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Law, Authority, and Gender in Post-Revolutionary Iran

LOUISE HALPER†

“[T]hinking is fundamentally not an individual matter but a collective matter, just as knowledge is a collective and ongoing matter.”¹

INTRODUCTION

In an earlier paper,² I wrote of how the politics of the Iranian Revolution ultimately created a space in which women could act to improve their situation inside the boundaries of the post-revolutionary regime of religious law. In this Article, I will suggest why the legal regime of the Islamic Republic, while firmly based in religious law, did not prove entirely resistant to the improvement women required.

My suggestion in fact relates to a larger question—one posed in all too many contexts today. That question can be stated as the relationship of Islam to a particular political

† Professor of Law, Washington & Lee University School of Law. My thanks to Liz Bucar, Mark Drumbl, Marie Failingler and her anonymous reviewer, Roja Fazaeli, Bernard Freamon, Nikki Keddie and Ziba Mir-Hosseini, whose comments on drafts of this paper I found particularly useful, as well as to the participants in the panel on Islam and Family Law at the 2004 Annual Meeting of the Middle East Studies Association in San Francisco, and participants in the Feminist Legal Theory Workshop at Emory Law School in February 2006 and in particular, its convener, Martha Albertson Fineman. I am grateful also to Linda Newell of the Washington & Lee University Law Library, for her help in gathering materials, to Mariam Tadros, W&L '07, for research assistance, and to Ali Korangy, Ph.D. candidate in Persian Literature, Harvard University, for his assistance in finding and translating Iranian Persian-language newspaper sources.

1. Interview by Dariush Sajjadi with Abdolkarim Soroush, on Homa TV (Mar. 9, 2006), available at <http://www.dr.soroush.com/English/Interviews/E-INT-HomaTV.html>.

2. Louise Halper, *Law and Women's Agency in Post-Revolutionary Iran*, 28 HARV. J.L. & GENDER 85 (2005).

ideology or, even more pointedly, as the “essential” nature of Islam. Too often, these questions are answered with reference to a text that is said to require no interpretation or to a law that speaks for itself. As lawyers, we know—indeed it is precisely our business to know—that interpretation is endless and that law speaks with, but also through, many voices, each one distinct. My argument is that the law of Islam, like the religion itself, is protean in practice and, more than that, is capable, like any religion, of being revolutionary or reactionary, severe or flexible. Thus, over the centuries of its development, its legal scholars have managed to provide religious guidance to complex and sophisticated societies dealing with changing social realities. In this, Islamic law does not differ from other forms of law; religious law, even *shari’a*, the revealed law, is instantiated and interpreted within a political context.

Islamic law plays a role in the life of each observing Muslim. The common wisdom in Islam is that state and religion are one, and that one is law. Indeed, Patricia Crone writes that law is at “the heart of Islam in all its forms.”³ Thus the common wisdom is that Muslim societies suffer politically because the separation of the political state and institutional religion, the product of the Reformation in the historical west, never occurred in Muslim states, which had no Reformation.⁴ Hence, according to this story, religious law continued to govern there long after civil society emerged elsewhere. When the Muslim world was exposed to Western ideology, the “*shari’a* state”—a state fully governed by law revealed over time to the Prophet Mohammad—continued as the desideratum of anti-modernist fundamentalists. And it was thought that such a state, should it ever come to exist, would be constrained—to the particular detriment of women—by religious law that emerged in the seventh century and is misogynistic and hostile to women’s equality claims.

This discussion has great relevance to Iran, where what Robin Wright calls “The Last Great Revolution” took place

3. PATRICIA CRONE, *MEDIEVAL ISLAMIC POLITICAL THOUGHT* 8 (2004).

4. See Mohammad Nafissi, *Reformation as a General Ideal Type: A Comparative Outline*, 6 *MAX WEBER STUD.* 69, 70-72 (2006) for citations to some of this literature.

more than a quarter-century ago.⁵ According to the Islamist groups that succeeded in taking power, political transformation was intended to effect governance by *shari'a*. In the construction of the post-revolutionary state, there was no expressed claim of the discovery of a new legal system, no jurisprudential search for law that matched the times of the sort that led to the Code Napoleon or the Soviet legal code. Instead, the aim of the new leaders of Iran was to govern by revelation, as expressed in the Qu'ran, the word of God revealed to his Prophet Mohammad, as well as the *sunna*, the traditions of the Prophet, and the time-honored practice of interpretation by religious scholars. Here, in other words, those who made the new state claimed the law to be applied predated the state that was to apply it; indeed, application of that law was the whole purpose of the state.

In the decades since Western colonialism and imperialism penetrated the Muslim world, *shari'a* had been, to varying extents, cut off from quotidian juristic practice as civil codes replaced religious jurisprudence in areas considered central to the projects of modernization. One may say that at least since the *Mecelle*, the 1869 codification of Ottoman imperial law, the history of *shari'a* in the Muslim world is in large part a history of displacement, replacement and distortion. Contract and injury, otherwise parts of *shari'a*, were largely codified, at least in respect to commerce and to crime.⁶ Juristic religious scholarship did retain its place in the law of marriage, family, inheritance and endowment, even after codification.⁷ But even there it was constrained, both directly by metropolitan law in the colonial situation and indirectly in the control that even the formally non-colonial state assumed over marriage, once simply been a contract between private parties.⁸

5. ROBIN WRIGHT, *THE LAST GREAT REVOLUTION: TURMOIL AND TRANSFORMATION IN IRAN* (2000).

6. Joseph Schacht, *Problems of Modern Islamic Legislation*, *STUDIA ISLAMICA*, 1960, at 108.

7. *See id.* at 116.

8. Thus, for example, Reza Shah, the first Pahlavi dynast, while leaving religious law its scope in respect to marriage and family, nonetheless required that marriages be registered with the state, thus forcing recognition of state

In the Iranian Revolution, more than a century later, that process reversed itself. A civil code containing both public and private law and constraining, though not replacing, the Islamic law of marriage and family, was eliminated and replaced by *shari'a* as the law of the state. In the West, that turn was largely understood as a re-turn; religious fanatics were attempting to recuperate a bygone world, figuratively turning their backs on the modernity that the Shah represented.⁹ But perhaps the "*shari'a* state" is not a return, but something new, a *public* law of *shari'a* addressing public necessities and the realities of *siyasat*, political administration.¹⁰

Having discussed the post-revolutionary exercise of Iranian women's agency in the earlier paper, here I propose to discuss at greater length *shari'a* and the authority of the state, as well as the applicability of both to gender issues, and in particular the law of marriage and divorce in Iran. In the first section, I begin by laying out the relationship between law and state in Shi'ism. In the second section, I briefly describe aspects of the Iranian context: First, the political and economic background of the relationship between religion and authority and then how the views of the most political of Shi'a religious leaders—Ayatollah Khomeini—changed in regard to authority in the Islamic state as he moved from opposition to revolution to leadership of the new state. The third section looks at women and law in the Islamic Republic of Iran (IRI). I begin by discussing the gender politics of the revolutionary beginnings of the IRI. I then look at the impact of *shari'a* law on women in post-revolutionary Iran. Finally, I examine, with some particularity, two changes in the law of marriage and divorce that occurred in the nineties, after Khomeini's death in 1989 and before the 1997 election of Mohammad Khatami as President of the IRI. These changes were intended to provide some guarantee of

control, however indirect, over marriage. NIKKI R. KEDDIE, *ROOTS OF REVOLUTION* 97-98 (1981).

9. See, e.g., GARY SICK, *ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN* 85 (1985) (referring to "Khomeini's radical medievalism").

10. A *shari'a* of the state was indeed the aim of the great 13th-century Sunni scholar Ibn Taimiya, but neither he nor other scholars ever succeeded in creating it. SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD* 98-100 (2003).

financial stability to divorced women. They support the view that religious law may, in a particular political context, allow for flexibility with respect to issues of concern to women. I end by concluding that religious law in IRI did indeed respond to political and state necessities.

I. SHI'ISM AND STATE

A. *The Founding of Islam*

In Islam, “[l]aw is essentially religious . . . [and] constitutes the ideal social blueprint for the ‘good society’.”¹¹ But the prescriptions of *shari’a* are not actually a law of governance,¹² for they apply to contracts, injuries, and family relations, as well as to specifically religious matters, such as the manner of prayer and the religious duties of believers.¹³ For the purposes of the state, *shari’a* had to be supplemented with *urf*, custom, and *siyasat*, the practical administration of matters of public interest like war and foreign relations, provincial governance, market regulation, forms of land-holding, and even crimes that were, in some character, political.¹⁴

Mohammad Nafissi says that, historically, the formative period that “fused state and religion”¹⁵ ended in

11. JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 74-75 (3d ed. 1998). Still, it is wise to avoid the error of “assuming that all aspects of Islamic tradition and Muslim lives can be explained by reference to law.” ASHK P. DAHLEN, *ISLAMIC LAW, EPISTEMOLOGY AND MODERNITY: LEGAL PHILOSOPHY IN CONTEMPORARY IRAN* 39 (Shahrough Akhavi ed. 2003).

12. See ZUBAIDA, *supra* note 10, at 202.

13. The portion of revealed law that deals with relationships among people is called *mu’amalat* and that which deals with relationships between the believer and God is called *ibadat*. Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 HAWWA 1, 11 (2003).

14. Majid Khadduri, *The Nature and Sources of Islamic Law*, 22 GEO. WASH. L. REV. 3 (1954). This is not to say that *shari’a* recognized “municipal law dissociated from the ethical and religious sense.” DAHLEN, *supra* note 11, at 48 n.11. No law in opposition to *shari’a* was permissible, but *shari’a* could be supplemented.

15. Mohammad Nafissi, *Reformation, Islam, and Democracy: Evolutionary and Antievolutionary Reform in Abrahamic Religions*, 25 COMP. STUDIES OF ASIA, AFR. & MIDDLE EAST 407, 407 (2005).

661 with the death of the Prophet's cousin and son-in-law Ali, the fourth and last of the Prophet's successors who had also been one of his companions. The Prophet began his mission in 610 and, by his death in 632, ruled the Arab trading city of Medina for ten years.

After the Prophet's death, Abu Bakr, his companion and father-in-law, became *caliph*, or successor, followed by Omar, another companion. Ali acquiesced in these choices, but left Arabia to settle in Iraq after the selection of the third caliph, Othman. When Othman died in 655, Ali took his place, claiming to be more than a "political and administrative authority."¹⁶ Because of Ali's blood relationship to the Prophet, a group of prominent Muslims considered him to be more than a caliph, or vice-regent, but rather the first Imam, "a person who in [both] worldly and other-worldly affairs is the successor to the Prophet, and is the leader of people."¹⁷ This group became known as the *Shi'at Ali*, or Ali's party, hence the term Shi'i.

Ali was murdered in the year 661 by a kinsman of Othman, after ruling for six years, ending the "golden age fusion of . . . temporal and spiritual authority."¹⁸ When Ali died, the caliphate was taken by his enemy Mu'awiya, the first of the Umayyad dynasty. But Ali's son, Hossein—the Prophet's grandson and the third Imam¹⁹—continued to urge his own right to leadership by descent. When Hossein fought Yazid-Mu'awiya's son and the second Umayyad caliph, members of the *Shi'at Ali* who promised to come to his aid, did not.²⁰ Their guilt and penitence at his death "marked the true beginning of Shi'i Islam."²¹

16. HAMID DABASHI, *AUTHORITY IN ISLAM* 89 (1989).

17. *Id.* at 101, 159 (citing ABU MANSUR AL-BAGHDADI, *AL-FARQ BAYN AL-FIRAQ* 280 (1954)).

18. *Id.* at 413.

19. Ali's eldest son, Hassan, renounced his claim to the caliphate, but was still regarded by Shi'is as having spiritual power, and is thus considered the second Imam. *Id.* at 8.

20. *Id.* at 9. It is said that Hossein knew that his struggle was doomed, but went forward to the battle anyway and died a martyr, making him a symbol of resistance to injustice and arbitrary power, as are his mother Fatima, his sister Zeinab, and the companions who died with him in 680 at Karbala, today an Iraqi shrine city. *Id.* at 9, 15.

It was then that the split in the *umma*, or Muslim community, over the succession to the Prophet led to a separation between religious and political authority that was never, in practice, restored.

Shi'ism has always been a minority wing of Islam "and usually the opposition."²² The Shi'a, who are themselves divided into a number of groups contesting who was the proper inheritor of Muhammad's legacy,²³ are in agreement that descendants of the Prophet, rather than non-descendants, should have been accepted as the Prophet's successors by the community of his followers. For Iranian Shi'is, the successors of the Prophet are his descendants, including Ali—who was his nephew and his son-in-law—his grandsons—Hassan and Hossein—and the other nine Imams who descended from Hossein.²⁴

21. *Id.* at 20. That guilt and penitence is on view each year in the public ceremonies during

Muharram, the month of mourning, when religious fervour is greatest over the passion and martyrdom of the Imam Husain . . . The religious ceremonies and dramatic performances [commemorating the Karbala events] . . . are a perennial re-enactment of courage, martyrdom and resistance to an unjust state. From the point of view of mobilization of opposition to the state, this period had always been recognized as potentially inflammatory because popular passions run high.

VANESSA MARTIN, CREATING AN ISLAMIC STATE: KHOMEINI AND THE MAKING OF A NEW IRAN 63 (2000).

In Iran, all ten of the first days of Muharram are devoted to collective commemorations of the events at Karbala, from Hossein's arrival there on the first day through the deaths of his companions and relatives on the following days, to his own martyrdom on Ashura, the tenth day of Muharram. On each day, another death is described and acted out before crowds in public in a series of passion plays called *taziyeh*. Ashura is the climax of these ceremonies.

Because the Islamic calendar is lunar, Muharram, the first month of the Islamic year, comes at a different time each year of the Georgian calendar. In 1963, it fell in June, the same month that Ayatollah Khomeini gave his first public speech in opposition to the regime, comparing the Shah to Yaz. In 1978, when Muharram commemorations led to the climactic overthrow of the Shah, it fell in December. Khomeini returned in February 1979. *See id.*

22. HEINZ HALM, SHI'A ISLAM: FROM RELIGION TO REVOLUTION, at viii (Allison Brown trans., Markus Wiener 1997) (1994).

23. There are also Shi'is who follow other Imams, like the Ismailis of the Indian subcontinent, who follow the Seventh Imam. *Id.* at 24.

24. SEYED MOHAMMAD ALI TAGHAVI, THE FLOURISHING OF ISLAMIC REFORMISM IN IRAN 141 (2005). These twelve, with the Prophet himself and his daughter, Fatima, Ali's wife, are the *ahl al-bayt*, or people of the household of

After the death of Hossein, none of the nine subsequent Imams claimed the caliphate as Ali and Hossein had. In 873, the Twelfth Imam, the *Mahdi*, disappeared from human sight. He is understood to be hidden from view, present but unseen, and will someday reappear and establish God's rule on earth, putting an end to all injustice. Thus, "through the doctrinal agency of the 'Hidden Imam,' . . . the charismatic energy engendered during Muhammad's time became permanently present and active for the rest of Islamic history."²⁵ Though hidden from view, the Imam remains "a person who in [both] worldly and other-worldly affairs is the successor to the Prophet, and is the leader of people."²⁶

B. *Law and Governance*

Shi'is who follow the Hidden Imam are called Twelvers; they are the dominant religious group in Iran. The Jafari *madhab*, or school of Islamic law, is followed by Twelver Shi'is and is, according to the Constitution of the IRI, the official and unalterable basis of law in Iran.²⁷ The Jafari school had its origins about a century after the failure of the Prophet's line to succeed him to political power. Jafar al-Sadiq, the sixth Imam and a learned scholar, developed the basic doctrine of *imamat*, the "need of the Muslim community to be permanently guided by the rightful leadership of a descendant of 'Ali."²⁸ This rule of governance is an article of faith for Shi'is. The descendant

the prophet. They are also known as the Perfect Fourteen and it is their traditions that comprise the sunna followed by Shi'i *madhab*, or school of law, dominant in Iran. *Id.*

25. DABASHI, *supra* note 16, at 120.

26. *Id.* at 101, 159 (citing *Abu Mansur al-Baghdadi*, AL-FARQ BAYN AL-FIRAQ 280 (1954)).

27. Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 12 [1980], available at <http://www.iranonline.com/iran/iran-info/Government/constitution-1.html> [hereinafter, CONSTITUTION].

28. DABASHI, *supra* note 16, at 153-54.

“is more than a . . . pious man of learning. He is a divinely inspired possessor of a special sum of knowledge of religion that is passed on before his death to the following imam.”²⁹ In separating the caliphate from the imamat, Jafar maintained the claims of the continued existence of charismatic authority in the form of the Prophet’s descendants, against the Sunni caliphs’ acceptance of mere political succession to the Prophet’s rule and against the Sunni *ulama*’s institutionalization of revelation in the form of their own control over *shari’a*.³⁰

Shi’is believe the Imam has the right to rule Muslims, not only spiritually but temporally; any other government is “a deviation from the divine commands.”³¹ The Imam “is more than a . . . pious man of learning. He is a divinely inspired possessor of a special sum of knowledge of religion that is passed on before his death to the following imam.”³² And when the Twelfth Imam went into occultation, there simply was no government on earth whose legitimacy derived from anything more than its relative superiority to *fitna*, or anarchy. Thus, while the apparent ruler must be tolerated in order to avoid the hell of *fitna*, the caliph had no other claim to allegiance. For Shi’is, a minority without political power, there was no single legitimate political leader equivalent to the Sunni caliph, because political, as well as spiritual, authority was rightfully the Imam’s.

Jafar was not only an Imam, but among the first of the Shi’i *muhaddithun*, those who collected and validated the practices and knowledge of the Prophet, as related by his Imamic descendants and those of his household.³³ These constituted the Shi’a *sunna* and were collected in *hadiths*—anecdotes of words, acts, and deeds—as guides to the actions of believers.³⁴ Over time, some *muhaddithun* became true jurists consulted by the Shi’i community as to

29. DAHLEN, *supra* note 11, at 53 (emphasis omitted).

30. DABASHI, *supra* note 16, at 154.

31. Shahrough Akhavi, *Contending Discourses in Shi’i Law on the Doctrine of Wilayat al-Faqih*, 29 IRANIAN STUD. 229, 229 (1996).

32. DAHLEN, *supra* note 11, at 53 (emphasis omitted).

33. HALM, *supra* note 22, at 24.

34. Sunni hadith do not include the *sunna* of the twelve Imamic descendants of the Prophet, but do contain *sunna* of the companions of the Prophet. ZUBAIDA, *supra* note 10, at 76.

appropriate and correct practices in all areas of life, a delegation approved by Jafar.³⁵ They relied not only upon the Qu'ran and *hadiths*, but also systematized and rationalized "the increasing body of judgments, arguments and disputations . . . making explicit the criteria of judgement and the validity of argument."³⁶

These religious scholars were the ancestors of the Twelve Shi'i jurists who, though they did not hold state authority, came to lead the community of believers, even when they were under the political authority of a Sunni caliph.³⁷ When the Twelfth Imam disappeared with no explicit designation of a successor, these religious scholars became central to the life of the Shi'i community which, until then, had possessed infallible guidance. In the absence of the Imam, and with the consequent necessity for the "postponement" of just rule until his return,³⁸ Shi'is relied upon *mujtahids*—scholars capable of *ijtihad*, or interpretation—to guide the community in its practice of *shari'a*.³⁹ Inevitably, because the true guide to *both* religion and politics was inaccessible, the reliance on the *mujtahids* was also political. So while the Shi'i *ulama* denied their political ruler religious authority, just as the Sunni *ulama* did,⁴⁰ they themselves were not adjuncts of the state. The strength of their claim lay in their interpretive power and the fact that interpretation "was restricted only by . . . revelation."⁴¹ The Shi'i *ulama*, like the Sunni, were not interpreting the law of the state, but stood aside from it. But unlike their counterparts their authority stood as a potential threat to *any* actually existing political authority,

35. See HALM, *supra* note 22, at 90 (alteration to original).

36. ZUBAIDA, *supra* note 10, at 18.

37. See SHAHROUGH AKHAVI, RELIGION AND POLITICS IN CONTEMPORARY IRAN 10 (1980).

38. See Nikki R. Keddie, *Is Shi'ism Revolutionary?*, in THE IRANIAN REVOLUTION AND THE ISLAMIC REPUBLIC 113 (Nikki R. Keddie & Eric Hooglund eds., 2d ed. 1986).

39. From the thirteenth century onward, Shi'is, unlike Sunnis, accepted *ijtihad* as a duty that could be undertaken by a specific group of persons trained in its exercise. DAHLEN, *supra* note 11, at 73.

40. See *supra* text accompanying notes 17-29.

41. DAHLEN, *supra* note 11, at 50.

Sunni or Shi'a, and their guardianship of *shari'a* a challenge to the legitimacy of the state.

II. RELIGION, AUTHORITY AND MODERNITY IN IRAN

A. *The Expansion of Religious Authority in the Safavid (1501-1736) and Qajar Dynasties (1779-1925)*

When the Safavid dynasty came to power in Persia at the start of the 16th century, most Persians were Sunni. But the Safavids, "millenarian charismatic[s]"⁴² who claimed descent from the Prophet, actively promoted Twelver Shi'ism, and are responsible for its current position in Iran. They invited Shi'i *mujtahids* from Iraq and Lebanon to their kingdom. These figures dominated religious education, founding juristic dynasties that continue to the present day.

The Safavids fell to Afghan invaders in 1736.⁴³ These Afghan Sunnis were hostile to Shi'ism and to its *ulama*, which "withdr[e]w into quiescence."⁴⁴ Many Shi'i *mujtahids* moved back into Iraq, then part of the Ottoman Empire.⁴⁵ The Ottomans, though Sunni, were multi-cultural in orientation and did not interfere with the religious practices of those within their domain; the leading Shi'i *mujtahids* were thus outside Persia during the eighteenth century. When Afghan rule collapsed, and with it central government, a period of tribal and regional rule continued until the end of the eighteenth century, when a Turkmen tribal leader, Aqa Mohammad Khan Qajar, was able to crown himself Shah, succeeded by others of his line.⁴⁶ The Shi'i *ulama* were reconciled to the Qajars who claimed to be

42. Akhavi, *supra* note 31, at 6.

43. See AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 18 (1988).

44. Michael M. J. Fischer, *Legal Postulates in Flux: Justice, Wit & Hierarchy in Iran*, in *LAW AND ISLAM IN THE MIDDLE EAST* 115, 123 (Daisy Hilse Dwyer ed. 1990).

45. See HALM, *supra* note 22, at 113-14.

46. He was assassinated within the year and was followed to the throne by his nephew, Fath Ali Shah, who then reigned for almost forty years.

devout Shi'is, but did not allow them the Safavids' claim of religious leadership through descent from the Imam.⁴⁷

At roughly the same time, the late-eighteenth century triumph of the Usuli school of interpretation, led by Vahid Behbehani, over the Akhbari school, institutionalized the role of religious leaders as guardians of the Shi'i community, regardless of who its political leader was. The Akhbaris believed the revealed text required no interpretive reasoning; the Usuli that religious scholars should interpret the law for believers by exercise of their independent judgment.⁴⁸ Added to the doctrine of *taqlid*, or emulation, the victory of the Usuli required believers to adhere to a *mujtahid*, whose interpretations authorized their behavior; thus each individual Shi'i must choose a scholar by whose judgment he or she would be guided.⁴⁹

Eventually, every Shi'i was required to follow the guidance of a *mujtahid*.⁵⁰ Jafar's delegation of jurisprudential authority to the *ulama* is the foundation of their religious leadership of the Shi'i community, understood to be at the direction of the Hidden Imam,⁵¹ who represents a source of divine knowledge that can be accessed by intellect. Unlike his Sunni counterpart, whose thinking is acceptable only as part of a consensus of scholars, the Shi'i religious jurist is potentially capable of discerning the divine command himself, and for that reason his decisions are binding on his followers.⁵²

The *mujtahid* provides a forum for his followers in which disputes can be resolved.⁵³ His *fatwa*, or decision, is a product of rationality, not revelation, and therefore not

47. HALM, *supra* note 22, at 116-17; DAHLEN, *supra* note 11, at 63. Arjomand points out that Aqa Mohammad Khan did claim descent from the Safavids. ARJOMAND, *supra* note 43, at 20.

48. DAHLEN, *supra* note 11, at 63.

49. MARTIN, *supra* note 21, at 116.

50. *Id.*

51. *Id.* The Imam, like his Prophetic progenitor, has received a delegation from God. The Imam's deputization of the *mujtahids* is a lesser delegation as it does not come directly from God.

52. DAHLEN, *supra* note 11, at 52.

53. The *mujtahid's* forum was independent of the state, as were *shari'a* courts, guild tribunals, and other forms of private enforcement, at least until Reza Shah's 1928 codification of civil law. ZUBAIDA, *supra* note 10, at 189-90.

infallible, a new *fatwa* can supersede an old one.⁵⁴ His followers who obey the *fatwa* are not to be blamed if their *mujtahid* is in error, since they may not rely upon their own understandings, but are required to select a *mujtahid* to follow.⁵⁵ The acceptance of fallibility, together with the absence of precedential value of any *fatwa* after the death of the *mujtahid* who proclaimed it, “gave great power to living *mujtahids*.”⁵⁶

One can see the usefulness of such a doctrine to a community that was ruled by outsiders and whose continued existence could only be guaranteed by unity. It assured the spiritual leaders of that community their intellectual independence from political authority.⁵⁷ The victory of the Usuli position secured the existence of an independent and potentially activist body of religious scholars who held themselves responsible for the spiritual welfare of their followers, and thus were appropriately involved in public issues, a position rejected by the defeated Akhbaris.⁵⁸

It was further accepted in the nineteenth century that some particularly learned, intelligent, and just *mujtahids* might be pre-eminent among *mujtahids* and thus the source of authority, or *marja al-taqlid*, for a great number of believers.⁵⁹ A *marja* was the guardian of the Shi'i *umma* and, in a conflict between *marja* and political authority, the believer's duty was always to follow the Imam's rule, as understood by the *marja*.⁶⁰ (Whether the *marja* was acting on behalf of the Imam, so there was always divine guidance in the world, or whether some of the Imam's political functions were simply unexercised, leaving no legitimate

54. *Id.* at 27.

55. See HALM, *supra* note 22, at 107-08.

56. Keddie, *supra* note 38, at 120.

57. ARJOMAND, *supra* note 43, at 14.

58. Hamid Algar, *Religious Forces in Eighteenth- and Nineteenth Century Iran*, in 7 THE CAMBRIDGE HISTORY OF IRAN 705, 711-12 (Peter Avery et al. eds., 1991).

59. The position is not granted hierarchically but by consensus of the *mujtahids*; at various times, there have been eight living *marja*, as well as none at all. Ziba Mir-Hosseini, *The Islamic State: An Unfinished Project* 5 (2002) (unpublished manuscript, on file with the Buffalo Law Review).

60. See HALM, *supra* note 22, at 119-20.

government at all during his occultation, remained a matter of dispute.⁶¹) A *marja's* interpretations were widely followed, creating in effect, though not formally, a figure whose pronouncements were weighty, important, and possibly contrary to those of the political leader, the Shah.⁶²

The Twelver Shi'i clergy⁶³ had both an autonomous community-based means of support⁶⁴ and a claim to independence from political authority. The situation of the Shi'i community's minority status in the Islamic world, together with the individual believer's duty to follow a particular religious figure with the power, ability, and duty to interpret sacred texts for their followers, gave religious authority—authority which might even be located within a different state entity—a political potential independent of the state. Although this independence was hardly used,⁶⁵ as Halm says, "[T]he Hidden Imam was always a potential challenger to the omnipotence of the king . . . and the clergy developed into a core of all potential opposition to the absolute monarchy."⁶⁶

61. As Dahlen writes,

[T]he Shi'i ulama established an informal structure of authority presided over by a single or multiple . . . supreme model of emulation, where in reality the jurist was in an intermediary position between God and the individual believer, something that created theoretical obstacles because of the inescapable presence of the hidden imam who alone personified all supreme authority.

DAHLEN, *supra* note 11, at 90.

62. Keddie, *supra* note 38, at 169.

63. This word is obviously imprecise but refers to the body of Shi'i religious figures who are empowered by their peers to interpret law for believers. "Whereas Islam recognizes no strict clergy in the Christian sense of a body of persons specially ordained to perform sacraments, the Shi'i evolution of *ijtihad de facto* came very close to that, since it gave religious validity to the daily practices of the individual believers." DAHLEN, *supra* note 11, at 89.

64. *Khums*, the tithe of a fifth of the Shi'i believer's income beyond necessities, are paid to his or her *mujtaha*. *Id.* Of the khums, part was used for the community's benefit, e.g., establishing religious schools, supporting students, supporting locally-based and itinerant *mullahs*, and another part for support of the *mujtahid* and, directly or indirectly, the *marja*. ZIBA MIR-HOSSEINI, ISLAM AND GENDER: THE RELIGIOUS DEBATE IN CONTEMPORARY IRAN 12 (2000).

65. ARJOMAND, *supra* note 43, at 75.

66. HALM, *supra* note 42, at 110.

Nonetheless, it was very clear that there was no actual political authority adhering to the *mujtahids* and the issue of their role *vis-à-vis* the state, while debated in the eighteenth and early nineteenth centuries, was more theoretical than real. Thus, the *ulama* were silent, at least until social pressures called for their response, in the late-nineteenth century. During this period, the extent of the potential political authority of the law's interpreters continued to be under internal discussion, as was the form and content of just government.⁶⁷

B. *The Modernization of Authority*

In the second half of the nineteenth century, Persia found itself caught between competing empires, the British and the Russian. Both attempted to gain influence there, along with economic advantage. Though several attempts were begun to modernize elements of society and government by Qajar leaders, they were not successful, at least in part because they were seen as capitulations to outside influence, as indeed they often were. Local and regional protests were heard against the economic and military defeats imposed on the Qajars by the contending imperial powers.⁶⁸

Opposition to foreign domination united both those who were influenced by Western thought to seek political reform of the monarchical system and its policies impoverishing the local economy and those who wanted to exclude Western influence in the interests of preserving the local culture, practices, and economy. In practice, this meant that reformers were often allied with the *ulama* who "emerged as the proponents of the rising indigenous nationalism which was expressed in terms of Islam."⁶⁹ The *ulama* were also tied to the *bazaaris*⁷⁰ from whom much of

67. Gregory Rose, *Velayat-e Faqih and the Recovery of Islamic Identity in the Thought of Ayatollah Khomeini*, in RELIGION AND POLITICS IN IRAN: SHI'ISM FROM QUIETISM TO REVOLUTION 166, 175-76 (Nikki R. Keddie ed., 1983).

68. KEDDIE, *supra* note 8, at 43-48.

69. HOSSEIN BASHIRIYEH, THE STATE AND REVOLUTION IN IRAN: 1962-1982 at 9 (1984).

70. Keddie defines *bazaaris* as "not only those who had shops in the bazaar but also those who carried on retail and export trade and manufacture of a traditional rather than a modern type . . . [The term] has meaning in its

their income flowed in a "natural alliance formed between the nascent Iranian bourgeoisie and the clerical establishment."⁷¹ The *bazaaris* were competing with products from abroad and faced a decline in prices for Iranian exports on the world market.⁷² These three groups—reformers, *ulama* and *bazaaris*—were part of an "alliance that has been responsible for so much revolutionary activity in Iran since 1891."⁷³

The first national challenge to a monarch was the so-called Tobacco Revolt of 1891, protesting Qajar Shah Nasruddin's grant of a monopoly over tobacco to an Englishman, not only its export, but its local production and sale.⁷⁴ This concession affected an industry already in existence, and the thousands of Iranians profiting from production and distribution of tobacco. Massive protests swept the country and within a few months, the government had to backtrack. The *marja* of the day, Ayatollah Mirza Hasan Shirazi, issued a *fatwa* forbidding smoking, starting a nationwide boycott of tobacco products joined by both men and women.⁷⁵ This broad movement forced the monarchy to cancel the concession and was the start of a popular revolt in Iran which, within little more than a decade, would lead to the creation of a constitution and the beginnings of a modern state.

The constitutional movement of 1905-1911 wanted a liberal constitutional monarchy, a *mashruta* (literally, conditional rule⁷⁶) a form being sought contemporaneously within the neighboring Russian and Ottoman empires, and

involvement with petty trade, production, and banking of a largely traditional or only slightly modernized nature, . . . centering on bazaar areas and traditional Islamic culture . . . [and] united in their resistance to dependence on the West and the spread of Western ways," but not in themselves a class. KEDDIE, *supra* note 8, at 226-27.

71. Hamid Dabashi, *The End of Islamic Ideology*, 67 SOC. RES. 475, 500 (2000).

72. KEDDIE, *supra* note 8, at 227.

73. *Id.*

74. Tobacco was one of the crops—along with cotton and opium—which were coming to replace silk, wool and textiles as Iran's leading exports in the nineteenth century. KEDDIE, *supra* note 8, at 50-51.

75. AZADEH KIAN-THIEBAUT, *SECULARIZATION OF IRAN: A DOOMED FAILURE?* 48 (Diffusion Peeters 1998).

76. ZUBAIDA, *supra* note 10, at 185.

one conceptualized in all three countries as a move toward modernization. Unlike the Tobacco Revolt, the Constitutional Revolution, was based on “modern political and social ideas: constitutionalism, establishment of a parliament, freedom of speech, press, and associations, restriction of the monarch’s power, national independence, and to a lesser extent, social justice.”⁷⁷

These new demands posed a dilemma for the *ulama*. While the revolutionaries, whose leadership included landlords, bazaar merchants, and tribal leaders,⁷⁸ as well as reformers, did not contemplate constitutional separation of religion and state, nonetheless, the *ulama* were split. Some supported the constitutionalists against the Qajars, while others believed the kind of legislation a parliament might draft could contradict *shari’a* and endanger the authority of religious scholars.⁷⁹ Religious leaders who supported the constitution theorized that since all temporal authorities are imperfect in the absence of the Hidden Imam, “a constitutional form of government that limits the ruler’s arbitrary power and grants people limited sovereignty was less abhorrent than other forms.”⁸⁰

Among clerics who played a leadership role as supporters of the constitutional revolution were Sayyid,⁸¹ Mohammad Tabataba’i, and Sayyid Abdallah Behbehani, without whom the “first triumphs of the constitutionalists . . . would have been unthinkable.”⁸² In response, the constitution gave the *ulama*, through a parliamentary committee of five *mujtahids*, the power to ensure conformity of legislation with *shari’a*.⁸³ This recognized an

77. AZADEH KIAN-THIEBAUT, *supra* note 75, at 50.

78. Gavin R. G. Hambly, *The Pahlavi Autocracy: Riza Shah, 1921-1941*, in *THE CAMBRIDGE HISTORY OF IRAN* 213 (Peter Avery et. al. eds., 1991).

79. Akhavi, *supra* note 31, at 16; ARJOMAND, *supra* note 43, at 50-51.

80. Mohsen Milani, *Shi’ism and the State in the Constitution of the Islamic Republic of Iran*, in *POLITICAL CULTURE IN THE ISLAMIC REPUBLIC* 139, (Samih K. Farsoun et al. eds., 1992).

81. The term “sayyid” means descendant of the Prophet. MARTIN, *supra* note 21, at 233.

82. Algar, *supra* note 58, at 732-33.

83. BASHIRIYEH, *supra* note 69, at 9.

This provision of the constitution was referred to again in 1979 when the post-revolution constitution was drawn up. HALM, *supra* note 22, at 126.

official role for the *ulama* within the state, without rejecting constitutionalism and representative government.

The hostility of other religious figures was attributable to fear of the secular tendencies of some supporters of the constitution.⁸⁴ Shaykh Fazlullah Nuri, the leading proponent of the constitutional creation of a committee of *mujtahids*, came to believe the leaders of the Constitutional Revolution sought a secular republic. He was hanged by the constitutionalists after he joined monarchic forces in an attempt to put down the constitution and parliament with the aid of foreign troops.⁸⁵

The leaders of the constitutional revolution, secular and religious, would not realize the outcome they sought, a long-lasting constitutional monarchy free of outside domination. At the end of 1911, Russia and Britain acted to put an end to a political movement that threatened their economic and strategic interests in Iran. The troops of both countries occupied Persian territory for the next decade,⁸⁶ and the Shah dissolved the *Majles*, the parliament.⁸⁷ While the 1906 constitution was, because of war, coup, and the Pahlavi dynasty, not implemented until after World War II and then only for eight years,⁸⁸ it stood throughout the twentieth century for the indigenous and modern self-government that was the aim of most Iranians. At the same time, the issue of the authority of the Shi'i clergy and Islamic law within a constitutional state was never resolved.

C. *The Pahlavi Dynasty*

1. *Reza Shah*. Though ineffective, the constitution was a symbol of Iranian nationhood, such that the Pahlavi

84. ARJOMAND, *supra* note 43, at 79-80.

85. MANSOOR MOADDEL, CLASS, POLITICS, AND IDEOLOGY IN THE IRANIAN REVOLUTION 149 (1993); ARJOMAND, *supra* note 43, at 54-55.

86. See KIAN-THIEBAUT, *supra* note 75, at 59-60.

87. *Id.*

88. Although the constitution was theoretically in effect under the Pahlavis, in practice it was a dead letter. In particular, the provision for religious supervision of legislation was never implemented. Akhavi, *supra* note 31, at 260.

dynasty continued to claim an adherence to it, while its opponents blamed their opposition the Pahlavis' failure to uphold that constitution. Nor was this the only way in which the constitution prefigured later events, for, in its compromises between republicanism and religion, the constitutional era can be seen as heralding the dilemmas of the revolutionary and post-revolutionary period in which the Islamic Republic is now embroiled.

When an Iranian cavalry officer, Reza Khan, soon to become Reza Shah, seized the throne in 1926 (having already been Persia's strong man for several years), Iran was far from being a modern state. Under the Qajar Shahs of the late nineteenth century, Iran was fought over by two empires, the Russian and the British. Each offered the usual imperial carrots and sticks to important figures in the patrimonial Qajar regime, with the British generally coming out ahead. In the first decade of the twentieth century, a proto-nationalist constitutional revolution attempted to create a constitutional monarchy and introduce a variety of reforms within a religio-national context. Women, for the first time, tried to play a role in support of nationalist forces, though female suffrage was strongly opposed by religious figures within the coalition and agitation in that direction was stillborn. The constitutional revolution failed, as Reza Pahlavi—with the blessing of the British⁸⁹—became the strongman of the state. Nonetheless, it remained an iconic reference point for patriotic Iranians.

To gain support before taking the throne at the start of 1926, Reza Khan disarmed those suspicious of his religious intentions with “ostentatious displays of religiosity”⁹⁰ and promises to preserve Islam, assuring the *ulama* that “he would fulfill Islamic law and not institute radical reforms.”⁹¹ Thus, on the whole, the clergy supported Reza

89. This was a shift from the historical preference of the British “for weak Qajar government.” KEDDIE, *supra* note 8, at 186. But Reza Khan was, as the Americans then described him privately, “an antidote to Bolshevism,” now making its appearance on Iran's borders. *Id.* at 89 (citing a State Department memo of 1921). Indeed Reza Khan thereafter defeated the Jangalis movement's, indigenous northern forces who had declared the “Soviet Republic of Gilan.” Algar, *supra* note 58, at 738.

90. ARJOMAND, *supra* note 43, at 81.

91. KEDDIE, *supra* note 8, at 91.

Khan's rise to power as a counter to the forces of secularism, nationalism, and socialism.⁹² Once in power, Reza Khan did not serve their purposes. Education was taken out of the hands of religious figures and a secular educational system created.⁹³ Public schools were established, though there were never more than a quarter of a million children in public elementary school at any period during the time of Reza Shah, when the population was about fifteen or sixteen million.⁹⁴ Tehran University was founded and its faculty of law became the only route to the civil judiciary,⁹⁵ except for family and marital courts which remained within the jurisdiction of the *ulama*. At the same time, a new historiography—teaching the pre-Islamic roots and successes of the Persian people—became part of a national curriculum, as well as official discourse. The state's assertion of its right to control *vaqf*, religious endowments,⁹⁶ state credentialing of the clergy, and the curriculum of religious schools cut into the *ulama*'s influence and power.⁹⁷ In addition, the Shah barred public *Muharram* processions and *taziyeh*.⁹⁸ Nor was there any special treatment for religious dissenters, as the imprisonment and execution of Sayyed Hassan Modarres, a leading religious figure who had been Reza's consistent opponent, demonstrated.⁹⁹

92. Dabashi, *supra* note 71, at 504; MARTIN, *supra* note 21, at 9.

93. ARJOMAND, *supra* note 43, at 82.

94. *Id.* at 68, 215, tbl.9. Keddie says that "less than 10 percent of the population received any elementary education, and, for secondary education, the figure was under one percent." KEDDIE, *supra* note 8, at 99.

95. HALM, *supra* note 22, at 126-27.

96. ARJOMAND, *supra* note 43, at 82-83. According to Fischer, the government's Office of Endowments was continually at odds with the clerical establishment over management of *vaqfs*, or trusts, and the question of whether the endowment of a trust could be converted out of the form in which it had originally been made, whether the proceeds of the trust were limited to the donor's specific purpose or could be used for broadly charitable purposes, and whether the administrators of a particular endowment were entitled to the position. Ten percent of trust income was claimed by the Office, which was another source of controversy. Fischer, *supra* note 44, at 131-32.

97. Dabashi, *supra* note 71, at 505-06.

98. HALM, *supra* note 22, at 77.

99. Algar, *supra* note 58, at 740-41.

Before Reza came to power in the first half of the 1920's, marriage and divorce were matters of private contract adjudicated by religious figures. With Reza Shah, the first of the two Pahlavi rulers, a modern bureaucratic state started to form. Among his reforms was the creation of a civil code that made important procedural changes in the law of marriage and divorce.¹⁰⁰ Religious scholars who sat in judgment on marital issues now had to have state credentials. Moreover, all marriages and divorces had to be registered by the state. Subsequently, women seeking divorce were required to bring their action in civil court, diminishing the jurisdiction of the religious court and limiting it to religious judgments on the validity of the marriage or divorce.¹⁰¹

Reza Shah claimed to be a nationalist patriot, a modernizer, and to model himself after Ataturk. After a 1934 visit to Turkey, where Kemal Ataturk had linked progress, modernization, and dress, Reza Shah decreed that women appearing in public could not be covered. His very unpopular decree was known as *kashf-e hejab*, or unveiling.¹⁰² He directed the police force to uncover women who wore *chador*—a head to toe cloak—in the streets and informed employees that their jobs depended upon the European dress of the female members of their families. The unveiling order also provoked widespread civil unrest. In 1935, a crowd of worshippers in Mashhad gathered at the tomb of Imam Reza, the holiest shrine in Iran,¹⁰³ to protest these policies. They refused to disperse and were attacked. Casualties led to rioting which continued for a

100. Girls under thirteen could not marry; a wife could be granted a divorce not only in cases of her husband's insanity or impotence, but also his unwillingness to have sex, his affliction with a disease which could threaten her health, or his mistreatment of her. Ziba Mir-Hosseini, *Family Law in Modern Persia*, in *ENCYCLOPEDIA IRANICA: VOLUME IX* 192, 192 (Ehsan Yarshater ed., Bibliotheca Persia Press 1999) (1994).

101. *Id.*

102. Perhaps coincidentally, Khomeini's first attack on the Pahlavis as enemies of Islam came in the early forties in an anonymously published book called *Kashf al-Asrar, The Unveiling of Secrets*. ZUBAIDA, *supra* note 10, at 191. In it, Khomeini wrote that "perhaps . . . one day the slumbering people of Iran will awaken so that you will get your just desserts." MARTIN, *supra* note 21, at 111.

103. Reza was the eighth Imam and the only one buried in Iran. HALM, *supra* note 22, at 26.

second day, until regular troops launched a machine-gun attack that resulted in many deaths.¹⁰⁴ This served as both a warning to the clergy and a source of future resentment against the Pahlavis.¹⁰⁵

2. *Mohammad Reza Shah*. Reza Shah's modernization program, as well as vast oil deposits in the southeastern provinces of Iran, made Iran part of the world economy. Although he never succeeded in giving Iran an economic base other than oil, that commodity was so important—first to modern warfare, and then to everything else—that the Iranian state became a great deal wealthier than it was when he took power. It fell to his son, Mohammed Reza, to try to make Iran something more than a source of oil, a state richer and more powerful than its Arab counterparts, Iraq and Saudi Arabia. In the early fifties, Prime Minister Mohammad Mossadegh nationalized the oil industry, an immensely popular move with Iranians, but a blow that neither the British owners of Iranian oil, nor their American allies, were prepared to absorb.¹⁰⁶ The British stood to pay more for oil, while the Americans feared the example of nationalist expropriation in a Cold War context, particularly because the Iranian Communist Party, *Tudeh*, or *Masses*, “was the most powerful, best organized party of modern Iran.”¹⁰⁷ and played a significant role in the newly-active postwar *Majles*, now governed by the 1906 Constitution. Together in 1953, the Americans and the British carried out a coup against Mossadegh and made the

104. Algar, *supra* note 58, at 743.

105. The unveiling policy was revoked in 1941 after the unpopular Reza Shah was forced by the Allied powers to abdicate; the revocation was an attempt to create popular support for his son, Mohammed Reza Shah, who then assumed the throne. KEDDIE, *supra* note 8, at 105-06. Nonetheless, Ayatollah Khomeini referenced the 1935 events in a speech in 1977 shortly before another wave of religious protest led to death at the hands of the Shah's forces in Qom. Algar, *supra* note 58, at 743 n.42. After the Revolution of 1979, General Iraj Matbu'i, whose troops had been involved in the 1935 deaths, was tried and executed, although he was then in his eighties. Houchang Chahabi, *Dress Codes for Men in Turkey and Iran*, in *MEN OF ORDER: AUTHORITARIAN MODERNIZATION UNDER ATATURK AND REZA SHAH* 209, 230 (Touraj Atabaki & Erik-Jan Zürcher eds., 2004).

106. See generally STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003).

107. AZADEH KIAN-THIEBAUT, *supra* note 75, at 103.

Shah the effective head of government, kept in power by a police force and army that developed virtually unlimited access to American military assistance, but little popular support.¹⁰⁸

Mohammad Reza, while not abandoning his father's secularism, moved to placate the clergy by reversing some of his father's anti-clerical legislation. He revoked the unveiling order,¹⁰⁹ restoring the *ulama's* control of religious endowments, and once again allowing the *Muharram* processions that marked the anniversary of the death of Hussein.¹¹⁰ That strategy paid off when the only living *marja*, Ayatollah Borjuerdi,¹¹¹ begged the Shah to return from Rome to take power when Mossadegh was deposed by coup. Two others, Ayatollahs Behbehani¹¹² and Kāshani, the latter hitherto a supporter of Mossadegh, joined his opponents at a critical moment.¹¹³ In the coup, the *ulama* "supported the preservation of the monarchy and the return of the Shah as a safeguard against the spread of communism."¹¹⁴ Thereafter, the Shah and the *ulama* had an "implicit concordat."¹¹⁵ Thus, the decade after the anti-Mossadegh coup was relatively stable, with opposition

108. See KINZER, *supra* note 106.

109. According to Halm, in 1948, the leading *mujtahids* issued a joint *fatwa* requiring that the *chador* and the young Shah "did not dare oppose them." HALM, *supra* note 22, at 127.

110. *Id.* at 78.

111. BASHIRIYEH *supra* note 69, at 63. Borjuerdi died in 1960, bringing the need for a successor to the political forefront.

112. Behbehani was the son of Sayyed Abdallah Behbehani who had been a strong supporter of the Constitutional Revolution and was himself a member of a notable clerical family. ARJOMAND, *supra* note 43, at 81.

113. KIAN-THIEBAUT, *supra* note 75, at 102.

114. ARJOMAND, *supra* note 43, at 85. According to the CIA history of the coup, as reported by the New York Times, part of the agency's anti-Mossadegh strategy was to stir up distrust among clerics of Communist influence with Mossadegh. To this end, the house of a prominent Muslim (presumably a cleric) was bombed and threats were made against other clerics in the name of the Tudeh party. James Risen, *How a Plot Convulsed Iran in '53 (and in '79)*, N.Y. TIMES, Apr. 16, 2000, at 1, 14.

115. MARTIN, *supra* note 21, at 19.

muted and "oil income and American economic aid . . . resumed."¹¹⁶

The relationship between the regime and the *ulama* became more attenuated as the Shah attempted to do what was ultimately impossible—keep an iron grip on the state and the economy and yet make sufficient changes to mollify Iranians opposed to the authoritarian nature of the regime and the uneven development it sponsored. Reform was urged by several United States administrations, beginning with Eisenhower. The Shah, whose "survival had been chiefly due to American support,"¹¹⁷ was in no position to refuse. Under pressure from the Americans, as well as a recession, the Shah moved to co-opt potential adversaries and turn them into supporters,¹¹⁸ launching *Inqilab-i Safid*, the so-called "White Revolution."¹¹⁹

The White Revolution, which began in 1961, was an attempt to create a popular base for the Shah among those sections of society that had hitherto been relatively inactive in political life and whose entry, by sponsoring, he hoped to turn to his own account. He looked to peasants, sponsoring a land reform program designed to force compensated transfers¹²⁰ from large landowners to those who worked the land. Though far from feminist himself,¹²¹ in seeking new bases for political support, the Shah turned also to women, creating some space for them. The White Revolution aimed to bring women into the political process as Shah supporters, by making education more available to them, as well as jobs in the state bureaucracy. They were to be a new

116. JOHN FORAN, *FRAGILE RESISTANCE: SOCIAL TRANSFORMATION IN IRAN FROM 1500 TO THE REVOLUTION* 317 (1993).

117. Hambly, *supra* note 78, at 279.

118. BASHIRIYEH, *supra* note 69, at 20-21.

119. This appellation was the regime's way of creating an identity for the Shah's reform different from those proposed by "black and red reactionaries," *Keddie*, *supra* note 8, at 145, or clerics and Communists. The plan was also known as the "Revolution of the Shah and the People," and as Arjomand points out slyly, it "set in motion a revolution of the Shah and the people. However, there was a sharp disjunction in the latter revolution." ARJOMAND, *supra* note 43, at 73.

120. BASHIRIYEH, *supra* note 69, at 21.

121. *Id.* at 22.

class of political actors, loyal to the Shah from the initiation of their political agency.

This plan for the White Revolution was submitted to the electorate (including women voters for the first time in a national election¹²²) in a 1963 referendum also designed to demonstrate support.¹²³ But opposition did exist. As Gavin Hambly says, “[i]n view . . . of the government’s claim that the result [of the referendum] was a vote of confidence in the Shah’s policies, it was embarrassing that massive anti-plebiscite demonstrations and riots took place.”¹²⁴ The opposition came from a new source,¹²⁵ the previously obscure¹²⁶ sixty-two year old Ayatollah Ruhollah Khomeini. It was the White Revolution that first evoked the fateful and “implacable opposition”¹²⁷ of an adversary with a “vibrant and powerful vision of Islam . . . coupled with the ability to transmit it, imperiously and convincingly, to others.”¹²⁸

Khomeini came to prominence after the death of Ayatollah Borujerdi in 1961; like Boujuerdi, Khomeini eventually became recognized as a *marja*. Until Borujerdi’s death, Khomeini, his protégé, emulated him in remaining “politically rather quietist.”¹²⁹ But after Borujerdi’s death, it did not take Khomeini long to make known his opposition to the Shah’s government, leading first to exile and ultimately to victory.

122. PARVIN PAIDAR, *WOMEN AND THE POLITICAL PROCESS IN TWENTIETH-CENTURY IRAN* 145 (1995).

123. At the same time, funding for SAVAK, the Shah’s hated secret police, was increased to take on opposition that could not be won over. ARJOMAND, *supra* note 43, at 73-74.

124. Hambly, *supra* note 78, at 279.

125. MOADDEL, *supra* note 85, at 139.

126. See generally MAHRAN KAMRAVA, *REVOLUTION IN IRAN: THE ROOTS OF TURMOIL* (1990).

127. FORAN, *supra* note 116, at 336. The reasons for Khomeini’s opposition to the White Revolution are not clear. Khomeini objected not only to female suffrage, but to extraterritoriality for Americans accused of committing crimes in Iran, as well as to nationalization of some of the assets of the *ulama*. MARTIN, *supra* note 21, at 22.

128. Algar, *supra* note 58, at 751.

129. KEDDIE, *supra* note 8, at 147.

D. Khomeini and His Changing View of Religious Authority

The general American view of post-revolutionary Iran begins (and often ends) with Ayatollah Khomeini, whose stern visage is usually at the forefront of the actual photographs, and certainly the mental images, that conjure up the Iranian Revolution, the hostage crisis, the Iran-Iraq war, and the general notion of a fundamentalist religious state. Yet, as Ervand Abrahamian pointed out more than twenty years ago, Khomeini was far from a religious fundamentalist.¹³⁰ By the end of his life, he was a pragmatic politician who not only recognized, but accepted, the extent to which religious norms and practices might have to give way to the exigencies of governance.

Abrahamian suggests a variety of ways in which Khomeini, once in power, proved himself to be something other than a fundamentalist. For one thing, he did not reject the modern nation-state's claim to the affiliation of believers, but was actually an Iranian patriot. Nor did he insist upon an Islamic Republic that duplicated Islam's early governance of believers, instead backing a constitution "modeled less on the early caliphate than on de Gaulle's Fifth Republic,"¹³¹ and containing a judiciary overseen by the state, rather than operating outside it. His Islamic ideology was distinctly political: in the revolutionary period he "hammered away at the [Shah's] regime on its most visible, political, social, and economic shortcomings."¹³² Indeed, it was precisely those shortcomings that he denounced as un-Islamic. Finally, Khomeini's construction of an Islamic Republic was novel and departed from Shi'i tradition that had not sought political involvement of religious jurists in the governance of the state. Even within Iran, as Dahlen also points out, Khomeini "met with criticism from other traditionalist *ulama* who opposed any appropriation of or dialogue with modernity whatsoever and wanted to preserve the traditional dualism of religious and political power."¹³³ It was precisely here, however, that Khomeini emerged as an

130. ERVAND ABRAHAMIAN, *KHOMAINISM* 15 (Univ. of Cal. Press 1983).

131. *Id.* at 15.

132. *Id.* at 17.

133. Dahlen, *supra* note 11, at 115 n.17.

innovator, by his arguments for both religion and republicanism.

Thus, in the revolutionary period, Khomeini came to embody both the desire for a democratic constitution and Shi'ism's "sense of insurrectionary expectation."¹³⁴ Indeed, it is said that when Khomeini declared his opposition to the Shah in 1963, he held a Qu'ran in one hand and the 1906 constitution in the other and accused the Shah of abandoning both.¹³⁵

On June 5, 1963, a day that marked the climax of the annual commemoration of an event fundamental to Shi'ism—the martyrdom of Imam Hossein, the Prophet's grandson—Khomeini described the Shah's government as "fundamentally opposed to Islam"¹³⁶ and explicitly compared the Shah to those who martyred Hossein. That defiance led to his arrest two days later, sparking riots throughout Iran, in which thousands were killed when the army fired on crowds in Tehran, Qum, Shiraz, Isfahan, and Mashhad, leading to the imposition of martial law.¹³⁷ As Kian-Thiebaut says, "the religious orientation and leadership of the [1979] revolution originated in the ferocious repression of the June 1963 uprisings."¹³⁸ For the first time, a religious movement was at the head of the opposition to the Shah.¹³⁹ Khomeini was sent into exile but he remained the people's leader.

By the seventies, the Pahlavi dynasty was "increasing perceived as pursuing the interests of its own elite and of a

134. Dabashi, *supra* note 71, at 482. *But cf.* Keddie, *supra* note 38. In times of defeat or persecution, adherence to the Hidden Imam may also have the effect of accustoming believers "to an indefinite wait for the mahdi" and hence to passivity in the face of injustice. *Id.* at 89.

135. ARJOMAND, *supra* note 43, at 85.

136. Algar, *supra* note 58, at 753.

137. MARTIN, *supra* note 21, at 63. Iranian sources claim "not less than 15,000" died in the protests against the arrest. THE POSITION OF WOMEN FROM THE VIEWPOINT OF IMAM KHOMEINI 60 n.77 (Juliana Shaw & Behrooz Arezoo trans., 2001) [hereinafter KHOMEINI].

138. KIAN-THIEBAUT, *supra* note 75, at 224. Khomeini was arrested and jailed for ten months and then released. Six months later, he gave another objectionable speech decrying the Shah's relationship with the U.S.; he was then sent into exile from which he did not return until February 1979, after the Shah fled Iran.

139. ARJOMAND, *supra* note 43, at 87

foreign power [the United States] while operating an oppressive political system and neglecting the poor."¹⁴⁰ The mobilization of Iranian society in opposition to the Shah was broad enough to encompass virtually every ideology that existed in the Iran of that day: secularists, left, liberal and moderate; islamists from reddest red to greenest green; atheist and agnostic; communist, nationalist, tribalist; feminist and anti-feminist; workers, blue-collar and white-collar; peasants and petty bureaucrats; *bazaaris* and intellectuals—the anti-Shah movement was as inclusive a coalition as imaginable.¹⁴¹

Inevitably, the differences that melted in the heat of revolution crystallized again when the question was no longer ousting the monarchy, but replacing it. In particular, a violent ultra-left opposition quickly arose, at the same time that right-wing opponents continued their attempts to bring down the new government.¹⁴² The tremendous prestige of Ayatollah Khomeini as both leader and symbol of opposition carried over to popular support for the constitution of an Islamic Republic.¹⁴³ But even Khomeini could not determine alone how Iran was to be governed.

Thus, the post-revolutionary form of the Islamic state was itself a compromise. Secularists wanted a republic, but what did Khomeini's forces want? Khomeini, from the exile to which he had been ordered in 1964, had written and lectured about the flaws and defects of the monarchy, indeed of all monarchies. But, despite his earlier support for the 1906 constitution, by 1970, Khomeini was clear that the scope of representative government must also be limited: "[I]n Islam the legislative power and competence to establish laws belongs exclusively to God Almighty. The sacred Legislator of Islam is the sole legislative power. No one has the right to legislate and no law may be executed except the . . . ruling of the [Divine] Legislator."¹⁴⁴

140. MARTIN, *supra* note 21, at 47.

141. ASGHAR SCHIRAZI, *THE CONSTITUTION OF IRAN: POLITICS AND THE STATE IN THE ISLAMIC REPUBLIC 1* (John O'Kane trans., 1997).

142. MARTIN, *supra* note 21, at 169-70.

143. *Id.* at 152-53.

144. Khomeini, *Velayat-i faqih*, quoted in DAHLEN, *supra* note 11, at 116.

In a series of lectures about Islamic government delivered during his exile in Iraq in the seventies, Khomeini made the novel claim that religious jurists not only could, but should, govern a nation of believers through *velayat-e faqih*, the guardianship of the jurist.¹⁴⁵ Although the term, in modern times, referenced the religious jurist's duty and ability to protect those unable to care for themselves—minors, the disabled, women with no male relations—in the revolutionary context, it came to be used as a means to extend the relationship between believers and religious leaders to the political realm.

Khomeini based his claim in part upon the authority of *marji'yat*. There was a tradition of respect for a *marja* and widespread deference to his *fatwas*, or religio-legal rulings.¹⁴⁶ Khomeini, himself a *marja*,¹⁴⁷ extended this deference to the political realm, arguing that in the absence of the just government of the Imam, the descendant of the Prophet, whose reappearance would establish perfect justice on earth, a *marja* should be understood to “have the ‘same authority’ as the Prophet and imams; . . . and jurisdiction over believers”¹⁴⁸

From that point of view, it was logical to insist upon the rule of the jurist who could best understand the divine law. But by the time the Shah's government had been ousted in early 1979, the popular demand for a republic was unquenchable. Because the political situation required it, Khomeini did in fact accept a republican legislature, the *Majles*, made up of elected representatives, as well as a president elected by the people, but in tandem with the guardianship of the jurist. The Islamic Republic thus had a modern president and parliament with an entirely novel religious leadership atop it. Dahlen, in an interesting

145. ABRAHAMIAN, *supra* note 130, at 24.

146. *See supra* text accompanying notes 78-81.

147. At the time of the Iranian revolution, Khomeini was one of several recognized *marja*. There was some objection among them to Khomeini's formulation of the means by which the IRI was to be governed. MIR-HOSSEINI, *supra* note 64, at 15. The association of *velayat-i faqih* with the *marjiyat* suggested that believers were no longer free to choose their own *marja* but must adhere to the *velayat-i faqih*. Ayatollahs Khoe'i and Shariat-Madari, in particular, made their objections to this known. DAHLEN, *supra* note 11, at 115 n.17.

148. ABRAHAMIAN, *supra* note 130, at 25.

discussion of Khomeini, concludes, "By considering the intellectual as well as practical question of modernity as essentially political, [Khomeini] accepted many modern notions (i.e. institutions), while rejecting the values and ideas of modernity Khomeini's attempt was essentially one of appropriating the notion of the modern state to Islam."¹⁴⁹

The revolutionary government that came to replace the monarchy was in effect a combination of the secularists' constitutional republic and Khomeini's *velayat-e faqih*, literally creating the Islamic Republic of Iran. It had a popularly elected president and parliament. It also had an appointed Supreme Religious Jurist (inevitably, and for his lifetime, Khomeini) with the authority to dismiss the president, appoint military commanders, declare war and name clerics¹⁵⁰ to a Guardian Council, *Shureh-ye Negahban*, that, in an echo of the 1906 constitution, reviewed legislation for its compatibility with Islam.

Once in power, Khomeini revealed himself as pragmatic in respect to governance by *shari'a*. Obviously, the new power relations of the post-revolutionary moment made the adoption of *shari'a* as the law of the state problematic. Khomeini did not insist on the jurisprudence of *shari'a* that had been protected during the Pahlavi dynasty by an *ulama* jealous of its jurisdiction, particularly in respect to the law of marriage and family. Instead, Khomeini now said it was a "fact" that the jurisprudence of *shari'a* "is dynamic and that zaman wa makan (time and place) are . . . decisive elements" in it.¹⁵¹ *Feqh-e puya*, or dynamic *feqh*, is "the practical implementation of the eternal *shari'a* [to] changing human conditions,"¹⁵² a kind of pragmatism, not in respect to the word of God, but in respect to its contextual implementation.

149. DAHLEN, *supra* note 11, at 115.

150. HALM, *supra* note 22, at 147.

151. DAHLEN, *supra* note 11, at 117 (quoting Khomeini). The jurisprudence of time and place asserts that "while the Quran is the word of God, God spoke to people in terms they could understand, which makes the utterances relative to the milieu of their reception." ZUBAIDA, *supra* note 10, at 222.

152. DAHLEN, *supra* note 11, at 117.

Indeed, it might be accurate to say that *feqh*, the jurisprudence of the revealed law,¹⁵³ was now problematized, in the sense that its meanings had to be rethought and *shari'a* itself recontextualized. *Shari'a* is understood to be a law for all times and all places and hence must suit each time and place. Thus, Khomeini's approach suggested (though never explicitly) that *feqh* may be socially and historically contingent. While in theory that process is never alien to Islamic jurisprudence, in practice such a large-scale recontextualization as that demanded by the creation of an Islamic republic, with a constitution recognizing the sovereignty of God and of the people,¹⁵⁴ was unique. As Ziba Mir-Hosseini writes, what was at stake was no less than "the transformation of Shi'a jurisprudence . . . from a scholarly discipline whose relevance was confined to the seminaries, into the ideology of the state backed by a modern [state] apparatus."¹⁵⁵

Pragmatism was not new to Khomeini. He had, for example, first made public his opposition to the Shah on the issue of female suffrage,¹⁵⁶ which he denounced as "contrary to Islam and the Constitution."¹⁵⁷ Yet returning to Iran after the fall of the Shah's government, when power was still in the streets, Khomeini told women that they "must participate in the fundamental matters of the country . . . in the same way that men are involved in all matters."¹⁵⁸ His

153. *Feqh* is the "human effort of giving a specific . . . norm or ruling . . . on a particular human act by studying the relevant textual sources and investigating its proper context. . . . [It] is not the 'end product' of legal learning or law itself, but rather an 'open texture' as the process of understanding and inference, open to rational argumentation and the historical process." *Id.* at 40-42. A *faqih* (pl. *fuqaha*) is one who does such jurisprudence. Because jurisprudence as a "process of intellectual activity [is] an act of piety, which discovers the terms of the Divine Will," the *faqih* is more than a judge, but less than a legislator. *Id.* at 46.

154. "Absolute sovereignty over the world and man belongs to God and it is He Who has made man master of his social destiny The people are to exercise this divine right in the manner specified in the following articles." CONSTITUTION, *supra* note 27, art. 56.

155. Ziba Mir-Hosseini, *Ayatollah Khomeini and the Question of Women: Pre- and Post-Revolutionary Positions*, in *AYATOLLAH KHOMEINI AND THE MODERNIZATION OF ISLAMIC LEGAL THOUGHT* 28 (Richard Tapper ed., 2000).

156. See MARTIN, *supra* note 21, at 60.

157. PAIDAR, *supra* note 122, at 142.

158. Mir-Hosseini, *supra* note 155, at 29 (quoting Khomeini).

previous opposition had been, not to women voting, but to their voting in the corrupt Shah's elections.¹⁵⁹ Unsurprisingly, women were considered more likely to vote for Islamist candidates, than their left secular co-revolutionaries, who made up the other substantial block of candidates. And indeed this expectation was fulfilled, with women lending "massive support . . . to the revolution and its aftermath."¹⁶⁰

By the end of his life, Abrahamian says, Khomeini "was now close to concluding that the affairs of this world were separate from the understanding of the sacred law."¹⁶¹ It was clear to Khomeini that his own guardianship was such that the Islamic Republic was in good hands. But as he tired, and recognized the temporal limits of his role, he took a number of steps designed to ensure that the republic would continue in the course he had set. For one thing, he modified the qualifications necessary for his successor as Supreme Religious Jurist so that they did not include reaching *marjiyat*, the highest level of religious esteem. He said that the person who replaced him need not necessarily be a *marja*, but rather should be the religious jurist "most knowledgeable about the contemporary world, especially economic, social, and political matters."¹⁶²

Inevitably, religious, social, and political elements would not always remain in tandem. There were serious differences between the *Majles* and the Guardian Council over attempts to provide benefits to the working poor, both urban and agricultural. Redistributive moves by the *Majles* were opposed by the Guardian Council, united in its adherence to the almost unequivocal protection afforded property by *shari'a*. In particular, land reform, labor protection, and state control of foreign trade became major political issues. Early in 1988, Khomeini wrote a letter to Ali Khamenei (then President, today Supreme Religious Jurist), in which he announced his opinion that ensuring the continued existence of the Islamic Republic of Iran took "precedence over all other [religiously-]derived ordinances,

159. See *id.* at 31-32.

160. Roksana Bahramitash, *Revolution, Islamization and Women's Employment in Iran*, 9 BROWN J. WORLD AFF. 229, 230 (2003).

161. ABRAHAMIAN, *supra* note 130, at 35.

162. *Id.* at 35.

such as prayer, fasting and the pilgrimage” and that this was the responsibility of the Supreme Jurist.¹⁶³

Since prayer, fasting, and pilgrimage are fundamental pillars of Islam, Khomeini’s declaration was stunning. The view of Iran’s Supreme Jurist was that the interests of the Islamic state were more central to Islam than its prescriptions. Khomeini’s letter made complete the identification of Islam with the interests of the IRI, and the subordination of prescriptive law to each. As Sami Zubaida writes:

This was a clear . . . empowerment of the state freely to pursue its legislation and policy-making in the belief that the Muslim ruler as an ordinance of God stands above all other divine ordinances, and could abrogate even the most basic of rules if it was judged to be in the interest of the Muslim people and their state.¹⁶⁴

Vanessa Martin puts Khomeini’s 1988 declaration, known as *velayat-i mutlaqa-yi faqih*, the absolute powers of the Supreme Religious Jurist, into the context of the religious commitments of Khomeini,¹⁶⁵ who was a well-known teacher of ‘*irfan*,¹⁶⁶ a form of esoteric knowledge that combines “Sufi thought and Twelver Shi’ite philosophy.”¹⁶⁷ *Irfan* conceives of the possibility of human union with the divine, in the person of the *Mahdi*, from which “the perfect man will return to the larger community with a combination of knowledge of the transcendent and an understanding of . . . effective thought and action in service of the community.”¹⁶⁸ If an ‘*arif*, one who acquires “enlightened inner awareness of the transcendent”¹⁶⁹ through ‘*irfan* is “imbued with the same divine wisdom as

163. ZUBAIDA, *supra* note 10, at 210.

164. *Id.* In Zubaida’s view, the consequence is that the Islamic Republic of Iran is not in fact an Islamic state. Sami Zubaida, *Is Iran an Islamic State?, in* POLITICAL ISLAM: ESSAYS FROM THE MIDDLE EAST REPORT 102, 118 (Joel Beinin & Joe Stork eds., 1997).

165. See MARTIN, *supra* note 21, at 41.

166. DAHLEN, *supra* note 11, at 114 n.15. The term *irfan* is often translated as “theosophy.” *Id.* at 39 n.1.

167. *Id.* at 63 n.26. (quoting GERHARD BOWERING, *THE MYSTICAL VISION OF EXISTENCE IN CLASSICAL ISLAM* 551 (1998)).

168. MARTIN, *supra* note 21, at 35.

169. *Id.* at 35.

the *shari'a*, he may be justified in altering it in particular circumstances as the ruling jurist."¹⁷⁰ Such alteration is not the contradiction of *shari'a*, for *irfan* and *shari'a* are "two manifestations of the same truth,"¹⁷¹ one inward and one outward. It appears that Khomeini saw the Islamic republic as existing even beyond the law as a manifestation of divine truth.

Whatever the religious basis for Khomeini's startling decision that the interests of the IRI trumped religious law, it led to the creation of an institutional body empowered to discern when the interests of the Islamic Republic might require suspension of prescriptive law.¹⁷² This was the *Shureh-ye Maslahat-i Nizam*, Council for Assessing the Interests of the Regime, known as the Expediency Council, which could step in to resolve disputes between the *Majles* and the Guardian Council.¹⁷³ In that resolution, the Expediency Council was to ascertain the interests of the state and to consider them paramount, as a matter of religious duty.¹⁷⁴

This is the paradox of the Islamic Republic. On the one hand, the unity of state and religion is now clear, as "the Shi'a state has joined the Sunni one in being legitimate in theory as well as practice."¹⁷⁵ Despite centuries of Shi'a disdain for the rule of any earthly power and the conviction that only the Hidden Imam could bring divine governance to the world, the only state governed by Shi'is and administered under their law came to regard itself as legitimate and Islamic, just as Sunni states did. But on the other hand, that state came to be read, by its founder, its revered leader, its most central figure, as beyond the law

170. *Id.* at 41.

171. *Id.* at 40. Indeed, the prescriptions of the law "are understood not only as norms of behaviour, but also as objects of contemplation, which lead toward the perception and the love of God." DAHLEN, *supra* note 11, at 51.

172. This body was subsequently constitutionalized as Article 112 in the 1989 Amendments to the Iranian Constitution. See generally ANOUSHIRAVAN EHTESHAMI, AFTER KHOMEINI: THE IRANIAN SECOND REPUBLIC 41 (1995).

173. The Expediency Council includes the Guardian Council, but it is in the minority; the majority of members are nominated by the president and the *Majles*, the elected branches of government. ZUBAIDA, *supra* note 10, at 21.

174. The Expediency Council was subsequently constitutionalized as Article 112 by 1989 amendment. EHTESHAMI, *supra* note 172, at 38.

175. MARTIN, *supra* note 21, at 172.

itself. This paradox of authority was particularly important for the law most relevant to women, the law of marriage and divorce.

III. WOMEN, AUTHORITY AND *SHARI'A* IN THE IRI

A. *Women in Iran Before and After the Revolution*

The "Woman Question," the issue of their place in a modern society and a developing economy, and, in particular, of their suffrage, had certainly been in politics in the period before the Revolution, but women themselves were not, by and large, political actors. The Shah, seeking new sectors of support in the early sixties, had tried to mobilize them. Female suffrage, though an important breakthrough for women, was a political concession that, because of the Shah's limitations on political activity, was nonetheless more symbolic than real, even before 1975 when the Shah made Iran a one-party state.¹⁷⁶ Even in the sixties, the two legal parties were not in any real sense allowed to be oppositional, either to each other or to the Shah.

More important to women's everyday life was the 1967 Family Protection Law. With that measure, initiation of divorce became available to women as well as to men and any divorce had to be registered by the state, rather than simply taking place in the form of *talaq*, the husband's oral renunciation of the wife. The husband's polygamy rights were limited and made dependent upon the first wife's consent and the court's permission.¹⁷⁷ A further 1975 amendment to the law allowed courts discretion in granting custody or support in consequence of divorce. These changes, which in effect created a rough gender equality in the law of divorce and custody, were not accomplished by renouncing *shari'a* as a basis for family law. Rather

176. The *Rastakhiz-i-Milli*, or National Resurgence, was created in 1975. FORAN, *supra* note 116, at 315. The two previously legal parties, *Hizb-I Mardum*, the People's Party, and *Hizb-I Iran-I Novin*, the New Iran Party, had both been puppets of the Shah. See Hambly, *supra* note 78, at 283. These two were "Tweedledum and Tweedledee in the art of obsequiousness." *Id.* at 289.

177. Behnaz Pakizegi, *Legal and Social Positions of Iranian Women*, in *WOMEN IN THE MUSLIM WORLD* 221 (Lois Beck & Nikki Keddie eds., 1978).

procedural changes were made, generally in the form of modifications to the standard marriage contract, itself a religiously-prescribed document.¹⁷⁸ Indeed "clerics were consulted . . . to give . . . religious legitimacy."¹⁷⁹ Nonetheless, the FPL was, upon its 1967 passage, denounced by Khomeini as intending "the destruction of the Muslim family unit, . . . [and] contrary to the ordinances of Islam."¹⁸⁰

But even with the FPL, the legal position of women changed more than their social position,¹⁸¹ which in spite of the claims "widely believed and repeated in the Western media . . . was not being revolutionised for the better as a result of state policies."¹⁸² Land reform and rural emigration had turned many farm families into wage laborers and "destroyed women's productive role" within the family economy.¹⁸³ While many became carpet weavers, this was work that was low-paid, or not paid at all.¹⁸⁴ As agricultural laborers, women's wages were half those of men.¹⁸⁵ Urban women who worked were also paid less than men; unlike rural women, their rate of labor force participation declined in the sixties, though it rose again in the seventies.¹⁸⁶

While education was legally mandatory for both boys and girls, it was hardly available to anyone in rural areas, though in towns both boys and girls had a roughly equal chance at an elementary education.¹⁸⁷ Educated upper-middle class women also had new access to education and

178. See Mir-Hosseini, *supra* note 100, at 193. The 1975 amendment also raised the legal age of marriage to eighteen for girls. Pakizegi, *supra* note 177, at 219.

179. Elham Gheytonchi, *Civil Society in Iran: Politics of Motherhood and the Public Sphere*, 16 INT'L SOC. 557, 568 (2001).

180. Mir-Hosseini, *supra* note 100, at 32.

181. Pakizegi, *supra* note 177, at 217. Even in that regard, it did not meet the demands of the official women's movement. PAIDAR, *supra* note 122, at 159.

182. PAIDAR, *supra* note 122, at 160.

183. *Id.* at 160-61.

184. *Id.* at 161.

185. *Id.*

186. *Id.* at 164.

187. See generally *id.* at 312-18.

professional careers, and their new jobs as teachers, nurses and office workers contributed to an increase in women working in the formal economy¹⁸⁸ from around 18% of the female population to around 20% between 1960 and 1980.¹⁸⁹ But some of these women were also absorbed into the Western image that “constructed [them] as sex-objects,”¹⁹⁰ contrary to the premium placed on female modesty in the Islamic tradition.

All this meant that women were not uniformly supporters of the Shah’s reforms in their favor, so that when, in the seventies, economic conditions declined for many people, he could not count upon their support. As Roksana Bahramitash says, “For the majority of women who lived in rural areas, and for the working class and poor urban dwellers, the gains for women that resulted from the Shah’s reforms were marginal.”¹⁹¹ In fact, it was not the Shah, but the anti-Shah coalition that had succeeded in mobilizing women, including women from the working class and the peasantry who had hitherto been politically powerless.¹⁹² It was precisely these women of the popular classes whose solidarity in opposition to the Shah were to be crucial in his overthrow and whose loyalty Khomeini sought throughout the revolutionary period. They were devout and their support went overwhelmingly to Khomeini, who actually encouraged their unprecedented political participation in an interview just as the

188. A great deal of women’s labor in Iran, such as textile and agricultural work, is unpaid work within the family unit. MARYAM POYA, *WOMEN, WORK & ISLAMISM: IDEOLOGY & RESISTANCE IN IRAN* 22-23 (1999). Nonetheless, much of this work is crucial to the formal economy, e.g., carpet-weaving, which is, after oil, Iran’s second largest export.

189. Roksana Bahramitash, *Islamic Fundamentalism and Women’s Economic Role: The Case of Iran*, 16 INT’L. J. POL. CULTURE & SOC’Y 551, 556 (2003) (citing World Bank World Development Indicator 2001). Interestingly, the gain in the next twenty years is much larger: from 20% to around 26%. *Id.* Bahramitash says, “This runs counter to the common stereotypical assumption associating the rise of political Islam . . . with a decrease in paid employment for women.” *Id.* at 564.

190. PAIDAR, *supra* note 122, at 166.

191. Bahramitash, *supra* note 189, at 231.

192. See PAIDAR, *supra* note 122, at 303-05. In this, the second Iranian revolution resembled the first one seventy-five years before. See generally *id.* at 50-77.

revolutionary conflict reached its height.¹⁹³ Nor did his earlier opposition to female suffrage survive the demise of the Shah: within a month of his return to Iran in February 1979, he was calling on women to vote in the referendum establishing an Islamic republic.¹⁹⁴

Thus, in the struggle over power that immediately replaced the anti-Shah struggle, women's support was both crucial and available to the supporters of the Islamic Republic and its constitution of *shari'a*. Consequently, the birth of the Islamic Republic took place in a gender context at odds with that figured in the post-Medinan¹⁹⁵ past where women had been largely absent from public life. Now Iranian women's political agency had been solicited and they were for the first time massively active in political events.¹⁹⁶ Moreover, this was occurring in a revolutionary context, where a claim of many revolutionaries was that the Prophetic message had been one of social justice.¹⁹⁷ That social justice had not existed since the days of the Prophetic and Imamic leadership, but under the divine law it could exist again, they pledged. Such a promise would be hard to redeem, but harder still to revoke. Indeed, Khomeini himself had promised women that an Islamic state would mean justice and equality for them, "Islam has never disagreed with [women's] freedom; on the contrary, Islam disagreed with the concept of the commodified woman, and opposed their commodification and returned their dignity and honour to them. Woman is equal to man; like men, they are free to choose their destiny and their activities."¹⁹⁸

In regard to women, revolutionary success thus posed the very interesting question: what did the revolutionary understanding of the social justice and equality

193. *Speech of Dec. 7, 1978*, KHOMEINI, *supra* note 137, at 55.

194. *Speech of March 8, 1979*, *Id.* at 62.

195. On the search for the "golden age" of gender equality, see Qudzia Mirza, *Islamic Feminism and the Exemplary Past*, in *FEMINIST PERSPECTIVES ON LAW & THEORY* 187 (Janice Richardson & Ralph Sandland eds., 2000).

196. While patriotic women were supporters of the Constitutional Revolution of 1905-11, their support was rejected by most of its active male participants. See PAIDAR, *supra* note 122, at 60-67.

197. See, e.g., ALI RAHNEMA, *AN ISLAMIC UTOPIAN: A BIOGRAPHY OF ALI SHARI'ATI* (1998).

198. Mir-Hosseini, *supra* note 100, at 30 (quoting Khomeini).

commitments of revelation mean for the law that would apply to a group that had previously been voiceless, but whose voices had been summoned precisely in response to the appeal to those commitments?

From the first days of the IRI, the application of *shari'a* to women could not be contained within the forms it had assumed in a society where women had yet to claim a place in public life. Certainly such constraint was contemplated with the declaration that the FPL was un-Islamic and would be replaced by religious law; with the attempt to lessen women's economic participation in the workforce, with the removal of women from certain positions of authority, including the judiciary; with the closing of some areas of work and study to women; with sexual segregation of public spaces; with reinstatement of a criminal code that assigned different penalties for violence against men and women; and, most notoriously in the West, with the requirement of *hejab*, or head covering, for women in public.¹⁹⁹

But each of these constraints came under attack; most failed to be fully instituted and some have disappeared entirely. Interestingly, it is in respect to *hejab* that there has been most success in imposing an historically-approved condition upon women, no doubt because most women of the popular classes already wore *hejab* and also because of the peculiar political and social history of gender covering during the Pahlavi dynasty.²⁰⁰ And of course, *hejab* is the most purely symbolic of impositions on women and the least likely to impact directly on their social condition in respect to education, reproductive life, and political and workforce participation.

In the legal issues of most interest to women, those relating to marriage, family, and to economic participation, women in large part avoided or modified impositions that would have most constrained their lives and families. Restrictions on women in the workforce have been repealed and measures like daycare in large-scale enterprises mandated. Women's education has proceeded apace and

199. Halper, *supra* note 2, at 106.

200. See *supra* text accompanying notes 111-12.

extended far beyond what existed in the Shah's time.²⁰¹ This pragmatism has become as characteristic of the IRI's gender legislation as has the steadfast insistence upon *hejab* that, in the American view, defines the IRI's gender policies.

B. *Women and Shari'a*

After the revolution, the economy slid. American sanctions had their impact almost immediately with the hostage crisis that began in November 1979; the ensuing war with Iraq substantially reduced income from oil exports. While not explicitly socialist, the revolutionary coalition confiscated the local wealth of émigrés and, in response to these conditions, directed *bonyads*, quasi-public religious foundations, to use it for the benefit of the poor. Women were major beneficiaries, as expropriated wealth went into large-scale programs to bring literacy and health care to Khomeini's poorest supporters.²⁰² Women were the working core of this program as well, as unpaid volunteers and organizers. It was in this way that the working lives of many women began, and then continued when the war required their mobilization as first aid workers, drivers and mechanics, and providers of food and clothing to troops.

These endeavors took on new depth during wartime suffering when the social safety net became crucial to the continuation of day-to-day life for millions of poor families. At the same time, enforced gender segregation in teaching and health care, *inter alia*, created a need for more women in those professions. Thus, even while the new regime explicitly claimed that the innate destiny of women was motherhood and work outside the home was at best secondary, in practice it did very little to keep women at home. Some professions were closed to them (e.g., the judiciary, mining, and some kinds of engineering), but in actuality women were strongly encouraged by Ayatollah Khomeini to continue their volunteer efforts outside the

201. See Halper, *supra* note 2, at 90.

202. Khomeini said literacy was a religious duty for women, so opposition from husbands or fathers was rare. See Bahramitash *supra*, note 189, at 561. Literacy and educational opportunity obviously contribute to a rising employment rate for women. See *id.* at 565.

home,²⁰³ and support for working women in the form of state-mandated daycare at large workplaces was legislated.²⁰⁴

Two key elements then in the post-revolutionary situation were, first, the initial, ongoing and politically significant support of women of the popular classes for Islamist forces²⁰⁵ and, second, the Islamist government's need for their enhanced participation in economic and political life, both as volunteers and employees.²⁰⁶ The consequence was that, from the new government's point of view, the attitude of these women toward the law that governed their marriages and their families was not insignificant. On the other hand, a profound conviction of the government and its leadership was that the previous regime's legal views on women were dangerous to the nation and had to be replaced by religious law.

Within two weeks of Khomeini's triumphant return to Iran after the fall of the Shah, it was announced by his office that the FPL was "un-Islamic" and would be replaced by *shari'a*.²⁰⁷ The FPL courts quickly disappeared, replaced in September 1979 by special courts headed by religious figures.²⁰⁸ But the religious law that would replace the FPL would give men unilateral power to divorce, require no payment of alimony to the divorced wife, and give the wife custody of her children only in their infancy. Her only financial compensation would be in the form of the *mahr*, the marriage gift,²⁰⁹ in the sum named in the original contract, an amount whose value was likely to have been much diminished by inflation. Her own grounds for initiating divorce would be extremely limited. Moreover, her husband could enter into three more marriage contracts at the same time without her consent. If her husband died,

203. See POYA, *supra* note 188, at 65.

204. *Id.* at 115.

205. PAIDAR, *supra* note 122 at 207-12.

206. POYA, *supra* note 188, at 94-98.

207. Halper, *supra* note 2, at 87-88.

208. Nobelist Shirin Ebadi was among the female civil judges ousted from the divorce court. SHIRIN EBADI & AZADEH MOAVENI, *IRAN AWAKENING: A MEMOIR OF REVOLUTION AND HOPE* (2006).

209. The marriage gift, or *mahr*, is the initial consideration paid by the husband in return for the wife's entrance into the marriage contract.

his male relatives were her children's guardian, not their mother. Moreover, all of these measures would be enforced in religious courts in which women could not serve as judges. Women could hardly be expected to give wholehearted support to these retrograde policies.

In fact, women's unhappiness with the new legal regime's lack of congruence with their domestic lives, and their complaints and resistance, led to amelioration of the law's consequences through procedural modifications. Among the changes they achieved were limitations on the husband's power of unilateral divorce, now subject to the consent of the court to be granted after the matter was referred to mediation; expansion of the grounds on and means by which they could initiate divorce themselves; expanded rights to child custody, and additional forms of compensation upon divorce, including up to half the earnings of the marriage as well as wages for unpaid home labor undertaken during the course of the marriage.²¹⁰ In sum, these changes amounted not simply to a return to the substance of the FPL, but went beyond it in respect to protecting the position of women either threatened by, or wishing to obtain, a divorce.²¹¹

Women clearly played the major role in obtaining these changes, but nonetheless, they were contending with a legal regime that had traditionally been interpreted in ways that limited women and rejected their equality claims. Thus, it is worthwhile to consider how it was that that law could now respond to their claims. Examining two particular changes in the law may be helpful in this respect. Each of these changes took place after Khomeini's death in 1989 and before the 1997 presidential election of Mohammad Khatami under a reform banner. Hence, they may be said to represent the influence on legislation of Khomeini's novel view of the role of religious law in the state, discussed above.

210. See Halper, *supra* note 2, at 98-99.

211. See Ziba Mir-Hosseini, *Women and Politics in Post-Khomeini Iran: Divorce, Veiling and Emerging Feminist Voices*, in *WOMEN AND POLITICS IN THE THIRD WORLD* 142, 143-45 (Haleh Afshar ed., 1996).

C. *Compensating Women on Divorce*

1. *The Problem.* Not until the Divorce Reform Law of 1989 were the sources of law applying to marriage and divorce in the IRI agreed upon, and legislation passed to rationalize them with existing rules and opinions.²¹² In 1992, that law was further amended, resulting in the creation of a new family code that, while similar to the FPL, went further in protecting women in respect to divorce and custody.²¹³ Thus, by the early nineties, the letter of the law itself had changed to not only duplicate, but supplement the discredited FPL in text as well as in practice.

One of the 1992 amendments, not ratified by religious jurists of the Guardian Council until 1993, was a new source of support for the divorced wife in the form of compensation for the housework and childcare she had undertaken during the course of the marriage.²¹⁴ In 1996, a second right to compensation for the wife was added. Her *mahr*, the marriage gift that serves as dower, was inflation-indexed so that it retained its original value regardless of the currency amount named in the document. It is the legal framing of these two new rights of compensation that I want to discuss.

In classical marriage law, the divorced wife has no right to further financial support if the husband exercises his *talaq*, or unilateral right to divorce for any reason or no reason.²¹⁵ The marriage contract does not require anything of the wife save *tamkin*, obedience and sexual services; it is in return for this pledge that she is entitled to *nafaqaa*, or ongoing maintenance during the course of the marriage,

212. See PAIDAR, *supra* note 122, at 276. These included, among other pieces of legislation, the Civil Code of 1931, the FPL, and the 1979 law creating the Special Civil Courts. POYA, *supra* note 188, at xvi.

213. MIR-HOSSEINI, *supra* note 211, at 144.

214. *Id.*

215. In respect to this right, the parties to the marriage contract do not have equal capacity to contract, for unilateral divorce is a gendered prerogative of the husband. In this sense, the marriage is understood to be the "property" of the husband, not of the wife. BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 204 (1999). Her property in the marriage is her right to *mahr* and *nafaqaa*. She is otherwise neither competent to enter into contracts as an equal, nor is her capacity to contract otherwise affected by her marital status, either before or after the marriage.

and the marriage gift capital sum similar to dower in the common law, guaranteeing her maintenance in case he dies or divorces her. She has no right to any post-divorce support other than her *mahr*.²¹⁶

The gift is due immediately upon marriage, but, although it is the initial consideration paid by the man in return for the woman's offer to enter into the marriage contract, its payment is usually deferred at her pleasure or until death or divorce. Because the *mahr* is meant to be a capital sum, one capable of generating income sufficient to maintain the wife in case of her husband's death or divorce, its payment can be onerous for the husband.²¹⁷ At divorce, the *mahr* gives the wife some protection against inequities in the gendered contract she has entered. If the husband exercises his *talaq*, she is entitled to her *mahr*; this can dissuade him from the divorce or push him to make other arrangements for her post-divorce support. Alternatively, she can waive the *mahr* to get custody of the children, for whose support he remains responsible.

But if the *mahr* is no longer a capital sum, its utility to the wife is lost, either as a source of support or as a bargaining chip. With the inflation that has plagued Iran for a quarter-century, the value of older dower gifts has diminished tremendously. Indeed, the longer a woman has been married, the more debilitating is adherence to a fixed *mahr* amount. In the words of Marziyah Sidiqi, a woman member of the *Majles*, when a woman is divorced, often the *mahr* "won't even cover her taxi fare to court."²¹⁸ This led to results recognized as inequitable by all.

A religious jurist who headed the Iranian judiciary, Ali Akbar Nateq-Nouri, anecdotally described the consequences in an interview given to *Zan-e Ruz* (Today's Woman), the leading women's magazine in the country:

216. However, the husband remains responsible for supporting his children.

217. See Ziba Mir-Hosseini, *Tamkin: Stories from a Family Court in Iran, in EVERYDAY LIFE IN THE MUSLIM MIDDLE EAST* 136, 148 (Donna Lee Bowen & Evelyn A. Early eds., 2d ed. 2002).

218. *In an official gathering of the Majles, the law for payment of women's dowry in accordance with the inflation index was voted and passed, ZAN-E RUZ* (Iran), Dec. 28, 1996. (All translations from *Zan-e Ruz* used in this piece are by Ali Korangy, Ph.D. Candidate in Middle Eastern Literature, Harvard University, and are on file with the author.)

Let's say after the woman has spent her youth there in that house, after fifty or sixty years of marriage, a man decided to let her go with the *mahr* of 100 or 200 tomans [now about a quarter] designated in that period [when the marriage was contracted]. Well, considering the youth that has been lost and energy she has spent . . . we can't just let her leave with change in her pocket. This would be the ultimate injustice.²¹⁹

Nateq-Nouri, a leading conservative later defeated in his bid for the presidency by Mohammad Khatami, was unlikely to have reached this position unless it was in fact widely held.

The *Majles* made several attempts to deal with the problem of support for divorced women. In 1982, at Khomeini's wish, it had included in the form marriage contract a provision that, if a divorce was based on the husband's *talaq*, he had to split up to half the proceeds of the marriage with his ex-wife.²²⁰ This evened the playing field somewhat: A woman could get a divorce only with her husband's consent²²¹ and this consent meant forfeiting her *mahr*. Now, the husband initiating a divorce could also be held liable for a substantial sum. In that sense, divorce was made onerous for both, despite the explicit *shari'a* principle that the unilateral power of divorce was the husband's alone.

This change in the contract terms provided protection to women married after the new contract went into effect, but not to those married under an old form of contract. Nor did it fully protect even those married under the new form, as it provided the wife "up to" half the income of the

219. *The Question of Wages for Work is Worthy of Presentation to the World Stage*, ZAN-E RUZ (Iran), Dec. 4, 1993 (Interview with Ali-Akbar Nateq-Nouri).

220. Ziba Mir-Hosseini, MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW 57 (1993, rev. ed. 2000). Mir-Hosseini says that in her attendance at the divorce court in Tehran in 1988, she came across no cases in which the claim to proceeds of the marriage was raised. *Id.* at 58. Khomeini originally suggested contractual incorporation of the delegation of the husband's *talaq* to the wife in 1980. KHOMEINI, *supra* note 137, at 58.

221. This form of divorce is known as *khul*, or consent divorce, and is in fact the ground on which most divorces are granted in Tehran. MIR-HOSSEINI, *supra* note 211, at 149. The husband agrees to release the wife from the marriage contract in return for repayment of the marriage gift, or some similar compensation.

marriage, rather than a guarantee of half.²²² Hence, another tack was tried.

2. *Wages for Housework*. As noted, the essence of the marriage bargain is the trade of the wife's obedience, *tamkin*, for her maintenance, *nafaqaa*, by the husband. While it may be assumed that the wife will also maintain the home and nurse the children, the contract itself does not require it. This became a peg for the novel, but not irreligious, notion that divorced women might be owed wages for past housework and childcare. The woman who does these things has not in effect been paid for her labor.²²³ Payment of wages for housework is based on a key principle of *mu'amalat*,²²⁴ or the religious account of human relationships, that a fair price, *ujrat al-mithal*, should be paid for any commodity, including the labor of a free person.

By requiring wages for housework, as assessed by a court at the time of divorce, the *Majles* was in effect creating a right to payment for the wife in a form that supplemented her deferred claim to her *mahr*. That wage payment would come due in current dollars if the husband exercised his contractual power of unilateral divorce. This time, the *Majles* not only required that the form contract include the provision that the wife was due her wages in case of divorce,²²⁵ but also made it possible for a woman married under the *old* form of contract to get wages for

222. *Determination of Wages for Work Done*, ZAN-E RUZ (Iran), December 18, 1993.

223. The social failure to compensate women's domestic labor in the divorce context is also problematized by American feminists. See, e.g., Joan C. Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1788-89 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY OF THE LAW* (1988)) ("just as [housework/childcare] is invisible inside marriage, it is invisible upon divorce. So when judges make support or property awards, they often ignore completely or seriously undervalue the economic worth of those services. . . . [S]ociety demands work from women and then refuses to acknowledge that women are doing it, or even that it is 'work' at all.").

224. Unlike *ibadat*, matters of worship, *mu'amalat*, matters of relations between people, are not immutable and are open to rational argument and modification. It is thus significant that, although marriage is considered a religious duty and thus *ibadat*, the legal aspects of marriage are treated as *mu'amalat*. Mir-Hosseini, *supra* note 13, at 11.

225. See *id.* at 14.

housework implied into the old contract judicially, if a court found she had not agreed to contribute her work without pay.²²⁶ Thus, even a woman married *before* the right to wages became explicit might be entitled to receive them.²²⁷

This change was broadly accepted. Nateq-Nouri stressed that the government was “proud of this [legislation] for it proves that women can have a secondary means of resuming their lives” in addition to the marriage gift.²²⁸ He also placed the change in a temporal context: “The great thing about this law is that not every husband nowadays can assume that divorce is easy and hence ruin a household’s life.”²²⁹ Thus, even the conservative Nateq-Nouri recognized and accepted this provision not simply as a matter of fairness, but as a change requisite in the context of the times, despite the fact that it meant discouraging unilateral divorce, a power explicitly available to the husband under *shari’a*. In other words, in order to protect the family and home, it was appropriate for the Islamic Republic’s legislature to add difficulties to the exercise of the power granted in the contract that adhered to the *shari’a* account of marriage. This appeal to the social context is a continual theme in public discussions of the law of marriage and divorce.

But even after the legislation implementing wages for housework, problems remained. For one thing, compensation was only due if the divorce was not the wife’s fault.²³⁰ And if the court decided her contribution had been uncompensated at her own wish, or that the custom of her community was to expect such labor be uncompensated, the husband would not be charged to pay for it.²³¹ Not only

226. ZAN-E RUZ *supra* note 222.

227. *Id.*

228. ZAN-E RUZ *supra* note 219.

229. *Id.*

230. ZAN-E RUZ, *supra* note 222. Dr. Safai questioned why uncompensated labor should be tolerated even if the woman *was* at fault. He was “of the opinion that a woman should also be able to request a determination of wages even if she is at fault in a divorce. If a woman has this right then why shouldn’t it exist regardless of the reason for divorce?” *Id.*

231. *Id.*

might the exceptions create a large loophole,²³² but even the woman entitled to compensation for wages had the burden of proving the amount due. Nor did it provide the same level of protection to long-married women, who had to persuade a judge as to their entitlement, as it did to those married after 1993, when the form of contract changed. Of course, it was the longer-married women who were most in need of protection.

3. *Inflation-Indexing the Mahr*. The resolution to the problem of these women came in 1996, when the *Majles* bit the bullet and explicitly required that the *mahr*, the marriage gift, be inflation-indexed to the price of gold as reported by the Central Bank of Iran.²³³ There was substantial opposition to the measure, which passed 106-79, with seventeen abstentions.²³⁴ Debate in the *Majles* was heated, with opponents arguing that the new law would "disable the traditionally recognized warm sphere of family life"²³⁵ and "destroy the economic basis of the country."²³⁶

But the proponents of the new law argued that the law was consonant with *shari'a*, stressing that inflation-indexing could be implied into the contract because time and place are meaningful in Islamic jurisprudence.²³⁷ They also urged that "social justice"²³⁸ required consideration of

232. However, in Nateq-Nouri's view, only an explicit *ante hoc* renunciation of her entitlement to wages would serve to defeat her subsequent claim: "If she says from the start, I don't want it, then that's the only condition under which she cannot pursue it. If she doesn't say it, it doesn't mean it is for free." ZAN-E RUZ, *supra* note 219.

233. ZAN-E RUZ, *supra* note 218. In 1988, the *Majles* had decided that payment of the *mahr* in full was a limiting condition on men's ability to divorce legally. Mir-Hosseini, *supra* note 155, at 34.

234. ZAN-E RUZ, *supra* note 218.

235. *Id.* (quoting remarks of Mu'allami, representative from Qa'im Shahr).

236. *Id.* (quoting remarks of an unnamed representative from Bandar Abbas).

237. *Id.* (citing remarks of Majid Ansari, a member of the *Majles* from Tehran). The jurisprudence of time and place asserts that "while the Quran is the word of God, God spoke to people in terms which they could understand, which makes the utterances relative to the milieu of their reception." ZUBAIDA, *supra* note 10, at 222.

238. ZAN-E RUZ, *supra* note 218 (quoting remarks of Marziyah Sidiqi).

inflation since the original date of the contract.²³⁹ Once again, the view of the proponents of inflation-indexing seemed to reflect a larger consensus.

Even a conservative religious figure, Ayatollah Makarimi-Shirazi, supported the provision, finding it consonant with Islamic law: "If a woman was promised . . . [a capital sum and] substantial time passes since the promise and inflation goes up exponentially . . . then she must get paid according to the inflation."²⁴⁰ Like Nateq-Nouri, he too stressed that "we don't hand over the management of a divorce entirely to a man,"²⁴¹ though he understood "popular belief" was to the contrary. Again, the divergence with the traditional view of *talaq* is marked.

This change in the law passed the *Majles*, but not the Council of Guardians, the non-elected body of lay lawyers and religious jurists constitutionally mandated to review all legislation for its compatibility with Islam. Hence it was referred to the Expediency Council, which saw the wisdom of allowing passage of the law, regardless of the stance of the Guardian Council.²⁴² Thus, both wages for housework and the inflation-indexed *mahr*, each an attempt to create a more equitable framework for divorce, were approved not only by elected representatives, but by religious leaders as well.²⁴³ The pressure for such changes in the divorce law was widely felt and, at the same time, Khomeini's insistence on contextualization of law in the Islamic state made it possible, even as it was necessary, for these forces to prevail.

The question women had placed on the agenda of the IRI was how their position in a marriage contract,

239. *Id.* (quoting remarks of Majid Ansari, a religious figure and legal scholar, who said, "If we didn't consider the rate of inflation [in other areas of economic life], then many who owed lots of money would quickly discharge their debt.").

240. *The New Law Regarding the Woman's Dowry, the Conditions of Divorce and Blood Money*, ZAN-E RUZ (Iran), Dec. 21, 1996 (quoting a BBC interview with Ayatollah Makarimi-Shirazi).

241. *Id.*

242. Mir-Housseini, *supra* note 211, at 245.

243. That suggests the outcome of the 2005 election, which created a more conservative *Majles*, may not lead to retrenchments in the advancement of women.

understood as binding parties with unequal power to contract,²⁴⁴ could be improved without violating either the substance or the spirit of that law. The substance of the law could not be violated by changing the revealed law, as annulling men's unilateral power of divorce would require, nor by making that power directly available to either spouse.²⁴⁵ And the law's spirit could not be violated by introducing an alien conception like natural right into an obligation-based theory.

In the case of both wages for housework and the inflation-indexed *mahr*, the solution was the legislative addition and/or permission for judicial implication of terms to the contract,²⁴⁶ a fairly standard procedure wherever a legal regime of contract is recognized. The parties to a contract may fail to foresee events that have impact on their expectations of the contract or they may have naturalized some foundational element of contract, failing to recognize its temporal limitations. A judge may imply a term, assuming that the parties omitted to make explicit understandings that were nonetheless shared and which might be discovered by reasoning from other contract terms or the contract as a whole. Alternatively, the parties may make a contract at least initially acceptable to both, but which has social consequences beyond the bargain made by the parties. In that case, the legislature may decide that such contracts should include a particular term because

244. The marriage contract is gendered in a variety of ways, including the husband's unilateral power of divorce and his ability to enter into other such contracts at the same time, both of which are denied to the female party to the contract.

245. Thus, Khomeini himself, while hinting that women's power to initiate divorce should be the same as that of men, said in 1982 that he "lacked the courage" to propose such a solution. Mir-Hosseini, *supra* note 155, at 33.

Khomeini finessed that by allowing the delegation of *talaq* to the wife in the original marriage contract. Although the delegation was not required, its inclusion in the form contract under which most people are wed made delegation accessible to most couples where it had previously been limited to those knowledgeable enough to insert the provision on their own. *See supra* text accompanying notes 242-43.

246. This had originally been done in 1982 when the legislature, at Khomeini's request, included twelve conditions in the form of a marriage contract which, if accepted by both parties, gave the wife, acting as her husband's agent, the power to initiate divorce herself. Mir-Hosseini, *supra* note 155, at 34.

such an outcome is socially necessary. In my view, that is the position the *Majles* adopted in respect to compensation for the divorced wife by means either of wages for work or the inflation-indexed *mahr*. The contract itself, originally seen as private, came to be understood as a bargain to which the state was at least implicitly a party.

No rule says women *must* do housework, although by custom they do. Since they are not required to do it by law, they must do it of their own will. That does not mean the labor that provides a benefit to the husband should be unpaid. Rather, as in any contract, the exercise of free will to provide a benefit to another is also for the contracting party's own benefit. Thus, the party's labor, though freely given, is entitled to compensation, since she is not a slave, but a person capable of the exercise of will. Hence, the labor must be paid, should she seek such compensation, because *mu'amalat*, the divine account of justice among those within society, depends upon widespread adherence to such a social agreement.

As to the marriage gift, it is designed to provide a woman who chooses to marry, and hence, to foreclose other life opportunities, with a guarantee of continued support regardless of the fate of her marriage or her husband. She is entitled to claim the *mahr* at any time, but having chosen to defer payment, her future ought not to be disabled by her self-denying choice to allow her husband to retain the capital sum until she in fact is faced with one of the two potential catastrophes of her widowhood or divorce. The enforcement of the *mahr's* value in a currency-denominated amount would disable her and possibly injure her family to the detriment, the *Majles* felt, of society, as can be read in the public debates on the issue.²⁴⁷

247. A similar outcome had occurred in a non-gender context as well. *Shari'a* considers the employer-employee relationship as one of private contract. But a state labor code was a demand of important sectors of the revolutionary coalition, which would not be satisfied merely with minimal regulation of workplace hygiene and safety. How could the state provide protection to workers within the context of a contract between employer and employee? The resolution was to claim the state was a party to the contract by virtue of the support it provided to employers by making available a variety of support services for commerce and industry, including energy, infrastructure, and monetary and economic policies *inter alia*. See ZUBAIDA *supra* note 10, at 203-04. On this basis, a labor code emerged in 1990 that had "many points in common with the old, non-Islamic, law of 1958 [passed under the Shah] as well

CONCLUSION

These arguments—for social justice, family protection, contextual interpretation to promote spousal equity—though couched in the language of religion, have reference to a social outcome and imply a social setting within which an outcome must not only be fair to the participants but also serve society. It is possible to characterize the outcome as consonant with religion and, given the commitment of the state to religious law, it is necessary to do so. But that is certainly not the outcome required by religion, and it is at least unexpected from the “*shari’a* state.” In fact, one must conclude that the political context is at least as important as the revealed law in producing these results. But as Zubaida says, “The insistence in modern pronouncements on [*shari’a*’s] fixed and unvarying nature as the law of God for all time is not supported by an examination of its history and function.”²⁴⁸

We have seen that Shi’is did not view their religious law as part of the existing state, whose legitimacy was in any case already provisional for them. Thus, when Ayatollah Khomeini found it necessary to intervene in politics because he believed the state was becoming too hostile to religion, he did so under the authority of Islam. Religion was in opposition to the state and hence, in some sense, itself a contender for state power. But on taking power, Khomeini was forced to reconceive the authoritative place of Islam in a state committed to divine law and guided by religious leaders. In the event, he found that, for a variety of reasons, the Islamic state required more than Islamic law.

One of the ways in which that was clearly true was that women, though in the main supporters of the revolutionary Islamic state over the Pahlavi dynasty, refused to be governed, in their marriage, family- and work-lives, by a tradition of jurisprudence that both threatened to remove them from public life and disadvantaged them in the private life. Because of their importance as supporters of

as with the labour laws of other countries.” *Id.* at 205 (citing SCHIRAZI, *supra* note 141, at 214). That code was also opposed by the Guardian Council and required Khomeini’s approval, contrary to his earlier writings, and the intervention of the Expediency Council. See ZUBAIDA, *supra* note 10, at 204.

248. ZUBAIDA *supra* note 10, at 221.

the IRI, they were able to win changes in the law of the new religious state. New interpretations of gender law were rationalized both as representing the social justice of the Islamic state, and the contextualized application of *shari'a*, to a particular time and place.

In sum, the "*shari'a* state" created by Khomeini's view of the necessity of Islamic rule did not in fact apply *shari'a* in the same way as its adherents had understood it before the state underwent its great political change. The authority of law, *even religious law*, in the new state depended upon the authority of the state. In some sense, the traditional view of revealed law did not capture all the authoritative bases of action in a state governed by a human understanding of God's purposes.²⁴⁹ But, on the other hand, the uniquely Shi'i notion of the continuous leadership of the Twelfth Imam, hidden from human sight, but always present, and the consequent expectation of imminent and immanent justice in the world, already provided a basis for flexibility and expansion in the jurisprudence of that community's scholars.

Khomeini himself expanded his view, and the state's view, of its bases of action, allowing an inward, what one might even call an Imamic, account of those purposes to trump, if necessary, the outward prescriptions of the revealed law previously understood to describe them. If possible, *shari'a*, through a dynamic jurisprudence, must be expanded from private law into the law of the state. But if that was not possible, even in the "sharia state," the interests of the state must take precedence. And where the interests of the state were consonant with those of its women supporters, that view was to their benefit.

249. CONSTITUTION, *supra* note 27. Iranian Constitution recognizes "[d]ivine revelation and its fundamental role in setting forth the laws," art. 2, sec. 2, "continuous leadership (*imamah*) and perpetual revelation," sec. 4, and the "continuous *ijtihad*" of qualified scholars, sec. 6. Together these—God, the *Mahdi* and the *marjaiyat*—suggest an earthly and divine dialectic in the legislative process.

