

STUDENT COMMENTS

VELAYAT-E FAQIH IN THE CONSTITUTION OF IRAN: THE IMPLEMENTATION OF THEOCRACY

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The May 1997 election of Mohammed Khatami, a relative moderate among Iran's ruling clergy, to the Presidency of Iran raised the question of whether the United States should continue its current containment policy towards Iran, or take advantage of the opportunity presented by Khatami's election to reestablish its ties with Iran.¹ Khatami's victory was seen as indicative of growing Iranian dissatisfaction with the conservative Islamic regime established by Ayatollah Ruhollah Khomeini in 1979.² That regime was based upon Khomeini's teachings as embodied in his work, *Velayat-e Faqih*,³ a work that was incorporated into the Iranian Constitutions of 1979⁴ and 1989.⁵

The objective of this paper is to provide the reader with an understanding of the theocratic underpinnings of the Iranian Constitution. Also addressed will be recent events in Iran that appear to indicate growing discontent with the current system of government, raising the possibility that the concepts contained in Khomeini's *Velayat-e Faqih* cannot survive his death.

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¹ See Steven Erlanger, *Iran Vote May Bring Pressure for a Change in U.S. Policy*, N.Y. TIMES, May 26, 1997, at A4 (discussing the election's potential impact on U.S. foreign policy).

² See Stephen Kinzer, *Many Iranians Hope Mandate Brings Change*, N.Y. TIMES, May 26, 1997, at A1 (reporting Iranian citizens' reactions to Khatami's landslide victory) [hereinafter Kinzer, *Many Iranians Hope Mandate Brings Change*].

³ See SHAUL BAKHASH, *THE REIGN OF THE AYATOLLAHS: IRAN AND THE ISLAMIC REVOLUTION* 38 (1984) ("[*Velayat-e Faqih*] is a blueprint for the reorganization of society. It is a handbook for revolution."). But see HOMA OMID, *ISLAM AND THE POST-REVOLUTIONARY STATE OF IRAN* 40 (1994) ("Although Khomeini had described it as a blueprint for an Islamic government, *Velayat-e Faqih* (Rule by a Wise Religious Male Leader) in 1971, in fact it was little more than a criticism of the *status quo* and promises of a better form of government under the guidance of the clergy.").

⁴ See Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979*, 20 No. 1 BRIT. J. OF MIDDLE EASTERN STUD. 64, 67 (1993) (describing the institutionalization of Khomeini's teachings, *Velayat-e Faqih*, as the law of Iran in the 1979 Constitution).

⁵ The 1989 Constitution that revised the 1979 Constitution is based on *Velayat-e Faqih*, but contains many tenets that critics have seen as inconsistent with the concepts in *Velayat-e Faqih*. See OMID, *supra* note 3, at 148-51.

I. THE CONSTITUTIONAL REVOLUTION: 1906

A. *Islam and the State*

Shia Islam, the official religion of Iran, envisions a government where religion is preeminent and God serves as the only legitimate source for the legislation of laws.⁶ Temporal rulers merely implement the laws of Islam as dictated by God.⁷

Shi'ites recognize as legitimate rulers only the twelve *Imams* beginning with Ali, Mohammed's son-in-law and the fourth caliph of the Muslim world, and ending with the twelfth *Imam*, Mohamad al-Mahdi, who is believed to have gone into a state of hiding in 874 C.E.⁸ These leaders were recognized as legitimate because they were considered "divinely inspired and, like Mohamad . . . [were] *masoum*, protected against sin."⁹

After the disappearance of the twelfth *Imam*, the Shi'ites were forced to reach an accommodation with the secular rulers under whose authority they lived.¹⁰ Although they did not accept the legitimacy of these various rulers, the Shi'ites opted against open rebellion so long as these rulers actively protected Islamic law, and so long as justice played an "integral part of the exercise of power."¹¹ It was in large part because the regime in Iran was seen as acting unjustly that many Iranians rose up in the early years of the twentieth century, demanding a constitution and political reforms.¹²

B. *The Constitution of 1906*

Until the twentieth century, Iran lacked a constitution. However, beginning in 1905, several factors coalesced to provide an impetus to create a constitution.¹³ Chief among these factors was a desire to eradicate the influence of foreign powers within Iran,¹⁴ coupled with

⁶ See *id.* at 3 (explaining the limited role of political rulers within Shia Islam).

⁷ See *id.*

⁸ See *id.* at 4-5.

⁹ *Id.* at 5 (explaining that Shi'ites have both tacitly and expressly accepted secular government as a social necessity).

¹⁰ See *id.* (stating that Shi'ites believe that secular rulers had no right to legislate but, rather, had only the right to "issue decrees . . . to meet [the] administrative and judicial needs of the day.").

¹¹ Omid, *supra* note 3, at 5.

¹² See PARVIZ DANESHVAR, *REVOLUTION IN IRAN* 3-5, 5 (1996) ("The intellectuals . . . blamed the country's waning fortunes on despotism and a lack of democratic institutions, which could provide checks and balances against the Qajars [the dynasty that ruled Iran from 1796-1925].").

¹³ See M. REZA GHODS, *IRAN IN THE TWENTIETH CENTURY: A POLITICAL HISTORY* 30 (1989).

¹⁴ See Mohsen Milani, *Shi'ism and the State in the Constitution of the Islamic Republic of Iran*, in *IRAN: POLITICAL CULTURE IN THE ISLAMIC* 133, 135 (Samih K. Farsoun & Mehrdad Mashayekhi eds., 1992) (describing the constitutional revolution's extensive roots in both international and internal affairs).

a strong desire to reform the political system.¹⁵ Two of the major groups demanding these changes were philosophical antagonists: the intellectuals and the *ulema*, or clergy.¹⁶ The intellectuals sought an end to the political corruption that had become entrenched in Iran and to separation of religion and state.¹⁷ The *ulema*, as might be expected, sought a more expansive role for religion within both government and society.¹⁸ To reach their goals these two groups were forced to reach a *rapprochement*.¹⁹

On August 5, 1906, the Shah,²⁰ bowing to popular pressure, agreed to the establishment of a committee to draft a constitution.²¹ The resulting constitution, signed by the Shah on December 30, 1906,²² was based heavily on the Belgian constitution of 1831,²³ and provided for the establishment of a Parliament, or *Majles*, which was first convened in October 1906.²⁴

The constitution, and the supplementary laws added to it by the Parliament, sought to appease the *ulema* by giving Islam a broad role in the new government.²⁵ Article 1 declared Shi'ism to be the state religion.²⁶ Article 2 provided for the creation of an ecclesiastical committee, which sought to ensure that all legislation conformed to Islam.²⁷ Articles 20 and 21 banned all publications and associations that were detrimental to Islam.²⁸ Lastly, Article 27 established a two-

Ghods discusses the increasing foreign influence in Iran throughout the nineteenth century. This influence came primarily from the European powers, particularly Britain and Russia, two nations that exploited Iran's internal political weaknesses to establish "spheres of [economic] influence" for their own benefit. See GHODS, *supra* note 13, at 17.

¹⁵ See Milani, *supra* note 14, at 135 (placing the impetus for this reform in a "new element, the people's power"). See also SAID AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 36 (1988) (describing the political system in Iran prior to the 1906 Constitutional Revolution as one marked by "[m]isgovernment, tyranny, and injustice").

¹⁶ See OMID, *supra* note 3, at 252.

¹⁷ See MOHAMMED AMJAD, *IRAN: FROM ROYAL DICTATORSHIP TO THEOCRACY* 38 (1989) (describing the breakdown of revolutionary leadership into distinct groups).

¹⁸ See OMID, *supra* note 5 at 13 (discussing various interests motivating the *ulema*).

¹⁹ See *id.* at 14 (elaborating on the uneasy alliance formed between intellectuals and the *ulema*).

²⁰ "Shah" is the generic term for the hereditary leader of Iran. Through the first quarter of the twentieth century, this position was held by members of the Qajar line. In 1925, Reza Shah Pahlavi, the commander of the armed forces of Iran, declared himself Shah. The Pahlavi's retained control until 1979 when they were ousted by the Islamic Revolution. See ERVAND ABRAHAMIAN, *RADICAL ISLAM: THE IRANIAN MOJAHEDIN* 11 (Society and Culture in the Modern Middle East Series) (Michael Gilson ed. 1989).

²¹ See AMIR, *supra* note 15, at 37 (describing agitation that culminated in the committee's establishment).

²² See *id.* at 38.

²³ See Milani, *supra* note 14, at 135 (discussing the structure of the 1906 Constitution). Because of the need for a quickly-written constitution, European-educated secular reformers relied heavily on the Belgian Constitution as a model. See GHODS, *supra* note 13, at 31.

²⁴ See GHODS, *supra* note 13, at 31.

²⁵ See Milani, *supra* note 14, at 135.

²⁶ See *id.* at 136.

²⁷ See *id.*

²⁸ See *id.*

tiered judicial system consisting of: a clergy-administered court to deal with religious issues and a government-administered civil court to deal with secular issues.²⁹

Although Islam had an expansive role in the new government, internal debate raged within the *ulema* over the legitimacy of the constitution.³⁰ An analysis of the opposing positions is instructive, not only in understanding events surrounding the 1906 Constitution, but also because these issues, debated and left unresolved in 1906, resurfaced in 1979, and are still contentiously debated in Iran today.

The two main issues of debate within the *ulema* were, first, what role, if any, a secular constitution should play in an Islamic society, and second, what role, if any, the people should play in the government. On one side of the debate was the relatively moderate Mirza Muhammad-Hosseini Gharavi-Na'ini, who gave limited support to the constitution.³¹ On the other side was the more conservative Ayatollah Fazlollah Nuri, who opposed it.³² Na'ini granted limited support to the constitution because he saw the constitutional system of government as compatible with Islam, which was itself "essentially constitutional because of its reliance on religious and civil laws."³³ Although no government outside that of the twelve *imams* was truly legitimate, a constitutional government at least served to "limit[] the rulers' arbitrary power and grant[ed] people limited sovereignty," and was therefore "less abhorrent than other forms" of government.³⁴ Na'ini seemed to be arguing that lay-people should therefore play a role in government.

Ayatollah Nuri argued that the various freedoms given to the people by the constitution were antithetical to Islam, because "sovereignty belonged to God, the prophet, and the Ulema [T]he masses had no right to exercise sovereignty."³⁵ He further stated, as Khomeini would several decades later, that "God alone is the law-maker in Islam" and His laws are to be "understood and disseminated by the learned clergy."³⁶ As such, there was no room for the people in government. In the end, this debate proved inconsequential. The constitution was passed despite the objections of the conservative faction of the *ulema*. Its passage, however, proved to be a hollow victory for the more moderate clergy because the constitution and the rights

²⁹ See Milani, *supra* note 14, at 136.

³⁰ See *id.* at 135-36 (describing the rift within the *ulema*).

³¹ See *id.* at 136.

³² See *id.*

³³ *Id.*

³⁴ Milani, *supra* note 14, at 136 (quoting A. HAIRI, *SHI'ISM AND CONSTITUTIONALISM IN IRAN* 165-97 (1977), and ENAYAT *op. cit.*, 160-74).

³⁵ AMJAD, *supra* note 17, at 38 (quoting S. AKHAVI, *RELIGION AND POLITICS IN CONTEMPORARY IRAN: CLERGY-STATE RELATIONS IN THE PAHLAVI PERIOD 26-35* (1980)).

³⁶ OMID, *supra* note 5, at 15.

it provided were ignored by a succession of ruling secular monarchs.³⁷

Under the reign of the Pahlavi³⁸ family, the *ulema* were silenced, the promised ecclesiastical committees never met, popular participation was non-existent, and the parliament was made subservient to the Shah.³⁹ The intelligentsia and the *ulema*, moderates and conservatives alike, had failed in their attempts to reform the political system. These groups would have to wait until 1979 for their next chance to effect change.

II. CAUSES OF THE 1979 REVOLUTION

Both economic and political factors led to the 1979 revolution that brought theocracy to Iran.⁴⁰ Mismanagement and reckless spending by the Shah had weakened the economy, while political rights and expression were curtailed by the Shah, who abrogated all political parties in favor of a single party controlled by the monarch himself.⁴¹

A. *Mismanagement of the Economy*

As a result of the Arab oil embargo of the early 1970's, Iranian revenues from oil sales rose dramatically, quadrupling from \$5 billion to \$20 billion per year.⁴² With this infusion of capital, the Shah undertook a campaign of massive spending aimed at turning Iran into a major military and industrial power.⁴³ To implement this program, Iran began to import a tremendous amount of goods from the West.⁴⁴ The Iranian infrastructure, however, proved incapable of handling this influx of goods.⁴⁵ For example, "[b]y mid-1975, ships had to wait 160 days to unload their goods—and when goods were unloaded, there was nowhere to house them."⁴⁶

The agricultural sector provides another illustration of the mismanagement and lack of planning that undermined the Shah's efforts.⁴⁷ In an attempt to modernize the countryside, the Shah ordered that small farms be consolidated into giant ones.⁴⁸ However,

³⁷ See Milani, *supra* note 14, at 137-38.

³⁸ See ABRAHAMIAN, *supra* note 20, at 11.

³⁹ See generally BAKHASH, *supra* note 3, at 10-18.

⁴⁰ See *id.* (explaining that "economic, social, and political dislocations in Iran created a fertile ground for Khomeini's radical ideas").

⁴¹ See *id.* at 11.

⁴² See *id.* at 12.

⁴³ See GHODS, *supra* note 13, at 199.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ *Id.* (observing that the Shah's programs were undertaken primarily to "foster Iran's international prestige rather than economic independence or cost effectiveness").

⁴⁷ See *id.* at 200.

⁴⁸ See GHODS, *supra* note 13, at 200.

the resulting farms were "too large for maximum efficiency and suffered from a lack of planning (in crop choices and budget forecasts) and skilled management."⁴⁹ Therefore, while food production did increase initially, it "did not keep pace with Iran's three percent annual population growth."⁵⁰

The Shah's desire that Iran become a regional military power further drained the country of its resources. Benefiting from the implementation of the Nixon Doctrine, which sought to lessen reliance on American forces by providing countries like Iran with advanced weaponry, and using his new-found oil-generated wealth, the Shah went on a military spending spree.⁵¹ Between 1972 and 1976, Iran purchased \$10 billion in American arms.⁵²

The Shah's poorly planned and mismanaged policies had negative consequences for the Iranian economy. Inflation rose from "9.9 per cent in 1975 to 16.6 per cent in 1976 and then to 25.1 per cent in 1977."⁵³ Meanwhile, oil revenues dropped from "\$21.8 billion in 1976/77 to \$21.3 billion in 1977/78."⁵⁴

B. *Suppression of Political Rights*

The other major cause of popular dissatisfaction with the Shah concerned his extreme political policies. To further consolidate his control, the Shah announced, in 1975, the abolishment of all political parties in favor of a single party—the Rastakhiz party—created by him.⁵⁵ All citizens were forced to join the new party and those who resisted were told by the Shah that they were "free to get their passports and leave the country."⁵⁶ The new party was viewed by many Iranians as an infringement on their political rights and as a further means for those loyal to the Shah to enrich themselves.⁵⁷

The *ulema*, whose representation in the legislature had significantly declined by the 1970's,⁵⁸ were particularly upset with the Shah, who in addition to cutting state subsidies to the *ulema*,⁵⁹ attempted to

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.* at 201-03. The Nixon Doctrine was implemented to "strengthen smaller allies' defenses, so they would remain pro-Western but would not have to rely on U.S. troops." *Id.*

⁵² *See id.*

⁵³ DANESHVAR, *supra* note 12, at 95 (quoting, Thomas Walton, *Economic Development and Revolutionary Upheavals in Iran*, 4 CAMBRIDGE J. OF ECON. 271-92 (1980)).

⁵⁴ GHODS, *supra* note 13, at 204.

⁵⁵ *See* DANESHVAR, *supra* note 12, at 72.

⁵⁶ *Id.* (quoting the Shah's Speech, March 1975 in *Iran Almanac* (1977)).

⁵⁷ *See id.* at 73. ("The party was used by many groups for rapid promotions and fast career tracks to positions of power, by showing intense loyalty to its principles.")

⁵⁸ *See* GHODS, *supra* note 13, at 206 ("Only 1 percent of deputies to the Twenty-first Majlis were clergy").

⁵⁹ *See id.* at 206 (showing that the *ulema* were dependent on the State as a source of revenue, but in 1977, "the government drastically cut its subsidies to the *ul[ema]*").

gain legitimacy for his throne in 1975 by replacing the Islamic calendar with a secular one that dated back to the time of Cyrus the Great.⁶⁰ The intellectuals and the clergy, outraged by the Shah's autocratic rule; angered by his disregard for the constitution;⁶¹ and convinced that Iran was under the control of foreign governments, particularly the United States,⁶² once again united, as they had done in 1906.⁶³

C. *Growing Dissent*

As a result of their dissatisfaction with the Shah's policies, many people began to turn toward Islam.⁶⁴ Demonstrations sprang up across the country against the Shah, who responded by sending his secret police force—SAVAK⁶⁵—to attack the protestors.⁶⁶ In January 1978, violence escalated further in response to the appearance of an article in the newspaper *Ittilaat* that attacked both the clergy and Ayatollah Ruhollah Khomeini,⁶⁷ one of the leaders of the opposition. The article was believed to have been placed there by the Shah.⁶⁸ The article touched off mass demonstrations that began in the religious city of Qom and spread throughout the country.⁶⁹ Government workers contributed to this movement against the Shah by going on strike, thereby paralyzing the bureaucracy.⁷⁰

The spreading violence allowed Ayatollah Khomeini to assume leadership of the movement against the Shah.⁷¹ These protests cul-

⁶⁰ See *id.* (explaining the Shah's decision was "clearly an attempt to attain political legitimacy for the monarchy at the clergy's expense").

⁶¹ See DANESHVAR, *supra* note 12, at 82 ("The Shah was seen as a dictator rather than a monarch, and his failure to observe the law and establish a credible parliamentary system had brought the legitimacy of the monarchy itself into question.").

⁶² See *id.* (explaining how the Shah's close ties with the West had "become synonymous with the import of decadence from the West"). The term 'Westoxification,' was used by some Iranians to describe Iran which, according to the Shah's critics, "had become a nation of imitators who only copied the superficial aspects of modern living without any regard[] to substance or acceptability." *Id.*

⁶³ See *id.* at 5 ("The 1906 constitutional revolution was a direct consequence of a period of 'awakening of the intellectuals to the problems of the country and the expansionist policies of the superpowers, [that] . . . forged an alliance between the intellectuals and some segments of the clerical establishment."). See also OMID, *supra* note 3, at 14.

⁶⁴ See DANESHVAR, *supra* note 12, at 82 (stating that the Shah had "established his power and authority by suppressing all opposition forces who were critical of his authoritarian rule").

⁶⁵ SAVAK is an abbreviation of *Sazman-e Ittilaat va Amniat-e Keshvar*, Iran's intelligence and security organization. See *id.* at 41.

⁶⁶ See *id.* at 102.

⁶⁷ See *id.* The article accused the clergy of being allied with the communists in an attempt to overthrow the government. Additionally, it accused Khomeini of having written erotic poetry and of having "homosexual tendencies".

⁶⁸ See *id.* at 101 ("According to a number of sources, the article was instigated by the Shah himself, who had become concerned over the rise in Khomeini's popularity.").

⁶⁹ See GHODS, *supra* note 13, at 217.

⁷⁰ See *id.* at 218.

⁷¹ See DANESHVAR, *supra* note 12, at 102("[Khomeini] directly accused the Shah of under-

minated in September 1978 when government forces and demonstrators engaged in a bloody clash in Jaleh Square, in Tehran.⁷² Shortly after this clash, the Shah left Iran, and Khomeini and his followers took control of the country.⁷³

III. KHOMEINI'S *VELAYAT-E FAQIH*

The theoretical foundation for the government established by Ayatollah Khomeini in 1979 was his view of the relationship between Islam and the state as codified in his work *Velayat-e Faqih*.⁷⁴ Translated as "[G]overnment of the Islamic [J]urists,"⁷⁵ this work is a compendium of lectures delivered by Khomeini to his students in the city of Najaf, Iraq in 1969,⁷⁶ six years after he had been exiled by the Shah for his criticism of the regime.⁷⁷ In *Velayat-e Faqih*, Khomeini propounded the view that there should be no distinction between religion and government in an Islamic state.⁷⁸ Like Ayatollah Nuri, Khomeini believed that modern government should closely resemble the theocratic Muslim community of the early years of Islam in which the only legitimate rulers are the clergy, who have assumed the mantle of leadership directly from Mohamad through the *Imams*.⁷⁹ The principle that "the *foqaha*, religious leaders, are the trustees of the Prophet," means that all tasks entrusted to the Prophet must also be fulfilled by the *foqaha* . . . as a matter of duty."⁸⁰ There is no doubt, according to Khomeini, that "the *imam* . . . designated the *foqaha* . . . to exercise the functions of both government and judgeship."⁸¹

Khomeini based his concept of rule by the clergy on the Koran: "O you believers, obey God, obey the prophet and obey those in charge among you."⁸² According to Khomeini, those in charge after

mining Islam. He further condemned the Shah for his close collaboration with the U.S. which, he claimed was going to destroy Iranian culture, Islam and the economy. Thus he added a new and important dimension to the uprisings: Islam and the external factor.").

⁷² See GHODS, *supra* note 13, at 218 ("The massacre, called Black Friday, ended any hope that the [S]hah had ever had of reaching a compromise with reformist elements among the religious opposition.").

⁷³ See *id.* at 219.

⁷⁴ See BAKHASH, *supra* note 3, at 38 (discussing Khomeini's "basically revolutionary concept of the Islamic state").

⁷⁵ *Id.* But see OMID, *supra* note 3, at 40 (translating *Velayat-e Faqih* as "Rule by a wise religious leader.").

⁷⁶ See BAKHASH, *supra* note 3 at 38.

⁷⁷ See OMID, *supra* note 3, at 31, 38 (stating that upon his exile in 1963, Khomeini went first to Turkey, then Iraq, and finally to Paris).

⁷⁸ See *id.* at 62 ("[I]n *Velayat[-e] Faqih*, Khomeini postulates a future government by a group of like-minded, and high-minded, clergy, who submit themselves to the will of God and merely prescribe the Islamic dictum for the population to follow.").

⁷⁹ See *id.* at 5 ("[U]niversal authority rests with the Imam.").

⁸⁰ OMID, *supra* note 3, at 59 (quoting IMAM KHOMEINI, *ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI 78-79, 96* (Hamid Algar trans., 1980)).

⁸¹ *Id.* at 60.

⁸² AYATOLLAH RUHOLLAH KHOEYNI, *ISLAMIC GOVERNMENT* 9 (Joint Publications Research

the prophet, the *Imams*, had "been entrusted with explaining the Islamic laws and rules and with disseminating them among the Moslems."⁸³ In the absence of the *Imams*, "[t]he just jurists have been required to carry out these tasks."⁸⁴

Khomeini believed that this system of government would be divinely inspired because God has given this government "the same powers that he gave the prophet . . . In regard to ruling, justice and the settlement of disputes . . . [and] the collection of taxes and the development of the country."⁸⁵ In addition, Islamic government differed from secular forms of government in that "the power of legislation is confined to God . . . and nobody else has the right to legislate."⁸⁶

Khomeini envisioned a government led either by a single member of the clergy, *faqih*, or by a group of clergy, *foqaha*.⁸⁷ "If competence for this task is confined to one person, then this would be his duty to do so corporeally, otherwise the duty is shared equally."⁸⁸ Two important qualifications a ruler must possess are knowledge of Islamic law and the "faculty" of justice.⁸⁹ "You can see that whoever governs or dispenses justice among the people must be an imam knowledgeable in the laws and the rules and must be just."⁹⁰ Such a ruler, when found, "will have as much control over running the people's administration, welfare and policy as the prophet . . ."⁹¹ Khomeini saw this ruler in paternalistic terms, in that "[t]he task of a trustee over an entire people is not different from that of the trustee over minors, except quantitatively."⁹² A strong leader is needed because the people are, generally, "devout, simple-minded and intellectually docile."⁹³ Khomeini also envisioned a modern Islamic government as one in which "[r]eligious taxes meet all the state's expenditure and religious courts dish out justice on an immediate and satisfactory basis There is no need for elections and representative government, because the laws are prescribed by Islam and the clergy have emerged as the best guides and have reluctantly accepted the burden of government."⁹⁴

Although, Khomeini offered an alternative form of government,

Service trans., *Translations on Near East and North Africa*, No. 1897, 1979) (1969-1970).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 21.

⁸⁶ *Id.* at 17.

⁸⁷ See Saffari, *supra* note 4, at 64, 65, 77.

⁸⁸ KHOMEYNI, *supra* note 82, at 22.

⁸⁹ See *id.* at 19, 20.

⁹⁰ *Id.* at 35.

⁹¹ *Id.* at 21.

⁹² *Id.* at 21-22.

⁹³ OMID, *supra* note 13, at 62 (theorizing that Khomeini believed the Iranian people should "accept the rule of the clergy and follow their instruction to the letter").

⁹⁴ *Id.*

in his lectures, he spoke in theoretical terms.⁹⁵ Nowhere did he set out specifics for the implementation of such a system.⁹⁶ Also problematic was Khomeini's assumption that a system of government from the seventh century would be adequate to meet all of the needs of a modern state.⁹⁷ Almost as soon as he gained power, Khomeini was forced to adjust his theoretical model to conform with reality.⁹⁸

IV. THE ISLAMIC REVOLUTION: 1979

In January 1979, ten years after the delivery of his lectures on the subject of *Velayat-e Faqih*, Khomeini returned from exile to Iran.⁹⁹ Upon returning, he ordered the implementation of a "dual" system of government in which a Provisional Government, "dominated by secular . . . liberals," and a Revolutionary Council "dominated by clerics and Khomeini himself," would share power.¹⁰⁰ From the outset, however, real power was exercised by the Revolutionary Council. The Provisional Government was merely a "front"¹⁰¹ for the clergy, who tolerated the government's existence while they consolidated their clerical power.¹⁰² What developed was a system of government wherein the Revolutionary Council "provided guidelines and rulings for changes, which the Provisional Government enacted in the daily running of the state."¹⁰³

On March 30 and 31, 1979, a referendum was held in which the people were asked whether they supported the Islamic Republic imposed by Khomeini and his followers.¹⁰⁴ The people approved of the government. Khomeini, claiming a ninety-eight percent approval rating by the people, "instructed the provisional government to draw up an Islamic constitution."¹⁰⁵

The draft constitution, which was secular in nature, was prepared by the Provisional Government and based upon the Iranian Constitution of 1906 and the constitution of France's Fifth Republic.¹⁰⁶ The constitution created a strong presidency while omitting any reference

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See DANESHVAR, *supra* note 12, at 136; OMID, *supra* note 3, at 130.

⁹⁹ See OMID, *supra* note 3, at 63.

¹⁰⁰ See Nikkie R. Keddie, *Introduction to THE IRANIAN REVOLUTION & THE ISLAMIC REPUBLIC 11* (Nikkie R. Keddie & Eric Hoogland eds., 1986).

¹⁰¹ See DANESHVAR, *supra* note 12, at 131.

¹⁰² See Cheryl Bernard & Zalmay Khalilzad, *THE GOVERNMENT OF GOD - IRAN'S ISLAMIC REPUBLIC 105* (1984).

¹⁰³ Robin Wright, *IN THE NAME OF GOD: THE KHOMEINI DECADE 66* (1989).

¹⁰⁴ See OMID, *supra* note 3, at 65-66.

¹⁰⁵ *Id.* at 66.

¹⁰⁶ See BAKHASH, *supra* note 3, at 74 (noting that the constitution was an extension of a partial draft which had been prepared in Paris by Khomeini's followers during his exile).

to the position of *Faqih*.¹⁰⁷ In addition, while a Council of Guardians was established to review all laws, ensuring their compliance with Islam, it was given only "limited veto powers" and the majority of its members were "lay judges, not Islamic jurists."¹⁰⁸

The draft was approved by the cabinet of the Provisional Government and by the Revolutionary Council.¹⁰⁹ Khomeini agreed to the draft¹¹⁰ with the understanding that provisions allowing women the right to hold the presidency and judgeships were to be removed.¹¹¹ The initial draft was so acceptable to Khomeini that he was willing to bypass the remaining steps in the drafting process and submit it directly to the people in a referendum.¹¹² This suggestion, however, sparked protest from a number of groups.¹¹³

The more conservative elements within the *ulema* were upset with the draft constitution's omission of the role of the *Faqih* and the negligible role it offered them in the new government.¹¹⁴ These clergy realized that "without constitutional assurances," as to their role in the new government, "and upon Ayatollah Khomeini's death," their newly acquired positions of power would be placed in great jeopardy.¹¹⁵ The *ulema*, therefore, supported a revision of the constitution.¹¹⁶ Khomeini, too, came to realize that unless he became more active in promoting the role of Islam and the clergy in the new constitution and government, the revolution would turn "towards a democratic system, with little room for the religious institutions to dictate policies."¹¹⁷ Khomeini therefore agreed to the establishment of an elected Assembly of Experts, which would be "empowered to amend and redraft the constitution."¹¹⁸

During the ensuing campaign for seats in the Assembly of Experts, Khomeini's Islamic Republican Party (IRP) presented the largest slate of candidates.¹¹⁹ While its secular opposition "remained fragmented," and without a "coherent agenda," the IRP skillfully utilized

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *id.*

¹¹⁰ See OMID, *supra* note 3, at 66 (suggesting that Khomeini supported the constitution, despite its omission of any reference to the *Faqih*, because he felt that the position of *Faqih* would "emerge as a matter of course" and that the people of Iran would, nevertheless, "obey his every command.").

¹¹¹ See *id.* at 66.

¹¹² See BAKHASH, *supra* note 3, at 74.

¹¹³ See *id.*

¹¹⁴ See Saffari, *supra* note 4, at 67.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ OMID, *supra* note 3, at 66. Khomeini reacted by "publicly criticizing the draft constitution for being insufficiently Islamic." *Id.* His supporters came to his aid by "stressing the requirement of adhering to the rule by *Faqih* as the *sine qua non*," of the new Islamic society. *Id.*

¹¹⁸ BAKHASH, *supra* note 3, at 75.

¹¹⁹ See Saffari, *supra* note 4, at 64, 67 (quoting *Enqelab-e Eslami*, 15 MORDAD 1358 (August 6, 1979)).

mosques and successfully publicized the endorsements it had received from the clergy and Ayatollah Khomeini.¹²⁰ As a result, the IRP won a landslide victory, securing more than two-thirds of the 73 seats up for election.¹²¹

Khomeini addressed the Assembly of Experts at its inaugural meeting, warning the delegates that the constitution must be "one hundred percent Islamic," and that "discussion of proposals contrary to Islam lies outside the scope of [the Assembly's] mandate."¹²² To ensure that the proposals were of an Islamic nature, the delegates elected two staunch supporters of Khomeini: Ayatollah Montazeri, who was elected chairman, and Ayatollah Beheshti, who was elected vice-chairman.¹²³ The Assembly was divided into seven committees, each of which was assigned a portion of the draft constitution on which to work.¹²⁴ The articles revised by the various committees were to be presented to the full house for a vote.¹²⁵

One committee within the Assembly of Experts was called the Goals of the Constitution Committee (GOCC). The suggestions of this committee aroused some of the strongest debate over the role of the *faqih*.¹²⁶ The GOCC was chaired by Beheshti and filled with his IRP colleagues, all of whom were ardent supporters of rule by a *faqih*.¹²⁷ One of the first articles brought to the full house was Article 5, which had been written by Beheshti himself.¹²⁸ This article proposed the constitution's adoption of rule by a single *faqih*. Article 5 stated that, "[t]he governance and leadership of the nation devolve upon the just and pious *faqih* who is acquainted with the circumstances of his age; courageous, resourceful, and possessed of administrative ability."¹²⁹

That the GOCC took less than two weeks to pass Article 5, demonstrates the lack of "substantive debate and opposition in the Goals of the Constitution Committee."¹³⁰ Once it reached the full house of the Assembly, however, it did encounter some opposition.¹³¹ Several delegates had reservations about, or were completely opposed to, the

¹²⁰ *See id.*

¹²¹ *See id.* at 68. The IRP thereafter "paralyzed" the provisional government by "forming a peripheral government and constantly challeng[ing] [its] policies." *Id.*

¹²² BAKHASH, *supra* note 3, at 81 (quoting *Enqelab-e Eslami*, 28 MORDAD 1358 (August 19, 1979)).

¹²³ *See Saffari, supra* note 4, at 68.

¹²⁴ *See id.* at 68.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See Saffari, supra* note 4, at 69 (quoting 1 *Surat-e Mashruh-e Mozakerat-e Majles-e Barrasi-ye Neha'i-ye Qanun-e Asasi-ye Iran* [The Complete Collection of Final Debates of the Assembly on the Constitution of Iran] 376 (Tehran, 1985)).

¹²⁹ *Id.* at 69 (quoting THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 29 (Hamid Algar trans., Berkeley, 1980)).

¹³⁰ *Id.*

¹³¹ *See id.* at 71.

incorporation of the position of *Faqih* into the constitution.¹³² One such critic was Ezzatollah Sahabi, who argued that "*Velayat-e faqih* does not mean that the *faqih* should be involved in day-to-day politics The *faqih* has certain qualities which are needed, but not enough for a political leader in today's society."¹³³ Sahabi also criticized the notion of *Velayat-e faqih* on religious grounds, adopting the same position that Ayatollah Na'ini had taken during the 1906 debates.¹³⁴ Sahabi argued that "absolute rule belongs only to God and the infallible Imams; human beings cannot be under the absolute rule and subjection of anyone except them."¹³⁵

Another critic, Hojjati Kermani, argued that in today's complex world, a religious leader does not possess the requisite knowledge to lead the people: "It is no longer enough for a *faqih* to know the details of his province, or even possess enough knowledge about the Iranian revolution. The concerns of Iran are insignificant compared to those of the international community"¹³⁶ Kermani also stated that the *faqih* is ill equipped to deal with modern society without "knowledge and understanding of social, economic, and legal matters."¹³⁷

However, these moderate clerics were not only out-numbered, but out-maneuvered procedurally by Beheshti's "deft handling of the Assembly."¹³⁸ Beheshti "used his position [as chairman] to cut off debate when necessary, to interpret the gist of the discussions as he saw fit, and to present the 'official' view of critical articles of the constitution."¹³⁹ As a result, Article 5, providing for rule by a single *faqih*, was passed.¹⁴⁰

In addition to Article 5, the Assembly approved several other articles pertaining to the role of the *Faqih*.¹⁴¹ Article 107 established an additional Assembly of Experts whose job it would be to select a replacement for Khomeini.¹⁴² This Assembly would "[r]eview and consult among themselves concerning all persons qualified to act as

¹³² See *id.*

¹³³ *Id.* at 71 (quoting *Enqelab-e Eslami*, 30 MORDAD 1358 (August 21, 1979)). The opposition wanted a leader with "knowledge and understanding of social, economic and legal matters" and they felt that Khomeini was only expert in religious matters. See *id.* This religious opposition to Khomeini should not be misunderstood as a rejection of theocracy or a government based on Islam but, rather, of Khomeini's assumption of total control. See *id.*

¹³⁴ See Saffari, *supra* note 4, at 72.

¹³⁵ *Id.* (quoting *Surat-e Mashruh-e Mozakerat-e Majles-e Barrasi-ye Neha'i-ye Qanun-e Asasi-ye Iran* 89 (1985)).

¹³⁶ *Id.* at 71 (quoting *Enqelab-e Eslami*, 10 SHAHRIVAR 1358 (September 1, 1979)).

¹³⁷ *Id.*

¹³⁸ While Beheshti "did not always have his way," he focused on the "essentials and kept the discussions in a chamber of prickly and senior clerics," sympathetic to his views. See BAKHASHI, *supra* note 3, at 82.

¹³⁹ *Id.* at 82-83.

¹⁴⁰ See *id.* at 83.

¹⁴¹ See Saffari, *supra* note 4, at 73.

¹⁴² See *id.*

*marja*¹⁴⁵ and leader. If they discern outstanding capacity for leadership in a certain *marja*, they will present him to the people as their leader; if not, they will appoint either three or five *marjas*,¹⁴⁴ until a single leader could be found. Article 107 is also significant for what it omitted. The article failed to provide any means for removing Khomeini as *Faqih* should a need arise.¹⁴⁵ This lack of reference to removal demonstrated just how powerful Khomeini had become.

The composition of the additional Assembly of Experts was delegated, by Article 108, to a twelve member Guardianship Council which was also "granted the authority to examine all legislation for compliance with the *Shari'a* (law of God) and the Constitution."¹⁴⁵ Of the twelve members, six were to be appointed by Khomeini and six by the Supreme Judicial Council and the *Majles*.¹⁴⁷

A 'Leadership Council' was designated by Article 109 "to be elected if the future Assembly of Experts failed to agree on a single *faqih* for leadership."¹⁴⁸ If no suitable replacement was present, the Republic would function under "collegial leadership."¹⁴⁹ This situation never presented itself, however, because six years later, in 1985, the Assembly, with Khomeini's approval, selected Ayatollah Montazeri to succeed Khomeini upon his death.¹⁵⁰

Article 110 specified the powers held by the *Faqih*, which included the power to select and remove the heads of the armed forces, as well as judicial officials.¹⁵¹ The *Faqih* could also remove political candidates who were not sufficiently religious.¹⁵² The *Faqih* also had the power to "appoint members of the Supreme Defense Council and declare peace or war, based on the recommendations of this Council."¹⁵³ In addition to the powers of the *Faqih*, the constitution set out and established the qualifications for the offices of President, Prime Minister, Parliament, and the Judiciary.¹⁵⁴

¹⁴⁵ Omid translates *marja* as the "highest ranking religious leader," and a "source of emulation." Omid, *supra* note 3, at 250.

¹⁴⁴ Saffari, *supra* note 4 at 73 (quoting THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 66 (Hamid Algar trans., 1980)).

¹⁴⁵ See generally Omid, *supra* note 13, at 67. When writing *Valayat-e Faqih*, Khomeini had "assumed that the Islamic ruler would be . . . de-selected if he failed to be just." *Id.*

¹⁴⁶ Saffari, *supra* note 4, at 74.

¹⁴⁷ See Omid, *supra* note 3, at 131.

¹⁴⁸ Saffari, *supra* note 4, at 75 ("The members of the Leadership Council were required to have the same religious standing and qualifications as the *faqih*.").

¹⁴⁹ See Omid, *supra* note 13, at 135.

¹⁵⁰ See *id.* at 136.

¹⁵¹ See Saffari, *supra* note 4, at 75.

¹⁵² See *id.*

¹⁵³ *Id.* ("Interestingly, opposition to this article came almost exclusively from the 'moderate' faction, which had voted for the initial article establishing the *faqih*'s role, but now disagreed on the extent of his power." One criticism of this article was that it infringed upon the power of the President.)

¹⁵⁴ See HELEN CHAPIN METZ, IRAN: A COUNTRY STUDY 198-202 (Area Handbook Series, 1989).

The Assembly finished its revisions by November 1979.¹⁵⁵ These changes, in line with Khomeini's wishes, had "laid the foundation for a theocratic state."¹⁵⁶ The revised constitution provided a central role in the new government for the *Faqih* and the clergy.¹⁵⁷ In addition, it "entrenched Islamic jurisprudence as the foundation of the country's laws and legal system, and limited individual freedoms to what was considered permissible under Islam."¹⁵⁸ The constitution was approved in a plebiscite in December 1979.¹⁵⁹

A. *Problems of Implementation: Velayat-e Faqih in Action*

1. Taxation

The theocratic government established by the revised constitution soon found that implementing its own rhetoric in terms of "practical day-to-day politics posed a problem that had no obvious solution."¹⁶⁰ Several problems, unforeseen by Khomeini when formulating his notion of the *Faqih*, emerged.¹⁶¹ One such issue was taxation. In *Velayat-e Faqih*, Khomeini had asked rhetorically whether there was "a difference between what the prophet and the imam collected and what the present-day jurist should collect."¹⁶² Under that system, the people were required only to pay taxes to support the poor, not the state.¹⁶³ Khomeini had mistakenly believed that the people would voluntarily pay additional taxes to support the state, therefore, this same system of taxation would suffice for present day Iran;¹⁶⁴ he was wrong. The people refused to voluntarily pay additional taxes.¹⁶⁵ The result was that the government was not able to generate enough capital to support both its domestic needs and the ongoing war with Iraq.¹⁶⁶ Khomeini was placed in a bind. On one hand, Iran needed to generate revenue to survive. On the other hand, if Khomeini were to call for an increase in taxation, he would effectively derogate from the system implemented by the Prophet, the very system Khomeini

¹⁵⁵ See BAKHASH, *supra* note 3, at 83.

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Milani, *supra* note 14, at 150.

¹⁶⁰ OMID, *supra* note 3, at 140-41.

¹⁶¹ *See id.*

¹⁶² KHOMEYNI, *supra* note 82, at 9.

¹⁶³ See OMID, *supra* note 3, at 141 ("The *Shias* are expected to part willingly with one-fourth of their surplus worldly goods, *zakat*, and one-fifth of their surplus liquid cash, *khoms*, each year, to meet the needs of the poor and the needy; not those of the state and government.").

¹⁶⁴ *See id.*

¹⁶⁵ See OMID, *supra* note 3, at 141.

¹⁶⁶ *See id.* ("The government needed an ever-larger income to fund the war and the state, but . . . [t]wentieth-century Iranians were not quite as forthcoming as they should have been, and the *ulema* saw no reason to pass what they obtained to the government.").

had tried to imitate. Khomeini solved this dilemma by invoking the principle of *ejtehad*, or "interpretation by a religious leader, to extend the religious duties of believers to the domain of payment of secular taxes."¹⁶⁷

Khomeini justified this extension of the state's ability to tax by asserting that "[p]ayment of such taxation is a religious duty. Just as the Muslims have an obligation to pay their religious dues, so they must also pay their national taxes to the Islamic government."¹⁶⁸ Khomeini's act of extending taxes beyond what Islam had called for caused many to question whether his "support for the secular state apparatus amount[ed] to a denial of his earlier teachings."¹⁶⁹

Khomeini's supporters came to his aid. Ayatollah Khatami, distinguishing between the 'basic' and 'temporal' laws, stated that "[t]here are some absolute immovable laws of God that are eternal and never changing; but the laws which govern the day-to-day administration of the land may well change over time [D]ifferent historical periods demand different regulations."¹⁷⁰ In further defense of Khomeini's use of *ejtehad*, *Hojatoleslam* Hassan Marashi, a member of the High Council of the Judiciary, stated that "[w]here there are legal shortfalls, our constitution permits the jurisconsults to pass a judgment based on religious texts and principles In Shi'ism *ejtehad* is a basic and invaluable principle which enables the jurisconsults to remedy all legal shortfalls and fill up all the legislative gaps."¹⁷¹

2. The Delegation of Authority

Another ambiguity created by the constitution was whether the absolute rule of the *Faqih* left any room for the "delegation of powers and responsibilities" to other members of the government.¹⁷² The constitution had placed responsibility with many, but had left real power in the hands of the *Faqih*.¹⁷³ This question was raised in an editorial in the pro-government daily *Kayhan*: "[t]he question arises as to whether the honourable representatives of the *Valiyeh Faqih* have any right to make independent decisions or must they always turn to the *Faqih*?"¹⁷⁴

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting *Kayhan* (July 9, 1987)).

¹⁶⁹ *Id.*

¹⁷⁰ OMID, *supra* note 3, at 142 (quoting *Kayhan* (February 6, 1988)).

¹⁷¹ *Id.* (quoting *Kayhan* (May 31, 1987)).

¹⁷² See OMID, *supra* note 3, at 144 ("Khomeini's insistence on the overriding importance of the *Valiyeh Faqih*, the sole true representative of God on earth, [seemed to leave] little room for anyone else.").

¹⁷³ See *id.* at 145 ("[T]he tangled web of the Islamic constitution allocated responsibility to all without giving anyone other than the *Faqih* any powers.").

¹⁷⁴ See *id.* at 144 (quoting *Kayhan* (January 24, 1988)).

Khomeini's response to these questions came in the form of an answer that he provided, in December 1979, to a question posed to him by the Ministry of Labor and Social Affairs. The question dealt with the ministry's ability to impose maternity leave on private employers. Khomeini responded that the ministry did have such power, thereby clarifying the question of whether members of the government were empowered to act independently of the *Faqih*. In addition, Khomeini used this opportunity to increase his own power. He stated that citizens of an Islamic state must obey the orders of the State.¹⁷⁵ In a letter to Khamanei, then the President of Iran, Khomeini stated that "if the government can exercise its authority only within the bounds of the peripheral divine laws, then the bestowal of the divine ordinances through absolute deputyship upon the Prophet . . . would be hollow and meaningless."¹⁷⁶ Akhavi interprets Khomeini to mean that "divine laws by themselves will not suffice to ensure the well-being of the Muslims," the people need a *Faqih* to lead them.¹⁷⁷ Akhavi further states that "The logic behind the absolute empowerment notion is that the establishment of an Islamic state supervenes in its importance every other facet of Islam, because without such a state, the very existence of Islam itself is in question."¹⁷⁸

3. Internal Religious Dissention

Another source of challenge to Khomeini came from several other religious leaders who took exception to the fact that Khomeini had elevated himself above the other clergy.¹⁷⁹ Traditionally, Shi'ite religious leaders, *marjas*,¹⁸⁰ had led their followers with "little interference from their colleagues."¹⁸¹ Now a single leader, the *Faqih* was "endowed with powers to overrule the religious decrees and authority of other *mar[jas]*."¹⁸² Khomeini had made himself into a singular leader who had the "prerogative to overrule his . . . colleagues if the [other] *mar[jas]*' rulings hampered the ultimate objectives of the na-

¹⁷⁵ See Shahrough Akhavi, *Contending Discourses in Shi'i Law on the Doctrine of Wilayat al-Faqih*, 29 Nos. 3-4 IRANIAN STUDIES 229, 262 (Summer/Fall 1996).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (quoting letters sent by Khomeini to Khamanei on January 8, 1988).

¹⁷⁸ *Id.* at 267. Khomeini's views were not supported by all. Critics argued that the authority to suspend religious practices "such as prayer and pilgrimage, can come only at the hands of Allah, acting through the Prophet and/or the Imams." *Id.*

¹⁷⁹ See Saffari, *supra* note 4, at 77 ("A number of high-ranking [*ulema*] publicly declared their opposition to the *faqih* articles and viewed them essentially as lacking a proper Islamic basis.")

¹⁸⁰ See Omid, *supra* note 3, at 250 (defining *marja* as the "highest ranking religious leader; source of emulation.")

¹⁸¹ Saffari, *supra* note 4, at 77.

¹⁸² The ability to overrule other religious leaders was extended not just to the single *Faqih* but also to the group of 3 to 5 religious leaders to be established, according to the constitution, in the absence of a single leader capable of assuming power. *See id.*

tion as seen fit by the *faqih*.¹⁸³

A leading critic of the notion of absolute leadership by a single religious leader was Ayatollah Shari'atmadari, who felt that the *Faqih* should merely be an adviser, and should enter politics "only under emergency conditions."¹⁸⁴ Shari'atmadari wrote that the people should be the ones to lead, for the "foundation of the dissolution of the former regime was a popular referendum; [thus] the will of the people should also be the foundation of the new government."¹⁸⁵ In defense of the constitution, Ayatollah Beheshti responded that "*Velayat-e Faqih* does not repudiate popular voting because the people must 'recognize and accept the *faqih*."¹⁸⁶

4. Problems of Succession

The continuity of the government initially appeared to be ensured by the designation of Ayatollah Montazeri as Khomeini's eventual successor. Montazeri proved to be a member of the dissident clergy, however, who, like Ayatollah Shari'atmadari, believed that the *Faqih* should not be a single all-powerful leader but, rather, one who, "in making important decisions . . . consults with experts and the learned to ensure that his decisions are beneficial to society as a whole and do not incur irreparable damage to the social fabric of Muslim nations."¹⁸⁷ He also charged that the government had been guilty of "injustice [and] denial of people's rights."¹⁸⁸

Montazeri's criticisms of the regime were seized upon by President Ali Khamanei and Speaker of the House Hashemi Rafsanjani, "both favourite disciples of the *Faqih*, [who] felt themselves vulnerable should Montazeri come to power."¹⁸⁹ Both realized that Montazeri was more learned than they were, and if it was "knowledge of Islamic law that was to determine who was to run the country" both "had much to lose."¹⁹⁰ Both were, therefore, influential in convincing Khomeini to dismiss Montazeri.¹⁹¹ Even after Montazeri was removed

¹⁸³ *Id.*

¹⁸⁴ Milani, *supra* note 23, at 149.

¹⁸⁵ *Id.* (quoting Ettela'at, Mehr 19, 1358 (October 11, 1979)) (emphasis added).

¹⁸⁶ *Id.* at 142; see also Ahmad Kazemi Moussavi, *A New Interpretation of the Theory of Velayat-e Faqih*, 28 MIDDLE EASTERN STUDIES 101 (January 1992) (discussing a new approach to the legitimization of the concept of *Faqih*, namely that of a dual layer of legitimacy bestowed both by God and the people).

¹⁸⁷ OMID, *supra* note 3, (quoting *Kayhan* (January 25, 1988)).

¹⁸⁸ BAKHASH, *supra* note 3, at 283 (quoting *Kayhan Havai* (February 8, 1989)) (emphasis added).

¹⁸⁹ OMID, *supra* note 3, at 146.

¹⁹⁰ *Id.*

¹⁹¹ See *id.* at 147 ("Rafsanjani . . . convince[d] Khomeini that the chosen heir . . . should never become the nation's leader."). Although Khomeini dismissed Montazeri as his successor, he did allow him to "continue functioning as a religious leader." *Id.*

as a threat, however, succession problems remained.¹⁹² According to Article 107 of the constitution, should no suitable candidate be found to replace Khomeini, a "council of three or five religious leaders would take charge of the leadership."¹⁹³ The problem for Khamenei and Rafsanjani was that membership in such a group would consist of the "leading *ulema* selected on the basis of knowledge and learning, [and] would [therefore] not have included either."¹⁹⁴ As a result, both men encouraged Khomeini to revise the succession provisions of the constitution.¹⁹⁵

There was also a need to clarify the power structure in Iran and delineate the powers of the President.¹⁹⁶ This need, combined with the campaign to revise the criterion for determining a successor, compelled Khomeini to order, on April 25, 1989,¹⁹⁷ the creation of a twenty member "Council of Reconsideration to revise the constitution."¹⁹⁸

V. REVISION OF THE CONSTITUTION: 1989

The Reconsideration Council, dominated by Khomeini's followers, abolished the post of prime minister, strengthened the position of the presidency,¹⁹⁹ and dealt with the leadership problem by amending the succession provisions of the constitution.²⁰⁰ Originally, the constitution had required the *Faqih* to enjoy the "support of the decisive majority of the people."²⁰¹ When no individual enjoyed "massive popular support, the Assembly of Experts, whose members are elected, should appoint three or five recognized *faqih*s to the Leadership Council which then becomes the country's supreme authority."²⁰²

In contrast, Article 111 of the amended constitution stated that if the previous leader has died, resigned, or been removed, a "council, consisting of the President, the Head of the Judiciary, and one of the *foqaha* of the Assembly of Experts, will perform the leader's responsibilities. This council, which must be controlled by the *ul[e]ma*, will

¹⁹² See *id.* ("Montazeri's departure precipitated a constitutional crisis; there was no other suitable candidate to fulfill the functions of the *Faqih*.").

¹⁹³ *Id.*

¹⁹⁴ *Id.* ("Neither [Rafsanjani nor Khamenei] was likely to command public, let alone religious, backing.").

¹⁹⁵ See *id.* ("It was imperative, in their interest . . . to change the constitution.").

¹⁹⁶ See *id.* at 148 ("The council was to disentangle the proliferation of command, [and] delineate the limits of power and responsibilities of the President . . .").

¹⁹⁷ OMID, *supra* note 3, at 148.

¹⁹⁸ Milani, *supra* note 14, at 150. Of the 20 members of the Council, Khomeini appointed 15. The remaining 5 were appointed by the Parliament or *Majiles*. See *id.*

¹⁹⁹ See Milani, *supra* note 14, at 151 ("The updated version . . . centralizes political power by strengthening the presidency and demolishing the post of prime minister . . .").

²⁰⁰ See OMID, *supra* note 3, at 148 ("The council was to . . . sort out the problem of the succession.").

²⁰¹ Milani, *supra* note 14, at 151.

²⁰² *Id.*

lead the country until the Assembly of Experts selects a new leader."²⁰³ This elimination of the Leadership Council moved the country "away from collective to single leadership."²⁰⁴

The major change to the constitution, however, was to the office of the *Faqih*. The qualifications for the position were diminished while its powers were expanded.²⁰⁵ According to Article 109 of the 1989 constitution, the leader need no longer "be a *marja* (a source of imitation with a considerable following who renders independent judgment over a variety of issues) or enjoy the support of the majority" of the people.²⁰⁶ Now "he need only be well-informed about *feqh*, or about socio-political problems, or have popular legitimacy (art. 107), and must be 'just and pious.'²⁰⁷

The Reconsideration Council increased the institutional powers of the *Faqih* beyond even those that Ayatollah Khomeini had enjoyed,²⁰⁸ for fear that lessening the *Faqih's* religious credentials would have a concomitant deleterious effect on the way in which the *Faqih* was perceived and obeyed by the people. For example, Article 110 gives to the ruler the power to determine the "general policies of the Islamic Republic."²⁰⁹ This power is exercised in conjunction with a Council of Determination of the Interests of the Republic, "which was designed to resolve the outstanding differences between the *Majles* and the Council of Guardians."²¹⁰ Article 112, however, declares that the leader "will single-handedly determine the composition of this new council."²¹¹

Other powers given to Khomeini's successor were the ability to "order referenda, delegate some of his duties and responsibilities to others, and decide when to revise the Constitution."²¹² The unmodified constitution only granted the *Faqih* power to appoint six mem-

²⁰³ Milani, *supra* note 14, at 151.

²⁰⁴ *Id.* (explaining that just as Khomeini had consolidated power in his own hands to the detriment of the other members of the *ulema*, so too here, the revised constitution provides for the consolidation of power in the hands of fewer people).

²⁰⁵ *See id.* at 151-52 ("Nor do the qualifications of the *faqih* remain the same.").

²⁰⁶ *See id.*

²⁰⁷ *Id.* at 152.

²⁰⁸ *See id.* at 152 ("[T]he leader['s] . . . powers were extended beyond those of Ayatollah Khomeini's.").

²⁰⁹ Milani, *supra* note 14, at 152.

²¹⁰ *Id.*

²¹¹ *Id.* As Milani explains;

This provision reduces the power of the *Majles*, and seems incompatible with articles 6 and 56, which respectively make voting the basis of the administration of the country's affairs . . . grants legislative power to the Council for the Determination of the Interests of the Republic, all of whose members are non-elected. Therefore, the power of the *Majles*, an important symbol of the people's power, is restrained by two non-elected bodies, the Council of Guardians and the Council for Determination of the Interests of the Republic.

Id.
²¹² *Id.*

bers of the Council of Guardians.²¹³ Now Khomeini's successors can both appoint and dismiss its members.²¹⁴ The revised constitution also contains a new chapter, which gives the leader the power to reconvene the Reconsideration Council.²¹⁵ To do so, he is only required to consult with the Council of the Determination of the Interests of the Republic to "determine what must be revised or amended."²¹⁶

The changes to the position of the *Faqih* did not go without criticism. As to the lessened religious qualifications for the *Faqih*, critics claimed that "[t]he demotion of the leader to the ranks of mere mortals posed a serious problem of legitimacy for a state which is run on the basis of absolute obedience to the laws of God and to the decrees of his shadow on earth, the *Valayateh Faqih*."²¹⁷ The *Faqih* was supposed to be infallible, yet the "revised constitution was going to appoint a mere human being, without sanctity, without superior religious learning . . . to rule over the country . . . the people were still expected to obey this ruler as if he were a *Valiyeh Faqih*."²¹⁸ In defense of the revised constitution, Khomeini's supporters among the *ulema* argued that as long as the government "relies entirely on the laws of Islam . . . it will have the full support of the Muslims and the religious leaders. . . . Should [the government] ever, God forbid, fail to do so, then the religious leaders and the people of Islam will rise as one and defeat it."²¹⁹

The members of the government defended revision of the constitution by criticizing the newly-omitted notion of collegial rule.²²⁰ Public Prosecutor *Hojatoleslam* Mousavi Khoyiniha argued that "consultation was unnecessary and collegiality merely an obstacle to efficiency: 'Collective leadership simply cannot work. . . . [I]t certainly has no place in the judiciary. Our decision-making is not a consultative process, it is a matter of personal interpretation of the laws of God.'"²²¹

Despite the criticism leveled against it, the revised constitution was approved in a national referendum on July 28, 1989 and remains the constitution currently in effect.²²² Khomeini's death earlier that

²¹³ See *id.* at 152 ("Ayatollah Khomeini could only appoint the members of the Council of Guardians . . .").

²¹⁴ See *id.* ("[T]he leader can now appoint and dismiss them [Council members].").

²¹⁵ See Milani, *supra* note 23, at 153 ("[T]he leader is given the power . . . to order the convening of the Reconsideration Council.")

²¹⁶ *Id.*

²¹⁷ OMID, *supra* note 3, at 149. Critics asked, "[i]f the *Faqih*, the highest source of emulation, is not one and the same as the *Vali*, the ruler, then who has absolute authority and the right to rule in the name of God?" *Id.*

²¹⁸ *Id.* at 150.

²¹⁹ *Id.* (quoting Interview with Public Prosecutor Mousavi Khoyiniha in *Kayhan*, April 20, 1989).

²²⁰ See *id.* (citing examples of government figures defending the revised constitution).

²²¹ *Id.* at 150-151.

²²² See BAKHASH, *supra* note 3, at 286.

summer led the Assembly of Experts to convene and name President Ali Khamenei as the new *Faqih*.²²⁵

VI. THE DECLINE OF *VELAYAT-E FAQIH*

Despite these constitutional efforts to strengthen the powers of the *Faqih*, Khomeini's death signaled the beginning of the decline of the position in the eyes of many Iranians.²²⁴ A major reason for this negative perception is the fact that Khomeini's successor Ali Khamenei, who was "not even an Ayatollah at the time of his designation," lacks the religious credentials for the position.²²⁵

In addition to Khamenei's lack of religious standing, several other factors have led to a growing dissatisfaction with the *Faqih* in general and the *ulema* in particular; a dissatisfaction best expressed in May 1997's presidential victory by Mohammad Khatami over Speaker of the Parliament Ali Akbar Nategh-Nouri, who had been supported by Ayatollah Khamenei and had been the *ulemas'* candidate of choice.²²⁶

The presidential election was significant for a number of reasons. First, as one opposition leader, former foreign minister Ibrahim Yazdi put it, "[f]or the first time we have had a campaign that [was] not between two individuals but actually between two different . . . outlooks."²²⁷ In their campaigning, the two candidates clearly demonstrated these two opposing outlooks. Khatami pledged to "respect the privacy of citizens" and to protect their "civil rights and freedoms."²²⁸ The cleric's choice, Nategh-Nouri, campaigned in favor of rule by the *ulema*.²²⁹

The electoral victory of Khatami clearly demonstrated the people's dissatisfaction with the clergy. The clerics had made it very clear that they supported Mr. Nategh-Nouri. Yet, "[n]ot only did their support fail to propel him to victory, it was also one of the main factors leading people to vote for Mr. Khatami."²³⁰ In fact, Khatami won a resounding victory. He received sixty-nine percent of the 29.1 million votes cast, approximately 20.5 million votes, as compared to

²²³ See *id.* ("Rafsanjani was elected the new president.").

²²⁴ See Akhavi, *supra* note 175, at 265 ("Khomeini's . . . death in June 1989 led to a crisis.").

²²⁵ See *id.* at 266. Khamenei is referred to simply as "leader," a purely secular term. This term, while also used by Khomeini, referred not to Khomeini's religious capacity but to his "political/administrative capacity as the overall authority in the system." *Id.*

²²⁶ See Erlanger, *supra* note 1, at A4.

²²⁷ Stephen Kinzer, *Voice for Change Makes Iran Vote a Real Race*, N.Y. TIMES, May 23, 1997, at A10 [hereinafter Kinzer, *Voice for Change Makes Iran Vote a Real Race*].

²²⁸ Stephen Kinzer, *Beating the System, With Bribes and the Big Lie*, N.Y. TIMES, May 27, 1997, at A4 [hereinafter Kinzer, *Beating the System, With Bribes and the Big Lie*].

²²⁹ See Scott Macleod, *Iran's Big Shift*, TIME, June 2, 1997, at 50.

²³⁰ Kinzer, *Many Iranians Hope Mandate Brings Change*, *supra* note 2, at A4. Contrast this rebuff of the clergy with Khomeini's success in 1979 in getting his IRP candidates elected to the Constitutional Assembly in overwhelming numbers. Here, Khamenei was unable to get his one candidate elected to office. See *id.*

Nategh-Nouri, who received only twenty-five percent.²³¹ Supporters of Khatami assert that his victory represents a "second revolution."²³² This theme was echoed by Ayatollah Montazeri, who, in a letter to Khatami following Khatami's victory, stated that the election had been a "popular revolution against the existing conditions . . . and a clear message to all the authorities and officials of the country."²³³

Khatami's support was not limited to any particular region or class, but cut across the Iranian political spectrum. "Mr. Khatami did well not only in cities and towns, where intellectuals are concentrated and where people are more resentful of the Government's social and economic policies, but also in villages and rural outposts."²³⁴ Supporters ranged from the young, who were upset with the regime's restrictive social policies, to women, who were angered by the regime's dress code.²³⁵ Exacerbating this dissatisfaction with social conditions was the general mismanagement displayed by the government. Unemployment had reached twenty percent, inflation had grown to twenty-five percent, and per-capita income had fallen from \$1,200 at the time of the Revolution to a present-day \$800.²³⁶

The youth vote is particularly telling of the decline of the power of the clergy. Seventy percent of the population of Iran is said to be under 25 years of age, a constituency who do not "feel bound by the ideology that brought the revolutionary Government to power."²³⁷ All these young voters have seen of the Revolution are the intrusive social polices that pervade and restrict their everyday lives. For example, the clerical regime's police squads have routinely patrolled the streets, enforcing conformity with Islamic law.²³⁸

Khatami has been perceived as a moderate since 1992, when he was forced to resign his post as Minister of Culture and Islamic Guidance.²³⁹ He had come into conflict with the more conservative elements within the government when he allowed the distribution of certain books, magazines, and movies that were considered "subver-

²³¹ See Stephen Kinzer, *Moderate Leader is Elected in Iran by a Wide Margin*, N.Y. TIMES, May 25, 1997, at A1 [hereinafter Kinzer, *Moderate Leader is elected in Iran by a Wide Margin*].

²³² See Stephen Fairbanks, *Iran's Democratic Efforts*, MIDDLE EAST POL'Y, September 1997, at 51 ("Unlike previous Iranian presidential elections where a prominent regime figure ran against one or more no-names, this was a real contest, and the winner was not the one selected by those holding the reins of power.").

²³³ *Id.*

²³⁴ Kinzer, *Moderate Leader is elected by a Wide Margin*, *supra* note 231, at A1; see also Bahman Baktiari, *Iran's New President*, in MIDDLE EAST INSIGHT, Nov. - Dec. 1997, at 16, 17 ("Not only did Khatami defeat Nategh-Nouri in the religious cities of Qum and Mashed, but also in Nategh-Nouri's home province of Mazandaran . . .").

²³⁵ See Macleod, *supra* note 229, at 50.

²³⁶ See *id.* at 51.

²³⁷ Kinzer, *Moderate Leader is Elected in Iran by a Wide Margin*, *supra* note 231, at A10.

²³⁸ See Kinzer, *Beating the System, With Bribes and the Big Lie*, *supra* note 228, at A4.

²³⁹ See Kinzer, *A Cleric's Tolerant Orthodoxy Wins*, N.Y. TIMES, May 25, 1997, at A10 [hereinafter Kinzer, *A Cleric's Tolerant Orthodoxy Wins*].

sive" by the more conservative clerics.²⁴⁰

A. *Prospects for Change*

While President Khatami is, by all accounts, more moderate than his predecessors, any analysis of his ability to effect change must consider the fact that he is very much a part of the system he is seeking to change. Mr. Khatami is not an outsider. To be allowed to run for the presidency, he had to swear allegiance to the regime.²⁴¹ It should also be noted that Mr. Khatami may not have grasped the degree of frustration with the current regime expressed by the people in their vote for him. As Shaul Bakhash, an academic noted for his analysis on Iranian affairs, has observed, Khatami "has emerged in the public eye as a candidate of real change in a way he probably did not intend."²⁴²

1. Conservative Backlash

Clerical opposition to change in Iran is likely to be fierce, for the ruling clerics "increasingly have come to fear for the position of the clergy in government and even for the fundamental principle of the Islamic Republic, velayat-e faqih."²⁴³ These concerns are well-founded. While criticism of the position of *Faqih* had in the past been relegated to "esoteric intellectual magazines,"²⁴⁴ the debate has now begun to "spread to the public."²⁴⁵ Ayatollah Montezari's recent criticism of the *Faqih* as being "too powerful"²⁴⁶ has simply added fuel to this debate. Another religious leader, Grand Ayatollah Nasser Makarem Shirazi, stated in an interview with *The New York Times* that "he fully expected that the question of the clergy's role would become an enduring feature of the country's political debate, although he was "confident that most Iranians continued to support the system."²⁴⁷

The *ulema* have already begun to try to silence their critics, much as the Shah did in his last days on the throne. The government has stated its plans to charge Ayatollah Montazeri with treason for his criticisms of the regime.²⁴⁸ A key ally of Khatami, Tehran's mayor Gholamhossein Karabaschi, has been convicted on charges of corruption and mismanagement.²⁴⁹ This conviction has been seen as a vic-

²⁴⁰ *Id.*

²⁴¹ See Kinzer, *Voice for Change Makes Iran Vote a Real Race*, *supra* note 227, at A10.

²⁴² Erlanger, *supra* note 1, at A4.

²⁴³ See Macleod, *supra* note 229, at 54-55.

²⁴⁴ *The Red Line*, THE ECONOMIST, November 29, 1997, at 48.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Douglas Jehl, *Iranian Clerics Hint at Treason Trial for Critic*, N.Y. TIMES, December 16, 1997, at A8 [hereinafter Jehl, *Iranian Clerics Hint at treason Trial for Critic*].

²⁴⁸ See *id.*

²⁴⁹ See Douglas Jehl, *Close Ally of Iran Chief is Sentenced to Jail Term*, N.Y. TIMES, July 24, 1998, at A6.

tory for the conservatives, who had accused Karabaschi of supporting Khatami's reform efforts.²⁵⁰ In addition, the *ulema* have also struck at Khatami by closing down the daily *Jameyah*, a newspaper that had been critical of the conservatives.²⁵¹ Also, the *ulema* successfully impeached Interior Minister Abdullah Nouri for allowing student organizations to conduct street demonstrations.²⁵²

This conservative backlash, however, was not unexpected. As Stephen Fairbanks, an analyst with the United States State Department, has pointed out, while an initial "conservative backlash is inevitable,"²⁵³ it will ultimately give way to reform and to a lessening role for the clergy. Fairbanks lists several reasons why he believes that Khatami will succeed over clerical objections including the substantial number of votes he received in his election, as well as the weakening of the conservative clergy in the *Majlis* which resulted from the defeat of its leader, Speaker Nategh-Nouri, in his bid for the presidency.²⁵⁴

VII. CONCLUSION

A constitution is merely a document that reflects the values and objectives of those who framed it. To remain viable, it must be capable of adapting to the changing needs of the citizenry. The people of Iran have seen three constitutions this century, none of which has provided them with the reforms that they had been promised. As recent events in Iran indicate, the people are beginning to seriously question their constitution and the system of government it embodies.²⁵⁵

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ Fairbanks, *supra* note 232, at 52.

²⁵⁴ *See id.* at 52-53 (observing that Khatami will succeed in getting the cultural and political restrictions imposed upon the people relaxed and that Khatami will be able to pursue a more open and engaging foreign policy).

²⁵⁵ *See, e.g.,* Jehl, *Iranian Clerics Hint at Treason Trial for Critic*, *supra* note 247, at A8. In an interview, Ayatollah Shirazi, "one of Iran's most respected clerics" stated that "[t]here are people who believe Iran should turn into a secular establishment, like the Turkish system." *Id.*