially changed.
3. Laws that were considered anti-Islamic before the revolution but were later tolerated or approved.
4. Laws that merely appeared to be Islamized or their Islamization came up against difficulties, and consequently were abandoned.
5. Laws that have had no relationship with the *Shari'ah* but have had to be accepted out of interest (*Maslahat*) or necessity (*Zarurat*) (Schirazi 1997:165).

Since the revolution, the ruling clerics have spearheaded the adoption of a mountain of criminal laws largely designed to establish social and political order and to strip the populace of any right to challenge their authority. The 1982 Islamic Penal Code accounts for four types of punishments:

- *Hudud* punishments, the scope of which has been determined by the *Shari'ah* (Article 8).
- *Qesas*, a retributory punishment where a criminal is condemned and the punishment must be equal to his crime (Article 9).
- Compensation (*Diyyat*), which are cash fines as determined by the parliament (Article 10).
- Discretionary punishments (*Ta'azirat*), the scope of which has not been determined by the *Shari'ah*, and thus the judge has discretion in what the punishment will be. These punishments include prison sentences, fines, and lashings, but should not be heavier than *Hudud* punishments (Article 11).

Interestingly enough, in its effort to control all aspects of the law, the regime has even tried to establish fixed penalties for the *Ta'azirat* (Schirazi 1997:223), an approach that defeats the purpose of the discretionary nature of these laws and even violates Article 11 of the Constitution. In Article 167 of the Constitution, judges are instructed to primarily rely on codified laws (as passed by the parliament and approved by the Guardian Council). In the absence of these codes, they

are allowed to use reputable Islamic sources, which presumably include the *Fiqh* and *Fatwas*. As this indicates, in the Iranian Penal Code (which is currently under revision) the traditional primary and perhaps secondary sources of the *Shari'ah* are to be referred to only in the absence of codified laws. Often, these laws modified the original *Shari'ah* rulings. These modifications generally resulted in disputes over the Islamic legitimacy of these laws. The Quran punishes fornication (a *Hudud* crime) with 100 lashes (24:2). The *Sunnah* requires that the offender to be stoned to death. The *Zina* (fornication) laws, adopted as a part of the 1982 Iranian Penal Code, divided the offenders into five categories and established different penalties, including: stoning to death for the married offender (*Muhsan*), 100 lashes followed by stoning for elderly *Muhsan*, flogging and shaving of the head and a year of banishment for the married person who had not yet consummated the marriage, and execution where the offense involved a number of special circumstances (Articles 99–103). Similar penalties are codified and justified by the *Maslahat* doctrine in regards to such issues as illegal political activism, speech harmful to the society and the regime's interest, espionage and treason, and apostasy. Among other things, the regime has used its legal arm to limit freedom of thought, movement, social behavior, and the choice of profession. The opponents of the regime, women, and minorities are systematically purged and denied their basic human rights (Schirazi 1997:138–39).

DOCTRINE OF *MASLAHAT* OR *ZARURAT*

In their efforts to justify laws that do not directly correspond to or contradict Islam, leaders of the Islamic Republic have relied on the old doctrine of *Maslahat* or *Zarurat* (overwhelming necessity). As a principle or method of law, this doctrine derives its validity from the idea that the basic purpose of legislation in Islam is to secure the welfare of the people by promoting their benefits and by protecting them against harm (Kamali 1995:339). There seems to be some disagreement among students of Islam over the scope of this doctrine. *Maslahat*, according to Muhammad Al-Ghazali, consists of considerations that secure a benefit and prevent a harm but are, in the meantime, harmonious with the objectives (*Maqasid*) of the *Shari'ah*. In his view, these objectives consist of protecting the five essential values, namely, religion, life, intellect, lineage, and property. Any measure that secures these values falls within the scope of *Maslahat*. In short, *Maslahat* applies only if it is harmonious with the *Shari'ah* and as long as the *Shari'ah* provides no explicit rulings about it (Al-Ghazali 1937:139–40). Muslims, thus, should follow explicit and implicit Islamic ordinances when the same are available, and *Maslahat* does not apply in these cases. From this perspective, for the doctrine of *Maslahat* to be valid, the necessity should be reasonably certain, not just probable; it should benefit the public at large, not just a certain segment of the population; it should not conflict with explicit or implicit Islamic ordinances; it should be rational and acceptable to people of sound intellect; and it should remove or prevent hardship from the people (Kamali 1995:346–48). Others suggest that the doctrine of *Maslahat* allows Muslims to temporarily waive the primary rulings of Islam in emergencies or conditions of overriding necessity. For instance, Khomeini contended that Islamic rulings can be waived if the very existence of the state is threatened or when inaction by the government would result in “wickedness or corruption” (Bakhash 1989:196). In 1988, debating the role of the government (i.e., the clerics’ role in the interpretation of the law), Khamenei, then the President of the Islamic Republic, and Khomeini vehemently disagreed on the scope of *Maslahat* as a principle of legislation. Wanting to limit the role of the clergy, Khamenei suggested that there are two types of laws: public or central laws (like drinking laws), which are definitive and unchangeable, and thus the government in its capacity as legislator cannot act against them. The secondary or peripheral laws (such as personal devotional matters and labor laws) are imprecise, and consequently subject to interpretation and open to the doctrine of necessity. Committed to the rule of the clergy and intent on disregarding any *Shari'ah* injunctions that might limit clerical rule, Khomeini rejected this categorization and concluded that in Islam there are no central injunctions. Arguing that all laws are pliable

to governmental injunctions, he said: "The government is empowered to unilaterally revoke any *Shari'ah* agreements which it has concluded with the people when these agreements are contrary to the interest of the country or Islam." He even added that the "government can also prevent any devotional (*Ihadi*) or non-devotional affair if it is opposed to the interest of Islam and or so long as it is so. The government can prevent hajj, which is one of the important divine obligations, on a temporary basis, in cases when it is contrary to the interests of the Islamic country" (quoted in Mallat 1993:91–93). Apparently, Khomeini was suggesting, in an unprecedented way, that the doctrine of *Vilayat-e Faqih* (leadership of the jurisprudent) is a central injunction while prayer and pilgrimage are secondary injunctions. Simply put, Khomeini suggested that a government run by clerics might make any laws it wishes as long as it serves the interest of the regime, which naturally coincide with Islam. Although this view is far from the mainstream Islamic, or even Shi'a, thought it is clearly consistent with Khomeini's efforts to equate Islam with the rule by the clergy (for a detailed discussion of this argument, see Tamadonfar 1989:106–09).

Following Khomeini's line of thought, Iranian revolution officials have since adopted what amounts to a mountain of laws, statutory instruments, and resolutions that have no demonstrable relationship to the *Shari'ah*. This has been accomplished by resorting to two main methods of legislation: binding secondary contractual obligations (*Shart-e Zaman-e Aqd*) and *Maslahat*.

Islamic law recognizes the validity of private contracts even if they are not reconcilable with the form of contracts recognized by the *Shari'ah*, under limited conditions. According to this method (*Shart-e Zaman-e Aqd*), obligations established on the basis of these contracts are valid. The Islamic Republic has made use of this provision and applied it to labor laws and family and divorce laws by treating them as labor and marriage contracts (Schirazi 1997:206). According to the Iranian Constitution, the Guardian Council is responsible for determining the compatibility of laws with the *Shari'ah* (Article 66). In practice, this council took a very rigid approach to its role by striking down many parliamentary decisions on the grounds of incompatibility with Islam. Frustrated over the inefficiency of the legislative process, Khomeini ruled that the parliament (*Majlis*) may pass any laws when it invokes the doctrine of overriding necessity by a two-thirds majority. The parliament used this doctrine to pass a controversial piece of legislation, the Temporary Cultivation Law (Bakhash 1989:201). The Guardian Council had strongly objected to this law, which gave landlords' property to occupying farmers, on the ground that the *Shari'ah* rejects the confiscation of private property. Ironically, in 1960 the Muslim clergy had violently opposed the land reform policies of the Shah on similar grounds. They were now arguing that it was in the interest of the state and Islam and a matter of social justice to violate the *Shari'ah* property rights. There is very little doubt that in adopting this law the regime was motivated by its reliance on the disinherited for support (Bakhash 1989:201).

The adoption of major anti-civil rights laws was also justified on the basis of the interests of the community. According to the Law on the Activities of Parties, Societies, Political and Corporate Organizations, Islamic Associations and Associations Founded by Recognized Religious Minorities (adopted in 1981 and finally put into effect in 1987), the creation of these associations requires a permit that could be revoked for such offenses as activities resulting in social friction or the undermining of the regime and the independence of the country (Article 16). To this day, anti-pluralist clerics are unwilling to tolerate any opposition groups. Similar restrictions are imposed on freedom of the press by laws passed in 1979 and 1986. According to these laws, the mission of the press is to promote the goals of the Islamic Republic, to combat the artificial and divisive demarcations between various social classes, to counteract the manifestations of the imperialist cultures, to further and propagate Islamic culture, and to support governmental policies aimed at rejecting the west. Furthermore, the press is required to avoid violating the fundamental principles of Islam or insulting, belittling, or sabotaging the regime (Schirazi 1997:138).

Continued dispute over the role of the Guardian Council, concern over the inefficiency of the legislative process, and the intent of giving primacy to the interest of the clerical regime led Khomeini to support the institutionalization of the *Maslahat*, in a clear violation of the

Constitution, by establishing the Assessment Council (*Majma-e Tashkhis-e Maslahat*) consisting of a selected number of clergy and governmental officials. This body, which was later accounted for in the revised Constitution and after Khomeini had become a major player in the legislative process, was responsible for determining what was in the interests of the regime. As a legislative authority, this council was authorized to frame laws independently of the parliament and the Guardian Council. Employing this council, the government passed a great deal of legislation referred to as the State Ordinances (*Ahkam-e Hukumati*), which practically suspended or violated Islamic ordinances. As Asghar Schirazi astutely observed, "A cursory glance at the history of the Islamic Republic makes it clear that the basis for the most fundamental decisions through all phases of the state's development was the interest of the ruling system—or more correctly, the interest of those persons, groups and camps who participated in power" (Schirazi 1997:237). The application of *Maslahat* was stretched far beyond simple legislation. It was even applied to the choice of the Supreme Leader. Reflecting the old but controversial Islamic doctrine of absolute obedience to the leader, a powerful member of the clergy, Ayatollah Azari Qomi, declared that the existence of the state has such an overwhelming importance that even if out of some necessity a depraved infidel came to preside over it, it is the duty of the believers to obey him (*Resalat* 30/4/89). Khomeini himself underscored the interests of the regime and their primacy over the *Shari'ah* rulings. In the aforementioned decree (*Fatwa*) on January 7, 1988, he declared that governmental rule was "derived from the absolute dominion of the Prophet of God." In his view, this was "the most important of God's Ordinances (*Ahkam-e Elahi*) and stood above all ordinances that were derived or directly commanded by Allah." (For the text of Khomeini's letter to President Khamenei, see *Kayhan* 7/1/88.) The state's absolute power, thus, lies in the absoluteness of God's sovereignty and extends to every level of state authority.

CLERICAL ABSOLUTISM, GROWING FACTIONALISM, AND LIBERALIZATION

In his doctrine of Jurisprudent Leadership (*Vilayat-e Faqih*), Khomeini emphasized the absolute power of the Supreme Leader (*Vali*), whose legitimacy lies in his unmatched knowledge of Islam and his piety. Since the Islamic state, in his view, is founded upon Islamic principles, those most knowledgeable in Islam should rule. Thus, clerical absolutism is the logical outgrowth of this doctrine. Historically, the ideal of clerical rule is rooted in the victory of the 19th century Usuli school of jurisprudence. The Usulis taught that all Shi'i Muslims are divided into two classes: the experts and the laymen. It is the duty of the laymen, this doctrine holds, to emulate the experts. In practice, the Usulis developed the institution of Supreme Source of Emulation (*Marja-e Taqlid-e Motlaq*), which introduced the possibility of a strong and absolutist central clerical authority (Cole 1983:33–34). This idea provided an ideological underpinning for the social and political power of the clerics. However, not all Muslims, not even all Shi'is, subscribe to this form of clericalism. While some recognize the clerics' right to rule, anti-clerical Muslims reject this role for the clerics on ideological grounds as well as on the clerics' excessive absolutism and intolerance. They suggest that Islam recognizes the equality of all people. The only privilege recognized by Islam is the one resulting from one's piety, good deeds, and noble character. There is no monopoly of spiritual knowledge or holiness to intervene between man and God. "Each soul rises to its Creator without the intervention of priest or hierophant. No sacrifice, no ceremonial, invented by vested interests, is needed to bring the anxious heart nearer to its comforter. Each human being is his own priest; in the Islam of Muhammad no one man is higher than the other" (Ali 1981:165).

Following the Usuli teachings, Khomeini and his brand of clerics never doubted nor denied their absolute power. When in power, Khomeini not only openly claimed but also effectively exercised absolute authority. In explaining this power, the first prime minister of the Islamic Republic, Mahdi Bazargan, wrote: "He [Khomeini] determined the main political lines and the general goals pursued by the government. Whenever important and fundamental questions were being dealt with, he was asked to give his command" (quoted in Schirazi 1997:61). As an astute

politician, Khomeini remained behind the scenes and often delegated decision making to others. However, it was more usual for him to make a decision and have it implemented without consulting anyone. This way, he dominated the legislative agenda and violated normal administrative and legal procedures to achieve his goals. Right after the revolution, he single-handedly created the revolutionary courts, appointed their judges, and granted them absolute power. He contradicted the parliament and the Guardian Council, and ultimately curbed their powers by establishing the Assessment Council and delegated legislative authority to the Council of Ministers and the Supreme Council of Justices. For instance, in 1987, Khomeini conferred upon the Council of Ministers the right to impose discretionary punishments (*Ta'zirat*) on persons convicted of hoarding and conspiring to drive up prices (*Kayhan* 22/7/87). Contrary to Articles 157 and 158 of the Constitution, he modified the role of the Supreme Council of Justices by dividing responsibility among its members, thus holding them individually responsible. He exercised legislative powers without consulting the constitutional organs of the government, the legislative bodies he himself had helped set up. As the then-President of the Judiciary, Ayatollah Yazdi, has asserted, Khomeini's legislative intervention was common and extensive, and included the following areas: the standardization of sentences for discretionary punishments (*Ta'zirat*); the allowance of inadequately trained judges, even though Article 162 of the Constitution requires that judges be qualified *Mujtahids*; determination of those cases in which discretionary punishments involving whipping or flogging were appropriate; determination of whether justice should be dispensed by single judges or by several judges, and whether this should be after separate consultation or jointly; determination of the circumstances and conditions of appeals; and deciding whether certain defendants should be tried singly or as a group (Schirazi 1997:66).

Khamenei, Khomeini's successor, does not wield such powers. It is becoming increasingly clear that power is now concentrated in the hands of the clerical class and their supporters rather than in the person of the Supreme Leader. These clerics, who historically as a class had to either share judicial power with the kings or, at times, accept the kings' primacy in the legal realm, are now dominating the judicial system (Fischer 1990:127). Today's laws intend to preserve the absolute powers of the clergy and justify these laws on Islamic grounds regardless of their apparent inconsistency with the *Shari'ah*. So far, these laws have eradicated a meaningful exercise of the constitutionally stipulated notion of popular sovereignty. These laws, along with crude political gesturing, have enabled hard-line clerics to intrude in and control various aspects of Iranians' lives, including moral values, social interactions and practices, dressing, and eating, as well as political ideas and behaviors. This, of course, severely limits human rights (Mayer 1996:284–89). It is true, however, that the hardliners are facing a tidal wave of reform initiated and implemented by reform-minded secular and clerical forces, especially President Khatami. The reformers' recent victory in the parliamentary elections and Khatami's decision to seek the presidency again have intensified the friction between hardliners and reformers. Given the political climate and the growing popularity of the reformers, it is evident that legal reform and political liberalization will likely curb clerical absolutism and advance the long-held hope for political openness in Iran.

THE INSTITUTIONALIZATION OF CONTROL

During the Iranian revolution, the clergy were able to mobilize and control their supporters, and ultimately dominated the revolutionary process by creating an extensive network of complex organizations. After the revolution, Khomeini and the ruling clergy surprised their opponents by exhibiting a great deal of sophistication in institution-building. They were not only aware of the need for an institutional framework to facilitate their control, they were both willing and capable of building an extensive network of institutions. When necessary, they even went beyond the constitutional framework to consolidate and maintain their power by establishing rules, processes, and structures.

The Pahlavi dynasty had ignored the rights granted to the clergy under the Constitution of 1906–1907. After the revolution, the clergy made sure that an institutional mechanism of control was built into the Constitution of 1979 for them. This Constitution accounted for three independent branches of government (Article 57). To ensure clerical control over legislation, it created the Guardian Council and assigned its members extensive legislative powers (Articles 91–99). This Council was given an unprecedented prerogative to examine all proposed laws and to veto those that violate the *Shari'ah*. Khomeini and the ruling clergy of the Leadership Council and the Supreme Judicial Council were granted the right to choose the clerical members of this council (Article 91). However, disputes between these clerics and the parliament and the subsequent concern over the regime's inability to pass necessary laws due to opposition from conservative members of the Guardian Council ultimately eroded their influence. In an effort to consolidate the clergy's power, Khomeini and his supporters went beyond the Constitution and established the Assessment Council. The members of this Council were chosen by Khomeini, and the Council was given the authority to initiate and frame legislation on its own, and to make final decisions on matters of dispute between the parliament and the Guardian Council. By appealing to the spirit of the Constitution that accords the clergy absolute power, the regime incorporated this Council in the amended Constitution of 1989. Now, the new Constitution had one more constitutionally sanctioned institution with extensive legislative powers whose members were chosen by the leader, not the people (Article 112 of the amended Constitution). The Supreme Council of the Cultural Revolution established in 1980 by Khomeini also engaged in legislation outside the normal constitutional process. In 1987, Khomeini had conferred on this Council the right to formulate guidelines and rules (*Zavabet va Qava'ed*) independent of the parliament. Furthermore, he assigned legislative powers to the Supreme Council for Supporting the War and the Supreme Council for Reconstruction. While these two councils were short-lived, the Supreme Council of the Cultural Revolution is still in existence.

To ensure compliance with the laws, the Constitution created a so-called independent judiciary. This highly centralized judiciary was given broad powers in investigation, prosecution, and rendering judgment in the interest of justice and Islam (Article 156). As the highest judicial body, the Supreme Judicial Council would play a seminal role in preparing judicial bills and developing judicial procedures and rules of judicial selection and appointments (Article 158). The Supreme Court was formed for the purpose of supervising the correct implementation of the laws, ensuring uniformity of judicial procedures, and fulfilling other duties assigned to it by the Supreme Judicial Council (Article 161). In this institutional structure, the Ministry of Justice was essentially an administrative body. There were three types of courts: civil, criminal, and special. To date, the civil courts still adjudicate in part on the basis of prerevolutionary laws. Other courts, including penal and Islamic Revolution Courts, rely on rulings enacted since the revolution. Primarily to deal with political crimes and to ensure the regime's survival, in 1983 the Act of Jurisdiction of Islamic Revolution Courts and Islamic Revolution Prosecutors' Offices was adopted. According to this Act, these two judicial bodies are administered by the judiciary and have jurisdiction over all crimes committed against the internal and external security of Iran; assassination attempts on the lives of politicians; drug dealing and smuggling; murder, massacre, detention, and torture committed under the Pahlavi regime, and suppressing the struggle of the Iranian people, either by issuing orders therefor or participating therein; plundering the treasury; and overpricing and hoarding staples. The Islamic Revolution Courts were divided into three categories to deal with these issues: Islamic Revolution Courts for Economic Offences; Islamic Revolution Courts for Political Affairs; and Anti-Drug Islamic Revolution Courts.

Reversing the prerevolutionary trend that increasingly put secular university educated judges on the bench, the clerics lost no time in reclaiming and expanding their traditional judicial role. The Constitution explicitly called for the appointment of just *Mujtahids* who are well versed in judicial matters as the head of the Supreme Court and the Prosecutor General (Article 162). The Constitution also stipulated that the attributes and qualifications of judges should be determined

in accordance with the criteria of *Fiqh* (Article 163). To assure the independence of the judges, the Constitution prohibits the removal or transfer of judges without their consent, unless the interest of the community is served by such a decision (Article 164). Formally, the Constitution guarantees open trials by jury and establishes general procedural and evidentiary guidelines (Articles 165–170). In practice, however, these principles and procedures were as meaningful as they were during the Pahlavi regime.

From the outset, the clerics who dominated the judiciary violated these constitutional guarantees and the basic premises of the Islamic judicial philosophy. To impose their will over the judiciary, they sponsored and operated an extensive network of organizations responsible for enforcing judicial decisions and moral rulings by powerful clerics. These organizations ranged from official security organizations, to the Party of God (*Hizbollah*), to such bands of enforcers of morality as the Sisters of Zainab (*Khaharan-e Zainab*) and the Admonishers (*Nasehin*). The clerics even passed laws to create and empower these organizations to control various segments of the populace. For instance, to control government employees, they created the Purg-ing Commission (*Heyat-e Paksazi*), which they later renamed the Rehabilitation Commission (*Heyat-e Bazsazi*). Article 14 of the law governing the functions of this commission specifies at least 17 political and military actions that are cause for dismissal from a governmental post.

CONCLUSIONS

Muslims generally agree that an Islamic state is not one that is merely inhabited by Muslims; it is a state that is governed by divine Islamic principles expressed in the *Shari'ah*. The founders of the Islamic Republic of Iran based the legitimacy of their rule on this very principle of the sovereignty of God and the clerics' right to govern on the basis of His *Shari'ah* rulings. To justify and consolidate their new-found power, they had no choice but to underscore the necessity of compliance with the *Shari'ah* in the Constitution of the Islamic Republic. Politically savvy and calculating, the clerics were quite aware that without such an assertion there is no Islamic basis for their contention to power. When their power was sufficiently consolidated, and the clerics faced the realities of contemporary Iranian life and the requirements of modern government, they did not hesitate to marginalize the *Shari'ah* and follow a pragmatic path. To justify such a transformation, they subscribed to and reinvented the old Islamic doctrine of overwhelming necessity, which allowed them to explain the marginalization of the *Shari'ah* on the ground of communal interests. Ironically, this strategy not only removes the unity of the state and religion, it separates the clergy from their traditional religious functions. It is not surprising that the farther the regime moves away from the *Shari'ah* the more it erodes the fundamental philosophical foundation of its own legitimacy.

In Islam, law, society, and politics do not naturally belong to separate realms. Religion and law are components of an integrated belief system that has been affected by the historical and cultural experiences of various Muslim societies. Obviously, these varied experiences have resulted in distinct legal and judicial philosophies and practices. For this reason, some Muslims reject the current trend towards Islamization of the laws as being unrealistic and counterproductive for Muslim societies. They embrace past and current efforts to secularize the laws in a process of social and political development. As discussed in this paper, others find salvation in the Islamization efforts. The experience of the Islamic Republic clearly demonstrates that for the law to be a living force it must reflect the experience of society. The clerics, as the guardians of the *Shari'ah*, have an ideological commitment to Islamic law. However, they have found it increasingly impossible to govern by the *Shari'ah*. Motivated by self-preservation and intent on maintaining control, they have turned into self-appointed "guardians of the community" and have abandoned the "guardianship of Islam." This could have far-reaching implications for the future of clericalism and even a clerical version of Shi'ism in Iran.

REFERENCES

- Al-Ghazali, Abu Hamid Muhammad. 1937. *Al-Mustafsa min Itam al-usul*, vol. 1. Cairo: Al-Mukatabah al-Tihariyyah.
- Ali, S. A. 1981. *The Spirit of Islam* (reprint). Delhi: Islamic Book Trust.
- Amin, S. A. 1985. *Islamic Law in the Contemporary World*. Glasgow: Royston Ltd.
- An-Na'im. 1990. *Toward an Islamic Reformation, Civil Liberties, Human Rights, and International Law*. Syracuse, NY: Syracuse University Press.
- Bakhash, Shaul. 1989. The Politics of Land, Law, and Social Justice in Iran. *Middle East Journal*, 43 (2):186–201.
- Bassiouni, Cherif M. 1982. Qesas Crimes. In M. C. Bassiouni, ed., *The Islamic Criminal Justice System*, 203–09. London: Oceana Publications, Inc.
- Cole, Juan R. 1983. Imami Jurisprudence and the Role of the Ulama: Mortaza Ansari on Emulating the Supreme Exemplar. In N. R. Keddie, ed., *Religion and Politics in Iran, Shi'ism from Quietism to Revolution*, 33–46. New Haven and London: Yale University Press.
- Constitution of the Islamic Republic of Iran. 1980. H. Algar, trans. Berkeley, CA: Mizan Press.
- Esposito, John L. 1998. *Islam and Politics*, 4th ed. Syracuse, NY: Syracuse University Press.
- Fairchild, Erika. 1993. *Comparative Criminal Justice Systems*. Belmont, CA: Wadsworth Publishing Company.
- Fischer, Michael M. 1990. Legal Postulates in Flux: Justice, Wit, and Hierarchy in Iran. In D. H. Dwyer, ed., *Law and Islam in the Middle East*, 115–42. New York: Bergine & Garvey Publishers.
- Fluehr-Lobbans, Carolyn, ed. 1998. *Against Islamic Extremism: The Writings of Muhammad Sa'id al-'Ashmawy*. Gainesville, FL: University Press of Florida.
- James, Noel. 1964. *A History of Islamic Law*. Edinburgh: Edinburgh University Press.
- Kamali, Muhammad Hashim. 1995. *Principles of Islamic Jurisprudence*, 2nd ed. Malaysia: Pelanduk Publications.
- Kayhan*, 7/1/88.
- Mallat, Chibli. 1993. *The Renewal of Islamic Law, Muhammad Baqer as-Sadr, Najaf and the shi'i International*. Cambridge: Cambridge University Press.
- Mansour, Aly Aly. 1982. *Hudud Crimes*. In M. C. Bassiouni, ed., *The Islamic Criminal Justice System*, 195–201. London: Oceana Publications, Inc.
- Mayer, Ann Elizabeth. 1987. Law and Religion the Muslim Middle East. *American Journal of Comparative Law*, 35 (1):127–84.
- . 1990. The *Shari'ah*: A Methodology or a Body of Substantive Rules? In N. Heer, ed., *Islamic Law and Jurisprudence*, 177–98. Seattle and London: University of Washington Press.
- . 1996. Islamic Rights or Human Rights: An Iranian Dilemma. *Iranian Studies*, 29 (3 & 4):269–96.
- Moten, Abdul Rashid. 1996. *Political Science, An Islamic Perspective*. London and New York: St. Martin's Press.
- Resalat*, 30/4/89.
- Schacht, Joseph. 1996. *An Introduction to Islamic Law*. Oxford: The Clarendon Press.
- Schirazi, Asghar (trans. John O'Kane). 1997. *The Constitution of Iran: Politics and State in the Islamic Republic*. London and New York: I.B. Tauris Publishers.
- Tamadonfar, Mehran. 1989. *The Islamic Polity and Political Leadership, Fundamentalism, Sectarianism, and Pragmatism*. Boulder, CO: Westview Press.
- Watt, William Montgomery. 1996. *A Short History of Islam*. Oxford: Oneworld Publications.