Shiite Tradition, Rationalism and Modernity:

The Codification of the Rights of Religious Minorities in Iranian Law (1906 - 2004)

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By

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Abbreviations

BDF	British Documents on Foreign Affairs
CAC	The Council for Amendment of the Constitution
EI ^{2}	Encyclopaedia of Islam (second edition)
EIR	Encyclopaedia Iranica
EJ ^{2}	Encyclopaedia Judaica (second edition)
EQ	Encyclopaedia of the Qur'ān
ER	Encyclopedia of Religion
ERE	Encyclopedia of Religion and Ethics
EWI	Encyclopedia of the World of Islam (Dānishnām-i Jahān Islām)
FRC	The Assembly of Final Revision of the Constitution
IDF	Iranian Documents of the Ministry of Foreign Affairs
JE	Jewish Encyclopedia
OEMIW	Oxford Encyclopedia of Modern Islamic World
Q	The Qur'ān
s. d.	Without Date of Publication
s. l.	Without Place of Publication

A Note on Transliteration and Dates

Transliteration from Arabic in this study follows the system adopted by the *Encyclopaedia of the Qur'ān* edited by Jane D. McAuliffe. The transliteration from Persian is done in accordance with Persian pronunciation. In addition, Arabic names and words entered into English, such as Shiite, Sunnite, Sheikh, Ayatollah, and so on, are written in accordance with what is mentioned in *Webster's Third New International Dictionary*. All dates are given in terms of the Common Era whether they originally were in lunar (*hijra*) or solar (*Shamsī*) formats.

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Introduction

The main thing that motivated me to choose this subject for a dissertation was the serious desire to expand the culture of negotiation in Iran. This impetus was intensified while I was translating the great mystical work of Christianity, *The Imitation of Christ* by Thomas A. Kémpis (d. 1274) into Persian (2002). As Kémpis' book contains some ethical-mystical teachings similar to those of Islam, it was enthusiastically welcomed in Iran by Muslims. I thought that this similarity could make a great opportunity to help advance the culture of dialogue with others among Muslims. However, the experience of studying and teaching in the Islamic seminary of Qum for about fifteen years has led me to the conclusion that the main obstacle to dialogue and coexistence with the followers of the various religions is some *fiqh*-oriented opinions (*fatāwā*) by Shiite jurists whose legacy is embedded in history. These opinions, regarded as non-codified regulations until the end of the 19th century, have circulated among ordinary people, the clergy and the elite. For this reason, the dissertation concentrates upon evaluating Muslim sources, particularly Shiite ones that are concerned with the rights of religious minorities, to analyze the process by which these legal opinions were formed. In the first years of the 20th century, when the Shiite tradition encountered new concepts and institutions during the 1906 Constitutional Revolution, some of those *fiqh*-oriented opinions came to the fore in the guise of the Constitution and in other laws and regulations.

About 100 years later, only a few of those *fiqh*-oriented opinions remain in Iranian law. The study that consists of five chapters is seeking to elaborate the process and to offer some suggestions to improve the status of religious minorities. Chapter one evaluates the formation of the rights and/or duties of religious minorities in Islamic Shiite sources including the Qur'ān, the *Sunna* and especially in *fiqh*-oriented opinions that emerged for the first time in classic Shiite sources and then repeated in the works of the posterity. Given that the initial impression of the status of religious minorities in Iranian society in the 19th century was based on opinions that were firmly rooted in those sources, it was necessary to examine those opinions in detail to find out the bases of and probable changes to them in Iranian law. While these sources are equivocal on the subject

in a way that made it difficult to categorize them and give a definitive judgment, most Shiite jurists, following the pioneers, formed a legal corpus which regarded religious minorities as having an inferior legal status in Muslim societies. The regulations, which gradually took on a divine coloring, were imposed on them with the initial hope of converting non-Muslims to Islam. This is because Shiite jurists and theologians thought that conversion, whether willingly or by coercion, not only brings about socio-political benefits for the converted neophytes, but also is a means to find out 'truth' and the attainment of 'salvation' in the hereafter. The assumption that salvation was limited to accepting Islam lies at the base of *fiqh*-oriented opinions concerning non-Muslims. Those *fiqh*-oriented opinions are dealt with in detail in chapter one.

In 1906 and afterwards, Iran codified laws and regulations for the first time. The socio-cultural and economic backgrounds of the 1906 Revolution and the condition of religious minorities in the second half of the 19th Century is the main topic of chapter two. According to the analysis, Iranian constitutionalism, under the influence of the nationalist paradigm of the period, was a stratagem planned on behalf of the intelligentsia and some courtiers to reform the Qajar government and to consolidate the prestige of Iran in the region. The general characteristics of Muẓaffar al-Dīn Shah and especially the political situation of the region contributed to the emergence of a demand for reforms in the early years of the 20th century. The calls for reform coincided with popular protests against the dictatorship of the regime as well as the tyranny and corruption of local governors which kindled and enflamed these demands. To grasp the political circumstances this study gives the priority to the primary sources including memoirs of who were an eyewitness, conversations of the representatives of the first Parliament and original documents such as *British Documents on Foreign Affairs* (1985). The modern concepts and institutions introduced during the Revolution did not make any sense for clerics, people, and revolutionaries except under the justification that such modern concepts might be found or inferred from Islamic teachings. However, the architects of the Constitution inserted new terms and concepts that were regarded in their discussions as initial steps towards modernizing Iran. The debates between the opponents and supporters of the Constitutionalism were the first conflicts between the representatives of tradition and modernity. For a better understanding of the atmosphere, a brief report of

those discussions relying on monographs written against and for the Constitutionalism has been presented in this chapter. The important point is that religious minorities significantly participated in and helped the 1906 Constitutional Revolution. One interesting point is that in a revolutionary milieu, where an entire people were united to demand reforms, those *fiqh*-oriented opinions concerning religious minorities were ignored. The point has been utilized in the proposed new method of *ijtihād* in chapter five that looks at finding a solution for improving the legal status of religious minorities. Based on important unpublished reports which are kept in the Center of Documents and Archive affiliated to the Iranian Ministry of Foreign Affairs (1862- 1906), supplemented by a number of personal interviews with representatives of the religious minorities coupled with some extant primary and secondary sources, the present study aspires to show some general status of the religious minorities in the second half of the 19th century as well.

Chapter three analyzes the Constitution (1906) and the Supplement (1907) as the great achievements of the Revolution. By introducing the authors of the Constitution and their method, the author is going to prove that the idea of the Revolution was planned initially by the aristocracy and the intelligentsia. The main part of this chapter basing on the text of laws and regulations is concerned with analyzing the content of the relevant articles concerning the rights of religious minorities and the meaning of new terms applied in the Constitution. In this chapter, the inquiry tries to verify the assumption that in addition to Iranian works written by some religious intelligentsia concerning the proposed constitution, the authors of the Constitution had various models in mind, including the Constitutions of France, Belgium, and the Ottomans.

The story of codifying laws and regulations in the Pahlavi period is also discussed in chapter three. We shall see that Reza Shah used his power and authority to establish the new dynasty and expand the process of modernization. The codification of the Civil and Penal Codes, which were the wishes of the revolutionaries of 1906, was enacted during his rule. After codifying the Code, Reza Shah was able to remove the right of capitulation for foreigners who were living in Iran. The secular attitude of the Pahlavi régime and the development of modernization in the period caused religious minorities to feel that they had gained a somewhat better legal status in the new situation. However,

the régime, broadly speaking, preferred nationalism and the Iranian identity as a new ideology to religious trends. The result was that all religious people thought they had failed vis-à-vis the new ideology. The despotic manner of the régime, the foreign pressures imposed to force the Shah to implement certain international covenants, and the strategy focusing on Iranian identity not being compatible with the social facts were major factors that caused most people, including religious minorities, to believe that the régime had become incorrigible. They joined forces to protest against Muhammad Reza Shah in order to change prevailing government policies, to gain equal rights and attain more freedom in a democratic government.

Chapter four focuses on explaining developments in the period of the Islamic Republic. Most people regarded the Pahlavi régime as incorrigible and they were going to put a new one in its place with a democratic aspect. The religious leaders, particularly Ayatollah Khomeini who had a profound influence on the people, gradually suggested the establishment of an Islamic government in which all the people's demands would be fulfilled. Accordingly, after the Revolution, the religious leaders came to Islamize the Constitution as well as other remaining laws and regulations as a heritage from the previous régime. This chapter describes the preparation of the first drafts of the 1979 Constitution and then the emendations that led to the codification of the final version. In addition, based on the main texts of the Constitution, the Civil Code, the Islamic Penal Code, and other regulations, the new terms and the relative articles are analyzed. The point is that religious minorities, forming about one percent of the population, found themselves having an inferior legal status in the laws and regulations of the new period and returned more or less to the conditions of being regarded as *dhimmī*. Apart from radicalism in the early post-revolution years, and in spite of the Islamic tone of the laws and regulations, one can find during the period of the Islamic Republic a certain element of rationalization. From that time on, in the process of Islamization the laws, the government did not return to the imposition of the *jizya*, *kharāj*, and other regulations, as outlined in Shiite *fiqh*. We will see that the secularization or rationalization approach slowly continued during the time and was strengthened by the establishment of a new institution, i.e., 'the Expediency Council' in the Constitution and in the political system. The Council ratified a number of regulations in favor of religious minorities.

Chapter five is more than a conclusion of the dissertation. Recalling and learning from what has happened in the last century, and based on some Shiite primary sources and classic method, this chapter offers two parallel ways as a solution for improving the legal status of religious minorities. One can regard the solution as not simply subjective but as a new strategy or method of *ijtihād*, which seems to be compatible with the facts of Iranian society. At the same time, the solutions so far found might not seem be adequate at this time but the trend shows that with more discussion and explanation in the future more satisfactory answers could be found to the question of the rights of religious minorities.

Appendix I contains the names of the deputies of the religious minorities in the National Assembly from 1906 to 2008. In Appendix II, selected articles on the rights of religious minorities in Iranian law during last century are cited chronologically in Persian to help the reader who knows Persian and to provide a background for deeper discussion concerning the issue in the future. Even though some of the selected articles have a less direct relationship to the issue, they are chosen to show the reader the context of the laws and regulations in that time.

The last mark worthy point is that this study is based on an approach, which tries to evaluate every phenomenon in the context in which it is emerged. Thus unlike some Muslim thinkers who try to highlight certain aspects of the status of religious minorities in Islamic sources and societies and to deny other Islamic rulings concerning non-Muslims, this inquiry seeks to examine the rights and duties of religious minorities in the Islamic sources as well as in Iranian law in order to identify the main obstacles to the implementation of the rights of non-Muslims as citizens of modern Iran.

Chapter One:

The Legal Status of Non-Muslims in the Shiite Tradition

There are profound differences between the two main branches of Islam, i.e., *Ahl al-Sunna* and *Twelver Shiʿīsm*, with regard to the sources and methods they use to explain their teachings. However, apart from the issue of jihad, their legal framework on the status of non-Muslims is not very different. The Qur'ān and the *Sunna*, about which each branch has its own definition, are the main sources of Islamic law or *fiqh*.[1] The main characteristic of the *Sunna* in the Shiite school of thought is that Shiites rely on accepting the theological doctrine of the *imamate* and the *wilāya* of the family of the Prophet (*ahl al-bayt*). They consider the Imams as authentic interpreters of the Qur'ān, since they are infallible and have been inspired with knowledge. The acts and utterances of the Imams constitute the *Sunna* and are authoritative for Shiite jurists and who follow them. Even the quotations and dictums attributed to the Prophet are valid only by virtue of the sayings of the Imams. Theologically speaking *Twelver Shīʿīsm* does not accept the opinions of the Companions of the Prophet (*qawl al-ṣaḥāba*).[2]

The relationship between the ruler and the jurists has been conceptualized in different ways in Shiite tradition. This subject has proven to be problematic for Shiite jurists throughout history, evidence of which can be seen in the variety of theories regarding this issue.[3] In the period of the presence of the Imam, the jurists and

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[1] In the Shiite school, four sources are normally cited for the inference of legal opinions: the Qur'ān, the *Sunna*, consensus (*ijmāʿ*) and reason. However, as a matter of fact the last two, apart from their vagueness, are not sources but are means for solving apparent inconsistencies between the Qur'ān and the *Sunna*. *Ijmāʿ* in the Shiite school does not mean the consensus of the *ʿulamā*' in the absolute sense but refers to the consensus of jurists, which is indicative of the opinion of the Infallible Imams.

[2] See more in E. Kohlberg, "Some Imāmī Shiʿī Views on the Ṣahāba", *Jerusalem Studies in Arabic and Islam*, No. 5 (1984):143- 175; On the characteristics of Shiite groups, see: M. Ḥ., Ṭabāṭabāʿī, *Shīʿa in Islam,* tr. Hussein Naṣr (Qum: Anṣārīyān, 1981); Moojan Momen, *An introduction to Shīʿī Islam: the History and Doctrines of Twelver Shīʿīsm* (Oxford: Ronald, New Haven: Yale University Press, 1985); Halm, Heinz, *The Shiites: A Short History*, tr. Allison Brown (Princeton: Markus Wiener Pub, 2007).

[3] Concerning these theories, see M. Kadīwar, *Naẓarīyyihāy-i Dulat dar Fiqh Shīʿa* [*Theories on State in Shiite Fiqh*] (Tehran: Ney, 1378/1999): 58-186; A.K.S. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981); see also Wilferd Madelung, "A Treatise of the Sharīf al-Murtaḍā on the Legality of Working for the Government", *Bulletin of the School of Oriental and African Studies, University of London*, 43/1 (1890): 18-31. In the nineteenth century, some jurists such as Ahmad Narāqī (d.1245/1828) in, *ʿAwā'd al-ayyām* (Qum: Al-Ghadīr, 1408/1986) esp.: 205-206 came to accept more authority for the jurist without interfering in the realm of the Shah's power. Then it was Ayatollah Khomeini in *Kitāb al-Bayʿ* (Qum: Ismāʿīyān, 1410/1989), vol. 3: 125-138 who integrated the mystical and

theologians, basing on *hadīth* traced back to the Imams, credited the ruler with legitimacy in order to implement the aims of religion and to handle the affairs of the people. Accordingly, they declared cooperation with those rulers who achieved power without the recommendation of the Prophet or the Imams illegal. In the Period of the Occultation (after 329/940), Shiite jurists regard themselves as the general deputies (*nuwwāb ʿāmm*) vis-à-vis the particular deputies (*nuwwāb khāṣṣ*) of the Hidden Imam. This authority was sometimes ambiguously mentioned in Shiite legal works 'religious legitimacy' and as we shall see in the next chapters, depending on the historical conditions, the term found various interpretations. Shiite jurists believe that the implementation of some elements of the *Sharīʿa*[4] requires a legitimate sanctioning authority, especially in the realm of the *ḥudūd*, i.e. those penalties whose nature and extent have been prescribed by the *Sharīʿa.* This belief inevitably leads to a rejection of the religious legitimacy of any state in anticipation of the return of the Imam. Based on these beliefs most of the *ʿulamā'* should not have legitimatized offensive jihads, (*jihad ibtidā'ī*), the practice of having slaves and rulers levying *jizya* and *kharāj*. However, one can easily find many *ḥadīth* as well as *fiqh*-oriented opinions (*fatawā*) in Shiite sources concerning these issues, which are directly related to the rights of religious minorities. Thus, we can conclude that from 940 to 1501 C.E. (the date of the establishment of the Safavid dynasty), the term "ruler", who would have legitimacy to handle the affairs of people, in Shiite literature mostly referred to the jurist who gained authority in a particular region. The people were supposed to take such a jurist as an authority for carrying out legal affairs such as marriage and divorce, distribution of inheritance, accepting religious taxes like *zakāt* and *khums* and even in some cases implementation of retaliation and *ḥudūd.*

We are mainly concerned here with the role of the *Sharīʿa* (*fiqh)* in defining the approaches of jurists toward non-Muslims. The *Sharīʿa,* literally the way of life, includes

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judicial meaning of *walīī* and declared for the first time explicitly, that jurists can and should have political power. See the ideas of jurists on the state in the period of the Iranian Constitutional Revolution, in M. Ājudānī, *Mashrūṭ-i Irānī* [*Iranian Constitutionalism*] (Tehran: Akhtarān, 1382/ 2002): 65-96; L. Ājudānī, *ʿUlamā' wa Inqilāb Mashrūṭīyyat Irān* [*Ulema and the Constitutional Revolution*] (Tehran: Akhtarān, 1383/2003): 39-64.

[4] The S*harīʿa* in the Shiite tradition is used by and large as a synonym for *fiqh*. Theological beliefs and discussions, however, have another expression known as *kalām or iʿtiqadāt*. For various usages of the term in the other four schools of Islamic law see: Joseph Schacht, "Theology and Law in Islam ", in G. E. Von Grune Baum, *Theology and Law in Islam* (Wiesbaden: Otto Harrassowitz, 1971) pp. 3-23.

regulations and stipulations which, in the opinion of the jurists, are sent down by God. It seems that the jurists have considered *fiqh* as an *a priori knowledge* outlining the process of reasoning without reference to particular facts or experience. It is believed that God has put the entirety of the laws and regulations needed for society in the Qur'ān and the *Sunna*. From the viewpoint of the jurists, the legal corpus is independent of historical events and reality.[5] With this framework and this interpretation of *fiqh*, jurists attempt to solve all newly-encountered legal problems by looking for causes or justifications in their sources, and not primarily through the process of reasoning or reality. They also try to preserve and transfer their sources and legal opinions as permanent *a priori knowledge* to succeeding generations. This may explain why jurists are reluctant to discuss the historical evolution of *ḥadīth* and *fiqh*, especially in the first and second centuries as well as the subject of the occasions when the revelations were sent (*asbāb al-nuzūl*).[6] However, one can find discussions and methods in jurisprudence that might justify the historical evolution of rulings, such as the division of rulings into established (*aḥkām ta'sīsī*) and confirmed (*aḥkām imḍā'ī*) and the belief that the door of juristic inference (*ijtihād*) has remained open which makes it possible to change some legal opinions through recognizing public interest (*maṣlaḥa*) and the corruption (*mafsada*) of affairs.[7] The question arises here as to how Shiite jurists could adapt these two different argumentations in jurisprudence. The solutions that have been offered by them are not directly concerned with our discussion, but they are important for the purpose of the present study, which looks at the contingent methods and psychological attitudes by

[5] The origin of this belief and interpretation dates back to some *ḥadīth* attributed to the sixth Infallible Imam Jaʿfar al-Ṣādiq, who remarked that "The entities and deeds declared lawful and permitted by the Prophet Muhammad remain lawful and permitted until the Day of Resurrection, and forbidden are those declared as such by him." (*ḥalālu Muhammadin ḥalālun ilā yawm-i al-qiyāma wa ḥarāmuhū ḥarāmun ilā yawm-i al-qiyāma*). See for example, M. Al-Kulaynī, *al-Kāfī fī ʿilm al-Dīn* (Tehran: Dār al-Kutub al-Isalāmīya, 1388/1965), vol. 1: 58, no. 19; Muhammad Bāqir al-Majlisī, *Biḥār al-Anwār* (Beirut: al-Wafā', 1403/1983), vol. 86: 148.

[6] The first standard work compiling such information on the incidents that occasioned the revelation of verses of the Qur'ān was written in the fifth century. It belongs to ʿAlī b. Aḥmad, al-Wāḥidī al-Niysābūrī (d.468/1075), *Asbāb al-Nuzūl*. See concerning the work, Montgomery Watt (ed.) *Bell's Introduction to the Qur'ān* (Edinburgh: Edinburgh University Press, 1970), Chapter 10.

[7] Most Shiite jurists have often discussed individual cases of public interest (*maṣlaḥa*) with respect to their opinion on the realm of the authority or rule of the jurist *wilāyat faqīh.* For examples, see J. Kāshif al-Ghiṭā' (d.1228/1813), *Kashf al-Ghiṭā' ʿan Mubhamāt Sharīʿati al-Gharrā'* (Iṣfahān: Mahdawī. s. d.), Vol.1: 25-26, vol. 2: 343, 357, 397; Sheikh M. al-Anṣārī, *Kitāb al-Makāsib* (Qum: Bāqirī, 1415/1994), vol. 1: 245, 358; See also on the role of *ijtihād* in Shiite school, N .Calder, "Doubt and Prerogative: the emergence of an Imāmī Shīʿī theory of Ijtihād", *Studia Islamica,* 70/1 (1989): 57-78.

which a jurist can change rulings concerning the legal status of religious minorities. This point will be discussed in more detail in chapter five.

To provide precise information concerning the standard method with respect to Shiite legal views on the subject, we have to know more about two main trends in *Twelver Shīʿīsm*. Current research shows that from the beginning of the Major Occultation (*al-ghayba al-kubrā*) of the Twelfth al-Imām al-Mahdī (329/940) onwards, two main attitudes have existed regarding the role of *ḥadīth*. One of them is that of the group that later became known as the *akhbārī* and the other is that of the group called the *uṣūlī*.[8] One of the main doctrines of the *akhbārī*s is that they believed that *ḥadīth* alone and in themselves are adequate for the *Shīʿa*,[9] hence there is no need to rely on the principles and rules recorded in jurisprudence, and there is even no need to rely on reason, which was more often applied in the sense of analogy (*qiyās*).[10] These jurists argue that the Prophet and the Imams explained rules and principles so that we might understand the meaning of the verses of the Qur'ān and the traditions. In addition, in each new case, if the *akhbārī* scholar does not have any relevant *ḥadīth*, he will not consider any new obligation. *Uṣūlī* scholars also accepted the authority of *ḥadīth* but believed that additional contexts and rules are needed to understand the Qur'ān and the *ḥadīth* to solve new legal problems. Sometimes they accepted reason (*ʿaql*) theoretically as a source and other times as a method, but never in the sense of analogy.[11] In the 19th century,

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[8] For more information on the history of both attitudes, see, W. Madelung, "Akhbāriyya" in *EI*^{2}, Supplement: 56-57; E. Kohlberg, "Akhbāryya" in *EIR*. It seems that Kohlberg's view on contemporary attitudes of the *Akhbārī* in Iran is not correct (esp.:718a). The best defense of the *Akhbārī* attitude, perhaps, belongs to Sayyid Niʿmat allāh Jazāyirī (d. 1112/ 1700) in *al-Anwār al-Nuʿmānīyya* and for the defense of *Uṣūlī* attitude, see: Waḥīd Bihbahānī (d.1206/1792) *al-Ijtihād wa al-Akhbār*; See also, Robert Gleave, "Akhbārī Shīʿī *usūl al-fiqh* and the Juristic Theory of Yūsuf al-Baḥrānī" in *Islamic Law: Theory and Practice*, ed. Robert Gleave & Eugenia Kermeli (London: I.B. Tauris, 2005); Robert Gleave, *Scripturalist Islam: The History and Doctrines of the Akhbārī Shīʿī School* (Leiden: Brill, 2007).

[9] These claims could be found in many works of the *Akhbārī* as well as *Uṣūlī* scholars; for the best example, see M. Fayḍ Kāshānī (d.1091/1680), *al-Tuḥfatu al-Sanīyya fī Sharḥ al-Nukhbatu al-Muḥsinīyya,* commented by S. ʿAbd Allāh al-Jazāyirī (Mashhad: Kitābkhān-i Āstān Quds, no. 2269, 1091/1680): 5-6.

[10] The acceptance of analogy by the *Uṣūlī* group is only attributed to Ibn Junaid (381/991) and Ibn ʿAqīl (first half of the fourth/10th century) but there is doubt that analogy in their opinion had the same connotation as the Sunni concept of qiyās; See M. H. Mudarressī Ṭabāṭabā'ī, *An Introduction to Shīʿī Law: A bibliographical study* (London: Ithaca Press, 1984): 28-30 and 37.

[11] What Shiite jurists said on the definition of reason in their works is utterly ambiguous. Sometimes they applied it as a practical ability to differentiate between good and evil *ʿaql ʿamalī*, elsewhere as a method that has a close resemblance to analogy (*qiyās*), hence they regarded it as *tanqīh al-manāt*, see, Ṭ. Mirqātī, "tanqīh manāṭ" in *EWI*. In other cases, it was used as the power of reasoning and making arguments to result rules.

specifically after Sheikh Murtaḍā al-Anṣārī[12] (d. 1281/1864), *uṣūlī* scholars applied some Aristotelian, medieval philosophical terms in their jurisprudential works in order to extend the role of reason in inferring the rulings from the Qur'ān and *ḥadīth*.

The borderline between the jurist (*faqīh*) and the *ḥadīth*-relater (*muḥaddith*) was ambiguous in the early centuries. The early *ḥadīth*-relaters insisted on the literal sense and wording of the *ḥadīth,* and thus they only repeated the verses of the Qur'ān and collected passages of *ḥadīth* in their works instead of giving their interpretation and *fiqh*-oriented opinions. Then, those jurists and the Qur'ān exegetes[13] who had inclination to the *akhbārī* trend followed up the method. It was Sheikh Abū Jaʿfar Muḥammad b. Ḥasan al-Ṭūsī (d. 460/1067) who was the first to play an intermediary role writing both kinds of works, that is, the book of *ḥadīth* and the book of *fiqh*. Thus, Shiite *fiqh* until the fifth century had not been written down in the form of a book of *fiqh*, but remained in the format of *ḥadīth* reports.[14] Al-Ṭūsī wrote several *fiqh*-oriented judicial books such as *al-Nihāya fī al-Mujarrad al-Fiqh wa al-Fatāwā; al-Khilāf;* and *al-Mabsūṭ fī Fiqh al-Imāmīyya*, in addition to a *ḥadīth*–based text which will be dealt with below. Even though al-Ṭūsī[15] and Aḥmad b. ʿAlī al-Najjāshī[16] (d. 450/1058) stated that Husayn b. Saʿīd al-Ahwāzī (*ca*. 220/835) and some *ḥadīth*-transmitters before and after al-Ahwāzī, like Ṣafwān b. Yaḥyā (d. 210/825), Muḥammad b. Sinān (d. 220/835), Mūsā b. Qāsim al-Bajalī (d.210/825), Muḥammad b. Ūrame al-Qummī (ca. 220/835), Muḥammad b. Ḥasan al-Ṣaffār al-Qummī (d. 290/ 902-3) and ʿAlī b. al-Mahzīyār (ca. 254/868) had written about thirty *fiqh* books, these were actually books on *ḥadīth.* The *fiqh*-oriented books in the Shiite school were to some extent both in material and method under the influence of Sunnite *fiqh* from the period of al-Ṭūsī and afterward, especially al-Muḥaqiq al-Ḥillī (d.

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[12] See his biography in S. Murata, 'Anṣārī, Sheikh Murtaḍā' in *EIR*.

[13] Such as Hāshim al-Baḥrānī (d.1107/9-1695/7) in *al-Burhān fī Tafsīr al-Qur'ān,* ʿAbd ʿAlī al-Jumʿa al-Ḥuwayzī (d.1072/1661) in *Nūr al-Thaqalayn,* and M. Fayḍ Kāshānī in *al-Ṣāfi* that they confined their interpretation to the verses which some *ḥadīth* from the *Ahl al-Bayt* remain concerning them and gave the rest up.

[14] Regarding the role of *ḥadīth* in the Shiite school, see, E. Kohlberg, "Shīʿī Ḥadīth", *Arabic literature to the end of the Umayyad period* (Cambridge: Cambridge University Press, 1983): 299-307.

[15] See: Al-Ṭūsī, *al-Fihrist* (Mashhad: Dānishgāh Mashhad, 1351/1973):104, 105, 172, 231, 278, 288, 295, 303, and 344.

[16] See: Aḥmad b. ʿAlī al-Najjāshī, *Fihrist Asmā' Mūṣanifī al-Shīʿa* (*Rijāl al-Najjāshī*) (Qum: Dāwarī, 1416/1995): 140, 231, and 251. Al-Najjāshī is one of the first and greatest of Shiite biographers to the extent that his quotations on *ḥadīth*-relaters are usually regarded as authoritative and reliable in the Shiite school.

676/1277) and ʿAllāma al-Ḥillī (d. 726/1325).[17] Muḥammad Amīn al-Astar Ābādī (d. 1033/1623), who reestablished the *akhbārī* attitude in *al-Fawā'id al-Madanīyya* and Sayyid Ḥusayn Brūjirdī (d. 1340/1961), the influential source of emulation (*marjaʿ taqlīd*) believed that Shiite *fiqh*, as a matter of fact, and especially in the format of al-Ḥillī's works, was marginal and peripheral in relation to that of the Sunnites.[18] The meaning of the influence, here, is that Shiite *fiqh* and jurisprudence in the organization of subjects and arguments are similar to that of Sunnites. The Shiite jurists held the structure where they gave their viewpoints whether in agreement or in disagreement. Even in accepting or rejecting the contents of *ḥadīth* that could be interpreted in favor of one side or the other, for Shiite jurists, disagreement with Sunnite legal opinions was a criterion for accepting the other (non Sunnite) interpretation.[19] However, as we shall see later on the issue of minorities, in cases where there was not any tradition attributed to the Imams, the Shiites imitated Sunnite jurists.

After al-Ṭūsī, the line of demarcation between these two trends gradually became more distinct and, until the nineteenth century, the *akhbārī* attitude was predominant in the shrine cities of Iraq, viz. the *ʿatabāt*.[20] After the death of Waḥīd Bihbahānī (d. 1792),[21] the leader of the *uṣūlī* trend of that time, and particularly after several violent disputations, the atmosphere changed in favor of the *uṣūlīs*. Soon after the establishment of the *Hawza* religious academy in Qum by ʿAbd al-Karīm Ḥa'irī Yazdī (d. 1355/1936),[22] the *uṣūlī* scholars were supported. Today, there is a tendency to regard *ʿulamā'* such as Muḥammad Bāqir Majlisī and Ḥurr al-ʿĀmilī[23] (d. 1104/1693), as *ḥadīth*-relater (*muḥaddith*), not as a *faqīh*, even though al-Majlisī could politically gain the position of a

[17] See the biography of these Ḥillīs: "Hellī, Najm al-Dīn" in *EI*^{2}, by E. Kohlberg; "Hellī, Ḥasan b. Yūsof" in *EI* ^{2}, by Z. Schmidtke.

[18] M. A. al-Astar Ābādī, *al-Fawā'id al-Madanīyya*, ed. by R. Raḥmatī (Qum: Al-Nashr al-Islāmī, 1424/2002) esp. 76-79; See also Mudarressī (1984): 47-48. Brūjirdī had a good relationship with Maḥmūd Shaltūt (d.1963), the Egyptian Sunnite religious scholar and rector of Al-Azhar. He promoted the idea of Taqrīb [rapprochement] between the Shiite and Sunnite schools for the first time in Iran. See also W. Ende, 'Takrīb' in *EI*^{2}, esp.:165-66. On the question of the way in which the Sunni school influenced the development of Shiite institutions from the period of the *Ṣafavid*, see Devin J. Stewart, *Islamic Legal Orthodoxy: Twelever Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998).

[19] See as an example, Al-Kulaynī: vol. 1: 9.

[20] See: H. Algar, ''Atabāt' in *OEMIW* and *EIR*.

[21] See about him, H. Algar, "Behbahānī, Aqā Sayyed Muhammad Bāqir" in *EIR*.

[22] See his biography, "Ḥā'irī" by H. Algar, in *EIR*.

[23] See his biography in J. Subḥānī (ed.), *Mawsūʿatu al-Ṭabaqāt al-Fuqahā* (Qum: Mu'assasa al-Imām al-Ṣādiq, 1418/1997- 1424/2003), vol. 12: 267-270.

high-ranking *faqīh*, viz. *Sheikh al-Islām* in the courts of the Safavid dynasty. The history of the emergence of the two lines of *'ulamā'*, on the one hand, and also in Najaf and Qum in the last century, on the other hand, have theological and political backgrounds that are beyond our present concerns here. Nevertheless, a brief description of the two attitudes is adequate to justify the method of the discussion concerning the rights/duties of religious minorities. In addition, as we shall see later, the ideas of both groups on non-Muslims concerning a number of subjects are similar.

Shiite legal views concerning religious minorities are inferred from the Qur'ān and the *Sunna* according to two main trends, the *akhbārī* and the *uṣūlī*. While we are going to discuss these viewpoints, we are, methodologically speaking, entitled to consider the earliest scholars and the pioneers in this area, such as al-Kulaynī and al-Ṭūsī, and refer to them in two separate sections; one in the realm of *ḥadīth* and the other in the realm of *fiqh*. One would assume their opinions would have to be stable, however we will mention if we find contradicting views instead. Therefore, viewpoints concerning religious minorities will be presented in three areas; the Qur'ān, the *ḥadīth*, and legal opinions in *fiqh.*

1. The Qur'ān and the People of the Book

In the Qur'ān only Jews, Christians (*nasārā* as the Qur'ān calls them), Zoroastrians (*majūs*) and Mandean or Ṣābi'īn,[24] are mentioned. The followers of other religions, such as Hinduism and Buddhism, were not known and recognized or simply not recognized such as Manichaeism. The Jews and Christians are also regarded as the People of the Book, *ahl al-kitāb*.[25] At first glance, the People of the Book were those who were literate vis-à-vis the Ḥijāzī Arabs, the majority of whom, if not all, were illiterate.[26] Due to the fact that most of those who were literate were Jews and Christians who could read their Scriptures, they were called the People of the Book. The Qur'ān called the Arabs who were not Jews and Christians and were not literate as *ummīyyūn.*[27] The Prophet himself is

[24] They are mentioned three times in the Qur'ān alongside the other believers, Q, 2: 62; 5: 69; 22: 17. See concerning the Jews and Christians, Uri Rubin, "Jews and Judaism", "Children of Israel" in *EQ*; Sidney H. Griffith, "Christians and Christianity", "Gospel" in *EQ*.

[25] See: M. Sharon, "People of the Book" in *EQ*.

[26] Cf.: Sebastian Gunther "Ummī" in *EQ*, esp. vol. 5: 400.

[27] Q, 62: 2.

said to be *ummī*.[28] Gradually the term "People of the Book" acquired a religious meaning and it was applied to followers of those religions which have sacred divine Books.[29] It is notable that the meaning of the Book, prophecy and the report of how Jews and Christians have found their sacred Books from the viewpoint of the Qur'ān and consequently from that of Muslims are very different to what Jews and Christians believed in. The term, *ahl al-dhimma,* which appeared after the death of the Prophet or probably in the last stages of his life, is not mentioned in the Qur'ān and is found only in *ḥadīth* and *fiqh* sources.

When we consider all the verses of the Qur'ān regarding non-Muslims, it is difficult to categorize them and give a definitive view. One suggestion is that these verses are better understood by taking into consideration the contexts and the occasions of their revelations, viz. *asbāb al-nuzūl.* Emphasizing some verses that imply tolerance with non-Muslims, some Islamic thinkers ignored verses that contradicted this. An alternative explanation would be mentioning tolerant and intolerant verses of the Qur'ān to find a relatively comprehensive interpretation. The word *kāfir* 'infidel', which is derived from the verbal root *kafara* meaning 'whoever hides and/or covers something out of sight',[30] -- like the farmer who buries the seed in the earth[31] -- is used in the Qur'ān in different senses. Like the farmer, whoever denies and hides the truth is considered an infidel. But with regard to the essence of the truth, the Qur'ān deals with this matter in various guises, and not all in the same manner. At times, an "infidel" is someone who denies the unity of God, prophecy, and the Day of Judgment;[32] in other contexts, it is someone who denies the Islamic interpretation of the unity of God (*tawḥīd*);[33] in other contexts, an "infidel" is someone who denies that Muhammad is a Prophet;[34] and finally an "infidel" is someone who does not acknowledge God's grace, hence does not appreciate Him, and does not fulfill his or her duty towards Him.[35]

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[28] Q, 7: 157-158. Some scholars believe that the Prophet's illiteracy had already become dogma by the end of the third century. See also: Sebastian Gunther, "Illiteracy" in *EQ*, esp.: 492- 93.
[29] Q, 5: 68; 40: 53. See also, Sidney H. Griffith, "Gospel" in *EQ*.
[30] M. al-Zabīdī (d.1205/1790), *Tāj al-ʿArūs* (Beirut: Al-Ḥayāt, 2000), vol. 3: 524-25.
[31] Q, 27:40; 57: 20.
[32] Q, 4:15; 2: 28; 18: 105.
[33] Q, 5: 2, 73.
[34] Q, 13: 43; 2: 105.
[35] Q, 14: 7.

There is some evidence to suggest that the treatment with the People of the Book from the view points of the Qur'ān is not permanent. Sometimes it calls them 'the people of the faith', praises, and invites them to participate in dialogue.[36] Sometimes, they are considered infidels[37] or even polytheists,[38] and Muslims are instructed to fight them in order to convert them into Islam, until they pay the *jizya*.[39] Some verses indicate an exclusivist attitude, regarding other religions as illegal and ways of darkness; stating that only Islam is the Straight Path.[40] However, a pluralistic attitude can be inferred from some verses. For instance,

> "We are those who have prepared for you a regulation (s*harīʿa*) and a way (*minhāj*), and had God wished He would have made you one community but He is going to test you with respect to what He has given you; so strive to lead in good deeds. Unto God will you all return and then He will inform you about that which you differed."[41]

Accordingly, the follower of religions should postpone the solution of their conflicts into hereafter. Sometimes the Qur'ān praises the Jewish rabbis and Christian priests and their synagogues and churches are seen as on a par with mosques, as places in which God is remembered and worshiped.[42] At other times, most of the rabbis and priests are regarded as those who illegally took the property of the people and then the Qur'ān warns them of Divine punishment.[43] One could thus rely on some verses or parts of others to accord with the decision that s/he has already got concerning the People of the Book. Therefore, as mentioned before, it would be difficult to rely on the prima-facie sense of the verses. We should see on which part of the verses the Shiite jurists relied and how they interpreted them.

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[36] Q, 2: 62; 3: 113-114, 199; 5: 5, 44, 69, 82.
[37] Q, 9:31; 19: 88,94; 4: 171; 5: 64, 73-75; 7: 138-140, 194.
[38] Q, 98: 1, 6.
[39] Q, 9: 29, 5. See concerning the meaning of jihad in the Qur'ān, also, Ella L. Tasseron, "Jihād" in *EQ*.
[40] Q, 3: 19-20, 85.
[41] Q, 5: 48. My translation of the verses is in the text. But compare it with that of Yūsuf ʿAlī and Pīckthāll which sound unclear. See also: Clare Wilde and Jane D. McAuliffe, "Religious Pluralism and the Qur'ān" in *EQ*.
[42] Q, 22: 40; 5: 44.
[43] Q, 9: 34.

2. Legal Shiite *ḥadīth* on Non-Muslims

The second source for the Shiite tradition in substantiating legal concepts is the *ḥadīth* attributed to the Prophet and the Imams, especially al-Imām Muḥammad b. ʿAlī al-Bāqir (d. between 114-118/732-736) and al-Imām Jaʿfar b. Muḥammad al-Ṣādiq (d.148/765). What can be asked is how these sources were gathered and preserved. According to some early *ḥadīth*-relaters, these early records were mostly written on papyrus, animal skins, or on other things that were available at the time and were known as *aṣl* [principle]. Some scholars have explained the concept in the following manner:

> "This term [*aṣl*] had a clear meaning in general Islamic literature as well as in the more specific Shiite trend of *ḥadīth* scholarship including the Shiite *Zaydī* tradition. It conveyed the sense of a personal notebook, recording a list of the material received through oral transmission. Perhaps originally a jotter simply compiled it out of the material received through oral transmission. It is believed that some four hundred of those notebooks were left by the transmitters from the Imams or only from the sixth Imam."[44]

Sixteen of those *aṣl*, which were separately taken from the later sources, are available and have been printed without notable editing.[45] Therefore, we can conclude that most Shiite *ḥadīth* were available only as oral reports until the beginning of the fourth century.

The oldest Shiite source which includes some *ḥadīth* toward non-Muslims[46] is *Kitāb al-Nawādir* which is attributed, though not with certainty, to either Aḥmad b. Muhammad b. ʿIsā al-Ashʿarī (d. 260/873) or Husayn b. Saʿīd al-Ahwāzī (lived in 220/835).[47] In this book, the sixth Imam was asked about the manner in which the People of the Book

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[44] M. H. Mudarressī, *Tradition and Survival: a Bibliographical Survey of Early Shiite Tradition* (England: One world Publication, 2003), Vol. 1: xiv; See also, E. Kohlberg, "Al-Usūl al-Arbaʿ Mi'a" [Collection of Imāmī Hadīth], *Jerusalem Studies in Arabic and Islam* 10 (1987): 128-166.

[45] See: Ḥ. Muṣṭafawī (ed.), *al-Uṣūl al-Settata ʿAshar* (Qum: Dār al- Shabistarī, 1405/1984).

[46] Here, the study focuses on attitudes toward non-Muslims but for the formative period of Shiite tradition in general, see Andrew J. Newman, *The Formative Period of Twelver Shīʿism* (U.K: Curzon, 2000); It should be noted that Newman confined his discussion to three books *al-Maḥāsin, Baṣāʿr al-Darajāt al-Kubrā fī Faḍā'il Āl Muḥammad* of Muḥammad b. Ḥasan al-Ṣaffār al-Qummī (290/ 902) and *al-Kāfī*. For a comprehensive listing of the Shiite *ḥadīth* works from the first to third century, see Mudarressī (2003), *op. cit.* Only the first volume has been published so far.

[47] See: M. J. Shubayrī Zanjānī, "Nawādir Aḥmad b. Muḥammad b. ʿĪsā or Husayn b. Saʿīd al-Ahwāzī", *Āyin-i Pazhuhish*, no. 46 (1376/1997): 23-26.

should take an oath. 'Only by God', the Imam replied.[48] On another occasion, the Imam was asked about the legality of benefiting from the *Kharāj* (an annual tax on the land) which was paid by a *dhimmī* from the income of a land whose circumstances of occupation were unknown. The circumstances could include inheritance, purchase, theft, or occupation. 'That annual tax is legal,' the Imam asserted.[49] The second source after *Nawādir* is *al-Maḥāsin* of Aḥmad b. Muḥammad b. Khālid al-Barqī (d.274-80/887-94).[50] The book contains two *ḥadīth*, one exempting children, women, the elderly, blind and the disabled from the *jizya,*[51] and one *ḥadīth*[52] and an independent chapter[53] on authorizing the use of *ahl al-dhimma*'s dishware, and eating their foods. The third early source is *Qurb al-Isnād* of ʿAbdallāh b. Jaʿfar al-Ḥimyarī[54] (d. ca. 310/922) which includes two traditions on *ahl al-dhimma*; the first one indicating of ways to fight them or to keep peace[55] with them and, the second one indicating whether it is permissible to look at the hair of their women.[56] In these three books, which became references for later texts, the traditions were quoted and collected without giving personal ideas and comments.

The first Shiite source in which the oral and written traditions were collected and categorized in the period of *al-ghayba al-ṣughrā* 'the Minor Occultation' is *al-Kāfī fī ʿilm al-Dīn* which includes fragments from *al-Usūl min al-Kāfī* and *al-Furūʿ* of Muḥammad b. Yaʿqūb al-Kulaynī al-Rāzī (d.329/940-1).[57] He quoted those *ḥadīth* on *Ahl al-dhimma* cited previously by al-Ashʿarī, al-Barqī and al-Ḥimyarī. He also related other *ḥadīth* from the Prophet, al-Imām ʿAlī (d. 40/656), the first Imam and ʿAlī b. Mūsā al-Riḍā (d. 203/818) the eighth Imam and specifically from the fifth and sixth Imams which would have been oral and they have no documents save *al-Kāfī*. At the same time, these *ḥadīth* occasionally seem to be contradictory but are considered sound (*ṣaḥīḥ*) and are often

[48] A. M. al-Ashʿarī, *Kitāb al-Nawādir* (Qum: Mu'assasa Imām al-Mahdī, 1408/1987): 51.
[49] Ibid: 168.
[50] See concerning Barqī and his book, Newman (2000): 50-66; see also, H. Ṭārumī, "Barqī" in *EWI*.
[51] See, Barqī, *al-Maḥāsin* (Tehran: Dār al-Kutub al-Islāmīyya, s. d.), vol. 2: 328.
[52] Ibid, vol. 2: 569.
[53] Ibid, vol. 2: Chapter 49.
[54] See concerning al-Ḥimyarī, *Qurb al-Isnād*, 'Muqaddama' [Introduction] (Qum, Āl al-Bayt, 1413/ 1992); see also Subḥānī (ed.), *op. cit.* vol. 4: 236-238; Kh. Ziriklī, *al-Aʿlām* (Beirut: Dār al-ʿilm lilmalāyīn, 1987), vol. 4: 76.
[55] Al-Ḥimyarī: 82, no. 260.
[56] Ibid: 131, no. 459.
[57] Regarding the biography of al-Kulaynī, in addition to the work of A. Newman (2000), see: al-Kulaynī, *al-Kāfī*, ed. by Ḥusayn Ghaffārī (Tehran: Dār al-Kutub al-Islāmīyya, 1388/1968), "Muqaddama [Introduction]" written by Ḥusayn ʿAlī Maḥfūẓ; see also, W. Madelung, "al- Kulaynī" in *EI* [2].

quoted without commentary. According to al-Kulaynī,[58] it was his aim to compile a comprehensive compendium of *ḥadīth,* which would be of benefit for every *Shīʿī* but he never intended to solve their discrepancies. [59] The content of those *ḥadīth* in the chapter, under the title "*fiqh* and non-Muslims," will be discussed, but it would be better to consider briefly the general subjects and points of discussion that are found in *al-Kāfī*, pertinent to attitudes towards *ahl al-dhimma.* As already noted, the content of *ḥadīth* were regarded as legal opinions for *akhbārī* jurists and they would not try to offer extra interpretations. The table of contents in the following format could not be found in *al-Kāfī* and was prepared after searching all the volumes:

- *Jihād*, including its types, and how to deal with infidels, captives, and others in wartime.[60]
- When to fight against infidels and/or when to give them pardon (*amān*) in war?[61]
- The distribution of the booty.[62]
- Whether it is permissible or forbidden for a Muslim to reside in *dār al-ḥarb* and to consider it her or his homeland.[63] As we shall see, in the works of al-Ṭūsī and later jurists this issue was not discussed.
- Who is meant by *ahl-dhimma*?[64]
- Buying and selling slaves of *ahl al-dhimma*.[65]
- How to correspond by letter with *ahl al-dhimma*?[66]

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[58] Al-Kulaynī: vol. 1: 8-9. He recommended the reader to refer to the Qur'ān and the consensus of the Imāmī ʿUlamā' where there is contradiction and then accept those of evidence which are opposite of the *ahl- al-Sunna*.

[59] There is a quotation attributed to the al-Imām al-Mahdī [the Hidden Imam] that has a kind of mythical function among some jurists who had the *akhbārī* attitude, saying that "*al-Kāfī* is enough for our followers" (*al-Kāfī Kāfin li Shīʿatinā*). See: Aḥmad Khānsārī, *Ruwḍāt al-Jannāt*, 553. Al-Majlisī in *Mir'āt al-ʿUqūl fī Sharḥ Akhbār Āl al-Rasūl*, 26 vols. (Tehran: Dār al-Kutub al-Islāmīyya, 1379/2000), vol. 1: 3, 21-22, which is, as matter of fact a commentary on *al-Kafī*, indicating that *al-Kāfī* is the greatest as well as the most precise work of the Shiite school, at the same time he enfeebled many traditions of *al-Kāfī* and *Biḥār al-Anwār* but according to his *Akhbārī* approach toward *ḥadīth*, a Muslim can rely in his acts on all traditions even though they do not have equally reliable documentation.

[60] Al-Kulaynī: vol. 5: 2-30, 35.

[61] Idem, *Ibid*: 30-35.

[62] Idem, *Ibid*: 43-47.

[63] Idem, *Ibid*: 43.

[64] Al-Kulaynī: vol.3: 567-69; vol.5: 10-11.

[65] Idem: vol. 5: 210-211.

[66] Idem: vol.2: 651.

- Why the *ahl-dhimma* should pay *jizya* and/or *kharāj* and the proper way to collect these taxes?[67]
- Marriage with and divorcing *ahl al-dhimma.*[68]
- The length of the waiting period (*ʿidda*) for *dhimmī* women after divorce.[69]
- The purity and impurity of their dishware and foods.[70]
- How to treat a *dhimmī* who commits a prohibited act in *dār al-Islām* such as illegal sexual relations, murder, and drinking an intoxicant (*muskir*) in public?[71]
- How to treat a Muslim who is charged with the malicious accusation (*qadhf*) of illicit sexual relations against a *dhimmī*, and vice versa?[72]
- Retaliation and blood money of the People of the Book.[73]
- The validity of a *dhimmī*'s witness in favor of or against a Muslim.[74]

These *ḥadīth* are reproduced in later Shīʿīte *ḥadīth* collections in addition to those that supplemented them. Following *al-Kāfī*, those *ḥadīth* are found in the works of ʿAlī b. Bābiwayh al-Qummī, known as al-Ṣadūq (d. 381/991), such as his *Man lā yaḥḍuruhū al-faqīh* and *al-Muqniʿ*. The title of his first work indicates that he intended to collect the *ḥadīth*, which were not readily available for the jurist, but in many cases, they could be found in earlier books.[75] About thirty years later, the *ḥadīth* on the People of the Book were repeated in *al-Muqniʿa* of Muḥammad b. Muḥammad b. Nuʿmān, known as Sheikh al-Mufīd (d. 413/1022). *Tahdhīb al-Aḥkām* [*Rectification of Judgments*], the traditional (*ḥadīth*) work of al-Ṭūsī, is in fact a commentary on Mufīd's *al-Muqniʿa.* Consequently, the same corpus of *ḥadīth* with some addenda and comments were developed by al-Ṭūsī.

[67] Idem: vol.3: 567-69, 270, and 282.
[68] Idem: vol.5: 436-37.
[69] Idem: vol.6: 174-175.
[70] Idem: vol.6: 263-265.
[71] Idem: vol. 7:238-39.
[72] Idem, *Ibid*: 239-40.
[73] Idem, *Ibid*: 309- 312, 364.
[74] Idem, *Ibid*: 398.
[75] As far as I know *ʿulamā*' in the advanced level Shiite seminaries try to justify the addendum traditions and their development from one book to another, but I did not find independent inquiry such as the work of A. Newman (1368/1989: 130-137 in Persian) on the issue. He compared the amount and the type of *ḥadīth* collected in the book of al-Jihād in *al-Kāfī* and in *Man lā Yaḥḍuruhu al-Faqīh.* Then he tried to make a relation between the authors' collection and their social class origins. This method of study is not applied in the framework of Shiite seminaries.

In his *al-Istibṣār,*[76] al-Ṭūsī explained why he chose between the disputed traditions some *ḥādīth* in his previous work and so again indirectly repeated them. These two *ḥadīth* works of al-Ṭūsī, along with the works of al-Kulaynī and al-Ṣadūq, came to constitute the canonical sources *al-kutub al-arbaʿa* of the S*unna* in the Shiite school by the end of fifth/eleventh century.

The collected Shiite *ḥadīth*, irrespective of the legal ones that include *ḥadīth* on non-Muslims, were limited to cases ranging in time from the fifth/eleventh to eleventh/seventeenth centuries. Then, there were two *ḥadīth*-relaters in seventeenth century who decided again to collect and categorize the Shiite *ḥadīth*. They envisaged that they should do what al-Kulaynī had done in the fourth century and therefore added *ḥadīth* that were found during their time. First, Muḥammad b. Ḥasan al- Ḥurr al-ʿĀmilī (d. 1104/1693) in his work, *Tafṣīlu Waṣā'il al-Shīʿa ilā Masā'īl al-Sharīʿa,* collected and categorized only the legal *ḥadīth*, without giving any detailed explanations. Secondly, Muḥammad Bāqir al-Majlisī (d. 1111/1699) compiled the *ḥadīth* in his voluminous work *Biḥār al-Anwār* which include previously-noted *ḥadīth*, and historical events, including his own interpretations. In fact, the content of the Shiite traditions on non-Muslims from the time of al-Ṭūsī until al-Majlisī were to some extent stable. Today in Shiite religious academies (*ḥawza*) as well as in their judicial books from the Qajar period onwards, in addition to the Qur'ān, the work of al-ʿĀmilī has been the main source for judicial inferences and opinions, and perhaps sometimes it has been regarded as higher than the Qur'ān itself in importance. It has been published several times and is now available in two editions, one in 20 volumes and the other an annotated edition of 30 volumes. The content of the *ḥadīth* on non-Muslims in this book are similar to that of *al-Kāfī*.[77]

3. Shiite *fiqh* and the Non-Muslim

Having cast a cursory look at the main sources for inferring rulings in the Shiite school, we shall now look at how jurists dealt with these sources. The focus will be mainly on the early generations of jurists and their *fiqh*-oriented literature, with a special attention to the works of al-Ṭūsī. Thus, it is not the aim of this study to examine several brief treatises on

[76] The full title of this work is a*l-Istibṣār fī mā Ukhtulifa min al-Akhbār*.
[77] See: al-Ḥurr al- ʿĀmilī, *Tafṣīl Waṣā'il al-Shīʿa* (Qum: Mu'ssasa Āl al-Bayt, 1372/1992), vol.15: 26-36, 125-126, 154- 159.

non-Muslims written before al-Ṭūsī by al-Sharīf al-Murtaḍā (d. 436/1044) and Ḥamza b. ʿAbd al-ʿAzīz al-Daylamī known as Sallār (d. 448/1056). Notable changes and transformations in *fiqh*-oriented opinions will be mentioned, however. In the history of Shiite *fiqh*, succeeding jurists have more or less remained repeater the same *fiqh*-oriented opinions of the pioneer and even their words. It is likely true to say that to the investigator of such topics, it does not make a great difference to refer to legal opinions of any given jurist in any period of time.

Because the issues of jihad as well as its related sub-topics make a vast and independent research topic, it shall not be discussed here.[78] However, the fundamental question concerning the discussion on jihad in the works of Shiite jurists is: Why do they discuss the issue in such detail, especially the acquisition of slaves, in spite of the fact that they do not legitimatize an offensive jihad (jihad *ibtidā'ī*) in the absence of the just Imam? If *ḥadīth* on jihad and its subdivisions attributed to any of the infallible Imams are reliable and sound, due to the chain of transmitters, one can perhaps say that the Imams would agree with offensive jihad in the period on which the Imam was present, even though they did not have enough power and were in a state of opposition the Caliphs. In the absence of the Imam, one could probably say that the discussion on the issue in the early years of the major occultation was focused on the anticipation of the enduring government of the al-Imām al-Mahdī that seemed imminent.[79] Afterwards, jurists explained the point and justified it only with respect to cases of offensive as well as defensive jihad which did not stipulate the presence of the just Imam and was obligatory for any Muslim to join in the event of any type of invasion.[80] Nowadays teachers in Shiite religious academies justify some of the remaining chapters of judicial books, remarking that in the process of *ijtihād* it is not important which issue you are dealing with. What counts is learning the process.

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[78] See: 'Jihad' in *OEMIW*, by Rudolph Peters. On the issue of jihad in *fiqh* works in the period of Qajar, see: Robert Gleave, "Jihad and the Religious Legitimacy of the early Qajar State" in *Religion and Society in Qajar Iran*, ed. Robert Gleave (London: Rutledge Curzon, 2005): 41-70.

[79] See Mudarressī, *Crisis and Consolidation in the Formative Period of Shiite Islam: Abū Jaʿfar Ibn Qiba al-Rāzī* (Princeton: Darwin Press, 1993), esp. Ch. 3: 122-129, 133-140.

[80] See as an example: al-Shahīd al-Thānī, *Sharḥ al-Lumʿa al-Damishqīyya* (Qum: Dāwarī, 1410/1990), vol. 2: 380-82; Ayatollah Khāmini'ī, the supreme religious leader of Iran, formed an opinion which has rare predecessor among Shiite jurists that the offensive jihad would also be necessary even in the period of the Occultation. See S. ʿAlī Khāmani'ī, *Ajwabatu al-Istiftā'āt* (Kuwait: Dār al-Naba', 1415/1995): 331, Question no. 1074.

The existence of some theoretical discussions on jihad and the treatment of religious minorities in the works of jurists would not be a reason for implementing these legal opinions. Whereas *fiqh*-oriented works indicate attitudes, factual events and treatments demand historical evidence. If we find discussions on the issue of *jizya* in the *fiqh*-oriented works of any jurist, it would not be the only reason for levying *jizya* in his lifetime. An example worth noting is the treatise of *Ṣawāʿiq al-Yahūd* [The Treatise of Lightning Bolts against the Jews] attributed to al-Majlisī which deals with the treatment of non-Muslims.[81] The content of the treatise, as we shall see, can easily be found in the works of many jurists before and after al-Majlisī down to the present day; however, the treatise alone would not provide a reason for implementing his ideas in his lifetime. The relevant quotation from al-Majlisī, which reads,

"I do not have any reliable reference and legal basis for this treatment"[82]

serves to support the notion that Shiite jurists dealt with this matter mainly in a fierce campaign with their competitors. The present writer does not wish to convey the impression that they did not believe in such treatment, rather the aim is to make a distinction between theoretical discussions and actual applications in order to avoid falling into a fallacy.[83] To do so, several concrete cases related to this treatment will be reported in the next chapter.

In addition to the issue of jihad, the legal opinions of Shiite jurists on non-Muslims may be categorized in the following way:

1- Who is meant by the *ahl al-dhimma*?

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[81] See this treatise in Vera Basch Moreen's article in English and Persian translation in *Die Welt des Islams*, Vol. 32, 2 (1992): 187-195.

[82] Ibid: 191, 194.

[83] See: D. Tsadik, "The Legal Status of Religious Minorities: Imāmī Shiite Law and Iran's Constitutional Revolution" *Islamic Law and Society*, 10/3 (2003): 380, 381. He seems to conclude indirectly from theoretical aspects to give some evidence for carrying out the treatment during that time. In addition, Shiite jurists did not distinguish in their *fiqh*-oriented opinions amongst religious minorities and regard all of them on a par with one another, that is, a single community "*al-Kufr Millatun Wāḥida*" as this statement frequently appears in their works. However, it is not clear why Tsadik in his works insists on focusing upon the Jews amongst them, for examples, see, idem (2003): 382, 386 and elsewhere. Then in one case where I found when Tsadik (ibid: 386) was quoting the statements from S. K. Yazdī Ṭabāṭabā'ī, *Su'āl wa Jawāb*, (Tehran: Markaz Nashr ʿUlūm-i Islāmī, 1376/1997), 142, article 242, Tsadik added on his own "or all Jewish food is prohibited as it were pork" to highlight the Jews. This phrase does not exist in the text but Yazdī wrote an interpretation on the lawfulness of the foods of the People of the Book in the Qur'ān "It is abrogated or confined to dry grains, such as wheat, barely, or rice not to moist foods which are prohibited and not foods that are prohibited in themselves like pork, dead animals and so on"; Cf. translation of Tsadik and his incorrect conclusion in footnote No. 38.

2- *Jizya* and *kharāj*

3- *Ahl al-dhimma's* commitment to and respect for Islamic regulations

4- Purity or impurity of *ahl al-kitāb*

5- Forbiddance or lawfulness of slaughtered animals

6- Legal relationships with Muslims: witness, inheritance, marriage and divorce, and penalties.

3. 1. Who is meant by the *ahl al-dhimma*?

By the phrase 'People of the Book', Shiite jurists mean exclusively Jews, Christians, and Zoroastrians, even though the Ṣābi'īn or Mandaeans are peripherally mentioned along with the former three categories in a passage of the Qur'ān, stressing their beliefs.[84] Nevertheless, the Ṣābi'īn, were never recognized as belonging to the category of the 'People of the Book' and Shiite jurists unanimously refer to Jews and Christians as the People of the Book. As for the Zoroastrians, there are several different opinions.[85] This disagreement is primarily based on the validity of the Prophetic *ḥadīth* related by al-Kulaynī regarding the *majūs* 'Zoroastrians'. According to this *ḥadīth*, they were the People of the Book who assassinated their Prophet and burned his revealed book, which was written on 12,000 sheets of parchment.[86] Adherents of other faiths, regardless of whether they are the great historical religions or are new religious movements as well as those who convert from Islam to other religions or abandon religion altogether, are regarded as "infidels" by Shiite jurists. These last groups do not have any rights in *dār al-Islām*[87] save death or accepting Islam.[88]

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[84] Q, 2: 62; 5: 69 and cf. 22: 17.

[85] On the history of Zoroastrians in Iran see, "Zoroastrians" in *ER* by G. Gnoli, tr. from Italian by F. Lubin; Boyce, Mary, *Zoroastrians: their Religious Beliefs and Practices* (London, New York: Routledge & Kegan Paul, 1991).

[86] Al-Kulaynī: vol.3: 567-68; Cf. al-Ṭūsī, *al-Mabsūṭ fī Fiqh al-Imāmīyya,* ed. by Muḥammad Taqī Kashfī (Tehran: Maktaba al-Murtaḍawīyya, 1387/1967), vol. 2: 37, who referred to the same *ḥadīth* with some differences attributing it to Imām ʿAlī.

[87] It is difficult to find a precise definition of *dār al-Islām* in the works of Shiite jurists. Most of them regarded it clear in meaning and gave *fiqh*-oriented opinions on subjects related to the term. However, they sometimes mean by the term Medina; at other times those cities which Muslims transformed into Islamic lands, e.g. Baghdad and Basra, at yet other times it would mean all of the territories over which Muslims have been ruling and where Islamic regulations are practiced, whether they were conquered by force or peace. This last sense stands in opposition with *dār al-ḥarb*, which refers to territories that do not have Islamic rulings and regulations. It does not necessarily mean that Muslims have to fight all their enemies in these territories. See, Aḥmad Fath Allāh, *Muʿjam Alfāẓ al-Fiqh al-Jaʿfarī* (Beirut: Fatḥ Allāh, s. d.): 186;

Both Shiite and Sunnite jurists have regard those People of the Book who live in *dār al-Islām*, keep their religion and accept the stipulation as *dhimmī*,[89] irrespective of their being Arab or non-Arab. For such people the Muslim ruler must support and protect their lives and properties in return for the tax they pay.[90] In the definition of *ahl al-dhimma*, al-Ṭūsī mentions the names of Jews, Christians and Zoroastrians and regards the Ṣābi'īn[91] who, in his opinion worship the stars, infidels and did not consider them as *dhimmī*.[92] A majority of Shiite jurists have followed him in this regard.[93] According to al-Ṭūsī, if the Islamic military encounters some people who claim that they are the People of the Book and are prepared to pay the *jizya*, the Muslim rulers should not question their beliefs, and the ruler must accept their claim and their *jizya*.[94] Based on the content of his *fiqh*-oriented opinion, one may infer that the opinion does not limit exclusively to his time.[95]

There is no significant and major change in the definition and recognition of *ahl al-dhimma* by jurists who came after al-Ṭūsī. The variations are minor, such as the attitude

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Qalʿijī, Muḥammad & H. Ṣ. Qanībī, *Muʿjam al-Lugha al-Fuqahā* (Beirut and Rīyāḍ: Dār al-Nafā'is, 1405/1985): 205, 492; See also, 'Dār al-Islām' in *EI* [2], by S. J. Shaw and in *OEMIW* by Rudolph Peters.

[88] Q, 9: 29; 2: 85; al-Ḥurr al-ʿĀmilī: vol. 15: 26. There are two famous *ḥadīth* in the literature of the *ahl al-Sunna*, see, as an example: Muḥammad b. Ismāʿīl, al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Istanbul: Dār al-Ṭibāʿa, 1401/1981), vol. 8: 50, 140,162 that are attributed to the Prophet, remarking, "You must kill whoever changes his/her religion." (*man baddala dīnahū, faqtulūh*). And, yet another one says "I am obligated to fight against the people until they become Muslim and say 'There is no god but the God' and when they come to believe in Islam, they will be protected thenceforth". Al-Ṭūsī quoted in one of his *fiqh*-oriented books that the first *ḥadīth* is frequently related on the authority of Ibn ʿAbbās, see as examples: al-Ṭūsī, (1387/1967), vol. 2: 36, 57; vol. 7: 281, 284, and then gave his opinion concerning the *ḥadīth* in the following way "There is the consensus of *Umma* on this injunction". He also cited (Idem, *op. cit.*: vol. 8: 282) the second *ḥadīth* and following him these *ḥadīth* are found in Shiite *fiqh*-oriented literature, too.

[89] The details of the stipulations will follow.

[90] Aḥmad Fatḥ Allāh, *op. cit.*: 198, 343.

[91] Al-Ṭūsī (1387/1967): vol. 2: 36. As for *Ṣābi'īn* 'the Mandaeans' who live until now in the southwest of Iran and southeast of Iraq, See: Rudolf Macuch, "The Origins of the Mandaeans and their Script", *Journal of Semitic Studies* 16 (1971): 174-192; Idem, 'Mandaic' in Franz Rosenthal (ed.): *An Aramaic Handbook* (Porta Linguarum Orientalium X), (Wiesbaden: 1967) Part II/1: 46-61; M. Rāmyār, "Ṣabi'īn", *the Journal of Faculty of Theology in Mashhad*, vol. 1, 1 (1347/1968): 154- 167; S. Birinjī, *Qawm-i az Yād Rafṭ-i* [*The Forgotten Tribe*] (Tehran: Dunyāy Kitāb, 1367/1988); Khāmis, Sāhī, *Ṣābi'īn Qawm Hamīsh-i Zand-i Tārīkh* [*Ṣābi'īn a Living Tribe for Ever in the History*] (Tehran: Āyat, 1383/2003); Mihrdād ʿArabistānī, *Taʿmīdīyān Gharīb* [*Lonely Baptists*] (Tehran: Afkār Nuw, 1383/2003).

[92] Al-Ṭūsī, *al-Nihāya fī al-Mujarrad*, *al-Fiqh wa al-Fatāwā* (Beirut: Dār al-Andulus, s. d.): 292.

[93] I found two exceptions on the *Ṣābi'īn* , in the works of the Shiite jurists; amongst the early ones, Ibn Junaid (d. 381/991), and among the contemporary ones al-Khū'ī (d. 1413/1992) who have regarded *ṣābi'īn* as *ahl al-dhimma*, even though they are not regarded as the People of the Book, see, A. al-Khū'ī, *Minhāj al-Ṣāliḥīn* (Qum: Madīnatu al-ʿIlm, 1410/1989): vol. 1: 391.

[94] Al-Ṭusī (1387/1967): 37.

[95] Al-Khū'ī, in *Minhāj al-Ṣāliḥīn*, vol. 1: 392, repeated the idea as his *fiqh*-oriented opinion.

offered by al-Ḥillī. He considered Zoroastrians as not belonging to the category of the People of the Book, but he regarded them as *ahl al-dhimma* and gave them the same injunction.[96] In this study, the manner of Muslim rules, especially in the first centuries of the history of Islam, in levying *jizya* will not be discussed. Cases of discrimination against one or another group as *ahl al-dhimma* might easily be found by examining historical books as *Futūḥ al-Buldān* of al-Balādhurī (d.279/892). These discriminations were related to the will of the ruler whether to receive *jizya* or not, without paying attention to *fiqh*-oriented opinions offered by jurists on religious groups.[97]

3. 2. *Jizya* and *kharāj*

The *Jizya* is by definition an annual tax imposed on the *ahl al-dhimma,* through a determinate contract by the Islamic ruler. The ruler promises to protect their lives and property in *dār al-Islām*. *Kharāj* is an annual tax which the People of the Book who are landowners should pay to the ruler. This tax is the percentage of income from the land and it has legality whenever the land was occupied by Muslim soldiers in wartime (*maftūḥ al-ʿanwa*).[98] According to these definitions, *jizya* is a levy for protecting the lives of *ahl al-dhimma*, while the *kharāj* is concerned with their lands. However, Shiite *fiqh* literature occasionally offers different definitions and formulations.[99] Another *ḥadīth* attributed to the Prophet states that the *jizya* is a tax for the *ahl al-dhimma* like the alms-tax (*zakāt*) for the Muslims; hence, the *dhimmī* should pay nothing else as a tax.[100] There is some evidence that the *jizya* was probably established in the later years of the Prophet's life and the *kharāj* was established in the period of the second caliph.[101] Since

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[96] Al-ʿAllāma Ḥillī, *Mukhtalaf al-Shīʿa* (Qum: Mū'assasa al-Nashr al-Islāmī, 1413/1992): vol. 4: 429-30.
[97] See, Ahmad b. Yaḥyā Balādhurī, *Futūḥ al-Buldān* (Cairo: al-Nahḍa al-Miṣrīyya, 1379/1959), vol. 1: 80, 91-92. cf. vol. 2: 334.
[98] See, M. H. Mudarresī, *Zamīn Dar Fiqh Islāmī* [*Land in Islamic Law*] (Tehran: Daftar Nashr-i Farhang Islāmī, 1362/1983), vol. 2: Ch. 5, esp.: 199-207.
[99] Al-Kulaynī in *al-Kāfī* related in one case six *ḥadīth* from the Imām Jaʿfar al-Sādiq on the role of *jizya* and *kharāj* (See: vol. 3: 567-68). According to the second *ḥadīth*, *kharāj* saves the life of the *dhimmī* and *jizya* saves the land for him. Al-Kulaynī quoted two *ḥadīth* from the Prophet which indicate contrary to the above formulations elsewhere (vol. 5: 10-11).
[100] Idem, vol. 3: 568; ʿAllāma al-Ḥillī gave the idea as his *fiqh*-oriented opinion, not simply *ḥadīth* quotations. See, al-Ḥillī (1413/1992), vol. 3: 251- 252; cf. al-Khū'ī, *Minhāj al-Ṣāliḥīn*, vol. 1: 395, which he used the term of *jizya* in both head and land cases and said only one tax is obligatory for *dhimmīs*.
[101] See, Mudarressī (1362/1983), vol. 2: 48-54.

al-Kulaynī[102] mentioned that before establishing this ruling i.e., levying the *jizya*, the duty of Muslims in dealing with the People of the Book was only good treatment and nothing else.[103] Then, he added,

> "the Qur'ānic verse concerned (2:83) with the issue was abrogated by the verse of Sura 9 (*at-tawba*) which was apparently revealed in the later years of the Prophet's life".[104]

The interchangeable uses of the terms *jizya* and *kharāj* in some early *fiqh*-oriented literature (that is, *jizya* on the head, and *kharāj* on the land, and vice versa) have led some scholars to assume that the terms are ambiguous and they have offered various ways to solve the problem.[105] In early Shiite works, the ambiguity did not explicitly appear; however, al-Ṭūsī attributed to Abū Ḥanīfa in some of his works,[106] that the two terms are certainly synonymous. Al-Ṭūsī then claimed that at least in Shiite *ḥadīth* they have clear and definite meanings and are not synonymous.[107] It may therefore be concluded that the meaning of the terms were to some extent ambiguous. One of the differences which al-Ṭūsī offers between the two terms is that if a *dhimmī* converts to Islam, he is freed from paying the *jizya*, but the *kharāj* remains in any case, without exception.[108] In addition, according to *ḥadīth* quoted by al-Kulaynī, it is possible for a *dhimmī* to pay the *jizya* with money earned from selling wine and pork,[109] but the *kharāj* is a determined percentage of the income from land(s) occupied by force and it does not make any sense to pay it by selling such things. The *jizya* and the *kharāj,* do, however, bear similarities: both are paid annually and are used for the same aims. The aims are limited to soldiers in jihad and that is why some jurists consider *jizya* as booty from war.[110] Nonetheless, jurists have argued that it is up to the Imam or the ruler to demand more taxes in relation to the interests and needs relevant to the Muslim society.[111] According to Shiite jurists, women, children,

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[102] Al-Kulaynī: vol. 3: 567-68.
[103] Q, 2: 83.
[104] Q, 9: 29.
[105] See Wellhausen: 276-277.
[106] Al-Ṭūsī, *al-Khilāf* (Qum: al-Nashr al-Islāmī, 1407/1986), vol. 2: 70; vol. 5: 535.
[107] For his definition on *jizya* see: al-Ṭūsī (s. d.): 194-195; idem (1407/1986): vol. 2: 69-70.
[108] See also Mudarressī (1362/1983), vol. 2: 149-151.
[109] Al-Kulaynī: vol. 3: 568.
[110] Al-Ṭūsī (1387/1967): vol. 2: 50; M. H. al-Najafī (d. 1266/1849), *Jawāhir Al-Kalām fī Sharḥ Sharā'iʿ al-Islām* (43 vol.), ed. by Abbās Qūchānī (Tehran: Dār al-Kutub al-Islāmīyya, 1367/1988), vol. 21: 262.
[111] Al-Ṭūsī (1407/1986): vol. 5: 545-546.

invalids, slaves, beggars, old men, and those who are mentally ill are exempt from paying the *jizya.*[112]

The interpretation of one word in the Qur'ān in 9: 29, *ṣāghirūn* literally "one who feels humble" raised various debates concerning the *jizya*. According to al-Ṭūsī, *ṣighār* means that the *dhimmī,* through the contract of the *jizya*, which protects his life, accepts Islamic regulations, and this position of commitment is called *ṣāghirūn*.[113] Following some Shiite jurists, a Sunnite scholar explained the term in such a way that it is indicative of a state where the *dhimmī* does not feel tranquility by paying the fixed and reasonable amount of the *jizya*, but rather he would usually be put in a state of anxiety. That is why the ruler or Imam fixes the amount at a level that the *dhimmī* could not actually pay it and must convert to Islam or at least would be in a constant state of anxiety. Then Shiite jurists added some conditions for the *dhimmīs* to pay the *jizya* with their own hands to emphasize their being *ṣāghirūn*.[114]

These are the main issues on the *jizya* and *kharāj* in al-Ṭusī's works, which are also repeated in the books of the jurists after him. The policy of levying the *jizya* can be found in pre-Islamic Arabian society,[115] in the Sāssānīan dynasty (AD 224-651), the last line of Persian kings before the Arab conquests of Iran, as well as in Byzantium.[116] It is said that the *jizya* has Persian- Pahlavi roots from *ġazīdag,*[117] while some scholars[118] argue that the word *jizya* is borrowed from Syriac,[119] or Aramaic.[120]

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[112] See, for example, Aḥmad b. Muḥammad al-Barqī, *al-Maḥāsin*: vol. 2: 328; Al-Kulaynī: vol. 3: 567.

[113] Al-Ṭūsī (1387/1967), vol. 2: 43, 52. Most Shiite jurists have accepted this interpretation. See as an example: ʿAllāma Ḥillī, (1413/1992), vol. 4: 434. But al-Ṭūsī in *al-Khilāf* (1407/1986), vol. 5: 543-4 offered a contradictory position to that which he gave in his *al-Mabsūṭ* (1387/1967); Concerning the meaning of Yad (hand) and Ṣāghirūn as well, Cf. M. M. Bravmann, *The Spiritual Background of Early Islam* (Leiden: Brill, 1972): 205-212.

[114] See: Al-Mufīd, *al-Muqniʿa* (Qum: al-Nashr al-Islāmī, 1410/1989): 273; al-Najafī, *op. cit.* vol. 21: 247-249.

[115] See: Jawād ʿAlī, *al-Mufaṣṣal fī Tārīkh al-ʿArab Qabl al-Islām* (Baghdad: University of Baghdad, 1993), vol. 7: 76; See also, Bravmann, *op. cit.* 199- 205.

[116] See, C. L. Cahen, 'Djizya' in *EI* [2], esp.: 563.

[117] See, D. N. Mackenzie, *A Concise Pahlavi Dictionary* (New York Toronto: Oxford University Press, 1971): 36.

[118] Arthur Jeffery, *The Foreign Vocabulary of the Qur'ān* (Baroda: Oriental Institute, 1938): 101-102; and see also C. L. Cahen, 'djizya', in *EI* [2], esp. 559-60.

[119] An ancient Aramaic language spoken in Syria from the 3rd to the 13th century that survives as the liturgical language of several Eastern Christian churches, See: *The American Heritage Dictionary*.

[120] A Semitic language originally of the ancient Arameans but widely used by non-Aramean peoples throughout southwest Asia. Also called Aramean, Chaldean, see: *The American Heritage Dictionary*.

3. 3. *Ahl al-dhimma's* commitment to and respect for Islamic regulations

Some stipulations for the People of the Book were regarded as necessary conditions in the *dhimma* contract. It is reported in Shiite sources,

> "the Prophet usually stipulated in his contract with the *ahl al-dhimma* that they avoid usury, incest,[121] eating pork and drinking alcohol in public."[122]

Regarding this issue, al-Ṭūsī divided the stipulations into two types, one positive and the other negative.[123] The first are mandatory stipulations, i.e., those that the *dhimmī* is obliged to observe. These stipulations should be precisely mentioned in the contract. The second type is mandatory stipulations that the *dhimmī* should not perform. It is divided by al-Ṭūsī into three general types:

a- Affairs which are contrary to their protection, such as the murder of a Muslim or waging war against Muslims and, any act where the *dhimmī* acts as if there was no contract. In such cases, the contract is annulled and the *dhimmī* becomes a *ḥarbī*. But here the identification of a *ḥarbī* and implementing the nullification of the contract is decided upon by the Imam or his delegation, not by individual Muslims.[124]

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[121] In many Islamic sources attributed to non-Muslims only the Zoroastrians practiced incest. See the Zoroastrian text which explicitly mentions the legality of incest in the *Dīnkird* III, *Dādistān Dīnī*, [a text in the Pahlavi language, containing 420 reports of Mazdian religions], tr. F. Faḍīlat (Tehran: Dihkhudā, 1381/2002), Ch. 80 and also Question 64. In the chapter (*kard-i* 80), the author explains the legality of incest in reply to a Jew who asked about the justification. "Incest" or "Xvaet.Vadaθa" in the Pahlavi language in Zoroastrian literature is attributed to a writer whose name Xantus Lidia (b. 465 B.C.E) in *Magika, s*ee, *Vandīdād*, no. 105 quoted by H. Raḍī, *Ā'īn Mughān: Pazhuhishī dar Bār-i Dīnhāy Irānī* [*The Teachings of Magi: Researches on Iranian Ancient Religions*] (Tehran: Sukhan, 1382/ 2002); See also the ancient religious text of the Zoroastrians in *Dānāk Mīnūy Khirad*, ed. by B. T. Anklesaria (Bombay: 1913). In question 35, paragraph 7, when the author numbered sins, he regarded the fourth great sin " when one cancelled his covenant of marriage with his intimate"; See also A. Tafazzolī, Tārīkh Adabīyyāt Irān Pish az Islām [*The History of Pre-Islamic Iranian literatures*] (Tehran: Sukhan, 1376/ 1997): 131, 152, and 155. Tafazzolī reported the emphasis on marrying intimates from the author of Pahlavi *narrators,* since in marrying others, the Zoroastrian priest was afraid of decreasing the level of people's faith; See also, *Vichitakiha- i- Zatsparam, with text and Introduction*, ed. by B. T. Anklesaria (Bombay: 1964), esp.: 93. However, later Zoroastrians believe that "Xvaet.Vadaθa" was a teaching of the Magi and it should not be translated to 'incest', because in their opinion they never had such a custom. According to this interpretation of the "Xvaet.Vadaθa" it means that the marriage of a Zoroastrian with non-Zoroastrian is not lawful. See, *The Lectures of Rustam Shahzādī*, 248, ed. by Mihr Angīz Shahzādī (Tehran: Shahzādī, 1380/ 2001). I could find that information through by search and interview with Dr. Shahram Hedayat (Interview, no. 3).

[122] Abū Jaʿfar, al-Ṣadūq (d.381/991), *ʿIlal al-Sharāyiʿ* (Najaf: Maktaba al-Ḥaydarīyya, 1385/1966), vol. 2: 377; repeated in al-Ḥurr al-ʿĀmilī, vol. 15:125.

[123] Al-Ṭūsī (1387/1967), vol. 2: 43-44.

[124] Al-Ṭūsī (1407/1986), vol. 5: 342, 457; idem (s. d.): 749.

b- Affairs which lead to harming the reputation of Muslims, such as *zinā* with Muslim women, reporting the news of Muslims to their enemies, or seeking to convert Muslims to their religion.

c- Affairs which are permitted in the religion of the *dhimmī* but are regarded as prohibited acts in *dār al-Islām*, like usury, incest, eating pork, drinking alcohol in public, and ringing the bells of churches (all examples given by al-Ṭūsī).

Regarding cases (b) and (c) al-Ṭūsī argues that the contract with *ahl al-dhimma* remains valid but the individual offender will be punished.[125] He then adds another option:

d- Affairs that are illegal according to both Islam and to his/her own religion, such as adultery and theft. He argued that the lawbreaker should be punished in accordance with the Islamic penal regulation [as if he were a Muslim].[126] In this case, all people are equal before the implementation of the law and it does not make a difference whether the subject is a Muslim or not.[127] As we shall see in chapter four, legislators take the idea from al-Ṭūsī and they have imposed some regulations upon non-Muslim criminals in the Islamic Penal Code.

Finally, al-Ṭūsī suggested some stipulations for the positive mandatory ones, i.e. those conditions that the ruler mentions in the contract and the *dhimmī* should commit himself to them.[128] Under these conditions, al-Ṭūsī wished they would get closer to Islam and accept it. But he mentioned that there are no *ḥadīth* or valid sources from the Prophet or the Infallible Imam(s) for these suggestions, and they are, therefore, left to the discretion of the ruler. These stipulations are the same as those found in the Pact attributed to the second caliph, ʿUmar b. al-Khaṭṭāb (*al-ʿUhūd* or *al-Shurūṭ al-ʿUmarīyya*).[129] Neither al-

[125] Idem (1387/1967), vol. 2: 43-44 and also vol. 8: 37.
[126] Idem (1407/1986), vol.5: 552-553; Cf. idem (s. d.): 749 that he regarded the example of drinking alcohol in public as a case which cancels the contract of *dhimmī*.
[127] It does not mean that the measure of punishment is also equal. Thus I said "equal before the implementation of the law" not simply equal before the law.
[128] Al-Ṭūsī, (1387/1967), vol. 2: 44-45.
[129] The pact of ʿUmar is mostly discussed in the Western Islamic studies but I was able only to find the following information on *al-Shurūṭ al-ʿUmarīya* in Islamic primary and secondary sources: Ibn Qayyim al-Jawziyyah, *Sharḥ al-Shurūṭ al-ʿUmarīyya*, ed. by Ṣubḥī al-Ṣāliḥ (Damascus: Jamiʿa al-Damishq, 1961); *Sharḥ al-Shurūṭ al-ʿUmarīyya* ed. by Muḥammad b. Abī Bakr al-Saʿdī al-Miṣrī known as al-Akhanā'ī (d.750/ 1349), the Egyptian judge; Ibn Kathīr (d.774/1372), *al-Bidāya wa al-Nihāya* (Beirut: Dār al-Iḥyā al-Turāth al-ʿArabī, 1408/1987), vol. 7: 69. He said "we explained the whole *al-Shurūṭ al-ʿUmarīyya* concerning Jews and Christians in my work *al-Aḥkām*", then he briefly reported them in vol. 14: 287-88 which may have compared to what al-Ṭūsī suggested; see also, *al-ʿUhūd al-ʿUmarīyya fī al-Yahud wa al-*

Ṭūsī nor any other Shiite jurist refers to the source of his suggestion. Al-Ṭūsī argues that it is appropriate for the ruler to force a *dhimmī* to wear a distinct type of dress,[130] such as a *zunnār* belt, a particular turban, clothing, or shoes, in order not be confused with Muslims. Al-Ṭūsī suggested that *dhimmī*-women should wear shoes different from those of the Muslims. For instance, either of the pair could be white and the other red.[131] They should not go to public baths, but if there is no alternative, they must, whether man or women, wear a necklace of iron or leather in order to be easily recognized as the People of the Book.[132] Subsequently, most Shiite jurists quoted al-Ṭūsī's suggestions and then added a few more statements, such as: a *dhimmī* should not ride a thoroughbred horse or should not ride any horse at all, and they should not keep any weapons with themselves and within their houses. They should not use the titles of Muslims, and they should not dress and cut their hair (uncut forelocks) in any way to resemble Muslims. In some legal opinions, if the Muslim ruler deems it advisable to impose conditions or other stipulations in favor of the general interests of the Muslims, then it should be done. To justify the suggestions, some Shiite jurists added, "the stipulation causes them to accept Islam whether out of fear or enthusiasm".[133]

As to stipulations on churches and temples, al-Ṭūsī distinguished between: (a) Places which belonged to the Muslims, or which they conquered and occupied by force (*maftūḥ al-ʿanwa*); and (b) Places that were acquired through a contract of peace *ṣulḥ* and levying the *jizya*. In case (a), they should not erect any new churches, temples, or places of fire worship and, additionally, they should not repair them because, in his view, these

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Naṣārā, ed. Aḥmad b. ʿAṭṭār al-Danīsirī (d. 794/1391), in Hājī Khalīfa, *Kashf al-Ẓunūn* (Beirut: Dār al-Iḥyā al-Turāth al-ʿArabī, s. d.), vol. 2: 1180.

[130] By 'wearing a distinct type of dress', Sunnite and Shiite jurists intended to attach a dress code which is sometimes called in their works as *'al-ghiyār*'.

[131] These examples are cited by al-Ṭūsī, but Ibn Kathīr, in *al-Bidāya wa al-Nihāya*, vol. 14: 288, says one of the shoes should be black and the other white.

[132] Since the examples were developed gradually and they have been become somewhat *fiqh*-oriented opinions, rather than mere suggestions, I have maintained the very examples and their details, all quoted from al-Ṭūsī here.

[133] See, for example, al-Najafī, *op. cit.* vol. 21: 271-273; Jaʿfar Kāşif al-Ghiṭā', *op .cit.* vol. 2: 402 and R. Khomeini, *Taḥrīr al-Wasīla* (Najaf: al-Ādāb, 1390/1970): vol. 2: 503-504. Al-Khū'ī (1410/1989), vol. 1: 398, on the authority of a *ḥadīth* quoted by al-Ḥurr al-ʿĀmilī, vol. 15:126, he added this condition that the People of the Book should not train their children in accordance with their own beliefs and should not prevent them from attending Muslim meetings and schools in order for them to find out the right path, a cause which would be *fiṭrī* or 'instinctive' in terms of religion, that is, the religion of Islam.

are the signs of evil (*munkar*).[134] But in the case (b), they can repair them while observing the conditions set by the ruler, such as the prohibition on erecting buildings higher than those of the Muslims', e.g. houses and mosques, and the prohibition against ringing church bells.[135]

Shiite jurists insist on several cases in which Muslims should respect the rights of the People of the Book. If a Muslim insults a *dhimmī*, for instance, by falsely accusing him or her of adultery or sodomy, the Muslim offender should be punished. But if the insult were a word that expresses infidelity or darkness (*ḍall*), he should not be punished, unless it would lead to unrest or corruption (*mafsada*) in the Islamic society.[136] Furthermore, should a Muslim cause harm to their pig-stock, other live-stock, or damage their musical instruments, which have monetary value, the Muslim should pay compensation. The rate of compensation is calculated by comparing the price of a sound musical instrument and that of a defective one.[137]

3. 4. Purity and Impurity

The subject of the purity or impurity of the People of the Book had a disputatious precedent in the legal opinions of Shiite jurists. Firstly, we should consider the bases of the idea in the Qur'ān and the *Sunna*. Then, through analysis, we will see that the idea was not confined to Shiite jurists and that gradually through more discussions the idea was changed among most of jurists in the twentieth century. There are two different relevant verses on this issue in the Qur'ān. In one of them, the believers are told that "the polytheists are unclean (*najas*)"[138] and in another verse, it is mentioned, "the food of the People of the Book is permissible for you".[139] So there are ambiguous terms, 'polytheist', 'impure' (*najas*), and 'food', which should be designated. The extant various *fiqh*-oriented opinions depend largely on the interpretation of these terms.

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[134] Al-Ṭūsī (1387/1967), vol. 2: 44-45; and al-Kulaynī, vol. 3: 368, quoted the *ḥadīth* of al-Imām Ja'far al-Ṣādiq in which he was asked about changing the churches and temples into mosques, and he replied in the positive.
[135] Al-Ṭūsī, *Ibid*, 46.
[136] On this issue, there are some *ḥadīth* in Shiite literature. See, for example, Al-Kulaynī: vol. 7: 234; and al-Mufīd, (1410/1989), *al-Muqniᶜa*: 798.
[137] Al-Mufīd, *op. cit.*: 770.
[138] Q, 9: 28.
[139] Q, 5:5.

Shiite *ḥadīth* references have no explicit words concerning the purity or impurity of the People of the Book; however, regarding the question of the purity or impurity of their dishes and foods, there are some *ḥadīth* in Shiite sources. Before looking at the various and divergent legal viewpoints, it would be better to have a look at the *ḥadīth* on the issue. There are ten *ḥadīth* in a chapter of *al-Kāfī*.[140] In three of them, the Imam was asked about the legality of the food of the People of the Book, and he allowed only grains (*ḥubūb*), vegetables and herbs (*buqūl*). In two other *ḥadīth*, the Imam simply answered in the negative, which has been interpreted in a variety of ways. In one of these two *ḥadīth*, the Imam is reported to have said; "I myself do not eat their food". In a fifth *ḥadīth*, the Imam limited the scope of the impurity concerned, making it conditional upon the definite knowledge that an impure substance, e.g., wine or pork, had been used to prepare the type of food in question. Whereas the ninth *ḥadīth*, with a very weak chain of authority, sounds paradoxical, in the tenth *ḥadīth*, the Infallible Imam explicitly allowed coexistence with the People of the Book as well as using their dishware and their food. Another important *ḥadīth* considered a reliable[141] (*muwaththaqa*) *ḥadīth* related by ʿAmmār al-Sābāṭī from the sixth Imam Ja'far al-Ṣādiq. It is usually referred to by jurists who believe in the purity of dishware and food of the People of the Book. Regarding the case of a Jew who drank water from a jug, the Imam was asked:

> "Can I make ablution or drink water from the same jug?" "You can," the Imam responded. Surprised, the *ḥadīth*-relater enquired again, saying, "The drinker is a Jew!", and he received the same reply again.[142]

Concerning the Sābāṭī *ḥadīth*, there is no information that will enable us to analyze and clarify the context; however, the surprise of the relater of the *ḥadīth* suggests that the notion of purity was not a common idea or concern. It is a *ḥadīth* that has been challenged by Shiite jurists, however, and it has been cited here in detail for this purpose.

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[140] Al-Kulaynī: vol. 6: 263-265.

[141] Each of the schools of thought, Shiite and Sunnite, have their own criteria of categorizing *ḥadīth* on three or more levels *Ṣaḥīḥ, Muwaththaq*, and *Ḍaʿīf*. Depending on their analyses and views in theological doctrines and historical narration, each jurist might even have his own criterion to consider transmitters as reliable or unreliable. In this field, al-Ṭūsī is also a pioneer. Further information must be sought in the Shiite books of *Rijāl* (*ḥadīth* transmitters), e.g., al-Ṭūsī (1351/1973), *al-Fihrist*; and al-Khū'ī, *Muʿjam Rijāl al-Ḥadīth wa Tafṣīl Ṭabaqāt al-Ruwāt*, 24 vols. (Qum: 1413/1992).

[142] Al- Ḥurr ʿĀmilī: vol. 1: 229-230. See also some opposing traditions in vol. 3: 419-422.

There are some other *ḥadīth* that reproduce the content of these categories with minute changes. These sources are ready for further scrutiny.

According to the present *modus operandi*, al-Ṭūsī's viewpoints must first be attended to. He interpreted *mushrikūn* as polytheists and infidels, and hence regarded the People of the Book as impure (*najas*). He argued that Muslims should avoid using their dishes and cooking and wet things that they have touched.[143] He interpreted *najas* as substantial impurity or *najāsat ʿaynī,* which should be avoided, in contrast to the inner type of impurity, viz., *najāsat bātinī*, or inward impurity, upon which some further views will be taken into account. Concluding this section, we may classify the legal opinions of later jurists regarding this matter into three categories:

a- Some jurists accepted al-Ṭusī's view absolutely. They rejected the *ḥadīth* that emphasized on the purity, as they contradicted those that indicated the impurity. In addition, this group of jurists justified the traditions that were indicative of purity by claiming that they were said by way of dissimulation (*taqīyya*).[144] Among the *ahl al-Sunna*, Muḥammad b. Ḥasan al-Shaybānī (d. 189/804),[145] Aḥmad b. Ḥanbal (d. 241/855), and his teacher Abū Isḥāq Ibrāhīm b. Muḥammad (d. 238/852)[146] offered the same idea concerning the interpretation of *najas* and the *mushrikūn*. Thus, the idea of impurity is not a distinctive characteristic of Imāmī Shīʿīsm.[147]

b- Some jurists limited the scope of the impurity of dishes and foods to substantial impurity (*najasat ʿaynī*), such as pork and wine in their food and dishes. According to this view, the Qur'ān is not clear on the question of the

[143] Al-Ṭūsī (1407/1986): vol. 1: 70; vol. 4: 406.
[144] Perhaps one may claim that the majority of Shiite jurists are found in this category and we can here, list many references from various periods of time. See for example, Muḥaqiq al-Ḥillī, *Sharā'iʿ al-Islām fī Masā'il al-Ḥalāl wa al-Ḥarām* (Tehran: Istiqlāl, 1409/1989): vol. 4: 755.
[145] See concerning him, E. Chaumont, 'al-Shaybānī, Abū ʿAbd Allāh', in *EI* [2].
[146] On Abū Isḥāq, see Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Beirut: Dār al-Fikr, 1404/1984), vol. 1: 134, no. 276.
[147] Al-Shaybānī in his argument on the legality of using the dishware of an infidel argues that the real impurity of an infidel does not transfer on to his dishes. See: Ibn Ḥazm al-Andulusī (d. 456/1063), *al-Muḥallā* (Beirut: Dār al-Fikr, s. d.), vol. 1: 130, 183, vol. 10: 9; Muḥammad b. Abī Sahl,Sarakhsī, *Sharḥ Kitāb al-Sīyar al-Kabīr* (Beirut: s. d.), vol. 1: 145; See also: Muḥyī al-Dīn, Nawawī, (d. 676/1277): *al-Majmūʿ fī Sharḥ al-Muhadhdhab* (Beirut: Dār al-Fikr, s. d.), vol. 1: 264-265. Nawawī, reported how Abū Isḥāq was interpreting two words of the verse; '*najas'* and '*mushrikūn'*. His interpretation is similar to one that al-Ṭūsī offered. It might be possible to add more evidence from the Sunnite jurists but it seems that these are adequate for our main argument in the present discussion.

impurity of the People of the Book. This group of jurists does not say that the dishes and foods of the People of the Book are always impure, since they are impure per se. In their opinion, since the word *najas* in the Qur'ān probably connotes an attribute of someone who carries out a corrupt action and/or has a false idea, the word does not explicitly (*naṣṣ*) signify the impurity of the *mushrikūn*. As a result, the term *najas* is used in the verse to convey a political and theological connotation rather than a *fiqh*-oriented one. This position was held by the famous Shiite jurist Muḥammad b. Makkī al-ʿĀmilī, known as the al-Shahīd al-Awwal (d. 786/1384) and also by Zayd b. ʿAlī al-ʿĀmilī, known as al-Shahīd al-Thānī (d. 966/1558).[148] It is worth mentioning that amongst the *ahl al-Sunna*, most of the *ulema*, be they Shāfiʿī, Ḥanafī or Mālikī, also fall into this category.[149] Thus, the notion of impurity is not a distinctive character of *Imāmī Shīʿīsm* and the claim that Shiite jurists received this idea from Zoroastrians and ancient Iranians is completely incorrect.[150]

c- Some jurists rejected the *ḥadīth* that indicate impurity and accepted the purity of the People of the Book, as such whether they are *ahl al-dhimma* or not. They also argued that if one knows of any real impurity in their dishes or food, then he should avoid it; however, this is not a reason for the general impurity of the People of the Book.[151] Among modern jurists it was perhaps Sayyid Muḥsin al-Ḥakīm (d. 1390/1970) who, without any precedent, gave

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[148] Al-Shahīd al-Awwal, *al-Dhikrā* (no print): 14; al-Shahīd al-Thānī, *Masālik al-Afhām ilā Tanqīḥ Sharāyiʿ al-Islām* (Qum: Mu'assasa al-Maʿārif al-Islāmīyya, 1413/1992), vol. 12: 65-67. On both of these jurists, see, 'Muḥammad B. Makkī' in *EI* [2] by B. Scarcia Amoretti, 'al-Shahīd al-Thānī' in *EI* [2] by E. Kohlberg.

[149] See quotations from other schools in: ʿAbd Allāh, Dārimī (d. 255/868), *Sunan al-Dārimī* (Damascus: al-Iʿtidāl, s. d.), Vol. 2: 233-34; Ibn Ḥajar ʿAsqalānī (d. 852/1448), *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, (Beirut: Dār al-Maʿrifa, s. d.), vol. 9: 511-512; Nawawī, *op. cit.*: vol. 1: 264, vol. 2: 562-3; M. Shirbīnī al-Khaṭīb (d. 977/1569), *Mughnī al-Muḥtāj ilā Maʿrifa Alfāẓ al-Minhāj* (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, 1377/1958), vol. 1: 31; Muḥammad b. Aḥmad Zakarīyyā al-Anṣārī (d. 926/1519), *Fatḥ al-Wahhāb Bisharḥ-i Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmīyya, 1997), vol. 1: 37; Muḥammad b. ʿAlī al-Shawkānī (d. 1255/1839), *Nayl al-Awṭār* (Beirut: Dār al-Jayl, 1973), vol. 1: 25-26.

[150] E. Sanasarian, *Religious Minorities in Iran* (London: Cambridge University Press, 2000): 23- 24. She quoted the idea from Bernard Lewis, *The Jews of Islam* (Princeton: 1984) and also from Sorour Soroudi in "The concept of Jewish Impurity and Its Reflection in Persia and Judeo-Persian Traditions" in *Irano-Judaica* III, 1994. Tsadik (2003: 383) quoted from Abū al-Qāsim, al-Qummī (d. 1231/1816) that this idea is one of the distinctive characteristics of Shiite school. But, as matter of fact, al-Qummī in his book *Jāmiʿ al-Shattāt* (Qum: Kiyhān, 1371/1992) mentioned that some *ʿulamā*' claimed the existence of consensus on the issue without mentioning any references and he did not say this was the distinctive characteristic.

[151] S. M. al-Ḥakīm, *Mustamsak al-ʿUrwa al-Wuthqā* (Najaf: al-Ādāb, 1391/1966), vol. 3: 361-362.

part of this argument which was consequently developed by a number of jurists like Abū al-Qāsim al-Khū'ī (d. 1413/1992), Muḥammad Bāqir al-Ṣadr (d. 1981), and Rūḥ Allāh Khomeini (d. 1368/1989). Al-Ṣadr scrutinized all the arguments for and against the purity and impurity of the People of the Book and then explicitly argued for their purity.[152] He argued that the old Shiite jurists had seen such *ḥadīth* like that of ʿAmmār al-Sābāṭī, mentioned earlier, and that we had received them through those *ulema*, but they were under the influence of the opinions of the *Ahl al-Sunna* and thus did not pay proper attention to these *ḥadīth.* Therefore, they assumed that impurity was the necessary idea in *fiqh*.[153] In addition, this group of jurists brought more evidence for their interpretation of *najas* and *mushrikūn* by reference to the semantic changes of the words in the Islamic sources. The principal reason is that the meaning of *najas* in the Qur'ān does not have a *fiqh*-oriented sense or expression (*iṣṭilāḥ*), for when the verse was revealed in Mecca, the technical, viz. *fiqh*-oriented sense did not exist; rather, it had only a lexicographic significance, namely, inner impurity (*najāsat* or *khubth baṭinī*) of thought. This group of jurists, which, until today, are gradually increasing in number, restricted the meaning of '*mushrikūn*' to those who practice idolatry, but, infidels, a category that includes atheists and the People of the Book, are considered actually pure.[154]

Reviewing the *ḥadīth*, which was evidence for who came to prove the impurity of the People of the Book, al-Khū'ī argued that the *ḥadīth* cannot prove the impurity in question, but it is the best evidence for their purity. Since, in the very *ḥadīth*, the Imam argued that the dishes of *ahl al-dhimma* used for drinking wine are impure. If the *ahl al-*

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[152] See: S. M. Bāqir, al-Ṣadr, *Buḥūthun fī Sharḥ al-ʿUrwa al-Wuthqā* (Najaf: Al-Ādāb, 1391/ 1966), vol. 3: 260-270.

[153] Idem, vol. 4: 282.

[154] Al-Ḥakīm, *op. cit.*, vol. 1: 367-368; see more explanation in A. al-Khū'ī, *Kitāb al-Ṭahāra*, 10 vols. (Qum: Dār al-Hādī, 1413/1992), vol. 2: 43-45; R. Khomeini, *Kitāb al-Ṭahāra* (Qum: Anṣārīyān, 1410/1989), vol. 3: 306. He said, "even an atheist (*mulḥid*) is not impure". However in the popular Persian judicial book such as *Tawḍīḥ al-Masā'il* of Ayatollah Khomeini (which was composed by others then endorsed by him) mentions the impurity of *al-Kāfir* and explains the word in a way that includes the People of the Book. Many ordinary religious people who cannot read Arabic in Iran assume that the People of the Book in the view of Ayatollah Khomeini are impure.

dhimma were impure as such, the stipulation on behalf of the Infallible Imam would have been meaningless. [155]

Thus far, we have looked at explanations of the three standpoints held by Shiite jurists regarding purity vs. impurity. One exception deserves to be mentioned here. Quoting early Shiite jurists as Ibn ʿAqīl (d. ca. fourth/eleventh century) and al-Ṣadūq (d. 381/991), Mullā Muḥammad Bāqir al-Sabziwārī (d. 1090/1679) argued that the drinking alcohol is forbidden but alcohol itself is not impure.[156] Accordingly, those jurists who have this opinion, are located in group (b) and subsequently only pork remains an impure substance, which could lead to avoid using the dishware and eating the foods of the People of the Book.

Due to the fact that most Shiite jurists in the past, and some in the present, belong to group (a) who regarded the People of the Book as impure, their opinions in Shiite Iran is well-known among lay Muslims, sometimes leading to prejudices. The prejudice has its origins in classic sources which do not explicitly attribute this attitude to the Prophet or to the Imams. Al-Ṭūsī's view, for example, on the discussion over who should partake in the ritual prayer for rain (*ṣalāt al-istisqā'*) is notable evidence for the claim. He encouraged the attendance of children, old men, and any pious person in such a prayer in order to attract God's grace. He added that it is preferable to prevent the attendance of the People of the Book because they are instances of those who would not receive God's grace, *maghḍūbun ʿalayhim*.[157] Then many later Shiite jurists reiterated his words without reflecting over his opinion. During the last century, these stereotypes have been on the decline. In chapters three and four, it will be observed that the idea of purity or impurity has not attracted any attention in Iranian laws and has become an issue already sunk into oblivion.

3. 5. The Forbiddance or Lawfulness of Slaughtered Animals

The food of the People of the Book is considered from two aspects. The first one is related to the question of the purity vs. impurity. The second aspect concerns another stipulation in Muslim dietary laws. This stipulation has its basis in the Qur'ān:

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[155] See, A. al-Khū'ī, *Kitāb al-Ṭahara*, vol. 2: 45-50. Muḥammad b. Muslim, who is usually in Shiite literature, regarded as a very reliable man, quoted the *ḥadīth*.
[156] M. al-Sabziwārī, *Dhakhīra al-Maʿād fī Sharḥ al-Irshād* (Qum: Āl al-Bayt, s. d.), vol. 1:153.
[157] Al-Ṭūsī (1387/1967), vol. 1: 135; vol. 7: 276.

"If you are believer, then eat that upon which God's name has been mentioned and … do not eat that upon which God's name has not been mentioned, for it is debauchery (*fisq*)…"[158]

On the other hand, in another verse, "the food of the People of the Book is authorized for Muslims."[159] The question arises here is whether the butcher who slaughters the animal should be a Muslim in order to authorize the consumption of the meat (*ḥalāl*) for Muslims, or is slaughtering by a non-Muslim butcher, provided that he pronounces God's name, enough to authorize the Muslim to eat the meat. Then, there still remains a very significant further question; in the case that a non-Muslim butcher slaughters an animal and mentions the name of God, what would he mean when he utters the name of God, since, the concept of God in another religion would be different from that of Islam. Therefore, the questions are not of only legal coloring but theological as well. Before considering al-Ṭūsī's viewpoint, it would be worthwhile to look at the *ḥadīth* quoted in Shiite sources.

Al-Kulaynī and al-Ṣadūq quoted about thirty *ḥadīth* in their works and then forty-six more *ḥadīth* were added by al-Ḥurr al-ʿĀmilī in his book.[160] What follows is an overview of their main contents the aim of which is only to clarify the bases behind the various viewpoints of Shiite jurists:

a) *Ḥadīth* in which the Imam declared the meat prohibited to eat owing to the fact that the non-Muslim slaughterer did not pronounce God's name just before slaughtering. While a non-Muslim slaughterer uttered the name of God, it is not enough, since what might be meant was Jesus Christ or a sense of God that did not correspond to the Islamic conception (these words are quoted in the *ḥadīth*). In this category, there is one more *ḥadīth* that refers to the prohibition of the meat of animals slaughtered by the People of the Book whether or not God's name was uttered.[161] In addition, another reason for the prohibition is retaliatory conduct with *ahl al-dhimma*. According to these

[158] Q, 6: 118-19, 121; see also, Ersilia Francesca, "Slaughter" in *EQ*.
[159] Q, 5: 5.
[160] Al-Ḥurr al-ʿĀmilī, vol. 24: 53-66.
[161] Al-Kulaynī, vol. 6: 238-241.

traditions, "since the *dhimmī* avoids eating what Muslims slaughter, the Muslim should not eat theirs".[162]

b) *Ḥadīth* that permit the consumption of the animals slaughtered by the People of the Book provided that they mentioned the name of God.[163]

c) *Ḥadīth* with the same content as in (b) but it is added that if a non-Muslim butcher mentioned the name of Christ, it is to be taken as God's name; therefore, the meat of the slaughtered animal is lawful.[164]

d) There is one *ḥadīth*, attributed to the eighth Infallible Imam, ʿAlī al-Riḍā (d. 203/818), which authorizes the eating of all animals slaughtered by the People of the Book (not only *ahl al-dhimma*) without any stipulation.[165]

e) Some *ḥadīth* closely connected prohibition and authorization to the act of mentioning the name of God. Therefore, if a Muslim butcher did not mention the name, the meat would be forbidden; if a non-Muslim butcher mentioned it, it would be lawful.[166]

f) In one *ḥadīth*, the lawfulness of the meat of the slaughtered animals is connected to the presence or absence of Muslims. If a Muslim was absent while the butcher slaughtered the animal and, accordingly did not know the details of what happened there, i.e. whether or not the butcher mentioned the name of God, then eating that meat would be permitted.[167]

Now let's examine how jurists solved this puzzle. Before al-Ṭūsī, al-Mufīd (d. 413/1022) wrote an independent monograph on animals slaughtered by the People of the Book, entitled, *Taḥrīm Dhabā'iḥ ahl al-Kitāb.* He did not regard them as lawful and appealed to the *ḥadīth* in group (a). He then argued that Jews do not believe in God; if they had, they would have accepted the Prophet Muhammad. This statement shows that

[162] Al-Ḥurr al-ʿĀmilī, vol. 24: 55-66, no. 4, 46.
[163] Ibid: no. 14, 38, 39, 40, 43, 44, and 45.
[164] Idem, *ibid*: no. 25, 34, 35, and 36.
[165] Idem, *ibid*: no. 41.
[166] Idem, *ibid*: no. 31, 37.
[167] Idem, *ibid*: no. 33. There is an *ḥadīth* that could not be located in our category. It mentions the lawfulness of animals slaughtered by Jews and Christians but not by Zoroastrians (See: Idem, *ibid*. n. 17).

the issue in al-Mufīd's view was not only legal, but it was also theological.[168] Similar to al-Mufīd, al-Ṭūsī referred to the *ḥadīth* in group (a) and argued that the flesh of animals slaughtered by the People of the Book, were absolutely prohibited.[169] Many later Shiite jurists accepted his legal opinion on the very subject.[170]

There are some noteworthy exceptions that demand attention. Al-Shahīd al-Thānī mentioned that Ibn ʿAqīl, Ibn Junayd, al-Ṣadūq and his father Bābiwayh al-Qummī (d. 329/940), with some minute differences, accepted the lawfulness of meat slaughtered by the People of the Book.[171] Then referring to the various groups of *ḥadīth,* i.e. (c), (d), and (e), al-Shahīd al-Thānī, argued in favor of the lawfulness of their slaughtered animals, this was a view that was a major exception in Shiite *fiqh*. In his work *Masālik al-Afhām*, he evaluated all those category of *ḥadīth* and arguments for and against the issue that had been offered by previous Shiite jurists.[172] It was in the nineteenth century that some Shiite jurists such as Sayyid ʿAlī al-Ṭabāṭabā'i (d. 1231/1815) were inclined to ruling that if a non-Muslim butcher mentioned the name of God, the slaughtered meat would be lawful. They relied on the *ḥadīth* in the groups (e) and (c). However, his contemporary jurist Muḥammad Ḥasan al-Najafī (d. 1266/1850) regarded the prohibition a necessary ruling of Islam and seriously criticized him.[173]

3. 6. - Legal Relationships with Muslims

3. 6. 1. Testimony

According to Shiite jurists, as far as personal status are concerned, non-Muslims are unbound by Islamic law. Marriage, divorce, worship, testaments and inheritance are to be practiced in accordance with their own regulations and there are no stipulations for

[168] Muḥammad b. Nuʿmān, Al-Mufīd, *Taḥrīm Dhabā'iḥ ahl al-Kitāb* (Qum: Mu'tamar al-ʿĀlamī li alfīya al-Sheikh al-Mufīd, 1413/1992), esp. 22-24.
[169] Al-Ṭusī (s. d.): 582; idem (1387/1967): vol. 7: 289; idem (1407/1986): vol. 1: 70.
[170] See for example, ʿAllāmah al-Ḥillī, *op. cit*., vol. 8: 299. He interpreted the (d) *ḥadīth* as operative when a Muslim is in emergency and *ḥadīth* (b and c) to have been uttered while the Infallible Imam was in dissimulation. Al-Najafī regarded the prohibition as an obligatory ruling in Islam and repeated the very idea of al-Ḥillī on (b) and (c) *ḥadīhs*; see al-Najafī, *op. cit.*: vol. 36:89. Contemporary Shiite jurists such as al-Khū'ī (1410/1989, vol. 2: 335) and S. ʿAlī al-Sīstānī, *Minhāj al-Ṣāliḥīn* (Qum: Maktaba Ayatollah al-Sīstānī, 1416/1995), vol. 3: 276) also have followed al-Ṭūsī.
[171] Al-Shahīd al-Thānī (1413/1992): vol. 11: 452.
[172] *Ibid*: 452-65.
[173] Al-Najafī, *op. cit.*, vol. 36: 86-89.

them.[174] As far as their relationships with Muslims are concerned, however, jurists have articulated several legal regulations that will be discussed in the present section. Trading with non-Muslims is not prohibited and a Muslim can appoint a procurator (*wakīl*) from the People of the Book, and vice versa, to carry out their legal or business affairs.[175] But in the cases where their legal affairs with Muslims are related to some extent to Islamic theological doctrines, jurists have laid legal stipulations. For instance, due to a theological issue that will be mentioned below, Muslims cannot take a non-Muslims as witnesses, whether for or against, either in his testament (will) or in proving any claim or debt in the court.

The stipulation of accepting anyone as a witness is that the person giving testimony in the court must have reputed integrity (*ʻadāla*).[176] *Al-ʻadāla* in the legal context of Shiite *fiqh* is granted to a true believer and is known for his good conduct and his or her avoidance of doing wrong. *Faith* in this definition is the theological point noted above. It is not sufficient in *fiqh* for someone who gives testimony to have strict moral or ethical conduct but he must also demonstrate his *faith* or belief in Islam.[177] With respect to the definition, a non-Muslim, who does not believe in the Muslim creed, cannot be a reputed integrity witness, even though s/he is known for having good moral conduct among his/her co-religionists. Al-Ṭūsī and other Shiite jurists regarded and categorized the People of the Book in this discussion as infidels. Consequently, they thought that the testimony of non-Muslims is not accepted.[178] If a non-Muslim, however, converts to Islam and bears witness repeating the same statements and claims that he had uttered before conversion, his testimony is acceptable in court.[179] This ruling has not witnessed any change among the Shiite jurists since the time of al-Ṭūsī onwards. There is, however,

[174] There is a rule (*qāʻida ilzām*) attributed to the sixth Imam indicating that every believer is entitled to obey the legal prescriptions of his or her religion, (*tajūzu ʿalā ahli kulli dhawī dīnin mā yastaḥillūn*); Al-Ḥurr al-ʿĀmilī, vol. 26: 158, no. 4. See also concerning testimony: al-Ṭūsī (s. d.): 334; al-Shahīd al-Thānī (1413/1992), vol. 14: 164.
[175] Al-Ṭūsī (s. d.): 317.
[176] Q, 2: 65; see also, al-Kulaynī, vol. 7: 398.
[177] Al-Ṭūsī (1407/1986), vol. 5: 344. Al- Shahīd al-Thānī (1413/1992), vol. 14: 161.
[178] Al-Ṭūsī (1407/1986), vol. 6: 272; idem (1387/1967), vol. 8: 187. Al-Shahīd al-Thānī (1413/1993), vol. 14: 164 quoted Ibn Junayd's acceptance of a *dhimmī*'s testament.
[179] Al-Kulaynī, vol. 7: 398; al-Ṭusī (1407/1986), 6: 272; idem (s. d.): 613.

one exception to this rule: if a Muslim were unable to find any Muslim for his purposes, it is lawful to choose a non-Muslim as a witness.[180]

3. 6. 2. Inheritance

Non-Muslims can inherit from each other in *dār al-Islām* in accordance with their own regulations.[181] As to their relations with Muslims, however, some points must be taken into consideration. According to Shiite jurists, and in this regard they do not differ from Sunnite jurists, an infidel cannot inherit from a Muslim but a Muslim can inherit from an infidel. According to a legal opinion which is relatively undisputed in Shiite *fiqh*, not only can a Muslim inherit from a non-Muslim but a Muslim can also prevent (*ḥajb*) relatives in the same level of priority in inheritance from inheriting. Al-Kulaynī[182] quoted *ḥadīth* indicating that if a father, who had a wife and children died and one of the inheritors became Muslim before the father's death, his or her conversion to Islam is a reason that prevents all those person's non-Muslim relatives from being entitled to inherit.[183] This legal opinion is one of the most disputed and often one of the most manipulated laws concerning non-Muslims in Iran in the past, mainly because of the profound effects it left on religious minorities, especially among Jews and Zoroastrians. There have been documented cases of individuals who have faked conversion to Islam in order to prevent their relatives from getting their inheritance. We will examine some cases in chapter two. With regard to this subject, al-Kulaynī also quoted another *ḥadīth*, which says the opposite of the above and to which Shiite jurists have not paid great attention in the history of *fiqh*. According to this *ḥadīth*, conversion is irrelevant in the distribution of inheritance, therefore, each of the inheritors inherits their share and no one can prevent another's share.[184]

One of the main sources for the general rule that an infidel cannot inherit from a Muslim, while the reverse is lawful, is a famous *ḥadīth* attributed to the Prophet and mostly cited in inheritance manuals under the title of impediments to inheritance: "Islam

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[180] Q, 5: 106.
[181] Al-Ṭūsī, (1407/1986), vol. 4: 125; See: al-Najafī, vol. 39: 32.
[182] Al-Kulaynī, vol. 7: 146.
[183] Al-Shahīd al-Thānī (*op. cit*., vol. 13: 21-22) claimed the existence of consensus in Shiite *fiqh* on this precept.
[184] Al-Kulaynī, *ibid*.

will be higher and nothing will be higher than it" (*al-Islam yaʿlū wa lā yuʿlā ʿalayh*).[185] There is no sufficient information concerning the context of this *ḥadīth* to decipher what "higher" means in this text, and why it has been only cited in legal subjects, this is especially so in the issue of inheritance. According to the ruling, therefore, an infidel does not inherit from a Muslim but she/he can be a legator/ testator (*mūṣī*) of a Muslim, and not vice versa; a Muslim can inherit from an infidel but cannot be taken as his/her testator/ legatee (*mūṣā lahū*).[186] However, apart from the weak chain of transmitters of the *ḥadīth* that causes to be not reliable, one can weaken the implications of the content in the following manner: If the criterion of applying the rule (*al-Islām yaʿlū*) is to maintain the state of the superiority of Muslims in all legal relations, one could say that in many contracts and transactions, such as the relationship between the lesser and the lessee, the Muslim has to accept the position that is not 'higher'. Can any jurist, based upon the *ḥadīth*, say such kinds of legal relations are illegal? As a result, the ambiguous meaning of the rule prevents every jurist from absolutely appealing to its indication.

3. 6. 3. Marriage and Divorce

Islam, generally speaking, is like Judaism and Zoroastrianism in that it does not permit its followers to marry the followers of other religions. Such regulations on marriage and divorce might be considered as regulations instituted to maintain the distinctive identity of the followers of these religions and should not be regarded as pure legal injunctions.[187] With respect to some verses of the Qur'ān[188] and the rule passed down in the form of a *ḥadīth* attributed to the Prophet Muhammad, where he said that "Islam will be higher, and nothing will be higher than it", a Muslim female should not marry an infidel (*kāfir*) including the People of the Book under any circumstances. The relationship between male and female, largely, in Islamic culture is based on male superiority.[189] Due to the fact that the female in her marriage accepts the superiority of a male, she cannot accept the superiority of a non-Muslim as her husband; this legal opinion is undisputed among

[185] See, for example, al-Ḥurr al-ʿĀmilī: vol. 26: 14, no. 11.
[186] Al-Ṭūsī (1387/1967), vol. 4: 51. See another sample of the rule in, idem, *ibid*, vol. 2: 46.
[187] Another example of such regulations, in Zoroastrianism, Judaism, Christianity and Islam, is regulations concerning the burial of the deceased.
[188] Q, 2: 221; 60: 10.
[189] See, as an example, Q, 4:34; see also, Harald Motzki, "Marriage and Divorce" in *EQ*: esp.: 278.

the Shiite jurists in this regard.[190] However, according to most Shiite jurists, a Muslim man in the light of his superiority can marry a non-Muslim woman provided that he has the intention of making her a Muslim.[191] Without the initial hope of conversion, permanent marriage with a non-Muslim, including a *kitābī*, is not lawful. Temporary marriage, viz. *mutʿa*, is, however, lawful only with Jews and Christians; temporary marriage with Zoroastrians is still a controversy.[192] Al-Shahīd al-Thānī believed that a Muslim man can marry a *kitābī* woman absolutely even when the *kitābī* male converted to Islam and wanted to keep his *kitābī* wife permanently without any hope for her conversion.[193] A tentative conclusion that can be drawn from this legal opinion is that he had insisted on the purity of the People of the Book as such, otherwise it does not make any sense his opinion on the lawfulness of keeping his *kitābī* wife. The different ideas among Shiite jurists concerning the subject the legality of marriage with non-Muslims go back to the diversity of *ḥadīth*.[194] Given that the marriage between Muslim and non-Muslim occur, the legal affairs of children from such unions would be in accordance with the more superior of the parents. To be Muslim, male and free in contrast to non-Muslim, woman and slave, are criteria for this superiority. Therefore, in every case where a Muslim marries a non-Muslim, the children would legally belong to the Muslim.[195]

The conversion of one of the spouses into Islam causes to bring about some legal subsequences. If one of them converts to Islam, his or her contract of marriage will not be cancelled but she or he cannot have sexual intercourse until the partner makes a decision to become Muslim. If the man keeps his religion and the wife has converted to Islam, the marriage contract is cancelled. This ruling is undisputed among Shiite jurists. However, if

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[190] M. al-Anṣārī, *Kitāb al-Nikāḥ* (Qum: Bāqirī, 1415/1994): 392. He also believed that a Muslim man couldn't marry an infidel in the form of permanent marriage, whether or not he has hopes for her conversion.

[191] Cf. Al-Sharīf Al-Murtaḍā (d.436/1044) in *al-Intiṣār* (Qum: Mu'assasa al-Nashr al-Islāmī, 1415/ 1994): 279-80. He did not accept this exception and believed that marriage with non-Muslims is absolutely forbidden.

[192] M. al-Anṣārī, *Kitāb al-Nikāḥ*: 392-7. Here most Shiite jurists, if not all, regarded the *Ṣābi'īn* as infidels, thus marriage with them is prohibited. Al-Shahīd al-Thānī (1413/1992): vol. 7: 362 quoted the uncertainty of some jurists concerning marriage with Zoroastrians.

[193] Al-Shahīd al-Thānī, *op. cit.*: vol. 7: 367.

[194] See Al-Kulaynī, vol. 5: 358; al-Ḥurr al-ʿĀmilī, vol. 20: 538-542.

[195] This rule could be concluded from Shiite *ḥadīth* as well as legal opinions. See, for example, Al-Kulaynī: vol. 5: 492-93; ʿAlī b. Ḥusayn al-Karakī (d. 940/1533), *Jāmiʿ al-Maqāṣid fī Sharḥ al-Qawāʿid* (Qum: Āl al-Bayt, 1408/1987), vol. 12: 396-97; al-Najafī: vol. 30: 213; and al-Khū'ī (1407/1986), *Kitāb al-Nikāḥ*, vol. 1: 275.

the woman keeps her religion (i.e., one of the three religions cited above), and at the same time the couple are going to preserve their marriage contract, they can do that permanently according to one legal opinion and, according to another, they can do so only by a new temporary marriage contract.[196] Moreover, relying on the Qur'ān and *ḥadīth*, some of the aforementioned Shiite jurists[197] hold that when a spouse converts from Islam into another religion or basically accepts no religion whatsoever, their marriage contract is cancelled; and if the conversion was verified in the court, he or she would be considered as an apostate and as a consequence, the death penalty is his or her fate.[198]

There is some evidence in Shiite tradition that leads to the assumption that *dhimmī* women were legally tantamount to being slaves. Among the evidence is the permissibility of having temporary marriage with *kitābī* women, the authorization to look at their hair and bodies, and being regarded them in some *ḥadīth* as their (Imams') slaves, and consequently, the possessions of the Imam.[199] Some scholars regarding the evidence expressed their doubts as to whether they are real legal opinions, i.e. if *dhimmī* women were actually the Imam's slaves, or if perhaps the designation was metaphorical.[200] Al-Khū'ī also approached the question in some of his works and argued that if the relationship between the Imam and *dhimmī* women was a real slavery, and it was not metaphorical, then it would have legal consequences; when for example the slave is assassinated, the blood money should be paid to his master or owner and, therefore, in such cases, if they are regarded as real slaves, the money should be paid to the Infallible Imam. However, in Shiite *fiqh* there are no such legal opinions on the People of the Book, and the blood money in that case is given to his or her family.[201] Al-Khū'ī finally concluded that the analogies are purely metaphorical. But there are some similarities that increase the ambivalence. For example, according to the Imam Jaʿfar al-Ṣādiq, in the case of getting divorced from her *kitābī* husband, a *kitābī* woman, unlike a Muslim woman does not have a waiting period (*ʿidda*), "for she is viewed as a slave of the Imam". Then

[196] Al-Ṭūsī (1365/1986): vol. 7: 300-301; idem (1387/1967): vol. 4: 212-214; see also al-Shahīd al-Thānī (1413/1992), vol. 7: 365-366; M. al-Anṣārī, *Kitāb al-Nikāḥ*, 398-99.
[197] See for example, Q, 3: 85; al-Ṭūsī, (1387/1967) vol. 2: 36, 57; vol. 7: 281, 284.
[198] See, as an example: al-Shahīd al-Thānī (1413/1992), vol. 7: 368-69.
[199] Al-Ḥurr al-ʿĀmilī, vol.15: 477-78.
[200] Tsadik (2003): 404-405.
[201] Al-Khū'ī (1407/1986), *Kitāb al-Nikāḥ*, vol. 1: 35.

the *ḥadīth*-relater asked another question of the Imam, “If a Muslim was going to marry a divorced Naṣrānī woman, how many days should her waiting period be." “Two periods or 45 days, before she converted to Islam”, said the Imam.[202] This waiting period is confined to the case of slaves in Shiite and Sunnite *fiqh*. The very *ḥadīth* also indicates that if that Naṣrānī converted to Islam and then a Muslim was going to marry her, she should have a waiting period like Muslim female. Anyway, the result should be treated with great caution.

3. 6. 4. Penalties

The People of the Book in *dār al-Islām* could present their legal issues to any judge or court that they wish. In the history of Islam, some cases are reported in which non-Muslims had taken the Prophet or the Imam as judge. However, depending on the content of the contract of protection (*dhimma*), in cases where legal and criminal claims effect the Muslim individual or Islamic society, such as illicit sexual relations, drinking alcohol in public and theft, they should refer to a Muslim judge and accept his verdict. In this state, they must receive a penalty according to Islamic regulations mentioned in the Qur’ān and the *ḥadīth*. By 'penalties', Shiite jurists mean the two terms of *ḥudūd* and *taʿzīrāt*.[203] The former refers to penalties whose nature and amount have been prescribed explicitly in the Qur’ān or in the *ḥadīth* and could be subject to being canceled under any state of doubt.[204] The practice of *ḥudūd* is left to the discretion of the Infallible Imam or the Muslim ruler. The latter prescribes those penalties whose nature and amount had not been prescribed by the *Sharīʿa*, and it has been left to the discretion of the judge; such as the amount of lashes that are to be milder than the amount prescribed by *ḥadd.* The minimum amount of lashes to be carried out according to *ḥadd* is up to 74 or 79 lashes according to various legal opinions.[205]

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[202] Al-Kulaynī: vol. 6: 174-175.

[203] These definitions are current for these expressions in Shiite *fiqh* but in a literal sense *ḥudūd*, and *taʿzīr* are sometimes used conversely and even as synonyms. Due to this point, some writers occasionally make a mistake, See: ‘Izz al-Dīn, ‘Taʿzīr’ in *EI* [2], esp.: 406.

[204] There is a rule in Islamic *fiqh* which states ‘prevent the implementation of *ḥudūd* whenever a doubt persists as much as you can’ (*tudra’u al-ḥudūd bi shubahāt*). This is evidence that punishment meted out in Islamic law is only for an admonishing, threatening effect.

[205] See concerning the application of the term: al-Mufīd (1410/1989): 795-97; al-Shahīd al-Thānī (1413/1992): vol. 14: 345-46. Even though compared with the Jewish Penal Code, the Islamic Penal Code

Where applying the penalties are concerned, Islamic regulations in *fiqh* consider all subjects as Muslim. This is based on the assumption that a *dhimmī* cannot say: "Since I am not a Muslim, I do not accept this or that verdict".[206] At the same time, however, the amount of the penalty to be carried out is not equal in every case where being Muslim or non-Muslim is subject. In some important crimes such as murder and illegal sexual relationships, the precepts bear determined inequalities. Here we will concentrate on explaining some of those inequalities.

Regarding illegal sexual relations, and same-sex intercourse, Muslims and non-Muslims do not have equal penalties in Islamic law. It is interesting to note that the more severe a punishment is, the more difficult it would be to verify. For example, it seems nonsensical that verifying lesbianism requires the testament of four men of reputed integrity or the confession of the performers. Therefore, it can be suggested that the punishment leaves only an admonishing, threatening effect. One of the inequalities of the punishment is the issue of fornication. If a non married Muslim man fornicates with a Muslim woman, he will receive 100 lashes as penalty and it is the same in the case of a *dhimmī* man with a *dhimmī* woman. But if a *dhimmī*, regardless of being married or not, fornicates with a Muslim woman or is found engaged in homosexual intercourse with a Muslim, then he will certainly receive the death penalty. The justification offered for the ruling is that he has violated by this act the contract of protection and is not entitled to live.[207] Even where a *dhimmī*, after his illegal sexual act, converts to Islam, the punishment will never be abrogated. Another example is the penalty for the false accusation (*qadhf*) of adultery or sodomy: If the accused is a Muslim, the penalty will be eighty lashes, but if the accused were a *dhimmī*, the penalty would be less than seventy-four lashes (*taʿzīr*).[208]

3. 6. 5. Retaliation (*qiṣāṣ*)

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is milder they have many similarities. Cf. "penal law" and "divine punishment" in *EJ*^{2}, by Haim Herman Cohn.

[206] Al-Ṭūsī (1407/1986), vol. 5: 553; idem (1387/1967), vol. 8: 37; al-Najafī, vol. 41: 313, 400, 460; See also *ḥadīth* in al-Ḥurr al-ʿĀmilī, vol. 28: 50.

[207] Al-Ṭūsī (s. d.): 692. This idea has been well entrenched throughout the history of Shiite *fiqh*. For example, see al-Najafī, vol. 41: 313; Khomeini (1390/1970), vol. 2: 463.

[208] Al-Mufīd (1410/1989): 792.

A Muslim does not suffer retaliation for killing a non-Muslim.[209] Thus, If a Muslim murders a *dhimmī* whether intentionally (*ʿamdī*) or by misadventure (*khaṭā'ī*), the heir of the *dhimmī* (*walīī dam*) is not entitled to demand retaliation and can only receive the blood money.[210] But there is an exception, a Muslim murderer who has repeatedly killed non-Muslims or, in other words, if he is a professional or habitual murderer, the heirs of the victim is entitled to take revenge on the killer but because of the precept that the rate of blood money for Muslim and non-Muslim is also not equal, the heirs of victim, the Imam or the ruler will pay the difference of the rate to the heirs of murderer and then he would suffer retaliation.[211] Some jurists argue that it is not necessary to pay any money to the heirs of such a murderer and the ruler can punish him as a malicious man (*mufsid fī al-arḍ*).[212] In some *ḥadīth* attributed to the sixth Imam, the right of retaliation is fully recognized for the heirs of the *dhimmī* victim, even if the killer is not professional.[213] However, Shiite jurists never did pay attention to those *ḥadīth*. In the case where a *dhimmī* deliberately murders a Muslim, on the other hand, apart from retaliation, he should pay all his/her properties to the heirs of the Muslim victim, even if the properties were more than the amount of the blood money.[214] In this case, some *hadīth* indicate that the family of the deceased Muslim could, in turn, choose whether to enslave or kill the *dhimmī*.[215]

Non-Muslims are retaliated against for killing non-Muslims. In cases where both the murderer and the victim belong to another religion, even though they might be followers of two different faiths, the law of retaliation is applied. Therefore, if the heir of the victim wanted the implementation of retaliation in an intentional murder (*qatl ʿamdī*), the murderer is sentenced to death.[216] In cases such as these, a debate worth noting here can be found both in the Islamic sources as well as history. In the case where a murderer becomes a Muslim after committing the crime to escape the punishment, the content of

[209] See the meaning and all conditions of retaliation in 'ḳiṣāṣ' in *EI* [2], by J. Schacht.
[210] Al-Kulaynī, vol. 7: 310, nos. 4, 9 and 12.
[211] Al-Mufīd (1410/1989), *al-Muqniʿa*: 739-40; al-Ṭūsī (s. d.): 749; al-Ḥillī (1413/1992), vol. 9: 323.
[212] For an example, see: Abū al-Ṣalāḥ al-Ḥalabī (d. 447/1055), *Al-Kāfī fī al-Fiqh* (Isfahan: Maktaba Amīr al-Mu'minīn, 1403/1982): 384.
[213] Al-Kulaynī, vol. 7: 310-311, no. 2, 8.
[214] Al-Ṭūsī (s. d.), 748; al-Najafī: 156-57; Khomeini (1390/1970), vol. 2: 520.
[215] Al-Kulaynī, vol. 7: 310, No. 7and 8; cited in al-Ḥurr al-ʿĀmilī, vol. 29: 110-111.
[216] Al-Kulaynī, vol. 7: 309-310.

the Shiite *ḥadīth* here are diverse. Some of them indicate that the conversion saves the life of the murderer and she or he should pay the blood money; others indicate that he should be killed and conversion plays no role here.[217] Most Shiite jurists relied on *ḥadīth* that confirm the first view.[218]

In the case of non-intentional murder, Shiite jurists demanded the payment of blood money in all cases, whether between Muslims or non-Muslims.[219] However, as it will be noticed, the amount of money is not equal between Muslims and non-Muslims. If a *dhimmī* unintentionally commits a murder, whether or not the victim is Muslim, he should pay the blood money '*diya*'; if he is unable to pay it, then the infallible Imam or the ruler will pay it, not his heirs or the blood wit (*ʿāqila*). The punishment in this precept might be easier for the People of the Book when compared to that of confided to Muslims. It has been justified in some *ḥadīth* by the argument that the *jizya* implies the blood money for the People of the Book, because they do not have any other protector like the blood wit (*ʿāqila*) for Muslims.[220]

3. 6. 6. Legal Compensation (*diya*)

There is generally no difference between Shiite and most Sunnite jurists (except Abū Ḥanīfa who didn't make any difference between Muslim and *dhimmī*) in designating the amount of legal compensations without any difference in instances including money, camels or goods. The blood money of the *dhimmī* and the *musta'min* (non-Muslim foreigner, temporarily admitted in Muslim territory) according to Shiite jurists is 800 *dirhams* for a free male and 400 *dirhams* for a free female, while the blood money for a Muslim male is 1000 *dīnār*s and for a female is 500 *dīnār*s.[221] In accordance with some reports, one gold coin (*dīnār*) was equal to about 12 silver coins (*dirhams*), depending upon the various prices at the time,[222] but today these monetary units are vague and the

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[217] Al-Kulaynī, *Ibid*. Al-Ṭūsī (1365/1986): vol. 10: 190-191; al-Ḥurr al-ʿĀmilī, vol. 29: 110-111.
[218] See, al-Shahīd al-Thānī (1413/1992): vol. 15: 144; al-Najafī, vol. 42: 156; al-Khū'ī, *Mabānī Takmila al-Minhāj* (Qum: Dār al-Hādī, 1407/ 1986): 65, Question no. 68; Al-Shahīd al-Thānī (*ibid*) claimed that there is no opposite *ḥadīth* and al-Najafī claimed consensus of Shiite jurists on this legal opinion.
[219] Al-Najafī, vol. 42: 156.
[220] See concerning *ʿāqila* which was regarded as kind of insurance in Arab tribes and then in Islamic Law, R. Brunschvig, ''Ākila' in *EI* [2].
[221] See al-Ṭūsī (1387/1967): vol. 7: 156; R. Khomeini (1390/1970), vol. 2: 559.
[222] See also, "Diya" in *EI* [2], by E. Tyan.

differences cannot exactly be figured out. Despite this problem, these vague monetary units are still mentioned in the works of contemporary Shiite jurists. The discrimination in blood money might be better seen when that of a *dhimmī* is compared with the rate of the *diya* which is determined with respect to a bodily organ of a Muslim. For example, if somebody destroyed the testicles of a Muslim, he should pay 1000 *dīnār*s which is equal to the full *dīya* of a sound man, but if one murders a Muslim woman or a *dhimmī*, he should pay 500 *dīnār*s in the former and 800 *dirham*s in the latter case to their heirs.

We can conclude from the data that the ideas of Shiite jurists on the subject of penalties, retaliation and blood money have not significantly changed since al-Ṭūsī. At times, his very words are quoted verbatim in the works of Shiite jurist. To prove the claim, in this part, I have tried to cite some references from early, medieval, and contemporary jurists to argue for the continuous and stable attitudes observable among them towards non-Muslims. Finally, it is reasonable to conclude that those legal opinions on non- Muslims are more akin to duties imposed upon them rather than rights that they enjoyed.

Chapter Two:
Iranian Society in 1848 to 1911

The Constitutional Revolution (1905-1911) represents the first direct encounter between traditional Shiite Islam and modernity. All the earlier attempts at modernization, although involving important changes in the legal, governmental, and administrative systems, were conducted in areas only marginally connected with underlying traditional values. In this Revolution, new ideas and terms emerged, among them, the idea of a Constitution, the limitation and separation of government power, freedom, state, the nation (*millat*) of Iran and the equality of all people before the law. This chapter will examine the period of 1848 to 1911, concentrating on the Revolution and its various backgrounds, and impacts. The study does not aim to repeat simply history and historical analyses; rather, the ensuing discussion will briefly clarify elements that would help us visualize and get a deeper grasp of a situation that had an influence on the codification of the Constitution regarding the rights and status of religious minorities.

1. The Political Situation

1. 1. The Qajar Dynasty

A positive and noteworthy aspect of the Safavid dynasty (1501- 1722) was that it gave unity and a new identity to Iran and the Iranian community since the Arab invasion.[1] The first Shahs of dynasty used to achieve their aims by the two important factors, namely the Persian language and *Imāmī Shiite* doctrines and beliefs.[2] Due to their fanatical attitude, however, Iranian Sunnis and religious minorities were oppressed by the tyranny of the

[1] On the role of Safavid dynasty in Iran, see S. J. Ṭabāṭabā'ī, *Dībāchi'ī bar Naẓarīyy-i Inḥiṭāṭ Irān* [*Introduction to the Theory on the Deterioration of Iran*] (Tehran: Nigāh Muʿāṣir, 1380/2001), esp.: 29-72, 121-126; R. M. Savory, 'The Emergence of the Modern Persian State under the Safavids', *Studies in the History of Safavid Iran* (London: Varium, 1987).

[2] The first Shahs of the Safavid dynasty regarded themselves *walī* (a very pious man who has a very close relationship with the Imām and God, like the saints in Christianity). Many followers of Shah Ismāʿīl, the founder of the dynasty, obeyed him, not politically, but simply to attain God's rewards. See A. Qazwīnī, Abū al-Ḥassan, *Fawā'id al-Safavīyya*, ed. by Maryam Mīr Aḥmadī (Tehran: Mu'assasa Muṭāliʿāt wa Taḥqīqāt Farhangī, 1367/1988): 90-95. Concerning the role of the Shahs in the Safavid dynasty, see Andrew J. Newman, *Safavid Iran: Rebirth of a Persian Empire* (New York: Tauris & Co Ltd, 2006).

Safavids.[3] After their fall, any thought of an independent and unified Iran was gone as well. Each ethnic group, including the Turks, Bakhtiyārīs, Persians, the Balūchis, and so on, sought after its own interests and nobody thought about the unity of country. This political instability, serious disputation and conflicts between religious as well as ethnic groups in the cities and villages, continued until the period when Āqā Muhaḥamad Khān from the Qajar tribe, a Turkic tribe from the northeast of Iran was able overcome and settle disputes but only through massacre and bloodshed. He established a new dynasty known as the Qajar in 1796. He was assassinated after one year.

The crown was passed on to his nephew Fatḥ ʿAlī Shah (d. 1834).[4] Two wars between Iran and Russia (1805-1813, and 1826-1828) occurred during his reign both of which ended in Iranian defeat. In accordance with the Gulistān (October 1813) and Turkamanchāy (February 1828) treaties, the Qajar government gave up large territories in the north, and declined to one of the worst positions in international relations, finally falling under the influence of Russian power in its internal affairs.[5] Under Articles 7 and 8 of the Supplementary Commercial Treaty, Russia and some other countries were able to achieve unilateral capitulation for their residents with respect to civil and criminal claims and, in consequence, the treaty threatened and abrogated the juridical independence of Iran.[6] Historians regard the Turkamanchāy treaty as a humiliating treaty and point to the political deterioration as its result. Abbās Mīrzā (d. 1833), Crown Prince (*waliʿahd*),[7] son of Fatḥ ʿAlī Shah, who was very active and had done meritorious acts during his life, died before his father, and as a result, the crown was passed on to Abbās Mīrzā's eldest son,

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[3] See, S. J. Ṭabāṭabā'ī, *op. cit*., 50-83. Further information can be sought in Vera B. Moreen, "The Status of Religious Minorities in Safavid Iran 1617-1661", *Journal of Near Eastern Studies*, 40 (1981): 119-134; Varten Gregorian, "Minorities of Isfahan: The Armenian Community of Isfahan 1587-1722," *Iranian Studies,* 7 (1974): 652-680.

[4] At his death, he left behind some 5,000 descendants from some 700 wives. See, Curzon, *Persia and the Persian Question*, vol. 1: 410- 411, quoted by C. Ghanī, *Iran and the Rise of Reza Shah: From Qajar Collapse to Pahlavi Rule* (London: B. Tauris, 1998): 2, 19.

[5] See text of the covenant including sixteen articles and its supplement in S. Nafīsī, *Tarīkh Muʿāṣir Irān* [*The History of Contemporary Iran*] (Tehran: Asāṭīr, 1383/2003): 670-687.

[6] See I. S. Wazīrī, *Niẓām Kāpītulāsīyūn wa Ilghāy ān dar Irān* [*The Capitulation and its Cancellation in Iran*] (Tehran: Wizārat Khārij-i, 1355/1976), esp.: 16-20. The roots of capitulation in Iran in the format of trading privileges go back to the period of Mongol rule in 639/1241. See M. A. Chilungar, *Kāpītulāsīyūn dar Tārīkh Irān* [*Capitulation in the History of Iran*] (Tehran: Markaz, 1382/2002), Ch. 2 & 3 for the condition of forcible capitulation in the period of Qajar dynasty; see also A. K. S. Lambton, "Imtiyāzāt, iii-Persia", esp. 1189-1191 in *EI* [2].

[7] With regard to his biography see H. Busse, "Abbās Mīrzā" in *EIR*; E. Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982): 53.

Muḥammad Shah (r. 1834-1848). Muḥammad Shah chose Mīrzā Abū al-Qāsim (1779-1835), known as Qā'im Maqām as his Prime Minister (*ṣadr aʿẓam*) who was quite influential,[8] but, after just one year, he was killed, because the king could not tolerate him. The next person to become *ṣadr aʿẓam* was Mīrzā Āghāsī (d.1849),[9] who studied mysticism and theology and used to be the Shah's teacher. During Āghāsī's thirteen year in office, the government had important political problem of recovering Herat (northeast of Iran). Iran engaged in a war with the Afghāns against the interests of Britain in Herat, hoping to get support from Russia, but finally, despite its efforts, it was forced to give up the region.[10]

Nāṣir al-Dīn, the son of Muhammad Shah, was the fourth Shah of the Qajar dynasty who came to power (in 1848) when he was only seventeen years old. He, too, had a very efficient and capable *ṣadr aʿẓam*, Mīrzā Taqī Khān, known Amīr Kabīr (d. 1852).[11] Amīr Kabīr followed up on the ideas of the reform started by Abbās Mīrzā and later on Qā'im Maqām took them up. He participated in three political missions to Russia and the Ottoman Empire before becoming *ṣadr aʿẓam* and those trips had a great influence on his thinking. Three years later, he suffered the same fate as that of Qā'im Maqām: he was the second Prime Minister to be killed by the order of the ruling Qajar Shah. Some of his reforms will be explained below. Mīrzā Ḥusayn Khān Sipahsālār (r. 1871-1882) was another eminent *ṣadr aʿẓam*, in the period of Nāṣir al-Dīn Shah who continued the great reforms. The idea of demand for justice as a background for the Constitutional Revolution had appeared among the people and governors during Sipahsālār's period in political office.[12] In general, historians have considered the situation of Iran in the forty years of the reign of Nāṣir al-Dīn Shah to be one of inactivity

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[8] M. Bāmdād, *Tārikh-i Rijāl Irān dar Qurūn,*12, 13, 14 [*Dictionary of National Biography of Iran 18, 19, 20 centuries*] (Tehran: Nigīn, 1351/1973), vol. 4: 234-239.

[9] See H. Saʿādat Nūrī, *Zindigī [the Life of] Mīrzā Āghāsī* (Tehran: Waḥīd, s. d.); Cf., Humā Nāṭiq, *Irān dar Rāhyābī Farhangī* 1834-1848 [*Iran in the cultural Route*] (London: Payām, 1988): esp. Ch.1.

[10] ʿAlī A. Bīnā, *Tārīkh Sīyāsī wa Dīplumāsī Irān* [*The Political and Diplomatic History of Iran*] (Tehran: Dānishgāh Tehran, 1342/1963), vol. 2: 128-134. For more information on the historical background of Herat, see Maria Szupe, "Herat" in *EIR*.

[11] Concerning Amīr Kabīr, see F. Ādamīyyat, *Amīr Kabīr wa Irān [The Great Lord and Iran]* (Tehran: Khārazmī, 1348/1970).

[12] The collapse of his state was made by the British embassy and the support of some radical clerics such as Mullā ʿAlī Kanī and Sayyid Ṣāliḥ ʿArab. See F. Ādamīyyat; *Andīsh-i Taraqqī wa Ḥukūmat Qānūn: ʿAṣr-i Sipahsālār* [*The Idea of Modernity under the Sovereignty of Law in the Period of Sipahsālār*] (Tehran: Khārazmī, 1356/1978), esp. 265-268. With regard to the manner of Sipahsālār, see E. G. Browne, *The Persian Revolution of 1905- 1909* (London: Cambridge, 1910), 130-133, 420.

and at the same time of relative stability.[13] Even though the Shah went to European countries three times, the trips made no positive impact on his mind. He was killed by Mīrzā Reza Kirmānī[14] (executed in 1896), who was a disciple of, and hence under the influence of Sayyid Jamāl al-Dīn Asad Ābādī, known as Afghānī (1839-1897).[15]

Muẓaffar al-Dīn (r. 1896-1907) was the fifth Shah of the Qajar dynasty who, with his special characteristics,[16] helped the Constitutional Revolution attain victory and in particular helped in the establishment of the first Parliament (*majlis*). Among his colleagues only Mīrzā ʿAlī Khān Amīn al-Dawla,[17](d. 1904) the effective prime minister -- who served for only a short time -- is worth mentioning. The Shah died only ten days after his endorsement of the Constitution. Muḥammad ʿAlī Mīrzā (r. 1906-1909) who continued the dictatorial policy of his grandfather became the sixth Shah of the dynasty. He did not support constitutionalism and, backed by Russian troops, closed and bombarded the parliament. Soon after, armed revolutionaries took over Tehran (July of 1909) forcing him to take refuge in the Russian embassy and then with Russian support left Iran abdicating his position to his twelve-year son, Aḥmad Shah, the seventh and the last Shah (r. 1909-1925) of the Qajar dynasty.[18]

1. 2. Foreign Powers

Two of the world's most powerful powers, Britain and Russia, were in constant competition over their interests in Iran, especially in the Persian Gulf. By the end of the nineteenth century, the paradigm of global politics allowed the strong countries to colonize and interfere with the internal affairs of other countries even by war.[19] On the

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[13] Ghanī, *op. cit.*, 4.

[14] See his motive for the assassination of the Shadow of God, the honorific used for the Shah, in his responses to the interrogator in prison. He mentioned that it was neither revenge nor personal motives but he called the Shah the 'root of corruption and tyranny in Iran'. See N. Kirmānī, *Tārīkh-i Bīdārī Irānīyān* [*History of the Awakening of Iranians*], ed. by Saʿīdī Sīrjānī (Tehran: Āgāh, 1362/1983), vol. 1: 106-116. Some information concerning Kirmānī will be mentioned below.

[15] He will be introduced later.

[16] See his biography and his especial characteristics in Browne (1910): 163-169, 415-17.

[17] About him, see Kirmānī, vol. 1: 154-55.

[18] Concerning this very sad and sorrowful period of Iran, see, C. Ghanī (1998).

[19] As to political and philosophical justification on war and peace, see Carl von Clausewitz, *On War*, tr. by J. J. Graham (Ware, Engl.: Wordsworth Press, 1997); Warren F. Kuehl, "Peace, international", *Dictionary of the History of Ideas*; ed. P. Wiener (New York: Charles Scribner's Sons, 1973); Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals*, tr. Ted Humphrey (Indianapolis: Hackett, 1983).

one hand, Russia interfered in the social political affairs of Iran in order to acquire the Northern provinces, to find a route to the waters of the Persian Gulf, and to increase its position in the balance of power. On the other hand, since the defense of India was a serious question for Britain in the time, Britain also sought after its own interests, such as an easy route to the geographical territories of India. In this competition, Iran was usually a subject of their threats. In many works written on the history of Iran and on the Constitutional Revolution, the authors relied on Foreign Office Archives (F.O.)[20] and other documents to show the degree of interference's two powers. The present study concentrates on *British Documents on Foreign Affairs* (*BDF*, 1985).[21] After publishing those documents, which explicitly mention those aims, the claim is certainly not groundless. One report among many could be regarded as evidence:

> "…on the other hand, it is surely clear that Russia cannot be suffered to annex Khurāsān, or any of the Northern provinces of Persia, while we sit still and do nothing….They want Persia, not merely for the intrinsic value of the Northern provinces but in order to get to the [Persian][22] Gulf, and they will rashly take any step that would effectually, and at a blow, prevent the realization of that dream".[23]

There are some documents that also show Russian rivalry in opposition to against British politics.[24] This bilateral competition, which is sometimes mentioned in documents as jealousy,[25] was not limited to economic and political affairs but developed into judicial cultural ones as well.[26]

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[20] For an example, see Martin Vanessa, "Constitutional Revolution- II: Events', *EIR*, who used *FO* in the discussion.

[21] *British Documents on Foreign Affairs*: *Reports and Papers from the Foreign Office Confidential Print*, Central Editors: Kenneth Bourne and D. Cameron Watt, vol. 13 (1886-1907) & vol. 14 (1907-1914) (USA: University Publications of America, 1985).

[22] In this document the reporter did not mention the word "Persian", but I have added it here since elsewhere in British Documents the term "Persian Gulf" has been mentioned. See, as an example, vol. 13: 271, 274, 294, 310 (including three islands), 421, 425, 494; vol. 14: 7-8.

[23] G. N. Curzon, 12th April 1896, *BDF*, vol. 13: 153; see also the report of Spring Rice, *ibid*: 412, 413.

[24] Browne (1910): 429-30; Vanessa Martin in her article, in *EIR* relied on the documents of the Russian Foreign Affairs that indicates their attitude.

[25] *BDF*, vol. 13: 147.

[26] *BDF*, vol. 13: 21. There is a report of Arthur Herbert (7th December 1886) on his sensitivity concerning buying 500 photographs of Bam by Zukovski, professor of Oriental Studies at the University of Moscow.

At first the Qajar*s* had no idea of building a relationship with a third country to create a balance of powers, and then, when this idea was finally broached, all diplomatic affairs had by then been frustrated.[27] After Napoleon's victory over Russia (1807) and the signing of the *Tilsit* treaty, Iran made great efforts to introduce France onto the Iranian political economic scene but these efforts were defeated.[28] As we shall see, however, France in the Qajar period had cultural influences, in particular, training the first group of the intelligentsia and expanding the education of Iranian Muslims and Jews. In the late nineteenth century, Iran could not even get loans from French, Dutch and Belgian banks.[29] One of the main reasons for this failure was the politics of Britain and Russia.[30] One example of their political interference is a report that was sent to the Ministry of Foreign Affairs late in the reign of Muẓaffar al-Dīn Shah where it says that

> "a request was made by the Persian government to the French minister for the appointment of a French financier …The Russian government minister saw no objection …but thought the appointment should be subject to the following conditions…3) That he should not deal with a foreign loan without informing the British and Russian representatives."[31]

When the first German ambassador came to Iran in 1885 and pursued economic and cultural activities such as obtaining concessions for a German bank, a school and hospital, he was able to achieve some measure of success; the British embassy reported these efforts and regarded his acts 'as poisonous for relations between the English, the Persians and the Russians'.[32] More cases of their competition in the period are available.[33]

In accordance with these circumstances, Nāṣir al-Dīn Shah tried to give political economic concessions to Britain and Russia, respectively. Every time the government

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[27] Concerning the first efforts to establish relationships with other countries in 1850, see, F. Ādamīyyat (1348/1970): 458-62. On the relationship between Iran and France in that period, see, idem, 546-565; and on Iran, Austria and America see also, idem: 566- 575; see also Kamyar Ghaneabassiri, "U.S. Foreign Policy and Persia, 1856-1921", *Iranian Studies*, 35/1-3 (2002): 145-177.
[28] Bīnā, *op. cit*, vol.1: 118-121.
[29] F. Ādamīyyat, *Idi'uluzhī Nahḍat Mashrūṭīyyat Irān* [*The Ideology of the Constitutional Movement*] (Tehran: Payām, 1355/1976): 110-111.
[30] *BDF*, vol. 13: 294-5.
[31] *Ibid*: 477.
[32] *BDF*, vol. 13: 424.
[33] See as an example: F. Ādamīyyat (1348/1970): 412-14, 455-546.

was about to give a concession to one, the other would definitely raise objections and try to cancel it. For example, the first objections to the Tobacco Regie Concession given to a British company were made by Russia[34] and only afterward did it gradually change into popular protest movement (1891-92) led by clerics such as Mīrzā Ḥasan Āshtīyānī in Tehran and in accordance with one idea Mīrzā Ḥasan Shīrāzī in Iraq who gave their legal opinions prohibiting the use of all tobacco. The intelligentsia also supported the protest.[35] The influential courtiers, the royal princes, statesmen, and even the Shah's friends were divided into supporters of Russia or Britain. The Shah liked this division because he was able to exploit the power of each group whenever it was appropriate, even though he was not proficient in managing the game. In accordance with this policy, Britain got economic concessions in the north and Russia secured its own economic concessions in the south. They also gave loans with very humiliating conditions to the Iranian government.[36]

During the period of Muẓaffar al-Dīn Shah direct intervention of two powers were increased. Their embassies ordered the Shah to choose who to put in charge of ministries and local governorships.[37] It is perhaps adequate for our purpose here to read part of Curzon's report on the death of Nāṣir al-Dīn Shah (1896) to learn about one hundred years of British intervention.

> "We don't want the *walīʿahd* [that is Muẓaffar al-Dīn whose residence was in Tabriz] to ride down from Tabriz with an escort of Russian soldiers in the same

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[34] *BDF*, vol. 13: 80, 83-86.

[35] See the details of the crisis in Browne (1910): 51-54; Abrahamian: 73; Brown (1910: 52) after stating the effects of the issued *fatwā* on prohibition of tobacco said "what a discipline, what obedience, when it is a question of submission to the councils or rather the orders of an influential *mullā* or of a *mujtahid* of some celebrity!"; Cf. A. K. S. Lambton "Dustūre, IV-Iran" in *EI* [2] which ignored the role of cleric leaders in the protest; F. Ādamīyyat (1360/1981) verified some doubts on the genuineness on the *fatwā* of Mīrzā Ḥasan Shīrāzī in the following work, see, idem, *Shūrish bar Imtīyāznām-i Rizhī* [*the Protest against Regie Concession*] (Tehran: Payām, 1360/1981), esp.: 74-75, 78, 83, 100.

[36] N. Kirmānī, vol. 2: 3-4; See also: IDF= *Nahḍat Mashrūṭ-i Irān bar Pāy-i Asnād Wizārat Khārij-i* [*The Constitutional Revolution According to Iranian Documents of Ministry of Foreign Affairs =IDF*] (Tehran: Ministry of Foreign affairs, 1370/1970): 52, 89-91, 133; Abrahamian: 55-56 mentioned the list of concessions. See the humiliating conditions of the loans in *BDF*, vol. 13: 279-282, 292-93, and 418.

[37] For some instances, see, N. Kirmānī, vol. 2: 420- 424; *IDF*: 94-95; Y. Dawlat-Ābādī, *Hayāt Yaḥyā*, [*The Life of Yaḥyā*] (Tehran: ʿAṭṭar, 1371/1992), vol. 1: 206-7.

way as we ourselves brought down Muhammad Shah in 1835 to be installed as shah under Russian auspices…".[38]

Afterwards in 1896 the balance of power between Britain and Russia changed in favor of Russian interests and by preparing the ground for the Constitutional Revolution, Britain who failed to get some concessions such as that of Reuter's, that in the competition it remained behind and lost its support. Thus she decided to advocate the protests to redress backwardness.[39] The support had a logical justification, for the Revolution could weaken the position of the royal government as well as Russian interests, and both aims were in Britain's favor. In addition, Russia was engaged in a war with Japan (January 1905) and could not attend effectively to the political scene of Iran at the same time.

British support for the Revolution lasted a short time. It was only after Muḥammad ʿAlī Shah closed the *majlis* that it continued and influenced the Shah to accept the Constitution.[40] The atmosphere changed, however, after the Anglo-Russian Agreement (31 August 1907) when the Russians and the British agreed to carve Iran into three regions of interest, the north, the south and the neutral region.[41] The foreign powers interpreted the agreement as contributing to the independence of Iran and a declaration of the end of negative competition, but from an Iranian perspective, it was a very harmful covenant.[42] The Iranian view maintained that England only supported the Constitutional Revolution as long as it saw in it a means of combating Russian influence. A consequence of the agreement was that only a few years later Russian and British troops were able to occupy Gīlān and Āzarbāijān in the north and some regions in the south in 1911. Some historians believed that if World War I in 1914 in Europe had not broken out, Iran would have been destroyed through the results of the agreement of 1907.[43]

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[38] *BDF*, vol. 13: 152. Some more instances are available in G. N. Curzon, *Persia and the Persian Question* (London: Longman, Green, 1892).
[39] See detail of the story in N. Kirmānī, vol. 1: 501-11; E. G. Browne, *A Brief Narrative of Recent Events in Persia* (London: 1909): 6-27; Aḥmad Kasrawī, *Tārīkh Mashrūṭ-i Irān* [The *History of Iranian Constitutionalism*] (Tehran: Amīr Kabīr, 1357/1979), 110-119; *IDF*: 160, 167.
[40] N. Kirmānī, vol. 2: 202-3.
[41] See: *IDF*: 167; N. Kirmānī, vol. 2: 513; F. Ādamīyyat (1355/1976): 183-85.
[42] Browne (1910): 171-174; *BDF*, vol. 14: 24-5. Some clerics wrote a letter to the British Embassy, complained to them about the contents of the Agreement 1907, and said they had not had such expectations. *Irān nuw*, vol. 2, 44 (1910/1328). I have not seen the journal but it is quoted in *Iṭilāʿāt Sīyāsī Iqtiṣādī,* 21/ 227-230 (1385/2006): 87.
[43] A. Kasrawī: 460-61.

As to the position of Russia on the Constitutional Revolution, an additional note deserves mention here. During the Qajar period, especially from 1896 on, Russia supported the Shah and its advocates among the courtiers. They usually consolidated their position by threatening the Shah, the ulema, and others with the possibility of occupying the north of Iran.[44] The support continued after the victory of the Revolution, when they agreed to give refuge to Muḥammad ʿAlī Shah and some princes.[45] It was Ivan Alexwich, the then Russian diplomat in Tehran, who wrote his ideas on constitutionalism in the following manner:

> "No Russian who knows the condition of Iran can agree with the revolution in such a country which from every aspect is backward. It is clear that the movement is not a natural event and will be only conducive to more sedition and disorder in the society placing our interests at risk. Thus, it is obligatory for the Russian state to defend Iran and act seriously to safeguard its interests."[46]

From examining secret reports on behalf of the representative of the Russian army, it becomes clear that the military operation against the *majlis* and the assassination of some revolutionaries in 1908 by the Shah was planned and advocated by Russian military forces.[47] For a short while, Colonel Liakhoff, the commander of operations, became the governor of Tehran.[48] But, Britain kept silent as regard to these events at that time.

The Anglo Russian rivalry continued until October 1917 when the Bolshevik Revolution occurred, during which Russia disappeared from the Iranian political scene. Later on, it was only Britain who had influence and was the active player. Britain's political and economic control was further strengthened by the presence of her army in almost all parts.[49] The humiliating apex of the Iranian state appeared in the agreement of 1919, under which, in spite of its name of 'Friendship and Assistance', put Iran completely under the influence of Britain. To all appearances, she was independent but in

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[44] F. Ādamīyyat (1355/1976): 48. He said this illusion in the Iranian mentality has existed in various periods. But it should be added that this illusion was also in the British mentality. See as an example: *BDF*, vol.13: 153.
[45] Browne (1910): 445.
[46] Ivan Alexwich: 55. I translated the statements from the Persian version; See also Browne (1910): 429.
[47] A. Kasrawī: 590-595.
[48] Concerning his role in the operation, see Browne (1910): 207- 208, 213- 215, 223- 226.
[49] Ghanī: Ch. 1, esp. 22f.

reality, it was a colony of Britain.[50] The story of sad situation in the period of Aḥmad Shah goes beyond the scope of the present study.

2. The Socio-cultural Situation

2. 1. The Social situation

When the young Shah, Nāṣir al-Dīn, came to power (1848), bearing the honorific title of the 'Shadow of God' until his death (1896), the socioeconomic and administrative structure had not improved and remained antiquated. The main obstacle to progress was the dictatorial treatment of the Shah and the lack of adequate education of the people. During the period, two *ṣadr aʿẓam*, Amīr Kabīr and Sipahsālār, had carried out some reforms, but their efforts were not followed up by their successors. The lack of big cities, learned men, easy routes of communication and available transportation, the very low rate of literacy and limited places and subjects for learning were the main reasons for Iranians remaining ignorant of the realities happening in the world in the 19th century. This period witnessed an increase in the rate of poverty, a rise in the occurrence of natural famines as opposed to artificial ones (such as those of 1871), the lack of drinking water, the spread of cholera (1892), the sale of Iranian girls to neighboring countries, and most important of all, the dictatorial treatment of the Shah and the oppression of local governors.[51]

Nāṣir al-Dīn Shah was personally interested in modern methods and instruments in order to consolidate his government. With respect to this fact, the telegraph, a government newspaper, the army, new administrative structures and a new system of levying taxes, which seemed to be effective elements for sustaining the power of the Shah, came to Iran more or less. Under his dictatorial policy, the Shah awarded contracts for the management of the security and public order of various regions to local governors. The result was that anybody of his relatives who was ready to pay the most money would be successful in gaining a position and as a consequence, he could put much more

[50] On the covenant of 1919, see Ghani: 23; Under British pressure, a blacklist of Germans, Turks, and other undesirable foreign nationals had been prepared. These people were expelled and not allowed to re-enter Iran. The list included German technicians and even Orientlists and archeologists. (Quoted by Ghanī from Yair P. Hirschfeld, *German-Iranian Relations 1921-1941*' PhD Thesis); see also, idem: 30-34 on the Iranian supporters of the 1919 covenant and the conditions.

[51] N. Kirmānī, vol. 1: 125- 128, 275, 299-306; see also, I. Taymūrī, *ʿAṣr Bīkhabarī yā Panjāh Sāl Istibdād dar Irān: Tārīkh Imtīyāzāt* [*The Period of Ignorance or Fifty years of Dictatorship: the History of Concessions*] (Tehran: Iqbāl, 1357/1979).

pressure on the people. In addition, the custom of taking bribes became a common practice in the system even by the Shah himself.[52]

The *ʿulamā',* mostly jurists (*fuqahā'*), upheld Shiite doctrines, they constituted a religious power and held a great deal of influence within the society. The Shah needed their support to legitimize his power and at the same time, he tried to prevent their interference in political affairs. The balance of power between the two groups; the religious and the political, remained one of the main issues during the Qajar dynasty.[53] In one of his letters, the Shah warned against the influence of clerics in politics, expressly stating that

> "We haven't forgotten those *fatwās* concerning jihad issued by those who came from Najaf and Karbala[54] to Tehran and forced poor Fatḥ ʿAlī Shah to fight against the Russian state. Whatever we have been suffering has been a result of those injunctions of the *ʿulamā'* and surely there is no need to repeat them…"[55]

According to this policy, he separated the customary courts (*maḥākim ʿurfī*) from the religious ones (*maḥākim sharʿī*) in order to limit the scope of the clerics' power. The laws of the religious courts were based upon the Qur'ān, the *Sunna* and the *fiqh*-oriented opinions of jurists; in consequence, the laws and regulations were administrated and practiced by the clerics without any unity of policy. In addition, religious judgments were regarded sacred, so it was impossible to dispute a judge's final decisions. The religious courts took cognizance of civil cases and left the criminal ones for the customary courts in which the law was based upon the Oral law, including common sense, and precedents. Judges of the customary courts were careful not to issue any judgment that would oppose the religious courts, and it was common for them to allow a case to be appealed to the

[52] N. Kirmānī, vol. 1: 106-108, 250.
[53] The worthy point here is the number of religious students (*ṭalabi*) had increased from the period of Fatḥ ʿAlī Shah. They got an allowance from the *ʿulamā'* and sometimes, especially in the period of the Constitutional Revolution, acted as militants for them.
[54] What he meant by 'whom' were, Kāshif al-Ghiṭā' (d.1227/1812), Sayyid Muḥammad Ṭabāṭabā'ī known as Mujāhid (d.1242/1826) and Aḥmad Narāqī (d.1245/1829). They issued a *fatwā* of defensive jihad against Russia to provoke people to participate in the war.
[55] F. Ādamīyyat (1355/1976): 40. He quoted the letter from the documents of Nāyib al-Salṭana, the son of Nāṣir al- Dīn Shah.

religious court when it contained some special difficulty.[56] Nāṣir al-Dīn Shah and Sipahsālār, *ṣadr aʿẓam*, tried to centralize the administration of justice through the *dīwān khān-i* and to expand the field of customary jurisdiction by establishing the Ministry of Justice.[57] Sometimes a criminal case was appealed directly to the governor of the province, or to the Shah himself; this was especially the case if one of the parties involved was in any way connected with the government. The Shah or the governor would not be very much concerned with the law in such an event, but decided at once, and with a word or a gesture decreed retribution or reward.[58]After all, even though the customary courts had a prominent place in the administration of justice, the religious one kept its important legal authority in practice. It remains to be seen a particular court which in accordance with capitulation, was independent. It was established in the Foreign Ministry called *dīwān muḥākamāt-i khārij-i* [the Supreme Court of Foreign Affairs] to look after the affairs of foreigners and sometimes of religious minorities. Nevertheless, the consulates in various cities under the law of capitulation had had the right of judgment, and sometimes they interfered with the injunctions that were issued by the Supreme Court.[59]

2. 2. Education

Education was exclusive for boys and was only possible in traditional schools (*maktab khān-i*) directed mostly by clerics. In these schools, the student learnt reading and writing, Persian and Arabic grammar, some classic literature, and the ability to read and memorize the Qur'ān. If the students continued their education in the religious schools, they would learn some *fiqh* material, *ḥadīth*, jurisprudence, Aristotelian logic, interpretation of the Qur'ān and, in some cases, philosophy mixed with mysticism and theology in polemic fashion. Due to the fact that the *uṣūlī* attitude triumphed over the

[56] See more information concerning these courts in, S. G. W. Benjamin, *Persia and Persians* (London: 1887), Ch. 15, esp. 438- 443; see also on the dual system of religious (*Sharʿī*) and customary (*ʿurfī*) courts, both of which were, theoretically, under the power of the Shah, W. Floor "Change and Development in the Judicial System of Qajar Iran (1800-1925)" in C. E. Bosworth and C. Hillenbrand (eds.) Qajar *Iran, Political, Social and Cultural Change, 1800-1925* (Edinburgh: Edinburgh University Press, 1983) 113-47. Most injunctions issued by both courts were written in the margin of the enquiry or were issued orally; hence, there is rarely adequate archive or reliable documents left.
[57] See, A. K.S. Lambton 'Maḥkama, 3. Iran' in *EI*^{2}.
[58] Benjamin, *op. cit*.: 440.
[59] S. Wazīrī (1355/1976): 16-17.

akhbārī after the death of Muḥammad Bāqir Bihbahānī (1791-2),[60] jurisprudential discussions were welcome more than before. There was no material beyond these subjects and at the same time the basic knowledge, the method of instruction and texts were not adequate for educational purposes. Religious schools still suffer from these defects today.[61] A few students were going to Najaf and Karbala in Iraq (*ʿatabāt ʿāliyāt*) in order to continue at higher levels of Islamic studies to reach the grade of *mujtahid* and perhaps become sources of emulation.[62] The clerics who graduated from the *ʿatabāt* had great influence and they were highly respected by the people. As we shall see, all the clerical leaders of the Constitutional Revolution, whether for or against, had been educated there.

Regarding education, Amīr Kabīr followed the process of reform started by ʿAbbās Mīrzā. During Amīr Kabīr's period of office (1849), some of the students who were sent abroad to Britain and France by Mīrzā for the first time to learn practical subjects and sciences, foreign languages and medicine had returned.[63] In addition to dispatching students abroad, Amīr decided to train some students in the modern fields of knowledge within the country. The *dār al-funūn* [The Abode of Learning][64] was a center he established for learning new techniques and modern sciences, vis-à-vis the traditional schools, however he could not see the results of his work, since he was assassinated by the Shah in 1852. The students of the *dār al-funūn* were mostly the sons of the aristocracy and rarely came from the ranks of the religious minorities who later had a role in the Revolution. These reforms coincided with the revolt of Sayyid Muḥammad ʿAlī Bāb, which created a general atmosphere of political instability which came to an end with the execution of the Bāb (d. 1849) and many of his followers.[65]

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[60] See, H. Algar 'Behbahānī, Aqā Sayyed Muhammad Bāqir' in *EIR*.

[61] For more information concerning sources and methods have been applied in religious schools in the past and now see: S. Edalatnejad,"Zu Geschichte und Gegenwart der Seminare und religiösen Schulen der Schia: Ein Blick von innen", in *Gott ist das Haus des Wissens:* Ein Kunstprojekt in theologischen Schulen und Hochschulen von Qum, Isfahan und Mashhad, ed. by Hans Berger (Germany, Trier: Catholische Tholische Akademie Trier, 2005).

[62] See: Norman Calder, "Marjaʿ al-Taqlīd" in *OEMIW*.

[63] F. Ādamīyyat (1348/1970): 163- 64. On the process of dispatching Iranian students abroad, see, H. Maḥbūbī Ardakānī, *Tārīkh Mu'ssisāt Jadīd dar Irān* [*the History of New Institutions in Iran*] (Tehran: Dānishgāh Tehran, 1354/1976).

[64] On *dār al-funūn* see, F. Ādamīyyat (1348/1970): 347- 362.

[65] Concerning the Bāb and Bahā'ī revolt in Iran, whether for or against, see: Benjamin (1887), *Persia and the Persians*: 353- 355; Browne E. G, *Materials for the Study of the Bābī Religion* (London: Cambridge,

After the death of Amīr Kabīr, the process of modernization and reforms continued under the control of the Shah who selected only those modernizing strategies that had a role to play in the consolidation of his government. He stopped the growth of the *dār al-funūn*, forbade the opening of new schools, declared some newspapers illegal, prevented the government from sending students abroad, forbade people, including his relatives, from visiting Europe, and adopted other policies that are recorded in history books.[66] Further example of his policy in the realm of education was choosing students from a particular social class for the *dār al-funūn*. Then the first schools with a new educational system were established by Mīrzā Ḥasan Khān Rushdīyya in 1886;[67] an open-minded man who was successful in handling these schools in spite of the harsh opposition he received from the clerics. One of the consequences of the Shah's trip (1873) to Europe, however, was the feeling that modern education would threaten his monarchy.

In the period of Muẓaffar al-Dīn Shah (r. 1896-1906), a new system of schools and some colleges were established by the order of the Shah and in some cases with the support of some European countries, especially France. Among these new colleges, it is noteworthy to mention that one of them, established by the order of the Shah (1899) was established to train diplomats in the political and legal sciences.[68] This college was under the management of Mīrzā Naṣr Allāh Mushīr al-Dawla, the foreign minister, and his son Ḥasan Mushīr al-Mulk (Pīrnīya),[69] one of the authors of the draft of the Constitution and its Supplement. Graduates from the college had an important role to play in the modern structure of the state. The admission of students depended on the nobility of their family, success in entrance examinations, and finally the agreement of the foreign minister. The

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1918); A. Kasrawī, *Bahā'īgarī* (Tehran: Farrukhī, 1322/1943); Iʿtiḍād al-Salṭana, ʿAlī Qulī, *Fitn-i Bāb* [*the Sedition of Bāb*], ed. by Aʿbd al-Hussein Navā'ī (Tehran: Masʿūd Saʿd, 1333/1954); Valī Sirāj, Aḥmad, *al-Bahā'īyya wa al-Niẓām al-ʿĀlamī al-Jadīd* (Damascus: Dār al-Fatḥ, 1994); Cf. "Bāb", by Denis, MacEoin and "Bahā'ī", by Todd Lawson in *OEMIW*. There is no doubt that the revolt was one a great obstacle to the modernization of Iran. According to F. Ādamīyyat (1357/1978): 24, 146, esp. the footnote, the revolt of the Bāb was a cry against the fanaticism of the Shiite clerics, but then it added more superstitions to the previous ones. See also his analysis on the Bābī movement in *Amīr Kabīr and Iran* (1348/1970): 436- 451. A note will be mentioned concerning the works written regarding the role of the Bahā'īs &Azalīs in the Constitutional Revolution in the present chapter.

[66] See, as an example, Abrahamian: 73-75.

[67] See his biography in F. Rushdīyya, F., *Zindigīnām-i Pīr Maʿārif Rushdīyya: Bonyāngudhār Farhang Nuwīn Irān* [*The Biography of the Master of Knowledge: a Founder of New Culture in Iran*] (Tehran: Hīrmand, 1370/1991).

[68] *IDF*: 19-20.

[69] In chapter three of the present study, the biography of Pīrnīyā and his brother will be mentioned.

history of the world, international and political law, and French language were the main subjects taught at this college. It had some foreign professors and some Iranians who were educated in the *dār al-funūn,* such as Mīrzā Muḥammad ʿAlī Furūghī (d. 1942). He was a learned man who later became the principal of the college and he became twice prime minister in the period of Reza Shah.[70] He was an eminent intellectual who tried hard to bring about modernization and modern thoughts. He wrote for the first time valuable works such as *Ḥuqūq Asāsī yaʿnī Adāb Mashrūṭiyyat Duwal* [*Fundamental Law, i.e. the Principles of the Constitutional States*] in 1326/1908,[71] and translated a book in economics as *Usūl ʿIlm Tharwat Milal* in 1323/1905.[72] In these books, he tried to present the principles of modernity in the field of political economic law. He also wrote *Seyr-i Ḥikmat dar Urūpā* [*The History of Philosophy in Europe*] to introduce the main ideas of Western philosophers from Thales (624?-546? B.C.) to the great philosophers of the 19th century. He had a great role in saving Iran from the invasion of foreign military forces during World War I.

2. 3. Newspapers

Mīrzā Ṣālih Shīrāzī, who was one of the eight students sent to Europe and returned in 1819,[73] printed the government newspaper *Kāghadh-i Akhbār* [*Newspaper*] for the first time in 1837. It reported in flattering tones, on the orders of the Shah and news from the royal court in a language that the people did not easily understand. Amīr Kabīr changed the style of the newspaper. For a long time, this newspaper and others similar were published in a simple format with almost the same content reporting on governmental affairs and news about statesmen.[74] Educated people however, showed no desire to read

[70] It seems to me a PhD thesis deserves to be written on what he did in the practical as well as intellectual spheres during his life in Iran. For more information regarding him see: ʿAlī Aṣghar Ḥaqdār, *Furūghī wa Sakhtārhāy Nuwīn Madanī* [*Furūghī and The New Structures of Civil Society*] (Tehran: Kawīr, 1384/2004); F. Ādamīyyat (1355/1976): 282-3.

[71] It was reprinted in 2002 (Tehran: Kawīr) with an edition and brief history of the author's life, ed. by ʿAlī Aṣqar Ḥaqdār.

[72] It was printed for the last time in Tehran (Tehran: Farzān Rūz, 1377/1998). The original version, however, was in French and written by Paul Beauregard; Cf. A. Amānat 'Constitutional Revolution': 166a, in *EIR,* who mistakenly attributed the original version to Adam Smith.

[73] F. Ādamīyyat (1348/1970): 363.

[74] See, B. Jabbārlūy, "Barresī Tuṣīfī Wīzhigīhāy Maṭbuʿāt Durān Mashrūṭ-i" [The examination of Journals and Newspapers in the Period of the Constitution], *Iṭilāʿāt Sīyāsī Iqtiṣādī,* 21/ 227-230 (1385/2006): 330-344.

the newspaper. The first newspapers with different formats and content to exert an influence in awakening Iranians used to be published abroad and were brought into Iran after delays and sometimes smuggled into the country. Some of these newspapers were as follows: *Akhtar* [*the Star*] (1875) published in Istanbul, *Qānūn* [*The Law*] from London (1880-9), and *Ḥabl al-Matīn* [*The Firm Cord*] a weekly (1893) coming from Calcutta. It was during the period of the Revolution that the number of newspapers increased.[75] Religious minorities also published some newspapers that will be introduced below.

2. 4. Books

It is pertinent to our discussion to look at the books that influenced the literate classes of society in the late 19th century. Books indirectly offered modern ideas such as the equality of all people before the law which later came onto the political scene in the society. The process of translating books was started by the order of Abbās Mīrzā[76] with the assumption that by these books the government could acquire the valuable experience of Western progress. Some of these books were Voltaire's *Essays on Peter the Great*, *Charles XII*, and Edward Gibbon's (1737-1794) *The History of the Decline and Fall of the Roman Empire*.[77] In the period of our study, there were scholars such as Fatḥ ʿAlī Ākhundzād-i (1812-1878), who held secular anti-clerical views and wrote notable books and plays in a new style, but they were never known among the masses. However, late during the rule of Nāṣir al-Dīn Shah, a free translation of the novel of James Morier (1780-1849) *Ḥajī Bābā Isfahānī*[78] achieved enduring popularity. It was translated by Mīrzā Ḥabīb Iṣfahānī and even though it displayed a hostile and disdainful portrayal of the Persian character, at the same time it provoked Iranians to acknowledge their backwardness and defects by its simple and funny language. The translator also had

[75] For more information on the newspaper before and after the period of the Constitutional Revolution (1906), see: M. Ettehadieh, "Constitutional Revolution, v. the press" in *EIR*; Abrahamian: 87; M. Ājudānī, *Mashrūṭ-i Irānī* [*Iranian Constitutionalism*] (Tehran: Akhtarān, 1382/2002), 239-247.

[76] These books were translated by a man whose name was Mīrzā Reḍā Muhandis educated in Britain; see F. Ādamīyyat (1348/1970): 349. I have not been able to find more information concerning the translator.

[77] F. Ādamīyyat (1357/1978): 151-152. M. Ājudānī: 213-14. Only the first volume of Gibbon's work was published (no. 66 of Iranian National Library, quoted by Ādamīyyat: *ibid*). Because of the death of Abbās Mīrzā and the fact that the text made Fatḥ ʿAlī Shah very angry, the remaining volumes were never published.

[78] The main title is *The Adventures of Hajji Baba of Ispahan*. The last Persian edition of the book was published with editing, introduction and valuable notes by Dr. Jaʿfar Muddarris Ṣādiqī (Tehran: Nashr Markaz, 1379/1999).

another story *Gharā'ib ʿAvā'id Milal*[79] [*The Strange Things of Nations*] which was rendered from Arabic and published in 1885. This book was a kind of anthropological story, described by the characters, and depicted the illogical and irrational convictions of various nations. One of them, according to the story, insulted the People of the Book and other religious people. The presentation of such a theme in fictional language was a really innovational act in a society that did not pay attention to other faiths. Another irrational conviction, according to the story, was the belief in the role of superstitions that was current among Iranians.[80] Another important critical work was *Sīyāḥat nāmiy-i Ibrāhīm Biyg* [*The Travelogue of Ibrāhīm*] whose author explains through a fictional story the wishes of a Persian national who enthusiastically returns to his homeland and finds nothing except the tyranny of the ruler, ignorance and corruption. It was written by Zayn al-ʿĀbidīn Marāghi'ī. The first volume was published in 1896, the second in 1905, and the third in 1909.[81] The book had a great influence on revolutionaries and according to Nāẓim al-Islām Kirmānī[82] the first volume was regularly read in secret societies before the Revolution.[83] In very simple language, this was the first time a book contained material that had some ideas on codes of law, egalitarianism and administering the codification of law. The name of the constitutionalism and the *majlis* even are mentioned in this work.[84]

There are two more stories worth mentioning here. The first was a historical, political and philosophical story of a young man whose name is Telemak.[85] The story as a matter of fact, criticized the state of Louis XIV and his dictatorship. The author also criticized the policy of the Church in the West and believed that the state should be associated with reason and civility. The story explicitly talks about natural rights and its elements, i.e. equality in the distribution of wealth; the rejection of inherited privilege; opposition to war, and showing a regard for individual merits.[86] These concepts were unfamiliar to Iranians and they learned about them through the story. The second story

[79] The author was Rufāʿa Bak from Egypt.
[80] F. Ādamīyyat (1355/1976): 83- 85. I quote the content of the books according to Ādamīyyat.
[81] F. Ādamīyyat, *ibid*: 85-100.
[82] Some information concerning Kirmānī will be offered below.
[83] N. Kirmānī, vol. 1: 248-52.
[84] Ādamīyyat, *ibid*: 96.
[85] *Les aventures de Telemaque* written by Fenelon and translated by ʿAlī Khān Nāzim al-ʿUlamā' in 1886.
[86] F. Ādamīyyat (1355/1976): 55-65.

was *Manṭiq al-Waḥsh* [*The Language of the Beasts*] originally written by Comtesse de Segure in French, introducing some elements of the natural system, and human rights in the memoirs of a donkey. Mīrzā ʿAlī Khān Amin al-Dawla, the learned *ṣadr aʿẓam* of Muẓaffar al-Dīn Shah, rendered the story from its Arabic version and published in 1300/1882.[87] The story is reported by a donkey complaining under the oppression of its owner. Through complaints, the donkey little by little understands whose rights, and in the Persian version, the translator intentionally inserted material relevant to Iranian society, criticizing the morality of provincial aristocrats and thus explaining the concepts of natural rights and equality.[88] These works made a background to bring about later some modern terms and concepts in the mind of learned men.

2. 5. Eminent Personalities

There were important personalities who had an important role in the process of the changes that led to the bringing about of constitutionalism. As to the prominent intelligentsia and clerics who by their acts and works played a key role in awakening Iranians, especially the elite class, and who paved the way for the emergence of the idea of the Constitution, eight persons deserve mention. They are as follows:

a- Sayyid Jamāl al-Dīn Asad Ābādī (1839-1897),

b- Sayyid Muḥammad Ṭabāṭabā'ī (1843-1913),

c- Sayyid ʿAbdu Allāh Bihbahānī (1840? -1911),

d- Fatah ʿAlī Ākhundzād-i (1812-1878),

e- Mīrzā Malkam Khān (1834-1908),

f- Mirzā Āqa Khān Kirmānī (1854-1896),

g- ʿAbd al-Raḥīm Ṭalbov (1834-1911),

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[87] Idem: 66.

[88] See, Idem: 66-76. Another less important book was *The Virgin's Kiss* (*Bus-i ʿAdhrā*') by G. Reynolds, translated by Sayyid Ḥusayn Khān Shīrāzī in 1307/1889, published in 1326/1908. See, F. Ādamīyyat (1355/1976): 76-82. Cf. A. Amanat, 'Constitutional Revolution-Intellectual background: 164-5'in *EIR,* where the author mentioned among these books only *Ḥājī Bābā* and *Sīyāḥat nam-i* and then, according to H. Ābādīyān, "Some Critical Points on the Translation of Articles on Constitutionalism in *EIR*", vol. 1/256 *Sharq newspaper* (14th Murdād 1383/4th August 2004): 8 added an unknown book attributed to Mīrzā Abbās Nūrī, the son of Abd al-Bahā', *Risāl-i Madanīyya* in which he proposed the creation of representative institutions. Ābādiyān then criticized this saying that this theme did not correspond with the general ideas of Bahā'īsm which were not to involve itself in political discussions. In addition, the book was published abroad only once after the Islamic Revolution of 1979, therefore the authenticity and validity of the book is still dubious.

h- Mīrzā Yūsuf Khān Mustashār al-Dawla (1808?-1895).

There are writings on each of them in Persian and English; nevertheless, for our inquiry it is adequate to know some relevant useful points regarding these individuals. On Sayyid Jamāl, known as Afghānī, according to Ādamīyyat, scholarly historian, his ideas on equality were not published in Iran. He did not have, by and large, systematic and profound ideas and was only a pan-Islamist who propagated Islamic nationalism in the 19th century when nationalism was in vogue. He became famous among the people of Afghanistan, Egypt, and India more than Iran.[89] The biographies of Ṭabātabā'ī and Bihbahānī are frequently mentioned in relevant sources, but there are some points concerning their position against Sheikh Faḍl Allāh Nūrī, a famous Ayatollah who disagreed with constitutionalism, which we will mention. Concerning the ideas of Fataḥ ʿAlī Ākhundzād-i,[90]Mirzā Āqa Khān Kirmānī[91] and Abd al-Raḥīm Ṭalbov,[92] who tried to introduce some aspects of Western thought in Iran, Ādamīyyat has independent treatises. These treatises are very valuable and readable, but their publication has been forbidden in Iran since 1979. He described their ideas with sympathy and occasionally with exaggeration. For our inquiry, Mīrzā Malkam Khān and Mīrzā Yūsuf Khān Mustashār al-Dawla are important amongst these eight personalities, for they had a relatively prominent role in understanding the concept of constitutionalism and the codifying of modern laws, which had some influence on the codification of the rights of religious minorities.

While Malkam[93] was apparently a Muslim by birth, he basically belonged to an Armenian family and his father had converted to Islam.[94] He was a secular intellectual, just as he appeared in his early works. Among his works, eight of them are on the essence of law. He wrote five of treatises (between 1858- 1862) when he was young and only

[89] F. Ādamīyyat (1355/1976): 33. He regarded Nikki Keddie's work on Sayyid Jamāl and other her works superficial in 1976. Concerning Sayyid Jamāl, see: Browne (1910): 1-30, 401; A. Ḥabībī, "Afghānī", in *EIR*, and Nikki R. Keddie, "Afghānī" in *OEMIW*.

[90] See also, H. Algar, "Akhūndzāde" in *EIR*.

[91] See also, Bayat Mangol, "Mirzā Āqa Khān Kirmānī: 19th century Persian Nationalist", *Middle Eastern Studies*, vol. 10/ 1(1974).

[92] See, Mehrdad, Kia, "Nationalism, Modernization and Islam in the Writings of Ṭalbov-e Tabrīzī", *Middle Eastern Studies*, vol. 30, 2 (1994), 201-223.

[93] He was educated in France then became a teacher in the *dār al-funūn* and then secured a political position as ambassador to Egypt and Britain. About him see, Abrahamian: 65- 69.

[94] Cf. Abrahamian: 65, Afary: 26. They attributed the conversion to Malkam not only to his father.

showed them to the Shah, his friends and some of the courtiers. These works are as follows: *Daftar Tanẓīmāt* [95] [*Book of Reform*] (1858), *Majlis Tanẓīmāt* [*Committee of Reforms*] (1859-60), *Dastgāh Dīwān* [*The System of Tribunal*] (1860-61), *Daftar Qānūn* [*Notebook of the Law*] (1860), and *Rafīq wa Wazīr* [*Friend and Minister*] (1861). With the exception of *Daftar Qānūn*, the rest of his works explained how the government should handle its affairs. The main proposal in his recommendations was the separation of the affairs of government into a legislative council and an executive cabinet, but both were to be appointed by the Shah. *Daftar Qānūn* was a new penal code, which he adopted from the French Penal Code. His books were never published among people to educate them as to the role of law and regulations in the reform and administration of the affairs of the country. His thinking being what it was, the Shah, influential courtiers, local governors, and the intelligentsia also read his works.[96] During his mission to London as ambassador, he was discovered to be engaged in financial corruption by selling a concession lottery to a British company. After he was relieved of all governmental responsibilities, he began to publish the newspaper *Qānūn* [*Law*] (1890-1898, which was altogether published in 41 issues) that had a liberal Islamic tone and content in order to attract the attention of the clerics. He intended to take revenge on the Shah and *ṣadr aʿẓam* for removing him from his post. Thus, he explicitly criticized them in his newspaper and at the same time offered modern ideas in Islamic religious terms. This was a trend that did not have a precedent in the earlier works of Malkam before 1890. If Malkam remained in his position, he would never have thought of publishing the *Qānūn*. In addition, after 35 years he renewed his idea in the previous treatises with a new attitude to attract the attention of Muẓaffar al-Dīn Shah. In his new works, he changed the previous idea that reform in Iran should involve absolute obedience to the West. While Ādamīyyat regarded Malkam Khān in his works as the father of introducing modern concepts and law in Iran, Algar[97] took him as a politically hypocritical man and

[95] Another name of this treatise is *Kitābch-i Ghaibī* [*Unseen Notebook*].

[96] The eighth work, which is related to our discussion, is an English lecture on the process of the civilization of Iran. His treatises were published for the first time in 1325/1907 ed. by Hāshim Rabīʿzādih, for the second time in 1948 ed. by. Muḥīṭ Ṭabāṭāba'ī, and for the third time in 1383/2003, ed. by. Ḥujjat Allāh Aṣīl (Tehran: Niy, 1383/2003). The present study relies on its latest edition.

[97] H. Algar, *Mīrzā Malkam Khān: A Study in the History of Iranian Modernism* (Berkeley: University of California Press, 1973); see also: N. Najmī, *Sar Sipurdigān Ingilis dar Irān* [*The Puppets of Britain in Iran*] (Tehran: ʿAṭṭār, 1378/1998).

disregarded his efforts in offering modern concepts to Iran. However, M. Ājudānī has shown balance in his judgment on Malkam and showed both sides of his character. The analysis on Malkam here has been obtained from the work of M. Ājudānī.[98]

As for Mīrzā Yūsuf Khān Mustashār al-Dawla [Counselor of the State], it can be said that he was a brilliant thinker, with a religious attitude, who had devoted all his life to the dignity and service of his government and people. When he was about eighty years old, Nāṣir al-Dīn Shah had heard something about his writing of *Yik Kalam-i* [*One Word*], in which he mentioned several times the equality between the king and a beggar before the codes of law. The Shah ordered the confiscation of his property, imprisoned, and tortured him. He died in 1895. His main work, i.e. *One Word*, with his biography was autographed in 1895 in Tehran by the author and was published in Tabriz in 1906, in Tehran in 2003, and in a Persian-English version in Amsterdam in 2007.[99] Under the influence of Malkam, he believed that the secret of progress in Western countries lay in one word; i.e. having a new system of law.[100] He followed Malkam in the idea of the separation of the legislature and the executive affairs in government. He thought that new terms in modern law such as justice or *egalite* in French could be found in Persian Islamic literature (*ʿadālat*). Thus, he selected nineteen articles of the French Constitution and inserted some Qur'ānic verses and *ḥadīth* to demonstrate similarities between Islamic doctrines and the Codes of the French Constitution.[101] He argued that he didn't intend to change regulations in *fiqh*; rather he intended to change their format so that they would become law books that would be universally available and expressed in the language of the people.[102] The method of *One Word* will be evaluated in "textual analysis" in chapters three and four of the present study. The last works of Malkam and the works of Mustashār al-Dawla were models for the authors of the Constitution. We shall see that the articles were written in a way that did not offend the Shah and the *ulema.* That is why the Constitution was formed in mixed motifs including Islamic, Western and Iranian content. The critique of the integrated policy of Malkam and then that of the Constitution

[98] See, M. Ājudānī, (1382/2002): 281-362.
[99] *One Word*: xvi- xvii. The bibliographical character of the latest version is *The Essence of Modernity*, Mirzā Yūsuf Khān Mustashār ad- dawle Tabrizi's Treatise on Codified Law (*Yik Kalam-i*), ed. by A.A. Seyed- Gohrab & S. McGlinn (Netherlands: Rozenberg SG Publishers & Purdue University Press, 2008).
[100] *Op. cit*., 6-7, 9.
[101] *Op. cit*., 13, 15, 27- 29, 37, 39, 53, 75 and in many other cases.
[102] *Op. cit*., 11.

is the main subject of the work of M. Ājudānī, *Mashrūṭ-i Irānī* [*Iranian Constitutionalism*]. According to him, expressing this policy was a kind of betrayal of the country and it caused a defective, failed Revolution and Constitution to appear, or we could see the emergence of an Iranian style constitution.[103] A lion was born without a mane, a tail and an abdomen.[104]

However, intellectuals such as Malkam and Mustashār al-Dawla did not have any other choice save regarding the religious context of Iran. Still, we see after one hundred years of the Constitutional Revolution, that every new subject with a religious coloring might be more easily accepted by ordinary people than other subjects. To understand what the real context is, it will be enough to remember that Ājudānī himself narrated, in a scholarly manner, the story of Iranian communist groups, especially *ijtimāʿiyyūn ʿāmmīyyūn* [the Social Democrats] and later on the *Tūd-i* party, which used many verses of the Qur'ān and religious items in their announcements and internal regulations to make themselves acceptable to their audiences.[105] One evidence can prove the main claim and show the real context; some preachers who were clerics regarded constitutionalism as a sign of the appearance of al-Imām al-Mahdī, the Imam in the Occultation, and they thus predicted that, according to the Qur'ān and *ḥadīth* that the Revolution would be victorious.[106]

3. The Constitutional Revolution

3. 1. Resources

Casting a cursory look at the main works concerning the Constitutional Revolution would help us give a relevant analysis on the subject. It is necessary to consider the historical

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[103] M. Ājudānī (1382-2002): 204 – 6 and no. 335 of his footnote. See his critique on Mīrzā Malkam Khān in no. 531 of the footnote and also p. 312, 317-19, esp. 327, 330-31 in which Malkam, in spite of his claims in his first works, in the *Qānūn* newspaper believed that the government should be in the hands of the *ʿulamā'* then he fabricated a decree on behalf of jurists that declared the prohibition of paying tax to the government; Cf. Ādamīyyat (1357/1979): 32. M. Ājudanī in 334-336 criticized Malkam Khān and Mīrzā Āghā Khān Kirmanī, whom were known as secular and nationalist, that they had a plan to cooperate with Ẓil al-Sulṭān, the governor of Isfahan, the older brother of Muẓaffar al-Dīn Shah, in order to bring down the reign of Nāṣir Al-Dīn Shah.

[104] It refers to a poem of the great Iranian mystic poet Jalāl al-Dīn Rūmī (d. 672/1273) in *Mathnawī maʿnawī*.

[105] M. Ājudānī: 414-15.

[106] *Rasā'il Mashrūṭīyyat* [*Monographs on the Constitutionalism*], ed. by Gh. Zargarīnizhād (Tehran: Kawīr, 1374/1995), Ahrumī Būshihrī: 273.

works written by historians who were close to the time. Five important historians who were more or less eyewitnesses of the phenomenon are Nāẓim al-Islām Kirmānī (1863-1918), Aḥmad Kasrawī (1890-1945), Yaḥyā Dawlat Ābādī (1862-1940), E. G. Browne (1862-1926), and Mahdī Malikzād-i (1884-1955).

Since Kirmānī was a cleric who belonged to the middle class of the society and did not follow the interests of any particular group, his work[107] is the main source for all researchers, even Browne who used to live in Iran at that time. At the same time, it is the fact that he was close to the religious leaders of the Revolution.[108] He wrote his daily memoirs during the events and, even though he did not have a standard style in recording historical events, his memoirs do enjoy scholarly value and validity.

Kasrawī,[109] a historian who was living in Tabriz, wrote about events in Tehran but rarely of other cities and it was all based on his own information; nevertheless, his book has a style in recording historical events, which is quite new to the Persian.[110] Since he was a secular, iconoclastic man, religious factions, whether Islamic or *Bahā'ī*, do not like his reports and judgments.[111] He also wrote treatises on *Shīʿīsm* and *Bahā'īsm* and was finally assassinated by a radical Islamic group called the Devotees of Islam (*fadā'īyān-i Islām*).[112]

The work of Dawlat Ābādī,[113] is an autobiography that contains much valuable information, even though was written without any standard style, hence it is difficult sometimes to find out relevant material for research purposes. Since, he was born in a clerical family and grew up in a religious atmosphere, he knew many of the customs and humor of such families. One can find in his book an anti-clerical approach and perhaps

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[107] N. Kirmānī, *Tārīkh Bīdārī Irānīyān* [*History of Awakening of Iranians*], 4th edition, ed. by Saʿīdī Sīrjānī (Tehran: Agāh, 1362/1983).
[108] Cf. M. Malikzād-i, *Tārīkh Inqilāb Mashrūṭīyyat Irān* [*The History of Constitutional Revolution*] (Tehran: ʿIlmī, 1363/1983), vol. 1: 8-10. He regarded Kirmānī as a man who was also close to dictators and believed that Kirmānī exaggerated in his description concerning some actors in the Revolution.
[109] *Tārīkh Mashrūṭ-i Irān* [*The History of the Iranian Constitutionalism*] (Tehran: Amīr Kabīr, 1357/1979).
[110] On examination of his work see, S. Yazdānī, *Kasrawī wa Tārīkh Mashrūṭ-i Irān* [*Kasrawī and the History of the Constitution*] (Tehran: Niy, 1376/1997); on his attitude, see M. A. Jazāyery, 'Kasrawī, Iconoclastic Thinker of Twentieth Century Iran' in *On Islam and Shiʿīsm,* ed. Aḥmad Kasrawī (California: Mazda Publishers, 1990).
[111] See, Malikzād-i (1363/1983), vol. 1: 8, vol. 3: 258-259.
[112] See, Farhad Kazemi, "Fedā'iān Eslam", in *EIR*.
[113] Yaḥyā, Dawlat Ābādī, *Hayāt Yaḥyā* [*The Life of Yahyā*] (Tehran: ʿAṭṭār, 1371/1992).

that is why some regarded him as *Azalī*.[114] However, it is important to know that the government and some clerics in the period accused every opponent or open-mind man as a *Bābī* or *Azalī* in order to easily suppress his views and ideas.

Browne's works on Iran are still regarded as unique and authentic. He wrote his book over one hundred years ago and even though he mentioned in his introduction to *The Persian Revolution of 1905-1909* that he did not intend to write a historical work, he practically did. Without Browne's work, i.e. without the eyes of a foreign observer, one cannot look at the phenomenon as it was and perceive the facts.[115]

Malikzād-i is a son of Malik al-Mutakallimīn (1864-1908), the open-mind cleric who, according to Browne,[116] became *Azalī* and due to his radical sermons and treatment was assassinated by Muḥammad ʿAlī Shah in 1908. Malikzād-i wrote his work, which included his analyses and memories on the events, about forty years afterward. He highlighted the role of some clerics and intelligentsia who, according to his idea, other historians did not do justice them in their works. As such, it benefits scholars to see his material and attitude to compare their data with others.

Furthermore, there are some monographs that were written for and against constitutionalism indicative of clerical attitudes on the subject.[117] These monographs would help us to find the bases of those current *fiqh*-oriented opinions as well as some articles in the Constitution 1907 and 1979, which contain some discrimination against religious minorities. Among historians, except for F. Ādamīyyat, few paid attention to these monographs that demonstrate the clerics' impression of and their argumentation regarding modern concepts and terms.

It would be also important to make a few comments on the analytical works written on the Constitutional Revolution. Some of these works were written to describe all the

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[114] *Azalī* attributed to Ṣubḥ Azal, the main successor to Sayyid ʿAlī Muḥammad Bāb until 1280/1863. Then from 1863 to 1866 his brother Mīrzā Ḥusayn ʿAlī claimed that he was the real successor and so the followers of Bāb became divided into two groups Azalī and Bahā'ī. See, Ādamīyyat (1348/1970): 448-451.

[115] Cf. Malikzād-i (1363/1983), vol. 1: 11. He regarded some of Browne's data wrong.

[116] Browne, *Materials for the Study of the Babī Religion*, 221-222, quoted in Afary, 45. See his biography in, M. Malikzād-i, *Zindigānī* [*The life of*] *Malik al-Mutakallimīn* (Tehran: ʿIlmī, 1325/1946). There is no designation in his works to indicate that his father was Azalī.

[117] *Rasā'il Mashrūṭīyyat,* [*Monographs on the Constitutionalism*] ed. by Ghulām Ḥusayn Zargarīnizhād (Tehran: Kawīr, 1374/1995).

facts that contributed to the making of the movement and analyze them according to their theories. In this category, three works may be identified, they are as follows: (1) the works of Fireydūn Ādamīyyat, and especially relevant to the present study, his book *Idi'uluzhī Nahḍat Mashrūṭīyyat Irān* [*The Ideology of the Constitutional Movement*], (1355/1976), (2) *Iran between Two Revolutions* by Ervand Abrahamian (1982), and (3) *Mashrūṭ-i Irānī* [*The Iranian Constitutionalism*] by Māshāllāh Ājudāni (1382/2003). In another category, there are some works that are rather adaptations and incorporations of previous works. Such works can hardly be regarded as valid and authoritative. In the third category, there are works written to impose the ideas of the writers on the reader and to change the reality into what they please. Some writers tried to highlight the role of social-democratic personalities and groups, others intended to emphasize the role of the clerics vis-à-vis the intelligentsia or vice versa, and other writers made futile efforts to present the Revolution as a result of *Azalī* ideas.[118] In the last type of works, everybody might be regarded for example as an *Azalī*, even Ayatollah Najm Ābādī, a famous jurist of Tehran and other clerics who were open-minded high-ranking clerics.[119]

3. 2. Events

The details of events were reported in historical works concerning the movement, but it is relevant to the present study to review some important aspects of these events to give an appropriate analysis regarding the main topic. The spark of the Revolution (1905-1911) was lit in Tehran by the public arrest and punishment of two respected businessmen for raising the price of sugar (12 December 1905). Following the incident, people gathered in the mosques and meeting places, and listened to the preaching of some clerics who were

[118] It was Nikki Keddie, Janet Afary and some authors of the entry under 'constitution' in *EIR* such as ʿAbbas Amānat who tried to highlight in their works the role of the *Bahā'ī Azalīs* in the Revolution 1906. See, for example, Afary: 4, 28-29; Cf. Malikzād-i (1363/1983), vol. 3: 610, who denied the role of the *Bahā'ī Azalīs* in the Revolution and attributed the accusation of being *Bābī* and against the revolutionaries to the clerics opposed to constitutionalism such as Sheikh Faḍl Allāh Nūrī.

[119] J. Afary: 48. She also certainly regarded Dawlat Ābādī (41), Majd al-Islām Kirmānī (1872-1922, P.45) as *Azalī*; Cf. Malikzād-i (1363/1983), vol. 3: 500, that regarded Majd as an adherent of the Queen and had some secret relation with the monarchy). In addition, Afary with some reservation regarded Naẓim al-Islām Kirmānī (42), as *Azalī*. On pp. 27-28, she introduced Sayyid Jamāl Asad Ābādī and exaggerated about him, since in her opinion he had some *Azalī* inclinations. Then on p. 44, she rejected Kasrawī, because he did not regarded the role of *Bahā'īsm* and had an anti-*Bābī* attitude. However, the role of the religious minorities and women in the Revolution was highlighted in her book in a positive way for the first time.

directed by two high-ranking clerical leaders, that is, Sayyid ʿAbd Allāh Bihbahānī,[120] and Sayyid Muḥammad Ṭabāṭabā'ī.[121] They invited a group of religious students (about 2000 persons) to take asylum (*bast*)[122] in the Shah ʿAbd al-ʿAẓīm shrine, a religious place in Rey, south of Tehran. Financially the *bast* was supported by some merchants among whom were Zoroastrians, some of the intelligentsia, and even some courtiers. The government asked the ulema about their demands. At first, they only called for the dismissal of ʿAyn al-Dawla,[123] *ṣadr aʿẓam* and son-in-law of Muẓaffar al-Dīn Shah, and of Mr. Naus, a Belgian manager of the customs house, and then later added to the list, establishing a House of Justice (*ʿadālat khān-i*).[124] The government accepted the request to restore the *ʿadālat khān-i* for the practice of Sharīʿa law in order to save people from the tyranny of local governors and to guarantee the safety of refugees in the sanctuary. This stage of protest soon ended, but still the ulema were suspicious of the reforms and doubted if the government really intended to keep its promises.

The early days of 1906 coincided with the month of *muḥarram.* It is of special significance to the Shiites because the martyrdom of the third al-Imām Ḥusayn occurred in that month in the year 61/680, and it provided the best opportunity for the clerics to resume their denunciations of the government. In the first clash between the government and the protesters, some preachers were arrested and compelled to leave the city. This sparked off even more protests against those decisions bringing the protesters into conflict with soldiers. Suddenly one of the religious students, who was a *sayyid* (in the lineage of the family of the Prophet, hence quite respected by the public) was shot and killed by an officer. This event added fuel to the flame. After a few days, the clerical leaders including Sheikh Faḍl Allāh Nurī[125] in this time made a decision to leave Tehran

[120] On his biography, see M. K. Āsāyish, 'Bihbahānī, Sayyid ʿAbd Allāh' in *EWI*; A. Algar, ''ʿAbdallāh Behbahānī' in *EIR*.
[121] On Ṭabāṭabā'ī, see I. Ṣafā'ī, *Tārīkh Mashrūṭīyyat bi Riwāyat Asnād* [*The History of Constitutionalism Based on Documents*] (Tehran: Yārān, 1380/2001): 507- 509; M. Bāmdād(1351/1973), vol. 3: 279-280; L. Ājudānī: 191- 194.
[122] Concerning the role of this practice in Iran mostly in religious places regarded as a kind of strike; see J. Calmard, 'Bast' in *OEMIW*.
[123] See J. Calmard, 'Ayn al-Dawla' in *EIR*.
[124] N. Kirmānī, vol. 1: 353, 357.
[125] He joined to the adherent of constitutionalism for about one year and then changed his mind. About Nūrī, see, *Rasā'il, Iʿlāmīyyihā, Maktūbāt Sheikh Shahīd Faḍl Allāh Nūrī* [*Monographs, Announcements, Writings and a Newspaper of Sheikh Martyr Nūrī*], ed. by Muhammad Turkamān (Tehran: Rasā, 1362/1983).

and take refuge in Qum (15th July 1906). According to Browne, 'thither they were followed by such crowds that the road from Tehran to Qum is said to have resembled the street of a town, and hence the Persians name this second exodus *hijrat kubrā*, 'the Great Flight'."[126] In addition, some representatives of the merchants and bankers took refuge at the British Legation, and later others were joined them. As already stated, religious minorities, especially Zoroastrians also participated in the meetings. During the time, the demands of the refugees were for the establishment of a Court of Justice, and for a Constitution, and a National Assembly. The telegraph, the new symbol of modernization established by a British company, played an important role during the Revolution in expanding the protests to other cities. Finally, after many discussions and negotiations, on 5th August 1906 which coincided with his birthday, the Shah agreed to depose *ṣadr aʿẓam* and to endorse the Constitution. The occupation of both sanctuaries came to an end and the ulema went back to Tehran, greatly respected and warmly welcomed by the public, including some groups of the religious minorities and representatives of the Shah. All the clerics remained united until the date of their demands; there was no disunity. When the clerics were being welcomed by various people, some of them were the religious minorities who erected tents in their encampments in the streets. When the leaders, Ṭabāṭabā'ī and Bihbahānī, entered their encampments and were received by being offered beverages, they drank without paying attention to the issue of the purity or impurity of their drinks. Kirmānī, surprisingly, reported the story while, according to him, the people noticed the events with much surprise as well.[127] I will use the evidence in chapter five to verify the favorite analysis on encountering the Shiite tradition with modernity.

The government under the pressure of the leaders appointed a committee to write a draft of the Electoral Law (*niẓām nām-i intikhābāt*).[128] The committee had anxiety that the Shah would change his mind and cancel his edict, so only 36 days later, on 8 September 1906, the Electoral Law was prepared and the Shah ratified it. According to Article 19, the Assembly was expected to begin its duty as soon as the elections were concluded in the metropolis, without waiting for the arrival of the provincial deputies.

[126] Browne (1909): 15.
[127] See, N. Kirmānī, vol. 1: 571-574.
[128] A committee was composed of five persons, two of whom were the brother and son of Mushīr al-Mulk, the last Foreign Minster of Muẓaffar al-Dīn Shah. They also wrote a draft of the Constitution and its Supplement. We shall see more details on their biographies in chapter three.

The Assembly was opened up on 7 October 1906, with Ṣanīʿ al-Dawla[129] as its first president.

The Crown Prince, the *walīʿahd,* Mīrzā Muḥammad ʿAlī, who lived in Tabriz, with the aid of his Russian tutor tried to prevent publishing the news of Tehran in the city. He failed and the people of Tabriz strongly protested against the tyranny of the *walīʿahd* and played an important role in the Revolution and subsequent events. They closed their shops and explicitly announced demands for freedom and the Constitution. On 27th September 1906, the news that the Shah had granted a Constitution reached Tabriz and the revolutionaries formed a society (*anjuman*) to hold elections. Amongst the deputies elected in Tabriz was a young revolutionary by the name of Sayyid Ḥasan Taqīzād-i[130] who played complicated role in subsequent events. Later on, he was who accused of killing Sayyid ʿAbd Allāh Bihbahānī, and of being linked with and depending on the British diplomatic mission. In time, he became a senator and even he was made chairman of the Senate Parliament in the Pahlavi period.

The duty of the Assembly was to prepare a final version of the Constitution for the Shah's approval. The deputies were able to do this in December and the Shah ratified it only five days before his death, on 30th December 1906. When Muḥammad ʿAlī Shah was crowned (19th January 1907), he showed his opposition to the *majlis* by not sending an invitation to the deputies, and continued his policy by banning the ministers from attending the Assembly and proceeded to answer questions himself. He was able to obtain the support of some clerics such as Sheikh Faḍl Allāh Nūrī who, after codifying the Constitution, changed his mind and began to write monographs and to give lectures against it, especially against those articles that were indicative of equality of people before the law. In addition, he and his adherents secured asylum (*bast*) in Rey demanding an Islamic constitution (*mashrūṭ-i mashrūʿ-i*). As far as our study is concerned, the sayings of Nūrī, which restored the *fiqh*-oriented opinions of Shiite jurists on religious minorities, are still important; the details of which shall be dealt with later. In August 1907, those oppositions coincided with some important events such as the assassination

[129] Regarding his biography and his role in the first Parliament, see, Bāmdād, vol. 4: 63-69.
[130] It seems that among works written on him, the following is academically the best one, see, 'Taqīzād-i' in *EWI* by ʿAbd al-Ḥusayn Ādharang.

of Amīn al-Sulṭān,[131] the new *ṣadr aʿẓam*, by a revolutionary from Tabriz;[132] encountering the government with Russian threats, Turkish aggression, and more importantly the Anglo-Russian Agreement (1907). In such an atmosphere, some revolutionary newspapers misused their freedom and made very sharp criticisms against the government and the Shah himself preparing the ground to make the Shah indignant.

In the autumn of 1907, the Supplement to the Constitution was prepared, and on 7th October, it was ratified by Muḥammad ʿAlī Shah. During this time, the deputies in the *majlis* came to oversee the executive affairs of the country. One of the suggestions made by revolutionary societies (*anjumans*) was that disliked the Shah, they would form a Persian armed forces as a national army. Gradually the conflict between the two groups increased; on one side was the Shah, his own bodyguards, Sheikh Faḍl Allāh Nūrī and his followers, and on the other side were the members of the *majlis,* in spite of their internal conflicts, radical *anjumans*, especially the *anjuman* of Tabriz, and top-ranking clerics in Tehran and in the shrine cities of Iraq were supporters of the Revolution. It was reported that the *majlis* secretly dismissed the Shah from power. The conflicts increased to a climax in June 1908, when, with the support of a Russian army and Cossack Brigade, the Shah arrested some constitutionalists, executed two revolutionaries and bombarded the *majlis*. After Tehran fell under the Shah's control, the center of opposition shifted to Tabriz, and two revolutionaries by the name of Sattār Khān and Bāqir Khān[133] led the movement with *anjuman* supporters, comprised mainly of Armenians[134] and Sheikhites. Sheikh Nūrī in Tehran justified the Shah's actions by arguing that constitutionalism and the parliamentary system contradicted the *Sharīʿa*. On the other hand, the ulema of the *ʿatabāt* and foreign embassies in Tehran wrote letters to the Shah and asked him to reopen the *majlis* and restore socio-political stability. The Shah however paid no attention to any of them until May of 1909. Then under new economic as well as political pressures, he

[131] See J. Calmard, "Atabak Aʿẓam, Alī Aṣghar Khān Amīn al-Sulṭān" in *EIR*.
[132] According to Browne (1909: 26) after the *coup d'etat* of June 23, 1908, the Shah got his body exhumed and burned and his grave obliterated.
[133] Both of them had no revolutionary antecedents and were *lūṭīs* (street toughs) who made up their minds and followed the line of the *mujāhidīn*. See, A. Amānat, "Bāqir Khan Sālār Mellī" in *EIR*.
[134] They were freedom-fighters, led by an Armenian known as Yeprem Khan. Concerning this Armenian group see Arkun Aram, "Dāshnak" in *EIR*, see concerning the role of Armenians in the Revolution, H. Berberian, *Armenians and the Iranian Constitutional Revolution 1905-1911: The Love for Freedom Has No Fatherland* (Boulder: Westview Press, 2001).

declared the restoration of the Constitution and proclaimed 19 July 1909 as the date of general elections for the second period of the *majlis*. Before the arrival of that date, however, the revolutionaries or *mujāhidīn* who were engaged in the battle against Russian intervention in Tabriz captured Tehran on 13 July 1909 with the support of the Bakhtīyārī tribe of Isfahan.[135] The Shah took refuge in the Russian embassy. The revolutionaries dismissed some of the courtiers and executed some of the Shah's supporters, including Sheikh Faḍl Allāh Nūrī and Muḥammad Ṣanīʿ Haḍrat[136] by special tribunal.

A supreme parliament (*majlis ʿālī*) that was comprised of about 300 members from all groups was founded to find a solution. This *majlis* deposed Muḥammad ʿAlī Shah and selected his son Aḥmad Mīrzā (r. 1909-1925), on aged 12, as his successor and ʿAḍud al-Mulk,[137] head of the Qajar tribe as regent. After a few months, a new electoral law was prepared. As far as our study is concerned, the main change in the Electoral Law was allotting particular seats for Jews, Zoroastrians, Armenians, and Assyrians, with each group having their own representatives. The second *majlis* started its activity on 15 November 1909, while the country had a very confused administration. After about six months, two parties were founded in the *majlis*, both of which had armed supporters outside. They were the radical Democrats led by Taqīzād-i who had some relations with the Social Democrat group in Baku, and the Moderates who included some of the courtiers, traditional merchants of the bazaar and ulema, led by Bihbahānī and Ṭabāṭabā'ī. Soon after, their conflicts increased so that Sheikh Muḥammad Kāzim, known as Akhūnd Khurāsānī,[138] and ʿAbd Allah Mazandarānī (d. 1330/1911), two top-ranking Ayatollahs who were great supporter of the constitutionalism, wrote in June 1910 to the government asking for the dismissal of Taqīzād-i from the *majlis* because of his harmful activities and his anti-religious manner in the opinion of the Ayatollah.[139]

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[135] See, J. P. Digard, "Baḳtīārī Tribe, I. Ethnography" in *EIR*.
[136] He had a previous record of oppression in his life before the victory of the Revolution. One of his crimes was that he played a major role in the assassination of two Zoroastrian merchants in Yazd and Tehran who financially supported the Revolution. See more information as regard to him in Bāmdād, vol. 3: 278-279.
[137] See: H. Maḥbūbī Ardakānī, ''ʿAlī Reḍā Khān ʿAḍud al-Mulk' in *EIR*.
[138] Concerning his biography and his role in the Revolution, see, A. Hā'irī & S. Murata, "Aḵūnd Ḳorāsānī" in *EIR*.
[139] See his letter in *Uwrāq-i Tāz-i Yāb Mashrūṭīyyat 1325- 1330* [*New Documents on the Constitution 1907-1912*], ed. by Īraj Afshār (Tehran: Jāwīdān, 1359/1980): 207-212.

Bihbahānī on 16 July1910 was assassinated by one of *mujāhidīn* connected with Taqīzād-i who afterwards escaped the country. The Bakhtīyārī tribe little by little expanded their influence in the administration of government until the end of the period of the second *majlis* (24 December 1911), and they even intended to return the ex-Shah to the throne. During that time, Britain and Russia occupied most regions in northern and central Iran and went on with their competition.

3. 3. Analyses

There are various analyses on the Revolution, which led to the formation of a constitutional monarchy. Nāṣir al- Dīn and Muẓaffar al-Dīn Shah and the class of governors were going to make a great reform in the country regarding all the socio-economic as well as cultural aspects of Iran. On the one hand, the idea of competition with the Ottoman Empire which had already been constitutional (1876) and had a limited parliamentary system, led the Shahs to think over reform seriously. However, until 1905, the idea remained undeveloped and they did not actually do anything.[140] Late in the century the Shah, the courtiers, and the intelligentsia, considered Britain and France as models of progress and modernization came to be understood to be the reason for development in these countries. One solution was in codifying laws and regulations, forming parliamentary system and applying economic freedoms. Even Nāṣir al-Dīn Shah after his third trip abroad (1889), in a meeting with his ministers spoke concerning his decision to uphold some regulations and to appoint a committee under the directorship of Mīrzā Maḥmūd Khān Nāṣir al-Mulk a learned man among the courtiers, to form a commission,[141] and to write a draft of laws.[142] Shah sent a representative to Germany to ask advice on reforms of the administration.[143] Therefore, the idea of a royal constitution was for this class a solution to save the royal government in a new form. As we shall see the class of intelligentsia had the major role in reforming, codifying the Constitution and other laws, and in managing the *majlis*. They considered the Iranian Constitution as a

[140] See on the reforms occurred in Ottoman Empire, R. H. Davison, "Tanẓīmāt" in *EI* [2].
[141] About him see, Bāmdād, vol. 3: 128-9; see also, R. Yelfānī, *Zindigānī Sīyāsī [the Political life of] Nāṣir al-Mulk* (Tehran: Mu'assasa Muṭāliʿāt Tārīkh Muʿāṣir Irān, 1376/1997).
[142] F. Ādamīyyat (1355/1976): 12. But the order was not serious and they practically did not do anything.
[143] *Ibid*: 4-5.

means of prestige in the Middle East. They intended to uphold and follow the model of the French Revolution.

Some of the courtiers and governors, however, were not in agreement with this prescription as a cure or remedy. They believed that the common man, who remained ignorant, could not understand what a Constitution meant. Among the documents, there are some references that can be used to argue for the claim. Two letters are worth noting: the first one, a letter of Nāṣir al-Mulk, who belonged to this group to Ṣayyid Muḥammad Ṭabāṭabā'ī, in early 1906, saying that a constitutional monarchy would cause disorder and confusion in the society. He argued that 'Iran does not even have ten persons who know what a parliament meant, let alone make decisions for the country there'.[144] The second was a letter of Sulṭān ʿAbd al-Ḥamīd (r. 1876-1909) from the Ottoman Empire, who wrote to Muẓaffar al-Dīn Shah, referring to the reason for suspending the Constitution and the Parliament in his country. He mentioned the point that having and applying a Constitution was too soon for his own people and the same held true for Iran.[145] The events that actually happened after 1911 approved their arguments.

Based on the above information, we can offer our analysis. It seems true and universally agreed upon, that people in the Qajar period were too disabled and oppressed to have the will to seek their freedom from that condition. The idea of the demand for justice had existed among the people and governors from the period of Ḥusayn Khān Sipahsālār (r. 1287-1297/1871-1882).[146] There is evidence that indicates on the low level of demands in the first sanctuary, and then a change in the demands to asking for a *majlis* and a constitutional monarchy.[147] Ordinary people and even clerics[148] did not know the

[144] See his letter in N. Kirmānī, vol. 1: 461-463.
[145] *IDF*: 196. Some scholars such as ʿĀrif Qazwīnī, Yaḥyā Dawlat Ābādī and Farrukhī Yazdī agreed with this idea and considered the Constitutional Revolution as a defective revolution. See M. Ājudānī: 205-7, 498.
[146] In this period Mīrzā Malkam Khān, the author of treatises on laws and regulations was the great advisor of the *ṣadr aʿẓam* and Mīrzā Yūsuf Khān Mustashār al-Dawla, the author of *One Word* was the Minister of Justice in the cabinet.
[147] See the list of their requests in Abrahamian: 82 and their developments in 85.
[148] In one of monographs written in agreement with the Constitution, the author, who was a cleric wrote, 'the Qur'ān is the abrogator all revealed Scriptures and includes all common, civil and fundamental laws. European countries, even, wrote their Fundamental Laws by using the Qur'ān, the sayings of the Imāms and the Shiite legal viewpoints. We don't need any codified law but we need the implementation of the *Sharīʿa* in our country.' But he himself believed that the committee for preparing the draft of the Constitution should not translate every article from the European Constitution, because most of them were

meaning of the Constitution, while some of the intelligentsia and the courtiers applied these new concepts. When the clerics and activists provoked people to protest and to participate in the gatherings in order to proclaim their demands, they explained some issues such as the backwardness of the country and the oppression and injustice of local governors, not the meaning of modern concepts. The Constitution, the parliament, the state, the nation and equality of the rights were terms and concepts that were only familiar ideas to the intelligentsia who graduated from a new system of education, whether in Iran or abroad.[149] It is said that the word 'constitution' was introduced in the royal proclamation of Muẓaffar al-Dīn Shah in August 1906 by two sons of Mushīr al-Mulk, the foreign minister.[150]

The triangle of participants in the Revolution consisted of merchants, clerics, and the intelligentsia. There is enough evidence for the idea that from the beginning, constitutional monarchy was not the question that was agreed upon on all sides of the triangle. There was also no single interpretation of constitutionalism, every class having their own interpretation. The merchants aspired to find a better economic situation, a decrease in government interference, and economic security. Some of the intelligentsia regarded the constitution as a means to free man from outdated traditions and historical superstition.[151] Other persons of this class and the courtiers regarded it as a means for the progress and prestige of the country and knew what they wanted to do.[152] Some of the participants had the interests of their masters in the foreign embassies in mind. The clerics imagined and attributed a religious conception to constitutionalism. They thought that constitutionalism might be the means to attain security, justice and further more the fulfillment of the Islamic law. Sayyid Muḥammad Ṭabāṭabā'ī, a pious clerical leader, honestly said in the first parliament:

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in contrast with the *Sharīʿa*. See, *Rasā'il Mashrūṭīyyat*,"ʿImād al-ʿUlamā' al-Khalkhālī (1325/1906)": 307, 321-325.

[149] A point should be noted here as to the meaning of intelligentsia. Here intelligentsia means those who graduated from the new system of education and cooperated with the government, but during the Pahlavi dynasty and after the 1979 Revolution, the meaning of intelligentsia has changed and found Russian and Marxian meanings. It indicates a group, whether clerics or laymen, who are in front of the government. See, A., Mīlānī, *Ṣayyād Sāyehā* [*King of Shadows*]*: Essays on Iran's Encounter with Modernity* (U.S.A: Ketab Corp, 2005): 144-46.

[150] N. Kirmānī, vol. 1: 527.

[151] A. Kasrawī: 274-75.

[152] F. Ādamīyyat (1355/1976): 156-59, 206.

"We ourselves did not see countries with a constitutional monarchy but have heard from those who had seen that it is a good idea and a system that is conducive to the security and development of the country. Then we enthusiastically accepted the constitution".[153]

To find out the precise position of the major participants more clarification is needed. On every side among the participants and even on the part of every eminent person the agreements and disagreements with constitutionalism were not merely based on discussion, but also upon the properties, interests, and the political as well as the social status that were to be achieved during the time if one stood against or for it. As far as the present study is concerned, two eminent persons are important from each side of the intelligentsia and clerics; Malkam Khān and Faḍl Allāh Nūrī are famous among historians respectively as influential supporters and opponents of the Revolution.[154] One sentence attributed to Nūrī at a very fateful time, i.e. the time of his execution, can support the assumption that the opposition and support of the Revolution did not only have a theoretical basis. After kissing the rope, he referred to his conflicts with other clerical leaders, and said, "I was neither a reactionary nor were Sayyid ʿAbd Allāh [Bihbahānī], and Sayyid Muḥammad [Ṭabāṭabā'ī] constitutionalists; it was merely that they wished to excel me, and I them, and there was no question of reactionary or constitutional principles".[155] One analysis based on the theory of emotionalism vis-à-vis rationalism in epistemology, says that one often gives his or her reasons for what he has already chosen. Therefore, Nūrī was indeed against constitutionalism, for his competitors were on the other side. This idea has more evidence in the history of the Revolution. A closer look at Malkam could present an appropriate case for this assumption. Malkam Khān, as noticed, had been considered in the sources as the father of modern laws in Iran

[153] *Mudhākirāt Majlis Awwal*, [*the Conversations of the First Parliament*] ed. by. Gh. Mīrzā Ṣāliḥ: 14 Shawwal 1325/1907, pp. 503-4. (Tehran: Mazyār, 1384/2005).

[154] N. Kirmānī, A. Kasrawī and E. G. Browne gave a very negative portrait of Sheikh Faḍl Allāh Nūrī not only as to his position on the Revolution but regarded him as supporter of the dictatorship of the Shah and reported financial corruption and bribery. See as an example, N. Kirmānī, vol. 1: 304, vol. 2: 459, 535; Browne (1910): 429-30. After the Islamic Revolution 1979, Ayatollah Khomeini praised and gave him the honorific of *Sheikh Shahīd* [martyr] and took him as a father of the ideology of the Islamic Revolution. See, R. Khomeini, *Ṣaḥīf-i Nūr* [*the Collect of Khomeini's Lectures and Ceremonies*], vol. 18: 135, 181, 231; See also about him, A. Hā'irī, 'Shaykh Fazl Allah Nūri's refutation of the idea of constitutionalism", *Middle East Studies,* 13 (1977): 327-339.

[155] N. Kirmānī, vol. 2: 535-36; Browne (1910): 444; F. Ādamīyyat (1355/1976): 431.

and was a secular intellectual, just as he expressed himself in his works, except in the *Qānūn* [*Law*] newspaper. He openly criticized the Shah in his newspaper and, at the same time, presented modern ideas in Islamic terms, this method had not appeared in his previous works before 1890. His new writings indicated a constitutional government with a religious coloring, "the status of the clerical leadership of the nation should be higher than that of the Shah…according to Shiite doctrines the present monarchy of Iran is an outlaw and a usurper."[156] The ideas of August Comte (1798-1857) and John Stuart Mill (1806-1873), who had influenced Malkam were gone in the *Qānūn*. According to the assumption, we can imagine that if Nūrī could get the status of the clerical leadership, which Malkam suggested, then constitutionalism would perhaps have been a very good idea. As to emotional theory, a large amount of evidence indicates that the facts are too complicated to be categorized into simple groups. It was natural that every group in the society, including the religious minorities who suffered from tyranny and inferior status, were supporters of the Revolution and every group which had some interests in the government would turn into an opponent.[157]

To offer a relative analysis on the issue, the impression of the clerics concerning constitutionalism and modern concepts merits attention. Their position, whether for or against, should be taken along with their political viewpoints on the relationship between Shiite Islam and the government in the period of the Occultation. The current idea among the ulema on government during the Qajar period was that sovereignty (*wilāya*) was divided into political and religious. The political realm with the permission of the ulema belonged to the Shah who was a guardian of the country and the nation (they meant by nation the *Sharīʿa* of Islam, not the modern sense of the term),[158] and the other to the ulema. In some references, it is mentioned that one of the conditions for the appearance of the twelfth Infallible Imam is the unity of these two realms.[159] According to the theory

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[156] Malkam, *Qānūn*, no. 26, 29, quoted by M. Ājudānī: 196. The materials on Malkam in the analysis are entirely from M. Ājudānī; Cf. Browne (1910), 35- 42; Abrahamian: 67.

[157] It might be found this analysis in some analytical works on constitutionalism such as those of F. Ādamīyyat, M. Ājudānī, and J. Afary.

[158] We shall see more information on the terminology applied during the time in chapter three.

[159] There are some monographs that explain this idea in which the authors supported absolute monarchy. See as examples, Muḥammad Rafīʿ Ṭabāṭabā'ī, *Tuḥf-i Khāqānīyya* [*the Prize for the Qajar dynasty*] (Tabrīz: 1312/1894); Muḥammad Ḥusayn Damāwandī, *Tuḥfatu al-Nāṣirīyya fī Maʿrifat-i al-Ilāhīyya* (s. l. 1264/1885), quoted in *Rasā'il Mashrūṭīyyat*, Zargarīnizhād (ed.): 59-61; See also, L. Ājudānī: 13-37.

on dividing the powers of government– for which their adherents quoted some supportive *ḥadīth* as well as some interpretations of Qur'ānic verses-[160] a believer is one who obeys the Shah absolutely and any efforts towards decreasing the power of the Shah and the clerics is regarded outlawed.[161] In this way, most clerics, including Sheikh Nūrī joined the revolutionaries to uphold the House of Justice in the early part of the Revolution as supporters of the monarchy and oppressed people, not as supporters of constitutionalism. Some clerics who agreed with constitutionalism thought it would lead to implementing and restoring the rule that says, "Islam will remain higher and nothing will be higher than it", as noticed in the previous chapter. At first glance, the clerics didn't have obvious view on constitutionalism and imagined that the concept of a constitution did not have any connection with the codification of laws and regulations and it meant merely the limitation of the Shah's power, and controlling and supervising executive affairs by the members of parliament.[162] One evidence for the claim is the utterances' Majd al-Islām Kirmānī[163] and the son of Ṭabāṭabā'ī, two revolutionary clerics, who gave sermons in order to provoke people to participate in the Revolution.

> "Since foreign countries are Christians and do not have any religious law, they need to codify laws by their intellectuals, but we are Muslim and we do have the law of Islam and should act in accordance with it", they said.[164]

Some supporters argued that constitutionalism was not a new concept.

> "Everyone who did not know should know that the monarchy of Iran from ancient times had been constitutional…and the basis of Islam and Mohammedan Law have been absolutely constitutional".[165]

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[160] *Rasā'il Mashrūṭīyyat*, Zargarīnizhād (ed.), Abū al-Ḥasan Marandī: 196-262, esp.: 197, 203-206.
[161] *Rasā'il Mashrūṭīyyat*, Zargarīnizhād (ed.), Abū al-Ḥasan Marandī: 251-52. Appealing to the verses of the Qur'ān and *ḥadīth*, Marandī argued that *mashrūṭ-i* [constitutionalism] according to the Chronogram- an inscribed phrase in which certain letters can be read as Roman numerals indicating a specific date- or *ḥisāb abjad* is equal to *mushrik* (polytheist).
[162] *Rasā'il Mashrūṭīyyat*, Zargarīnizhād (ed.), Maḥallātī (1326/1908): 516, 539, 544.
[163] Concerning his biography, see, Bāmdād, vol. 6: 201-205 and as we saw Afary and Malikzād-i regarded him as Azalī and as a supporter of the Queen.
[164] N. Kirmānī, vol. 1: 322, 339.
[165] N. Kirmānī: vol. 2: 133. He quoted this sentence on behalf of a cleric whose name was Sheikh ʿAlī ʿArāqī.

When Muḥammad Ḥusayn Nā'īnī, who gave relatively the best explanation on constitutionalism, came to support it, he declared that it is not a new concept, he regarded it less likely to be oppressive than absolutism and was closer to the principle of Islam. He argued that the ulema had to choose the lesser of two evils.[166] He described the Constitution as a practicable manual (*risāl-i ʿamalīyya*) which was written for the political affairs and general regulations of mankind (*niẓāmāt nuʿīyya*).[167] After the victory of the Revolution, seeing the results and disorder of the country Nā'īnī changed his opinion and regretted writing the book *Tanbīh al-Umma wa Tanzīh al-Milla* (1327/1909) that advocated constitutionalism. He withdrew all copies of the book and even disagreed with the idea of republicanism for the country, and supported Reza Khan to take control of the situation.[168] To find out the true difference between the two groups of clerics, i.e., the opponents and the supporters, it is necessary to clarify what caused Sheikh Nūrī to change his mind. According to Nūrī,

> "During the Revolution some naturalist intellectuals presented some concepts such as constitutionalism, the legitimacy of the opinion of the majority, and so on, and because of supporting social justice I tolerated them. But afterwards when they came to write the Constitution I felt that there was a heresy there; otherwise, what does a deputy [of *majlis*] mean? What is a parliamentary system? … If it aims to codify common law, there is no need of such a system; if it aims to interfere in religious affairs; such deputies are not entitled to interfere in this area. In the period of the Occultation this right belongs only to the ulema, not to such people like a grocer or a cloth-seller."[169]

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[166] M. H. Nā'īnī, *Tanbīh al-Ūmma wa Tanzīh al-Milla,* ed. by S. M. Ṭāliqānī (Tehran: Shirkat Sahāmī Intishār, 1361/1981): 49-50. See concerning his biography, ʿA. Ḥā'irī, 'Nā'īnī, Mīrzā Muḥammad Ḥusayn Gharawī', in *EI* [2]; see also, F. Nouraie, 'The Constitutional Ideas of a Shiite Mujtahid: Muḥammad Ḥussein Nā'īnī', *Iranian Studies*, 8/ 4 (1975): 234-48.

[167] M. H. Nā'īnī, *ibid*: 51. He reported in P.48 a dream of the Prophet where he is told that constitutionalism is new in name but the content have a previous record. See also, *Rasā'il Mashrūṭīyyat*, "Mukālamāt Muqīm wa Musāfir" [Conversation between Resident and Passenger]: 89. The author believed that the form of the government of the Prophet and early Caliphs were constitutional.

[168] A. Ḥā'irī, *Shīʿīsm and Constitutionalism in Persia: A Study of the Role Played by the Persian Residents of Iraq in Persian Politics* (Leiden: Brill, 1977), esp. 177- 181.

[169] *Rasā'il Mashrūṭīyyat*, Ḥurmat Mashrūt-i [Forbiddance of the Constitutionalism]: 153-54.

After the bombardment of the *majlis* by the Shah, Nūrī expanded his ideas by writing some judicial as well as political announcements and monographs against constitutionalism. He said in a monograph,

> "Don't you know that in Islam speaking and giving legal opinions concerning the general affairs (*umūr ʿāmm-i*), and public interests (*maslaḥa*) of Muslims is restricted to the Imam or his deputies in the period of the Occultation? The interference of others in such affairs is forbidden and tantamount to arrogating the position of the Prophet and the Imam."[170] Nūrī added, "It is evident for a Muslim and it does not need an argument that we, as Shiite, praise to God, have the best and most complete divine laws. Since the laws and regulations sent unto the Prophet are divine laws… Islamic societies have divine laws extending from politics to acts of devotion …and to respect this great capital, the establishment of any law by the man is a fruitless effort".[171]

Nūrī in his treatise "Ḥurmat Mashrūṭ-i" [Forbiddance of Constitutionalism] which he wrote after the enactment of the Supplement,

> "One of the articles of that misled work *ḍalālatnām-i,* referring to the Constitution, is that a penalty should not be carried out, unless by the law, and then in order to fool people they (enactors) divided the law into three branches: the first is the legislature and this is heresy and pure darkness, since nobody in Islam is entitled to codify the law… Islam does not have any deficiency for one intended to redress it".[172]

Other serious arguments, which Nūrī and other opponents made against the Constitution, refer to the content of those articles dealing with freedom and the equality of the rights of all people before the law. Examining their sayings can be helpful to grasp a better picture of the situation in the period. The content of the arguments is not new for the present study, and they are the same materials that were dealt with in the previous chapter

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[170] *Rasā'il Mashrūṭīyyat*, Tadhkiratu al-Ghāfil [The Remembrance of the Ignorant and the Guidance of the Unknown]: 184.
[171] Ibid: 174.
[172] *Rasā'il Mashrūṭīyyat*, Ḥurmat Mashrūt-i: 159-160.

concerning the legal opinions of Shiite jurists. Addressing members of the *majlis*, Nūrī remarked,

> "The rulings of Islam are based on inequality among mankind, so you took an oath to agree with equality! The Qur'ān stated that a Muslim should not be retaliated against for a non-Muslim, and then you took an oath to agree with the right of retaliation for non-Muslims!"[173] "Whatever sounds contrary to Islam, will never have any legality whatsoever. Oh! Knaves, oh! Dishonesty, the owner of the *Sharīʿa* gave you dignity and superiority and then you yourself give it up and say 'I should be a brother and equal with the Armenians, the Zoroastrians, and the Jews!"[174]

As to Article 8 of the Supplement which states 'the people of the Persian Empire are to enjoy equal rights before the law', he wrote

> "I am told that if we do not insert this article in our Constitution, then foreign countries would not recognize us as Constitutionalists, I responded that in such a case then Islam is gone (*faʿalā al-Islām salāmun*). Islamic countries will never be Constitutional since in keeping with Islamic teachings it is impossible to accept equal rights."[175]

The adherent clerics of constitutionalism responded to the questions of the opponents. Concerning the philosophy of the establishment of the parliament, they argued that they were not going to codify new laws in the realm of the *Sharīʿa*. In addition to those laws supervising the executive affairs of government, limiting the power of the Shah and statesmen, and preventing the oppression by local governors, the duty of the parliament was to deal with issues that were of benefit to the people at the time. Personal status and other Islamic laws introduced by the Prophet and the Imams are permanent and the *majlis* does not intend to change them. Furthermore, the supporters believed that by establishing the parliament, the nation would be able to save the country from the invasion of foreign powers, from their interference in its internal affairs and,

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[173] See, N. Kirmānī, vol. 2: 186.
[174] *Rasā'il Mashrūṭīyyat*, Ḥurmat Mashrūṭ-i, 161-62.
[175] Ibid: 159-160.

finally, the *majlis* could realize the rule of exhorting the doing of good and the forbiddance of what is unlawful (*al-amr bilmaʿrūf wa al-nahy ʿan al-munkar*).[176]

It seems to me that the ideas of Nūrī and his followers regarding the rights of religious minorities reflected the general perception of Shiite jurists whether they explicitly asserted it or not. With respect to our subject, i.e. the inequality between the rights of Muslims and non-Muslims, all clerics, the *uṣūlī* and the *akhbārī,* regardless of their stance on constitutionalism, had no disagreement. From their viewpoint, legal inequality was a subject that God had mentioned in the Qur'ān and this ruling was permanent and recorded (*naṣṣ)* in which does not accept new interpretation and inference (*ijtihād*). If Muḥammad Ḥusayn Naʾīnī, Akhund al-Khurāsānī, Sayyid ʿAbd Allāh Māzandarānī, Sayyid ʿAbd Allāh Bihbahānī, and Sayyid Muḥammad Tabāṭabā'ī, who were great clerical leaders of the Revolution, were asked whether they were following the Revolution in order to make the rights of Muslims and non-Muslims equal, surely their responses were negative. They also did not even agree with the participation of women in the election, and regarded it as contrary to the rulings of the *Sharīa*.[177] Nā'īnī explicitly stated that they did not mean by freedom and equality, the equality of Muslims and *dhimmī*s in matters of inheritance, blood money, retaliation, and the freedom in marriage.[178] The supporters did not have any jurisprudential response, for they also had the same position regarding the inequality of the rights of men and women, and Muslims and non-Muslims. Muḥammad-Ismāʿīl Maḥallātī, a cleric who was a supporter of constitutionalism, responded to Nūrī, saying,

> "We do not mean by freedom and equality that Muslim, Jews, Christians, and Zoroastrians are equal in their rights…yes, they have equality with Muslims with respect to the implementation of the law. Nobody can be excluded from the law.

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[176] The claims were repeated in all monographs written by the supporters. See as examples: *Rasā'il Mashrūṭīyyat*, Maḥallātī (1326/1908): 500-503, 509-510, Taqawī (1324/1906): 267-68, Ahrumī-Bushihrī (1325/1906): 279-80. Ahrumī in his defense of the Constitutional Revolution appealed to some *ḥadīths* which stated some signs of the end of the time and the world which coincided with the appearance of the twelfth Imam [the hidden Imam], and then he adapted the situation in 1906 of Iran to the context of those *ḥadīths*. By using a Chronogram and some astrological data (esp.: 292), he concluded that the year 1324/1906 would be the year of the preliminary appearance of al-Imām al-Mahdī.

[177] See, Art. 3 and 5. *The Electoral Law of September 1906*. See Browne (1909): 68.

[178] See F. Ādamīyyat (1355/1976): 238-240. But Na'īnī had a particular opinion which was that in his work he did not confine dictatorship to the realm of politics, and referred from time to time to a religious dictatorship which, according to him, relies on deceiving and misleading others. (Idem: 233, 235, 247).

> Moreover, we mean that they have equality with Muslims in acquiring national benefits (*fawā'id waṭanīyya*), in a way that their efforts would not be contrary to the conditions of *dhimma*. It does not mean that Islamic prerogatives will be cancelled and the Qur'ān would be equal with the abrogated Old Testament."[179]

At the same time that opposing clerical leaders did not have any disagreement concerning the legal inequality between Muslims and non-Muslims, jurisprudentially speaking, they did not allow radical groups to attack religious minorities and they issued a *fatwā* that made it incumbent to extend good treatment to them.[180]

There seems to be some difference between the supporters and the opponents, because of a political point that had roots in the emergence of the signs of modernization in Iran.[181] In the opinion of the former, the Constitutional Revolution was merely a means of rejecting the dictatorship of the Shah and his governors and, in this movement, all Iranians, including religious minorities should take part in and have a share. In addition, the supporting clerics tried to Islamize the content of the Constitution and curiously knew that the more or less four seats for religious minorities in the parliament not only would not make any difference regarding their right to veto any law, which could be contrary to the *Sharī'a,* (according to the Article 2 of the Supplement), but it also might support uniting people against the tyranny of the Shah. Nūrī and his camp for some reason or, to be more exact, due to some emotion, did not want to understand this point and in effect, their position supported the dignity of the Shah and the dictatorship.[182]

The last point to be added is that most clerics, if not all, who participated in the 1906 Revolution (regardless of their (dis-) agreement), belonged to the *Imāmī* and the *uṣūlī* school of thought and accepted the inequality of Muslims and non-Muslims. Hence, the theory, which is put forward in some works concerning the impact of the *uṣūlī*

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[179] *Rasā'il Mashrūṭīyyat*, Maḥallātī: 519, 546; Khalkhālī (1325/1907): 320.

[180] As an example, see a *fatwā* of Khurāsānī in Browne (1910): 421- 22. The subject of violent acts towards religious minorities will be examined below.

[181] There is another evidence for the claim that clerics had only political disagreements, not legal ones, for example, with respect to the content of the Constitution. Article 2 of the Supplement was suggested originally by Nūrī and then the *majlis* codified it with a slight modification. See the report concerning the suggestion and the modification in *Rasā'il Mashrūṭīyyat*, Zargarīnizhād (ed.): 155 esp. footnote no. 1.

[182] According to M. Ājudānī: 365, in the period between 1860-1909 in Iran, only two radical persons explicitly said that Islam was in contrast with constitutionalism; Nūrī declared this idea from an Islamic viewpoint and Fataḥ ʿAlī Akhūndzād-i from a secular one. These are representatives of tradition and modernity in Iran and their conflicts have continued to the date. See the biography of the latter in A. Algar, 'Akhūndzāde' in *EIR*.

attitude on the victory of the Revolution, is not backed by enough evidence.[183] As already stated, there was no great difference between both sides of clerics regarding the principle of the Constitution, especially on the rights of non-Muslims. According to this agreement, they could easily find the position to veto laws that might be contrary to the *Sharīʿa* in the Supplement. Gaining this position was actually a triumph of their ideas, even though the leader of the idea, Nūrī, was executed and, during the Pahlavi period, the position of veto was ignored under the power of the Shah, not through legal discussions.[184] The great legal achievements for the intelligentsia were the introduction of some new modern concepts, such as the Iranian nation, equality before the law and the separation of powers in the Constitution. According to our analysis, the division of clerics into supporters of constitutionalism (*mashrūt-i khāh*) and the supporters of the *Sharīʿa* (*mashrūʿ-i khāh*) had a purely political basis. It seems that the most important element that affected the mentality of the former was the process of modernization, which had more or less had already begun in the country. The modernization caused the cleric adherents to *ignore* not to *change* some *fiqh*-oriented opinions on religious minorities and to grasp the new situation of the world. This is the major point that will be explained in chapter five.

4. Non-Muslims in the Society

Broadly speaking, there has been as yet no systematic information concerning non-Muslims between 1848 to 1911, in particular the Mandeans (Ṣābi'īn). However, a short description on the situation of recognized religious minorities is provided through extant works. In the focal period of our study, Zoroastrians, Jews, Christians, Ṣābi'īn, and Bābīs (including Bahā'īs and Azalīs) were living in Iran.

4. 1. Demography

[183] The idea among Iranian scholars is current and acceptable, see for example, Kasrawī: 729-731.
[184] Abrahamian in the conclusion of his book (534 -35) wrote: "After the 1905-9 Revolution, the *ʿulamā'* had protested that they had been fooled by the intelligentsia. After the 1977-9 Revolution, it was the intelligentsia who claimed to have been fooled by the *ʿulamā'*." But, we shall see that the *ʿulamā'*, legally speaking, in both Revolutions were who won the game.

Some reports estimate that the number of the whole population in 1881 was about six million persons and in 1904 ten million.[185] Religious minorities had been living in various cities with different early histories of their presence in the society. Most Zoroastrians lived in two cities: Yazd and Kirmān in the east and southeast, respectively. Their quarter, which was called the *gabr-mahall-i,*[186] was outside the city walls and they had to live there. According to some reports, about 9, 000 Zoroastrians lived in those cities in 1850 and then 23, 000 in 1883, while in the early period of the Safavid dynasty the number reached 1,000,000.[187] When Manekjī Līmjī Hāteria (1813-1890),[188] as a representative of the Parsis,[189] in India came to Iran (1854), the Zoroastrians found in him a strong supporter. Some of them especially after the 1906 Revolution, gradually left those cities and moved to Tehran. Nowadays, most Zoroastrians live in Tehran and Yazd.

Iranian Jews, who have had a long history in Iran, were about 13, 000 in 1854. They lived in various cities such as Shiraz, Isfahan (both cities in the centre), Hamadan, Kirmānshāh, Sāwujbulāgh (in the west and northwest) and Mashhad (in the northeast).[190] In 1839, some Jews of Mashhad were forcibly made to accept Islam and were known as *Jadīd al-Islām*.[191] Many of Jews moved to Tehran from the west and northeast after 1906 to find more security and to improve their economic situation. They have had synagogues in those cities, and they have a high respect for Hamadan where there is the tomb of

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[185] *Judeo-Iranian and Jewish Studies Series Pādyāvand*, "The Jewish Community in Tehran", ed. by A. Netzer (California: Mazda Publisher& Costa Mesa, 1999), vol. 3: 145-204, esp.: 149-152.

[186] This is a Persian word that means a region of infidels. Originally, *gabr* is a name applied only for Zoroastrians but metaphorically used for all non-Muslims.

[187] Hāshim Raḍī, "The Life of Zoroastrians in the Last Century" *Tchissta*, 4/1 (1365/1986): 14-19. The author attributed the number of Zoroastrians in the early of Safavid dynasty to Comte De Gobineau; cf. Mary Boyce, *Zoroastrians: their Religious Beliefs and Practices* (London, New York: Routledge & Kegan Paul, 1991): 210-211; see also Benjamin: 356.

[188] He was born in Surat in India. His ancestors were Iranian who moved into India in the Safavid period. He grew up in India but at the same time had British nationality and that is why he could make many reforms and services for Zoroastrians who lived in Iran. Concerning him see, *Asnādī az Zartushtīyān Muʿāṣir Irān* [*Some Records on the Iranian Contemporary Zoroastrians*] 1879-1959, ed. Tūraj, Amīnī (Tehran: Sāzmān Millī Asnād Irān, 1380/ 2001), Ch. 1; Mihr Budharjumihr, 'An interview', *Tārīkh Muʿāṣir Irān* [*Journal of Contemporary History of Iran*], 28 (1382/ 2002): 142-144.

[189] See: Jesse S. Palsetia, *The Parsis of India: Preservation of Identity in Bombay City* (Leiden: Brill, 2001); see also J. R. Hinnels, 'Parsis' in *EI* [2]; D. Menant, 'Parsis' in *ERE*; Willard G. Oxtoby, 'Parsis' in *ER*.

[190] M. Keywān, *Al-Yahūd fī Iran* [*Jews in Iran*] (Beirut: Bīsān, 2000): 33-34.

[191] R. Waterfield, *Christians in Persia* (London: George Allen & Unwin, 1973): 112; Eugene, Aubin, *La Perse d'Aujourd'hui* (Paris: Librarie Armand Colin, 1908): 295- 299. Aubin, who was an ambassador of France in 1906-1907 in Iran, mentioned that in those days there was no trace of them in Mashhad. See also Zhāli Pīrnaẓar, "Yahūdīyān Jadīd al-Islām Mashhad", *Irānnāmeh*, 19/1-2 (1379-1380/2001): 41-59. More information as to the expression *Jadīd al-Islām* will be mentioned below.

Esther (4th cent. B.C.E.), the wife of Ahasuerus, king of Persia, and Mordecai (5th cent. B.C.E.).[192] Most Iranian Jews, after the 1906 Revolution, have been living in Tehran, Isfahan, Yazd, and Shiraz provinces. They were only able to build fifteen synagogues in Tehran during the Pahlavi period,[193] but at the same time, their number had decreased.[194] According to the head of the *Anjuman Kalīmīyān*,[195] the main Iranian Jewish institution, today there are about 35,000 Jews living in Iran and they are free to practice their rituals.[196]

Christians, including Gregorian Armenians and Assyrians,[197] who are known as Nestorians, and Chaldeans, were living in the focal period of the study mostly in Isfahan, Shiraz, Khuzistān, Būshihr (southwest of Iran)[198] and Urūmīyya (in the northwest), with very few in Tehran. They have very famous as well as old churches in the region of Āzarbāyjān.[199] Armenians were resettled from Julfā of Armenia to Isfahan by Shah ʿAbbās I (r. 996-1038/1588-1629). After staying there they were permitted to build churches in new Julfā and at the same time they have kept their relation and dependency upon the Armenian Church of Armenia until 1958, and then, of Cilicia.[200] According to some reports, in the period under study, the number of Armenians had decreased to 20, 000.[201] The exact number of Assyrians in the period concerned could not be ascertained, however.

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[192] See on Esther and Mordecai, Book of Esther in the *Old Testament*.

[193] As for the names and places see, Shamoil Kamran, 'Iranian Jewish Organization', vol. 1: 118-119 in *Yahūdīyān Irānī dar Tārikh Muʿāṣir* [*The History of Contemporary Iranian Jews*], eds. Homa & Houman Sarshar (U.S.A, California: The Center for Iranian Jewish Oral History, 1996, 1997, 1999).

[194] For more information on Jews in 1854-1911 see, Waterfield: 115-121; Keywān: 35-40.

[195] Concerning on this society, see: A. Netzer, "Anjuman Kalimīyān" in *EIR*.

[196] *Yahūdīyān Irānī dar Tārikh Muʿāṣir* [*The History of Contemporary Iranian Jews*], vol. 2: 335-336.

[197] The majority of Christians in Iran are Armenians, see more information in, E. Sanasarian (2000), *Religious Minorities in Iran*: 39-42; concerning the roots of Nestorians in Persia, see, Waterfield: 30-38; see also W. A. Wigram, *The Assyrians and their Neighbors* (London: G. Bell, 1929); see also, R. Macuch, 'Āšūrīān in Iran' in *EIR*.

[198] On the history of Christian immigration in Būshihr, see, ʿAbd al-Karīm Mashāyikhī, *ʿĪsawīyān dar Būshihr* [*Christians in Būshihr*] (Būshihr: Būshihr, 1382 /2003).

[199] With regard to the history of their churches see, A. Hūwīyan, *Armanīyān Irān* [*Armenians of Iran*] (Tehran: The Center for Dialogue among Civilizations & Hirmis, 1380/2000): 111-154. Their churches can be categorized into three kinds: a- those which were built before the fourteenth century such as the Church of Saint Thaddeus or Qarā in Mākū (in the northwest), b- those which were built in the Safavid period such as that of Wānk in Isfahan and c- those which were built in the nineteenth and twentieth centuries in the majority of cities in which they are living.

[200] See on this city, www. Armeniapedia.org/index.php? title=Cilicia.

[201] Edward Pollack who lived in Iran during 1851-1860 mentioned in his travelogue, *Iran and Iranians*, the number of Armenians (quoted by Mashāyikhī: 118).

The Ṣābi'īn have been living in the southwest, especially around the city of Ahwaz for many centuries. According to some reports they are Jews who converted and believed in John the Baptist, the son of Zechariah, hence they were called *Ṣābiḥīn* (swimmers) and later on the name changed to Ṣābi'īn.[202] No information could be gained on the number of them in the period under study.

Sayyid Muḥammad-ʿAlī Bāb, the founder of Bābī faith, was executed in 1849.[203] Great conflicts have been reported to have erupted among his successors, hence they divided into two main groups; Azalī and Bahā'ī.[204] Afterwards his followers, regarded as heretics, lived in various cities such as Yazd, Būshihr, Shiraz, Zanjān, and Mazandarān (in the north). There is no reliable source on their number in that period.

4. 2. Social Conditions

In the period under discussion, the economy of the country was mostly based on agriculture and primitive trade and the government obtained income through taxes. The characteristics of the cities were more similar to that of villages or undeveloped societies. The high rate of poverty; the low standards of education, income, and health; interference in others' affairs; and considering others who did not have the same tribal or religious affiliations as strangers were the main features accounted for in such societies by sociologists. Religious minorities had an inferior status and role in the society and because they accepted this status, they have often coexisted with Iranian Muslims in peace. For more security, in most cities, recognized religious minorities preferred to live together in certain local areas (*mahall-i*) separately and towards which local governors did not pay adequate attention. Perhaps one reason for the limited information regarding them in the sources would be the particular conditions in those areas. Neighborhoods where religious minorities lived did not have independent systems of education and health. It was only in the late 19th century when modernization began to appear in Iran that some schools, with the support of some foreign countries were established for Jews

[202] M. Rāmyār, "Ṣābi'īn", *Majall-i Dānishkadih Ilāhīyāt Mashhad* [*the Journal of Faculty of Theology in Mashhad*], 1/ 1 (1347/1968): 24- 54. Further literature on Ṣābi'īns is available at footnote 91 in Chapter One of present work.
[203] Some references to the Bābī movement were introduced in footnote 67 in present chapter.
[204] See, Brown (1910): 424-428; Kasrawī: 291.

and Christians for the first time. It has been cited that religious minorities, especially Jews, some Zoroastrians and Christians who didn't have lands to work on, chose as careers such activities as providing music for weddings, trading in alcohol, cloth, silk, and antiques, the buying and selling land, exchanging money (*ṣarrāfī*), usury and sometimes selling traditional drugs besides the crafts and the professions.[205] The majority of Zoroastrians and Ṣābi'īn were also peasants and artisans.[206]

People in 19th century Iran lived at a low socio-cultural and economical level. Religious minorities sometimes had problems that made their situation with more difficult; for example, Christians in the northwest had ongoing conflicts with Kurds and Turkish tribes of Iran and Turkey in the area and, from time to time, they were attacked by Kurds.[207] Since the Ṣābi'īn were an isolated faith and tribe, they had less socio-political difficulties with Muslims and other groups. It is true that according to some reports religious minorities generally speaking, were

> "treated with much toleration, and are rarely forced to submit to greater injustice and indignity that is awarded to Muslims as well".[208]

However, religious minorities, especially Jews and Zoroastrians, occasionally, were oppressed by local governors in order to extract more taxes or take more bribes. Misusing legal opinions, low ranking clerics, attacked religious minorities through radical groups and pressured them to become Muslim or accept difficult regulations. There were also religious motivations to attack religious minorities but in the most of them, the major motivation was the tyranny of local governors. As far as I have found, among all the no-print documents in the Archives of the Foreign Ministry from 1862/1279 to 1906/1324 there were about two hundred cases recorded where religious minorities had been attacked. But one can rarely find a *fatwā* on behalf of a high-ranking jurist where he gave anybody the right to attack religious minorities, to force them to convert, or issued the

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[205] See as an example a list of crafts and professions which were carried on by Armenians in Isfahan in: Thomas Philipp, 'Isfahan, 1881-1891: A Close-up View of Guilds and Production', *Iranian Studies*, 17 (1984): 391-409.
[206] See, Waterfield: 113; Benjamin: 356, 358. More information can be sought in Willem Floor, *Traditional Crafts in Qajar Iran, 1800-1925* (Costa Mesa, CA: Mazda Publishers, 2003).
[207] See, Waterfield: 130-131.
[208] Benjamin: 358.

right to identify religious minorities by special dress codes.[209] The lack of implementation of the *Sharīʿa* was a religious motivation that cleric-preachers used to exhort the people to protest against prevailing conditions, which they considered to be the cause for every social defeat, even the spread of cholera.[210] In such an atmosphere when some radical clerics want to show the people examples of evil (*munkar*), they reduced the evil to the act of usury and the selling and drinking alcohol in public view by religious minorities. In some cases, they thought that if religious minorities became Muslim, or at least obeyed the specific regulations offered by the jurists, their situation would have been better in the light of God's grace. This kind of treatment, according to some reports, existed from time to time since the Mongol period until the end of the Qajar dynasty. The attack on religious minorities sometimes also had roots in the social and psychic feedback of another problem. For example, after Amīn al-Dawla, who was an efficient *ṣadr aʿẓam* for a short time in 1314/1896, and who prevented many abuses by the *ʿulamā'* and influential courtiers (*darbārīyān*), decreasing their monthly allowances, some fanatic groups with the permission of some clerics attacked Jews and claimed that they should have a dress code to be distinguished from Muslims. The government for a short time had to order Jews to hang a silver necklace with *musā'ī* (attributed to Moses) written on it on their clothes.[211]

To better understanding circumstances at the end of the 19th century, and the role of the Revolution in uniting the people, it is pertinent to add a few more explanations and evidence on the violent treatment toward religious minorities. The following examples illustrate the obstacles of codifying the Constitution which contains the equal rights for Muslims and non-Muslims. One of the main references that reported this kind of

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[209] The list deserves to be examined in detail in an independent study but here I am content to mention the number of some more important cases, which have been evaluated for this study. See, 1317: box 24, file 20, p. 53-54, 56, 82-84, 91, 92; 1318: box 15, file14, p. 35, 36, 63-66, 99; 1318: box 26, file 21, p. 24, 34-35, 40, 42, 64, 71, 74-76, 82; 1320, box 24, file 4, p. 10-11, 16, 23, 35, 61, 64, 120, 161, 197, 202-204; 1321, box 28, file 5, p. 11, 39, 49, 99, 109, 131, 145; 1323, box 11, file 4, p. 23, 41, 47; 1323, box 22, file 13, p. 2.

[210] See the attachment of Lassels' report in 1892, *F.O*, quoted by I. Taymurī, "Iran Pish az Inqilāb", [Iran before the Constitutional Revolution], *Iṭilāʿāt Sīyāsī Iqtiṣādī,* 21/ 227-230 (1385/2006), esp.: 8-10; See also Iʿtimād al-Salṭana, *Rūznām-i Khāṭirāt* [*the Newspaper of Memoirs*] (Tehran: Amīr Kabīr, 1351/1971): 1033; *Judeo-Iranian and Jewish Studies Series, Pādyāvand*, ed. by Amnon, Netzer, vol. 3: 172.

[211] See: M. Ājudānī: 272-75 and footnote, no. 465. The *ʿulamā*' also believed that Amīn al-Dawla was going to establish new Western laws and he must be a naturalist – anti religious person.

treatment is *Tārīkh-i Yahūd-i Irān* [*The History of Iranian Jews*], written by Ḥabīb Liwī [212] and confined mostly to the oppression of Jews. According to the author, the reasons for violent treatment of religious minorities are:

- The impact of the violent morality of Mongols on Iranians.[213]
- The impact of the anti-Semitism of radical Christians in Europe on Iranians. He believed that Iranians came to know of this kind of treatment against the Jews by European tourists who visited Iran in the period of the Safavid dynasty. In this part of the report, Liwī refers to this point that levying the *jizya* and enforcing a dress code in order to distinguish the Jews were also current in European countries. However, the color of the dress code in Islamic countries, including Iran, was red and in the European countries yellow.[214]
- Converted Jews tried to make some difficulties for their relatives. They captivated the hearts of local governors by conversion and even sometime by persecuting or killing their former co-religionists. The governors usually employed these persons to collect the *jizya* and other taxes.[215] This group, known as *Jadīd al-Islām* or *nuw musalmān*, as already stated, could prevent all of their non-Muslim relatives from receiving an inheritance.
- The religious motivations of clerics or radical Muslims were another factor. These motivations sometimes had other aims such as gaining a reputation in the eyes of the people, wealth or a good position in the government.[216]

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[212] The sources on the history of the religious minorities in Iran have not adequate standard. The work of Liwī, which is sometimes regarded as the main reference work for studying the situation of Iranian Jews, was written by a non-expert. Liwī was an army officer in the Pahlavi régime and thus in his arbitrations tried to attribute the oppressions against Jews to the pseudo-clerics (as he would like to call) and rascals, not the Shah himself and his governors. In addition, his book was prepared mainly from secondary sources and sometimes includes some myths, exaggerations, and mistakes. I have here tried to summarize and categorize the large content of volume three of the book. See also Houman Sarshar, (ed.), *Esther's Children: A Portrait of Iranian Jews* (Beverly Hills, Philadelphia: The Center for Iranian Oral History and the Jewish Publication Society, 2002).

[213] Liwī, vol. 3: 4.

[214] Ibid: Introduction, w, 219, 277, 283, 313, and 501-2. But the color of the dress code in Islamic literature is sometimes yellow and at other times red, as we saw in the previous Chapter. See also, Shīrīn Daghighīyān, "Yahūdī Sitīzī dar Urūpā wa Irān: Muṭāliʿ-i Muqāyisi'ī"[Anti- Semitism in Europe and Iran: A Comparative Study] in *Yahūdīyān Irānī dar Tārikh Muʿāṣir*, Homa and Houman Sarshar, (eds.), vol. 1: 171-190.

[215] See, for example, Liwī, vol. 3: 393-4.

[216] See, Idem, ibid.: 757, on the report of revolt of Hamadan, p. 762, on Kirmānshāh, p. 773, and on attacking religious minorities in Tehran, vol. 3: 801-804. The author explained why Sheikh Ibrāhīm Qazwīnī who wanted to become famous attacked Jews and Christians in Tehran in the period of Muẓaffar

The conversion of some Jews intentionally and faithfully, as they believed, to Islam, Christianity, Bahā'ī or the Bābī Azalī faiths, was another factor that the author mostly ignored. In some instances, converted Jews wrote treatises or essays criticizing Jewish law and theology, or tried to propagate and spread their new faith to their former co-religionists. These activities increased the Islamic motivation for Muslims to cooperate with the *Jadīd al-Islām*s to convert more individuals. In the opinion of Muslims, after writing such monographs, there was no longer any rationale for remaining a Jew. Liwī in his work reported some cases of conversion, including even the conversion of Jewish clerics to Bahā'īsm.[217] It is more important to find out the reason for the latter case because the people of the Bahā'ī faith were under harder circumstances in that period than the Jews. Liwī was not successful in explaining the problem and only complained about his co-religionists regarding the conversion. He tacitly hinted that the reason for this was that these Jews were not satisfied with how the law and theology of the Jewish tradition corresponded with the demands of this world.[218]

Liwī in his works rarely mentioned reports indicative of intentional conversions from Judaism to Christianity[219] or Islam. In the 19th century, there were two important conversions which had great impact on the situation of the Jews. Daniel Tsadik, however, reported the story to us in a scholarly and detailed manner.[220] Here we quote briefly it in order to mention some points concerning the report. Two Jewish clerics whose names were Ḥājī Bābā Qazwīnī, the son of Muḥammad Ismāʿīl, and Muḥammad Riḍā'ī, known as *Jadīd al-Islam*, converted to Islam and wrote two books refuting the claims of Judaism. Qazwīnī's book, *Maḥḍar al-Shuhūd fī Radd al-Yahūd* [*The Court of Refuting the Jews*] written in Persian in 1797, and the book of Riḍā'ī, *Manqūl Riḍā'ī* [*The Discourse*], was written in the Hebrew language or characters without an exact date.

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al-Dīn Shah. This motivation was not limited to attacking religious minorities; rather there are even some reports of attacks on Sunni Muslims or Shiite Ismāʿilīs as well. See, for example, M. Ājudanī, 112-13.

[217] Liwī, vol. 3: 795. Waterfield: 118.

[218] Liwī, vol. 3: 795; cf. Tsadik: "Religious Disputations of Imāmī Shīʿīs against Judaism in the late Eighteen and Nineteenth Centuries," *Studia Iranica*, 34/1 (2005): 97 in which he claimed "By the early 1890's, as their numbers increased (the number of those who converted from Judaism to Bahā'i), Hamadan Bahā'īs of Jewish descent felt secure enough to profess Baha'īsm openly." This claim is not based on evidence since the Muslims, as stated in chapter one, recognized Jewish tradition but Bahā'īsm could never receive recognition; they did not have any security in the nineteenth century.

[219] Some cases were reported in Waterfield: 136-137.

[220] Tsadik (2005): 95-134.

Riḍā'ī was a contemporary of Aḥmad Narāqī (1245/1831).[221] According to M. M. Aqā Buzurg Ṭihrānī (d. 1389/1969), the historian biographer who in scholarly fashion, collected a list of Shiite works from the seventh to the twentieth century in 26 volumes, said that

> "the original Hebrew of Riḍā'ī's book was not found but Sayyid ʿAlī Ṭihrānī cooperated with Muḥammad Jaʿfar, son of the author's brother, and Muḥammad ʿAlī Kāshānī known as Mullā Aqā Jānī translated it into Persian and published in 1292/1875-6".[222]

Tsadik did not mention explicitly whether he reported the content of the book from Persian or the Hebrew version, but only in one case did he give his judgment on Riḍā'ī's book which was that it had similar words with that of Qazwīnī's.[223] Following this brief information regarding the two books, it is notable that when the Jewish community reproached him for his conversion,

> "he explained that he did not renounce his forbears' religion for the sake of property, status or nearness to the rulers."[224]

The conversion of the two rabbis with this high level of motivation, therefore, naturally increased cultural pressure on religious minorities in the period of our study. Tsadik (2005) reported the content of the book in detail, but the polemic-theological motifs of these books will not be considered here.[225] It is worth noting that with the support of the Qajar dynasty, especially in the period of Fatḥ ʿAlī Shah, many polemic works were written against Sunnism, Wahhābism, Sūfīsm, Sheikhīsm, Bahā'īsm, Christianity and Judaism.[226]

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[221] M. M. Aqā Buzurg Ṭihrānī, *al-Dharīʿa ilā Taṣānīf al-Shīʿa* (Beirut: Dār al-Aḍwā', 1403/1983), vol. 25: 61; Tsadik (2005): 98.
[222] Aqā Buzurg Ṭihrānī: vol. 23:152; vol. 25: 60; cf. Tsadik (2005): 99 and no.14 of footnote. It seems to me that Tsadik did not see volume 25 of *al-Dharīʿa.*
[223] Tsadik (2005): 99 and no.9 of footnote.
[224] Ibid: 99.
[225] See Ibid: 111-130.
[226] See, for example, M. M. Aqā Buzurg Ṭihrānī: vol. 2: 52, 216, vol. 10: 189, 214-16, 219; Tsadik (2005): 100-101; idem, "Nineteenth Century Shīʿī Anti-Christian Polemics and the Jewish Aramaic Nevuat Ha-Yeled [The Prophecy of the Child], *Iranian Studies*, 37/1 (2004): 5-15; Reza Pourjavady, et. Sabine Schmidtke, "Muslim Polemics against Judaism and Christianity in 18th century" *Studia Iranica*, 35/ 1 (2006): 69-94; Vera B. Moreen, A Shīʿī- Jewish "Debate" [Munāẓara] in the Eighteenth Century, *Journal of the American Oriental Society*, 119/ 4 (1999): 570- 589.

There are some cases where Zoroastrians also converted to Islam to find a better socio-economic situation. Most of them were women seeking an opportunity to marry Muslims. Like Jews, Zoroastrians regard only themselves as the chosen tribe of God and consider their blood pure. According to this belief, the marriage of a Zoroastrian with others is not lawful and conversion is regarded as a great heresy.[227] The Zoroastrian documents consider all cases of conversion as forcible ones,[228] but there are some documents that expressly indicate voluntary conversion as well.[229] As to Christians and the Ṣābi'īn there were no cases of conversion found for that time.

Amidst all the disturbances surrounding religious minorities in this period, the Hamadan disturbances (1892-3) was a notable example which the sources have reported in detail.[230] According to Iʿtimād al-Salṭana, a learned man who used to read newspapers to the Shah and then became a minister of cultural affairs, the disturbances were started by a cleric called Mullā ʿAbdu Allāh who issued a verdict that the Jews of Hamadan had to convert to Islam or restrictions and a dress code would be imposed on them to distinguish them from Muslims. Since the Jews were more than five or six thousand in number in Hamadan and at that time benefited from the support of the British embassy, the ambassador complained about the Mullā to the Shah. The Shah immediately summoned the Mullā to Tehran.[231] Reporting the events with some exaggeration, Liwī said that the Mullā imposed regulations on the Jews such as their men should wear a red patch on their coats, their women should put on red or khaki veils; they should not ride horses, they were not allowed to come outdoors on a rainy day lest they might defile Muslims; they were not allowed to build houses higher than that of their Muslim neighbors, and so on.[232] Such regulations had existed for Zoroastrians in Kirmān and

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[227] *Asnādī az Zartushtīyān Muʿāṣir Irān*1879-1959: 339-340. In the early religious texts of the Zoroastrians, such as *Dīnkard III*: Kard-i 80, an expression called in Pahlavi language "Xvaet.Vadaθa" is found. The term is explicitly explained as 'incest', but later Zoroastrians, not satisfied with the meaning came to interpret it as the rule of the lawfulness of Zoroastrians only marrying each other. See more information in chapter one, footnote no.121.

[228] See: *Asnādī az Zartushtīyān Muʿāṣir Irān*: 339- 384.

[229] Ibid: 375-376.

[230] See, as an example, Robert Cleave, (ed.), Haideh Sahim, "Jews of Iran in the Qajar Period: Persecution and Perseverance" in *Religion and Society in Qajar Iran* (U.S.A: Routledge Curzon, 2005). According to F.O documents and what Liwī wrote, she analyzed the events and their reflection in foreign newspaper and journals with high sympathy for Jews.

[231] Iʿtimād al-Salṭana, 1027. See his biography in Bāmdad, vol. 3: 330-348.

[232] Liwī, vol. 3: 757-58.

Yazd during 1880 to 1911.[233] From amongst the lengthy list of regulations which are to be found in the documents, I have only briefly quoted those that have bases in the works of Shiite jurists from al-Ṭūsī until today.

Similar riots occurred in Kirmānshāh and Shiraz in 1896. However, regarding the former, there is only one reference available.[234] As to the latter, the disturbances had various aspects, among them religious motivations. Shuʿāʿ al-Salṭana, the governor of Shiraz, mentioned the requests of people in a letter, among which was the request for distinguishing religious minorities, especially Jews, in Shiraz. According to him, the people had said that since religious minorities were not identifiable, they were worried about impurity and other Islamic rulings.[235] The governor indicated that he would ask the Crown Prince, the *walīʿahd* to give them permission to distinguish Jews in Shiraz in order to maintain calm. The governor then ordered the Jews to attach the red patch on their clothes, and the revolt temporarily ceased.[236] However, after a few months, the riot was completely over as soon as the governor was removed.[237] This event showed that the roots of the riot did not have a religious motivation or basis but grew from the oppression and pressures imposed by the governor. According to Liwī, compared to the reign of the previous Shahs and governors of the Qajar, Safavid, and Mongol dynasties, the situation of religious minorities was better in the time of Nāṣir al-Dīn Shah (1848-1896).[238] Some similar reports are available concerning the Zoroastrians[239] and the Sheykhīyya group in the same period of time.[240] On the other hand, according to some documents in the Iranian Ministry of Foreign Affairs, some riots against the Jews in Tehran in 1904 and in

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[233] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 392-400, 421, 428, 452-57, esp. the footnote in 341.
[234] Liwī, vol. 3: 763.
[235] *IDF*: 115-116.
[236] *IDF*: 116.
[237] *IDF*: 122. See also no print documents in Archive of Foreign Ministry, 1323, box 22, file 13, p. 2.
[238] Liwī, vol. 3: 765.
[239] Iʿtimad al-Asalṭana: 950- 951; *IDF*: 93; See also, *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 428. The document is a letter on behalf of about seventy clerics of Yazd (1299/1902) to *ṣadr aʿẓam* in which they complained on changing the clothes of Zoroastrians.
[240] They were groups which had a more mystical approach to Shiite teachings and helped to prepare grounds for the rise of the Bābī movement. They used to live mostly at that time in Kirmān and Yazd. About them, see: Y. Richard, "Sheykhiyah" in *OEMIW,* and a relevant article by D. MacEoin in *EI* [2]. See also Abrahamian: 16-17; and M. Jūdakī, "Thiqat al-Islām Tabrīzī" in *EWI*.

Shiraz in 1910 took place at the instigation of the Jews themselves as well as those of some foreigners.[241]

In 1905, with the start of the protests against the tyranny of the local governor of Tehran which led to the Constitutional Revolution, religious minorities joined other Iranian Muslims. There are some reports which indicate the participation of Jews, Christians, Zoroastrians and Azalīs in the Revolution in Tehran, Isfahan, Tabriz, Urūmīyya, and Shiraz.[242] These documents briefly refer to the issue and do not contain detailed expositions. However, the atmosphere and the prejudice with regard to religious minorities during the Revolution had not completely changed, and the traditional mentality continued to exist, even among the revolutionaries. In one of the secret committees (*anjuman makhfī*),[243] established for implementing revolutionary acts, religious minorities had intended to appoint their deputies for the *majlis*. Kirmānī reported that

> "the committee decided to convince them to ignore the selection of representatives because of the opposition of the *ʿulamā'* in Najaf and Isfahan. After great efforts, the Christians and Jews accepted and succumbed to the justification. They, then, gave their right to Sayyid Muḥammad Ṭabāṭabā'ī and Sayyid ʿAbdu Allah Bihbahānī, respectively, to be their representatives in the *majlis*. But the Zoroastrians had selected Arbāb Jamshīd.[244] We tried to convince them and to treat them like Jews and Christians, since if any riot occurred in the society, the religious minorities would suffer".[245]

Then through the support and praise of Zoroastrians in the words of Bihbahānī in the *majlis*, their deputy remained in his position. Bihbahānī praised them that they were, in

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[241] ʿAlī Akbar, Wilāyatī, *Irān wa Mas'al-i Filisṭīn bar Asās Asnād Wizārat Khārij-i 1897-1937* [*Iran and the Problem of Palestine According to Iranian Documents of Foreign Ministry*] (Tehran: Wizārat Khārij-i, 1378/1999): 47-48. The author was the Iranian Foreign Minister from 1983 to 1995.

[242] Waterfield: 140; A. Netzer, "Naqsh Yahūdīyān Irānī dar Inqilāb Mashrūṭ-i" [The Role of Iranian Jews in the Constitutional Revolution] in *Yahūdīyān Irānī dar Tārikh Muʿāṣir*, Sarshar, Homa & Houman (eds.), vol. 1: 31- 40; see general factors that created the unique circumstances under which Armenians became actively involved in the Revolution in: Houri Berberian, *Armenians and the Iranian Constitutional Revolution 1905-1911: The Love for Freedom Has No Fatherland* (Boulder: Westview Press, 2001).

[243] About these committees see: M. Ettehadieh, "Constitutional Revolution, V", in *EIR.*

[244] Concerning him see, *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: Ch. 2; see also H. Ranjbar, "Jamshīdīyān" in *EWI.*

[245] N. Kirmānī, vol. 1: 583-4.

fact, the fathers and the original owners of this land and very decent people. This praise is referred to in one of the radical monographs written against constitutionalism, known as *Tadhkira al-Ghāfil wa Irshād al-Jāhil* [*The Remembrance of the Ignorant and the Guidance of the Unknown*].[246] Referring to Bihbahānī's statement, the author wrote as follows,

> "Islamic theodicy is based on the inequality of the rights of individuals; equality and freedom are the essence of oppression...why he described the Zoroastrians as 'decent', when they are the wicked ethnic group?"[247]

4. 3. Communal Institutions

While some limited amount of information is available on the communal institutions of Iranian Jews, Christians and Zoroastrians, such information has not been found on the Mandeans in the focal period of this study. Since 1850, Iranian Jews, in addition to their synagogues had societies (*Anjuman* or *Hibra* in Hebrew) in a number of cities to provide for their needs arising from their personal status, to practice the Jewish law (*halakha*), including the supervision of preparing kosher food, resolving family and financial conflicts, burying the deceased, and registering marriages and divorces. The first Jewish *anjuman* was officially registered in Tehran in 1316/1933.[248] Iranian Jews have chosen members of societies from among their trustworthy men. They had their own rabbi in their community and were independent in training rabbis and building synagogues. Since the establishment of the second parliament in 1909 to 1959, Jews had a representative in the parliament who was also the head of their society, but afterwards they have chosen two persons for the two separate roles.[249] Another Jewish institution was the schools with a new system of education established for the first time by the Alliance Israelite Universelle. The Alliance was established by six Jews of Paris in 1860 for

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[246] It is famous among many historians that this monograph belongs to Sheikh Faḍl Allāh Nūrī, but Iraj Afshār (ed. 1362: vol. 2: 235-36) said this work is written by Mīrzā ʿAlī Isfahānī, one of his followers. F. Ādamīyyat (1355/1977: 259) argued that it was written by Sayyid Aḥmad, the son of Sayyid Kāẓim, and didn't add more information on these individuals.

[247] *Rasā'il Mashrūṭīyyat,* ed. by Zargarīnizhād (ed.): 181; F. Ādamīyyat (1355/1976): 265-66.

[248] The data based on my interview (no. 1) with H. Yashāyā'ī, the head of *anjuman kalīmīyān* in Tehran.

[249] See, Shemoil Kāmrān, "Iranian Jewish Organizations: A History" in *Yahūdīyān Irānī dar Tārikh Muʿāṣir*, Homa & Houman Sarshar (eds.), vol. 1: 119- 121.

"the protection, improvement and support of those Jews who have been suffering persecution because they are Jews. They declared at the outset that all political questions should be excluded."[250]

With the support of the Embassy of France, the Alliance's activities in Iran actually started from 1898 in the period of Muẓaffar al-Dīn Shah.[251] In 1898, they had 350 boys as pupils in Tehran with a budget of 14, 900 Francs.[252] Later on, in 1901, they were also able to establish new schools in the cities of Tehran, Hamadan, Shiraz, Kirmānshāh, and Isfahan mostly for Jews and rarely for Muslims. They had a total of 2, 225 students in 1906 in those cities.[253] During that time, the Jews did not have any newspaper or publication, however.

Communal institutions for Zoroastrians were developed by Manekjī. One of the most important efforts was the establishment of societies in order to provide for their needs arising from their personal status and to keep, legally speaking, Zoroastrian independence from Islamic communal courts.[254] The first society was established in Yazd and Kirmān after 1854,[255] and later on in other cities such as Tehran (1907) and Shiraz (?), where Zoroastrians lived. Zoroastrian women were not entitled to participate in the elections of their societies until 1345 /1966.[256] Throughout the history of these societies, which are renewed every two years, Zoroastrians have had many conflicts with each

[250] See Jacques Bigart, "Alliance Israelite Universelle" in *JE*. This organization was founded many years before the emergence of the idea for establishing the country of Israel and the Zionist movement. Some radical conservative Iranian groups regard them as a branch, or even as the founder of Zionism. See H. Ābādīyān, *Buḥrān Mashrūtiyyat dar Irān* [*The Crisis of the Constitution in Iran*] (Tehran: Institute for political studies and researches, 1383/2003), Ch. 8, esp. 265-266, 268-269. No where does the author mention the suffering of the Jews in various periods in Iran, rather he concentrates on the Jews and their activities, as belonging to Israel and Zionism. On page 276 the author regards E.G. Browne as a colleague of the Jewish English society, too; Cf. Michael Wickens et al. "Browne" in *EIR*.

[251] The Shah also used to pay 200 *tomans* per month as allowance.

[252] See: J. Bigart, *ibid* in *JE*. For more information on the development of Jewish activities in Iran, see A. Netzer, "Anjoman-e Kalīmīan" in *EIR*; see also E. Sanasarian, *Religious Minorities in Iran,* 45-48.

[253] Aubin Eugene, 299. See also Humā Naṭiq, "The Short History of Alliance Activities in Iran" in *Yahūdīyān Irānī dar Tārikh Muʿāṣir*, Homa & Houman Sarshar (eds.), vol. 2: 55-130. She relates that the British government was not in agreement with those activities in Iran (62-63). On the other hand, A. A. Wilāyatī (1378/1999: 25), drawing on *IDF* (p. 422), claimed that France came to interfere in the internal affairs of Iran under the pretext of these schools. For more information on these schools during 1922-1925, see *Judeo- Iranian and Jewish Studies Series Pādyāvand*, A. Netzer (ed.) (California: Mazda & Costa Mesa, 1997-1999), vol. 2: 123-134.

[254] See *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: Ch. 5, esp. 283-284.

[255] Ibid: 4-6; Cf. M. Boyce: 218. She mentioned 1898 as the date of the establishment of the Anjuman in Yazd, but it would not be true.

[256] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 286.

other.[257] Among the members of each society, there is a priest or clergyman (*Dustūr* or *Mūbad*) however, apart from the fact that the position is hereditary; no more information is available concerning the institution of the education and training of those priests and their relationship with the society of Zoroastrians at the time.[258] Zoroastrians did not have any facilities to educate their students before the arrival of Manekjī in Iran. The first Zoroastrian schools were established by him, and after 35 years, they experienced such great success that in the late Qajar dynasty they even had special high schools and literate girls.[259] However, they did not have any newspaper and publication, during 1848 to 1911.

Churches were the main institution where Christians carried on their ritual ceremonies, including a place where they could provide for their needs arising from their personal status. As already stated, they had kept their affiliation to foreign, especially Syrian churches. The Armenians, for example, have three dioceses in Iran; a) Ādharbāyjān (from 1833), b) Isfahan and all the southern provinces, (from the early part of the seventeen century), and c) Tehran and the northern provinces (from 1945).[260] Despite the *fiqh*-oriented opinions of jurists, which forbade the building churches, most churches in Tehran were built in the period of the Qajar dynasty, with the oldest one dating back to about 215 years ago.[261] Amongst the religious minorities, during the years 1905-1911, it was only the Christians who had newspapers and weeklies in the Armenian and Chaldean languages such as *Orthodoxunā* (1907) by the Christian Assyrians in Ūrūmīyya, the weekly *Erāwd* (1909) and the *Zāng* (1910) in Tabriz by Armenians.[262]

4. 4. The Legal Situation

According to documents and reports, during the focal period of this study, all of the religious minorities often coexisted with Muslims and accepted to pay the *jizya*, via their legal representative (*kalāntar*). From time to time, they had been obliged to obey certain

[257] Ibid: Ch. 5, esp. 284-85, 290-293.
[258] See the role of the Mūbadān in Zoroastrianism, Mary Boyce (1969), *Historia Religionum*, ed. C.T. Bleeker, vol. II, Holland, tr. Freydūn Wahman (Tehran: Thālith, 1386/2007), esp. 118-131.
[259] Mary Boyce (1969): Ch. 13, esp. 210-211; see also Ch.14: 219-223 on their situation in the early of twentieth century.
[260] Lindā, Malkamīyān, *Kilīsāhāy Arāman-i* [*Armenian Churches of Iran*] (Tehran: Daftar Pazhuhishhāy Farhangī, 1380/2000): 39, 69.
[261] Ibid: 113.
[262] See more information in Jabbārlūy (1383/2003): 338-340.

regulations such as wearing distinguishing clothes. Their legal situation was as if an unwritten contract of peace (*muʿāhida* or *amān*) for foreigners and protection (*dhimma*) for religious minorities had existed. There is no detailed information available concerning such an official contract at this time.[263] The members of Jewish as well as Zoroastrian societies (*anjumans*), as already mentioned, were chosen by the vote of their people, and then the society selected a *kalantar* for legal relations with the government.[264] Before establishing those societies the representatives were chosen by the government, whether from their co-religionists or from *Jadīd al-Islāms*. The Armenians and Assyrians paid *jizya* directly through their archbishops in the Churches. This method brought about more security for Christians since the local governors or influential men could not bother every person in the region to levy a *jizya*.

One important effort Manekjī did for Zoroastrians in this respect was paying the *jizya* on behalf of the Parsis directly to the Shah for twenty five years at one time.[265] He could by the activities and support of his co-religionists in India, increase the security of Zoroastrians. Then in 1290/1882, with the support of the ambassadors of Britain and France, and also the Imam of the Friday prayer of Kirmān,[266] Manekjī was able to satisfy Nāṣir al-Dīn Shah to get a decree canceling the *jizya* for Zoroastrians. He also asked Sheikh Murtaḍā al-Anṣārī[267] (d. 1281/1864), a great Iranian *usūliī* jurist in *ʿatabāt*, fourteen questions concerning the legal relations between Muslims and Zoroastrians, including conversion to Islam by force. In the response, the Sheikh deemed it necessary for the Muslims to observe all the rights of religious minorities and to respect them. In his opinion, there was no obligation whatsoever remaining for minorities except paying the *jizya*. In addition, he declared that conversion by force is not lawful.[268]

Another role of the *anjuman*s, synagogues, and churches was maintaining the legal autonomy of religious minorities in the area of personal status including family law,

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[263] On paying the *jizya,* besides some reports there also existed the memories of people who lived in Iran at the time such as Aubun, the ambassador of France, see: *BDF*, vol.14: 13-18.
[264] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 57- 58.
[265] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 9-10.
[266] Ibid: 10, See the original documents as regard to the issue in ibid: 51-62; See also Boyce (1979), *Zoroastrians*: 209-212.
[267] See his biography in, "Anṣārī, Sheikh Murtaza" by S. Murata in *EIR*.
[268] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 340.

inheritance and testimony.[269] The Christians had written laws and regulations in the field of personal status but Zoroastrians did not have internal written laws for their legal personal status until 1320/1925. That is why they had to refer to *ʿurfī* (customary or governmental) courts in cases where they could not resolve the problem within their societies.[270] The Jews relied on *halakha* which was usually interpreted by their rabbis in the field of personal status. They had written laws only on inheritance and issues other than this were left up to the opinions of the rabbis.[271] It is worth mentioning that Amīr Kabīr in 1851[272] declared that the conversion of a non-Muslim to Islam could not prevent other relatives from the inheritance, and then with the support of foreign forces especially that of France and Britain, Nāṣir al-Dīn Shah issued similar decrees in 1880 and 1884. The influence of the clerics in *Sharʿī* court actually helped to keep the problem unresolved, however. All groups of religious minorities were referred to *ʿurfī* courts or, as we shall see, to the *dīwān* at the Ministry of Foreign Affairs in the cases where there were claims on, or conflict with, Muslims.

Christians had their institutional as well as cultural dependencies on foreign churches and it was regarded as a kind of legal support for them. Therefore, at the same time that Christians have played an intermediary role in Iran they have regarded themselves as Iranian, keeping their own ethnicity, culture, religion, and language with foreign protection. Thus, they had not encountered forced conversion as far as the present author has found, and did not experience the problems which Jews or Zoroastrians had. When missions and archbishops were coming from abroad, the Christians had churches, including the Presbyterian Church, the Orthodox Church of the Middle East, and the Roman Catholic Church.[273] Missionaries who came to Iran were major supporters for the Christians. The exact date of the arrival of American, English, and Roman Catholic

[269] The Gregorian Armenian Church has a special written personal law that is revised from time to time. See the latest one in seventy-six articles, *Muqarrarāt Aḥwāl Shakhṣīyya* (Isfahan: Wānk Church 1380/2000). As to the law of the personal status of Assyrians, I could not find any detailed and relevant piece of information.
[270] *Asnādī az Zartushtīyān Muʿāṣir Irān* 1879-1959: 610-611.
[271] According to Iranian Jewish Society, they have not official codified law on their personal status and they rely on the regulations which might be understood from *halakha.* See in Appendix II the original letter (no. 8355, dated 17/Ādhar /1378/7 December 1999) sent on behalf of the Society to Judiciary power approving the claim.
[272] F. Ādamīyyat (1348/1970): 304- 305.
[273] See for more information, Y. Armajani, "Christian Missions in Persia" in *EIR*; see also, A. Amurian and M. Kashefi, "Armenians of Modern Iran" in *EIR*.

missionaries is not clear, however, some reports indicate that they have been coming to Iran at least since 1834.[274] The Lazarus and Presbyterian missionaries came to Tabriz and Tehran from 1876 on and established some schools and orphanages in 1901. One of their aims among the native Christians and Jews in Iran was the direct attempt to convert Jews and Muslims to Christianity. Since the conversion of Muslims calls for the death penalty in the *Sharīʿa* and being non-Muslim would place them in great danger, the attempts by those missionaries to convert them failed. But their educational and medical activities saw considerable achievement in various cities. There are of course some instances of Jews who converted into Christianity.[275] On the other hand, when the Belgians and Austrians controlled the management of the Ministry of Ports and Customs in Tehran (1890-1906), they only employed Iranian colleagues from religious minority communities, especially Christians. Such support and treatment provoked a negative Muslim Iranian attitude towards religious minorities.

The Zoroastrians benefited from the legal support of their co-religionists in India since 1854. Since Manekjī had British nationality as well, he could gain the support of the British embassy. However, due to their original Iranian identity Zoroastrians could not gain the right of capitulation from other embassies. What completely remains obscure is the situation of the Ṣābi'īn, hence more research is needed in this field on how they provided for their needs arising from their personal status and how they conducted their legal affairs. In addition, they were at the mercy of having no supporters and, even though they were not regarded as the People of the Book or, to be more exact, were not under a special peace contract (*muʿāhida*), they were practically regarded as *dhimmī*.

Through the Turkamanchāy treaty (1828), as already stated, a formal unilateral capitulation existed in the first place for Russia, and later on in favor of other countries such as Britain, Austria, Germany, France, the Ottoman Empire, etc., which had political

[274] Benjamin: 359; see a brief Persian report on the activity of churches and missionaries in the nineteenth and early of the twentieth century in H. Dihqānī Taftī, *Masīḥ wa Masīḥīyyat dar Iran* [*Christ and Christianity in Iran*] (London: Sohrāb 1992), vol. 1: 67-98. See also, John Elder, *History of the American Presbyterian Missions in Iran 1834-1960* (Tehran: Literature Committee of the Church Council of Iran, 1960).

[275] For more information on the situation of Christians, esp. in Tabriz and Ūrūmīyya, in the period of the Constitutional Revolution, see, Aubin: 69-75,108-109. In addition, he gave a description of the Jews and Zoroastrians of that period in Isfahan and Mashhad on pp. 295- 299.

commercial relationships with Iran.[276] Three categories could benefit from this juridical right: foreigners who were living in Iran, foreigners who traveled to Iran and anyone who became a refugee in the embassies or whoever the embassy accepted to protect on his/her request. Through some reports, it could be understood that at that time some foreign embassies, such as those of France and Britain, accepted the need for and pursued the protection of Iranian Jews. This was understood by examining the reports whether published or unpublished, on the disturbances against the religious minorities in Hamadan, Tehran and Shiraz. Accordingly, the Iranian government accepted the protection, too, and referred cases of legal conflicts between Jews and Muslims to the *dīwān* affiliated to the Ministry of Foreign Affairs to verify the accounts in the presence of a British representative.[277] Most of the time, however, Jews tried to keep their Iranian identity and only in emergency cases, had requested foreign aid. The Russian embassy and its consulates in various cities, especially in the Northern provinces, supported the Christians.[278] The capitulation sometimes was considered as a means for supporting the legal affairs of the religious minorities. It remained from 1828 until 1927, when Reza Shah after codifying the Civil and Penal Code unilaterally cancelled it.

[276] I. S. Wazīrī: 16-18; see also, A.K.S. Lambton. "Imtiyāzāt, iii- Persia" esp.: 1189-1191, in *EI* [2].
[277] See, M. A. Chilungar (1382/2002): 186-187.
[278] See, for example, *IDF*: 93. The Embassy of Russia in a letter (dated 1904, no.109) asked the Iranian government for the safety of the Armenians of Sabziwār, a city in the northeast of Iran, who took refuge in the telegraph house. Aubin: 299.

Chapter Three:

The Codification of Laws and Regulations 1906 - 1979

1. The Constitution 1906 – 1907

The codification of the Constitution is regarded as a great achievement of the 1906 Revolution. The debates, in- and outside the first Parliament, took place on the nature and the function of the Parliament, on the theme of some articles of the Constitution, and on the Supplement. These debates, in particular those of that had some relationship with the rights of religious minorities, brought about the first confrontations between representatives of modern thought and those of the traditional Islamic classes on the level of their theories. The main question in this chapter is as follows: "Was there any shift in the Constitution and other laws, when compared with those legal opinions in Shiite *fiqh* concerning the rights of religious minorities?" To answer this question we need to know briefly, the process by which the first Parliament in 1906 was established, then about the method by which the Constitution was drafted and codified, and finally through textual analysis we will return to answer the question.

The chain of events was begun by the Declaration of Muẓaffar al-Dīn Shāh (August 1906) when he agreed to have a constitutional monarchy. It led to the formation of a committee that was responsible for writing a draft of the Electoral Law, and later on, the Constitution. In October of 1907, the very committee, with the cooperation of some deputies of the first Parliament, wrote a draft of the Supplementary Law as well which was approved by the Parliament and ratified by the new Shah, Muḥammad ʿAlī Shah. According to the Electoral Law, sixty persons from Tehran and another sixty from other cities in total could be elected to seat in Parliament for two years from each class of society.[1] As already noticed, women were not allowed to participate as candidates or as voters.[2] There was no article in the Electoral Law indicating how religious minorities could elect their deputies, although there was an oral agreement: the Zoroastrians chose

[1] There is a little information on the conditions of society in the first years of the twentieth century. But according to some evidence such as the first Electoral Law 1906, one could see the existence of a kind of caste culture that made it possible to render distinct each class of society. The main classes recognized for the election were the princes and the *Qājār* tribe, the *ʿulamā'* and their students, nobles and notables, tradesmen, landowners and peasants, and trade-guilds. Each voter had one vote and could only vote for his own class. Therefore, the deputies were representatives of some guild or other and not of all the people as expected.

[2] Art. 3 and 5 of the Electoral Law 1906.

Arbāb Jamshīd [3] as their own representative, and the Jews and Christians agreed that two clerics Sayyid ʿAbd Allāh Bihbahānī and Sayyid Muḥammad Ṭabāṭabā'ī would be their deputies. [4]

The representatives of Tehran started the activities and they did not wait for the representatives from other cities. Because the Shah was seriously ill and nearing death, this decision was of crucial importance and was appropriate. Among the deputies who came to the Parliament, a few of them were familiar with matters concerning constitutionalism, the law in the modern sense of the term, and the main task of the *majlis*. They sought to justify every new thing that was of benefit for the people by clothing it in the garb of religion and putting it in a religious context. That is why most deputies regarded the Parliament as a means by which it could uphold justice and implement the *Sharīʿa* or Islamic law in society. In this paradigm, the name of the *majlis* was usually mentioned in juxtaposition with the adjective 'sacred' (*muqaddas*).[5] Ṭabāṭābā'ī, and Bihbahānī, the two clerical leaders of the Revolution who were specialists in the field of Islamic law attended the Parliament to help the deputies in their discussions and more importantly, to give religious legitimization their decisions. This position was one of the reactions to the attitude that regarded the Parliament as a modern instrument that aimed to enfeeble the role and function of Islam. Most people, who suffered from the oppression of the local rulers including religious minorities, sought help from the Parliament and sent many complaints to the representatives expecting them to react. The reading of those complaints and discussions regarding what had happened and what the deputies could do, took a great deal of time.

A cursory look at the biography of the major members of the committee will prove the idea that constitutionalism in 1906 was a solution planned by the aristocratic elite to save the monarchy, maintain Iranian prestige on the international political scene

[3] He was introduced in Chapter two.

[4] It is famous in the literature written on the 1906 Revolution that Jews and Christians, gave their right of deputyship to Bihbahānī and Ṭabāṭabā'ī in the first Parliament. But as it appears from the discussions of the deputies, when choosing a deputy became an issue of concern for them, the two clerics announced that they would be their representatives. See, *Mudhākirāt Majlis Awwal* [*The Discussions of the First Parliament*], ed. Gh. Mīrzā Ṣāliḥ (Tehran: Mazīyār, 1384/2004): 85.

[5] When representatives came to ratify the law of the municipality (*Baladīyya*), which was translated from the French, some of them asked to avoid the mention of some words such as 'theater' and 'museum' in the 'sacred *majlis*'. They believed that the word 'theater' was not appropriate for the dignity of the *majlis* and the latter, in their opinion, did not have any benefit. See, *Mudhākirāt Majlis Awwal*: 140.

and being ahead of the Ottoman Empire, its competitor in the region. At the same time, the people and the clergy while they didn't know the meaning and the implications of constitutionalism supported the Revolution in order to rescue themselves from deplorable conditions. First of all, we should briefly familiar with the authors of the draft of the Constitution and their methods. The committee was made up of the members of the Foreign Ministry who belonged to the class of the intelligentsia, which had been educated abroad or had graduated from the *dār al-funūn* and the School for Political and Legal Sciences. It is pertinent to mention that the history of major personalities and the codification of the Constitution in Persian literature have not been investigated. What is written in the memoirs of various influential persons is confused. There are no independent reports on the activity of the commissions of the first Parliament, which discussed the articles. What has been presented below, however, has been uncovered through reading and evaluating extant documents including all the discussions of the deputies and some related memoirs.

2. Biography of the authors of the Constitution and their methods

2. 1. Authors

The committee, firstly, was made up of the following persons respectively, in order of importance: [6] Ḥasan Pīrnīyā, known as Mushīr al-Mulk and then Mushīr al-Dawla and his brother Ḥusayn Pīrnīyā, known as Mu'taman al-Mulk; Murtaḍā Ṣanīʿ al-Dawla, and his brother Mahdī Qulī Hidāyat, known as Mukhbir al-Salṭana, and Ḥasan Isfandīyārī, known as Muḥtasham al-Salṭana.[7] The committee was able to quickly prepare the draft of the

[6] These five persons who had key role in both steps in the drafting of the Constitution are mentioned in the following references: M. Hidāyat, *Khāṭirāt wa Khaṭarāt* (Tehran: Zawwār, Second edition, 1363/1983): 189; I. Bāstānī-Pārīzī, *Talāsh-i Āzādī* (Tehran: Nuwīn, 1354/1975): 92; M. Bahār, *Tārīkh Mukhtaṣar Aḥzāb Sīyāsī Iran* [*the Short History of Political Parties*] (Tehran: without the name of publisher, 1371/1991): 6; cf. N. Kirmānī: 514 where he regarded Ismāʿīl Mumtāz al-Dawla as the author of the Electoral Law but he was actually one of the members of the translation committee; cf. Browne (1909: 16) added also M. Qulī Mukhbir al-Mulk, the third brother of Ṣanīʿ al-Dawla; S. A. Arjomand, 'Constitutional Revolution, iii' esp.:187 in *EIR* in which he mentioned only four persons out of five; F. Ādamīyyat (1355/1976): 385, 392 which added Mirzā Reza Khān Girānmāya (Mu'ayyad al-Salṭana) who was the first ambassador in Germany in the period of Nāsir al-Dīn Shah. See also, Ādamīyyat, *op. cit.*: 174, added Muḥammad Ṣadīq Ḥaḍrat, the teacher of law in the School for Political and Legal Sciences. The differences can show the status of documents concerning the issue.

[7] He was educated in the traditional educational system and wrote some books on the *Sharīʿa* and ethics. In the first months of the Parliament, as an employee in the Foreign Ministry, he attended the Parliament

Constitution, which was then approved by the deputies and ratified by the Shah only ten days before the latter's death. After a few months of discussions on various issues in the Parliament, the state and representatives identified some general defects in the structure and content of the Constitution. Subsequently, according to the agreement, the Parliament appointed the following persons to collaborate with the last committee in preparing a draft of the Supplementary Law; Jawād Saʿd al-Dawla (head of the committee); Maḥmūd Iḥtishām al-Salṭana; Muḥammad Ṣadīq Ḥaḍrat;[8] Naṣr Allāh Taqawī; Muḥammad Ḥusayn Amīn al-Ḍarb;[9] Ṣādiq Mustashār al-Dawla;[10] and Ḥasan Taqīzād-i.[11] The related references available indicate that, among the group, the six persons below were pioneers and had prominent roles in preparing the draft of the Constitution and its Supplement as well as in managing the first Parliament.

2. 1. 1. Ḥasan (1874- 1936) and Ḥusayn Pīrnīyā (1876- 1947)

They were the two sons of Naṣr Allāh Khān Mushīr al-Dawla, the Foreign Minister (d.1907). Naṣr Allāh was descended from a pious mystic family that went back to Mīr ʿAbd al-Wahhāb, who was a master (*Pīr*) of a Ṣufī Order, *Nūrbakhshīyya*. The tomb of Mīr ʿAbd al-Wahhāb is located in Nā'īn, a small city 100 km east of Isfahan. Thus, the sons of the master were given the honorific Pīrnīyā (the master's children). Naṣr Allāh moved from Nā'īn to Tehran and step by step achieved high political positions. He became the first Prime Minister after the victory of the 1906 Revolution.[12] Ḥasan and

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every day on behalf of the Shah and the state. He became the head of the Parliament three times in the period of Reza Shah. Later on, he was one a serious advocate of the forcible removal of women's veils in 1317/1939 a policy that Reza Shah practiced. See more on his biography in M. Bāmdād, vol. 1: 321- 322. His father was the deputy Foreign Minister for twenty years.

[8] He graduated from the School of Political and Legal Sciences and then he became a teacher of law courses there. It is said that he taught the new concept of law and the subject of the Constitution at his home every night for trade guilds of deputies. He was also a representative in the second Parliament as well as the author of *General International Law* in 1906.

[9] He was the representative of tradesmen in the Parliament. He died in 1311/1932. See more on his biography in M. Bamdād, vol. 1: 429- 430, vol. 3: 348- 362.

[10] He was the head of the moderate fraction in the first Parliament. Then, he became the head of the second period of the Parliament for one year. Later on in the process of the overthrow of the Qajar dynasty in 1304/1925, he was the head of Senate and voted for establishment of a new dynasty.

[11] He was the head of revolutionist fraction vis-à-vis the moderate one in the first Parliament. See, ʿAbd al-Ḥusayn Ādharang, "Taqīzād-i" in *EWI*.

[12] See also, I. Ṣafā'ī, *Tārīkh Mashrūṭīyyat bi Riwāyat Asnād* [*The History of the Constitutional Revolution Based on Documents*] (Tehran: Yārān, 1380/2001): 453-466. The author explains how he could gain such a high position in Foreign Ministry.

Ḥusayn were born in Tehran. First, they received the schooling of the time at home, and then with ʿAlī, the third son of family, they were dispatched abroad to complete their education. Ḥasan graduated first from a military college and then from a school of law in St. Petersburg in 1316/1898. He immediately began to work as an attaché of the Iranian Embassy in St. Petersburg. Ḥusayn and ʿAlī went to law school in Paris to complete their education. When ʿAlī was only twenty four years old, he contracted tuberculosis in Paris and died there. Ḥusayn, however, continued his education and graduated there in 1317/1899. When their father became the Foreign Minister in 1899, first Ḥasan, and then Ḥusayn, were called to Tehran to work with their father.

Ḥasan was appointed as first secretary of the Minister and during his tenure, he was able to establish the office of Ministry Archives and framed regulations for issuing visas as well as for implementing the legal affairs of Iranians living outside the country. He had also been appointed first secretary to the Prime Minister, viz. Amīn al- Sulṭān, and because he knew French and Russian quite well, acted as translator for him and the Shah on their trips to Europe. The major concerns for him throughout his life, was legal reform and reforms concerning juridical staff. This focus on reform led him, with the aid of his father, successfully to secure the Shah's agreement to establish the School for Political and Legal Sciences for training diplomats in late 1899. He became the head of the school and both brothers taught international private law there. In the late 1901, Ḥasan published his lectures in the school under the title of *International Law*. He believed that *fiqh* should also be required study for students at the school, but the *ʿulamā'* maintained that the learning of *fiqh* was confined to religious students only, so none of them agreed to teach there.[13]

By the inception of the constitutional movement, the two brothers received staunch support from among the class of the intelligentsia. On their suggestion, the word 'constitution' was inserted in the proclamation of the Shah and it was Ḥasan who read it out to the people.[14] Due to the fact that both Pīrnīyā brothers were moderate in their conduct and their politics throughout their lifetimes, they were regarded as trustworthy

[13] See more information on Ḥasan and Ḥusayn Pīrnīya in I. Bāstānī Pārīzī (1354/1975), esp.: 81 onward; M. Bāmdād, vol. 1: 323- 326, 388- 389; Bāqir ʿĀqilī, 'Pīrnīyā, Ḥusayn' in *EWI*; M. Mahdī Amīnī, 'Pīrnīyā, Ḥasan' in *EWI*; See also some criticisms of their political behavior in M. Iḥtishām al-Salṭana, *Khāṭirāt*, [*Memoirs*] (Tehran: Zawwār, 1366/ 1987), esp.: 524, 543-546.
[14] N. Kirmānī, vol. 1: 446; Browne (1910): 449.

men in the eyes of the state and the Parliament. Their personalities helped the Revolution, the people and the government several times, especially in securing the Constitutional proclamation and getting the Shah to ratify the Constitution earlier than expected. Ḥasan was appointed head of the committee that was responsible to prepare the draft of the Constitution.

When Muḥammad ʿAlī Shah came to power in 1906, he dispatched Ḥasan on a mission to inform European countries on the news of coronation of the new Shah. On this trip, he tried to know more about the legal procedures in those countries. Later, his acceptance of the mission was criticized by some revolutionaries. When he became Foreign Minister for a short time in 1907, he sent a letter to the British Embassy, declaring the Anglo-Russian Agreement 31 August 1907 invalid regarding their interests in Iran. Even though the letter never exerted any influence on the agreement, it brought him further popularity.

Ḥasan Pīrnīyā believed that the secret of Iran's development depended upon reforming the Ministry of Justice. Based on this belief, during 1907- 1916 when Iran, was suffering from political instability, he accepted the post of Minister of Justice four times in various cabinets all of which had a short duration. During this time, he himself was able to restore and alter the structure of the Ministry and prepare the background for subsequent reforms. He did this by writing and offering to the Parliament the law concerning the juridical structure of the Ministry in 311 Articles, legal procedure in 812 Articles and codes of criminal procedure in 506 Articles for the courts by the end of 1911.[15] He employed a French supervisor, Adolph Pierny, to reform the new structure of the Ministry of Justice. He established for the first time a new procedure in the courts, which had two steps for auditing claims; the Court of First Instance (*badwī*) and Appellate Courts (*Istīnāf*).[16] The report on his biography concentrates on his legal efforts.[17] Another important effort during his directorship was the establishment of a military school. It became later the military faculty tasked with training an independent

[15] Bāstānī Pārīzī, *op. cit.*: 510; See also M. A. Furūghī, *Maqālāt Furūghī* [*the Furūghī's Papers*], ed. by Maḥmūd Frūghī and Ḥabīb Yaghmā'ī (Tehran: Millī, 1354/1976), vol. 1: 346- 348.

[16] In the legal opinions of jurists, it is believed that the injunctions of judges should not be revised or abrogated at all. Thus, the division of the courts into First Instance and Appellate was regarded as a decision contradictory to the *Sharīʿa*.

[17] See his political and cultural efforts in, "Pīrnīyā" in *EWI* by Muḥammad Mahdī Amīnī.

Iranian military force. With the coming of Reza Khan to power, Ḥasan was isolated in the last twelve years of his life when he wrote some works on ancient Iranian history that showed his nationalist mentality.

During the period, 1907-1909 Ḥusayn Pīrnīyā was Minister of Trade in various cabinets. He was elected from Tehran in the second (1909) to the sixth (1926) period of the Parliament most of the time chosen as head of the Parliament. By the seventh (1307/1928) period, the dictatorial way Reza Khan ruled the state did not allow the holding of any free elections, and as a matter of fact all the representatives were appointed by the government. Inevitably, Ḥusayn had to bid farewell to the political scene also.

2. 1. 2 Murtaḍā Qulī Khān Ṣanīʿ al-Dawla (1273/1856 - 1329/1911) and Mahdī Qulī Khān Hidāyat Mukhbir al-Salṭana (1280/1863/ - 1334/1955)

They were two sons of ʿAlī Qulī Khān, known as Mukhbir al-Dawla (d. 1315/1897), born in Tehran in an aristocratic, influential family, all of whom were educated in Europe. After they graduated from the *dār al-funūn*, their father intended to send them abroad to continue their education. In 1290/1873, when Nāṣir al-Dīn Shah made a trip to Europe, ʿAlī Qulī Khān who was one of the companions of the Shah took his elder son Murtaḍa and left him in Germany to study mineral engineering there. After five years, his brother Mahdī joined him for the same purpose. Murtaḍā graduated from the faculty of engineering in Berlin after seven years, while Mahdī during 1876- 1879 learned German as well as some English and French. When both brothers in 1879 returned home, they were employed in government posts. Murtaḍā secured a high position in the Ministries of Mines, Internal Affairs, Education and Culture from 1879 to 1906. He established the first private spinning factory in Tehran. By the end of 1897, Murtaḍā married one of the daughters' of Muẓaffar al-Dīn Shah. Besides working on various governmental boards, Mahdī taught German in *dār al-funūn*. He became the head of the Tehran Military School in 1904. On Nāṣir al-Dīn Shah's second journey to Europe (1878) Mahdī was one of his translators. By the beginning of the Revolution, both brothers were its advocates and later became members of the committee. The class of nobility chose Murtaḍā as a representative and he became the first head of the Parliament. He had crucial role in

managing the first days and months of the Parliament. When Amīn al-Sulṭān, *ṣadr aʿẓam*, who was a supporter of the opposition to constitutionalism, was assassinated by some radical groups, Murtaḍā objected to the act and resigned his position. He was also chosen as a representative of Tehran to the second Parliament. Finally, in 1911 he was assassinated by two Georgian men when he was the Financial Minister. Afterwards, the murderers took refuge in the Russian embassy in Tehran and then they were transferred to Russia where they escaped punishment using the right of capitulation.[18]

Mahdī had a completely different fate after the Revolution. He became the Minister of Education in the first government established after the Revolution, and at the same time, taught German from 1907 on at the high school that Germany established in Tehran with the cooperation of the Iranian government. He lived for 95 years during which he held high political positions; for example, he became Prime Minister four times one of which was during the period of Reza Shah between 1306/1927- 1312/1933. He wrote his memoirs *Khāṭirāt wa Khaṭarāt* [*Memoirs and Dangers*] which is a valuable primary work on the history of Iran in modern times.[19]

2. 1. 3. Jawād Saʿd al-Dawla (1220/1842- 1308/1929)

He was born in Khuy, in northwest Iran, and he received an elementary education including some French under a French missionary who lived there at that time. He was, one of the young students dispatched to Georgia to learn how to work with the telegraph set in 1287/1870- 1288/1871. He then returned home and he was employed at the telegraph house in Tabriz. In 1291/1874, it is reported that he became a brigadier general even though he apparently did not have a military education and then became the head of the telegraph house in Azarbāyjān Province. He traveled to Austria and France twice, from 1874 to 1877, a journey that made a profound impact on him. In 1296/1878, he married a daughter of Mukhbir al-Dawla, the father of Murtḍā Ṣanīʿ al-Dawla and Mahdī Hidāyat. Due to his irascible and proud manner, he had a bad relationship with his wife and even sometimes attacked her. Finally, she got divorced but became sick and after a

[18] See more information on him, see Y. Dawlat Ābādī, *Ḥayāt Yaḥyā* [*the life of Yaḥyā*], vol. 1: 346- 357, vol. 3: 142- 144; M. Bāmdād, vol. 4: 63-69; cf. I. Ṣafā'ī: 549- 562.

[19] See, M. Hidāyat, *Khāṭirāt wa Khaṭarāt* [*Memoirs and Dangers*] (Tehran: Zawwār, 1375/1996); Bāmdād who regarded most male courtiers in the Qajar period as corrupt, believed that Mahdī was a pious, worthy, hyperactive and very obedient to superiors during his lifetime. See M. Bāmdād, vol. 4: 184- 187.

short time, died. This event had a direct influence on subsequent important events of the Constitutional Revolution.

In 1301/1883, Saʿd al-Dawla was employed in the Ministry of Foreign Affairs and served as Iranian ambassador in Belgium for about seven years. During his tenure, he was able to create the conditions for financial advisors to be sent who later on became managers of the customs house in Iran. After about twelve years, he returned and in 1905 became the Financial Minister. When people protested against the governor of Tehran in the early days of 1906, he opposed the conduct of the governor which caused ʿAyn al-Dawla, the Prime Minister to dismiss him and exile him to Yazd. The event was one reason why Saʿd al-Dawla became and a gained popularity as a supporter of the constitutionalists later being chosen as a representative of the tradesmen from Yazd. Although he had already translated the Belgian Constitution, he did not have any role in writing the Iranian Constitution but did know that the brothers of his ex-wife had key roles therein. This point, besides his experiences and knowledge on modernity and new concepts of law, which he learnt when he lived in Belgium, caused him to be irritator during the process of writing the Constitution. For this reason, he was one of the first individuals to suggest a drafting of the Supplement to the Constitution and became the head of the committee chosen by the representatives. Based on the discussions of the first Parliament, he was very active in making valuable proposals such as establishing the first national bank, recalling the ministers to the *majlis* in order to answer queries raised and, at the same time, could not tolerate Ṣanīʿ al-Dawla, the brother of his ex-wife as the head. After the resignation of Ṣanīʿ al-Dawla from his post, he tried to become president but the representatives chose Iḥtishām al-Salṭana. Afterwards, in 1907, he refused to talk with the deputies, left the Parliament and cultivated secret relations with the Russians. During the bombardment of the Parliament, he supported the Shah's position, i.e. the way of dictatorship, later, when Tehran was captured by the *Mujāhidīn*, he took refuge in the Russian Embassy and with their support, went to Europe. After about ten years in 1294/1915, he came back to Tehran and lived in isolation until the end of his life.[20]

2. 1. 4. Maḥmūd Iḥtishām al-Salṭana (1239/1860- 1314/1935)

[20] For more information, see, M. Bāmdād, vol. 1: 288- 295; M. Hidāyat, 265, 267; cf. I. Ṣafā'ī: 565- 583.

His aristocratic family belonged to the Qajar tribe and his father, Muḥammad Raḥīm Khān (d. 1299/1881) was a courtier in the period of Nāṣir al-Dīn Shah who companied the Shah on his first trip to Europe. His father sent his son, Maḥmūd, to the *dār al-funūn* to study there for six years, but he left the school and became a member of the guards in the royal court. As it seems from his memoirs, he often criticized the curriculum as well as the method of teaching in the *dār al-funūn* in his lifetime. He believed that this school did not have any worthy teaching staff and he regarded this deficiency as one of the reasons that Iran was behind. By accepting the post of governor of Zanjān in 1306/1888, he returned to government service. He became the Iranian consul in Baghdad in 1312/1894 for two years and during that time, he learned Arabic well. On coming back to Iran, he became the deputy of the Foreign Minister for two years and then from 1318/1900 to 1319/1901, he was the governor of Kurdistān Province. Living five years, i.e., 1901-1906 in Berlin as the Iranian ambassador, he learnt German and acquired experience that is more political.

He was chosen as a representative of the Nobility and Notables, during the elections for the *majlis*, even though he was on his mission outside the country. After Ṣanīʿ al-Dawla, the first head of the Parliament resigned, Iḥtishām al-Salṭana was chosen as his successor in 1325/1907- 1326/1908. He was able to carry out great services to improve the political power of the Parliament including cooperating in drafting the Supplement, encouraging Muḥammad ʿAlī Shah to ratify it quickly, and asking the Shah to take an oath by the Qur'ān to remain the supporter of the Constitution. It is said that he had had the first politically influential position in the first Parliament, but, due to his hot-temper and his bluntness of expression, he posed a challenge to the representatives and had to leave after seventeen months.[21] When the Shah bombarded the *majlis*, he escaped to Kurdistān and Azarbāyjān in order to support the *Mujāhidin* in attacking Tehran. He was also chosen as a representative in the third Parliament. He had two Iranian and one French wife.[22]

[21] F. Ādamīyyat exaggeratedly reported his role in the first *majlis*, see, idem (1355/1976): 158- 162, 363, and 378- 382.

[22] See also, M. Iḥtishām al-Salṭana, *Khāṭirāt*, [*Memoirs*], ed. M. M. Mūsawī (Tehran: Zawwār, 1366/ 1987); I. Ṣafā'ī: 627- 639; M. Bāmdād, vol. 4: 33- 34.

2. 2. Method

Little attention has been paid to the method by which the committee prepared the draft of the Constitution. There has been no reliable independent document regarding the subject. However, from various documents including the memoirs of the individuals above as well as the transcripts of the discussions between the representatives in the first Parliament the following analysis can be made.

Since most members of the committee and especially its president, Ḥasan Pīrnīyā, had high positions in the Ministry of Foreign Affairs, it is predictable that they could easily obtain the texts of foreign constitutions through Iranian embassies.[23] The first step was that translator teams were constituted and they came to render or reproduce the texts of four Constitutions, those of Belgium, France, Russia, and the Ottoman Empire as models.[24] In the second step, the committee tried to adapt those texts to two major important social facts; to keep and to respect a) the power of the Shah, and b) the Shiite teachings that the majority of people believed in, and on which the power and influence of the ulema in society was based.[25] To fulfill the former, they took the structure of royal systems such as that of Belgium as models and they took into consideration the attempts and works carried out in the period of Nāṣir al-Dīn Shah, especially the efforts of Mīrzā Ḥusayn Sipahsālār, ʿAlī Aṣghar Khān Amīn al-Dawla and the efforts of Mīrzā Malkam Khān which intended to establish a kind of consultative *majlis*.[26] Even though the final version of the Constitution divided power into three branches, i.e. the legislative power which included the Shah, the National Assembly and the Senate; secondly the judicial power; and thirdly, the executive power which was controlled by the Shah (article 27), it was the Shah who was entitled to enact and ratify any law, to appoint ministers and half

[23] Adīb al-Tujjār, a deputy of the first Parliament said in session of 21th Dhū al-Ḥajja 1324/1906, "It is not easy to codify the Constitution and we requested from foreign countries 60 volumes books concerning the law and regulations". See, *Mudhākirāt Majlis Awwal*: 131.

[24] See, I. Ṣafā'ī, *op. cit*., 257; A. Kasrawī: 151- 153, 251; F. Ādamīyyat (1355/1976): 407- 408; M. Hidāyat: 145; cf. S. Amir Arjomand, 'the Constitution III', esp.: 188, in *EIR*. He added to the sources the Bulgarian Constitution. It is true that some articles of Iranian Constitution are similar to that of the Bulgarian but there is not enough historical evidence for the claim. Arjomand didn't clarify that where and how Iranians could use this source or which documents prove his claim. See C. E. Black, *The Establishment of Constitutional Government in Bulgaria* (Princeton: Princeton University Press, 1943).

[25] See, M. Iḥtishām al-Saṭana: 654; I. Ṣafā'ī, 574; *Mudhākirāt Majlis Awwal*: 134

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[26] Some information concerning these individuals and their activities was reported in chapter two. They intended to form a consultative Assembly like that of the Ottoman Empire established in 1876.

the members of Senate, to dissolve the National Assembly and to be supreme commander of all military forces, land and sea.[27] These rights, legally speaking, were able to satisfy the Shah in the sense that, in a Constitutional monarchy, according to the Constitution, the Crown was still quite powerful. By codifying the Constitution, which defined the role of the Shah, the National Assembly and the Senate, the committee was able to carry out its task in maintaining and respecting the power of the Shah.

As far as our study is concerned, the method of adapting the laws derived from Shiite teachings to the local environment warrants the focus of our attention. The great deficiency of the Constitution was that it did not have articles clarifying the rights of the people. Since the relative articles concerning the rights of people are gathered in the Supplement, it should become under study here. First of all, the committee did not follow the idea that the law should be westernized in the process of encountering modernity without paying attention to the religious context of the society.[28] This assumption is supported by knowing that some of members of the committee[29] were familiar with jurisprudence as well as knowing the new concept of law. Furthermore, they had, at least, two references in mind as models they could adopt; one was the Constitution of the Ottoman Empire and the other, the *One Word* of Mustashār al-Dawla written in the period of Nāṣir al-Dīn Shah. The former, translated by the committee,[30] was a model illustrating the possibility of conformity between the new concept of law and the *Sharīʿa* in the Sunnite School.

The second model, *One Word*, is worth more explanation here. The author, who was already introduced, first summarized the French Constitution and then explained it in nineteen basic principles. He then added to each principle some comments and references by relying on the Qur'ān and the *Sunna* in order to show that Islam contained the same elements and teachings that existed in the French Constitution. He tried by the process of

[27] See also, articles 35-57 of the Supplement, which states the rights of the Persian Throne.
[28] The committee was able to see the failed experience of Malkam Khān and Mīrzā Ḥusayn Sipahsālār. They didn't want to repeat them in the period of Nāṣir al-Dīn Shah.
[29] In the first committee Ḥasan Isfandyārī and in the second Naṣr Allāh Taqawī and Taqīzād-i had traditional educations.
[30] It was translated by Ismāʿīl Mumtāz al-Dawla (1258/1879-1312/1933). He was employed at the Foreign Ministry and then he became one of the staff members at the Iranian Embassy in Istanbul. When the Parliament was bombarded, he was the head of the Parliament and took refugee in the French Embassy, afterwards moving to Paris. After Tehran was conquered by the *Mujāhidīn*, he came back and again became a member of the Parliament.

integration, to Islamize and to simplify the concepts applied in the structure of that Law. Irrespective of the different epistemological bases of the two systems, he made an effort to show that no contradiction existed between the teachings of Shiite Islam and Western ideas. At the same time, he did mention some differences; for example, that regulations in Persia were not codified and were not available for anyone who wanted to know them and prove his/her claims by relying on them. Mustashār al-Dawla described a modern country as a place where there is a collection of code (*kitāb qānūn*) that includes articles and procedures which are constantly and periodically revised in accordance with the demands of the times. This collection is codified with the agreement of the state and the people, a phenomenon quite unlike Islamic countries including Persia in which their laws and regulations are written in the works of jurists irrespective of the will of the people, and according to the rules of the *Sharīʿa* that seem to be permanent.[31] *One word*, in spite of its priority, did not use a legal language, but the committee could create a law text in clear legal language following the model of the Constitution of the Ottoman Empire they had in their possession. Some of the members of the committee shared the same views like that of Mustashār al-Dawla on the conformity between modernity and Islamic teachings. For example, they imagined that the act of *Shūrā*, which the Prophet was obliged to carry out, was the same activity that parliaments in modern countries engage in.[32] As a case in point, they compared the role of the representatives in Parliament to the role of the procurer (*wakīl*) in jurisprudence and they compared the function of the 'newspaper' with the 'faculty of common sense' (*quww-i ḥiss mushtarak*) as expounded in Aristotelians philosophy.[33]

The committee wrote some general articles, in the section concerning the rights of the nation, especially article 8, which enshrined equal rights for all people.[34] These of articles, mentioned that the practical details of the article would accord with the law. The ambiguity of the word 'Law' in the text could provide the opportunity for the legislators vis-à-vis radical clerics to rapidly enact and approve the Supplement, at least at a time

[31] See, M. Y. Mustashār al-Dawla, *The Essence of Modernity: Treatise on Codified Law (yak Kaleme)*, ed. A. A. Seyed Gohrab & S. McGlinn, revised edition (Amsterdam: Rozenberg Publishers & Purdue University Press, 2008), esp.: 12- 20.
[32] See, M. Hidāyat: 147 footnote 1.
[33] See, *Mudhākirāt Majlis Awwal*: 279-280.
[34] Article 8 states, 'The people of the Persian Empire are to enjoy equal rights before the Law', '*Ahālī mamlakat Iran dar muqābil qānūn mutasāwī al-ḥuqūq khāhand būd*'.

when the country was unstable. The legislators had this presupposition that new details of law would later on be prepared in an atmosphere more compatible with the paradigm of modernity. In this process, the committee was able to introduce some new and unprecedented concepts such as citizens' rights,[35] nation and the equality before the law in the text. These terms will be explained in detail below but due to the fact that the enacting of these rights for the people and their final fate is the story of the first encounter of Shiite tradition with modernity, it is pertinent to explain how they were ratified by the Parliament.

According to Sheikh Faḍl Allah Nūrī, a clerical opponent of the Constitution, the new concepts basically contradicted the *fiqh*-oriented opinions held by Shiite jurists. He believed that the conciseness of the term 'before the Law' contained all aspects including the extent of the punishments for Muslim and non-Muslim, man and woman, which according to the legal opinions in *fiqh* should not be equal. Other clerics including revolutionaries were not at variance with him in this respect. They agreed with the notion of the equality of people before ratified laws, and ignored legal opinions with respect to the revolutionary atmosphere which needed the unity of people, and to the public interests (*maṣlaḥa*). Nurī and radical religious groups held protests against the Parliament for the codification the Supplement that pointed to the equality of rights. The protests caused the committee and the members of the Parliament to accept Nūrī's suggestion, one that the clerics did not have any disagreement on in principle. The suggestion was to insert an article, called Article 2,[36] that obliged the Parliament to set up a committee composed of not less than five *mujtahids* who were familiar with the requirements of the age, to recognize whether such laws as might be proposed by the Assembly and the Senate, were in conformity with the rulings of Islam. In this article, the process was

[35] It is true that the 'citizen' (*shahrwand*) is a new term and the very word was not used in the text, but there are some phrases that suggest the meaning of citizen, such as '*hich yik az Irānīyān*' (art. 14), '*afrād mardum*' (art. 9).

[36] The draft of the article was suggested by Sheikh Faḍl Allāh Nūrī, but what was ratified in the Parliament was similar to that which existed in the Ottoman Constitution. Later on, over the last fifty years Islamic countries which came to codify their constitutions inserted the article in their bodies of law as Article 2. See an inquiry on the biography of Article 2, especially in Egypt in Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporations of the Sharī'a into Egyptian Constitutional Law* (Leiden: Brill, 2006), esp. Introduction and Part II, Article 2 of the Egyptian Constitution; See also "Dustūr" in Islamic countries in *EI*^{2} by various authors.

defined in such a way that the *ʿulamā'* were entitled to introduce twenty persons to the Parliament and then the representatives would choose new members to fulfill this responsibility.[37] None of the articles could obtain legality save after undergoing the process.

Inserting Article 2 into the Supplementary Law, made it reflect two aspects or, more precisely, made it appear paradoxical with respect to the section on 'the rights of the people'. We will look at the paradox more closely concerning its textual analysis below. With respect to those articles that spoke about equal rights for all people, religious minorities held celebrations on the enactment of the new law, prominent members among the minorities sent telegraphs to the Parliament appreciating the representatives' gesture approving their rights.[38] On the other hand, by inserting the Article 2, *ʿulamā'* confidently knew that any alteration in the process of enacting the Constitution would never happen and that their legal opinions would take priority over those articles. Unfortunately, no records or transcripts of the discussions in the committees of the first Parliament are available to show more information concerning the order and the content of the articles in question.

3. Textual analysis of the Constitution

The Constitution was codified in fifty-one articles with a short introduction. It mainly asserted the rule of law instead of rule based on the arbitrary will of the Shah (Arts. 2, 15, and 16). It recognized the division of powers and the new institutions as the *majlis* (Arts. 1- 42, especially 27) and Senate (Arts. 43- 51), giving them rights and duties such as the right to give concessions and financial contracts to foreign countries which would be permissible only via the permission of the *majlis* (Arts. 23, 24, and 26).[39] It actually resembled the internal law of the National Assembly and mostly explained the duties and

[37] In the article it is also mentioned that its contents will be maintained and be permanent until the appearance of al-Imām al-Mahdī. A major difference between Nūrī and the clerical leaders of the Movement was the question as to whether the location of these members should be in the Parliament or outside and whether their status was superior to the Parliament or not. See serious debates on the position of the clerics in the Parliament in *Mudhākirāt Majlis Awwal*: 288, 289b, 291-293. The differentiation was not highlighted in works written on the Constitutional Revolution but, as it will be observed, the codifier of the Constitution of 1979 paid close attention to this experience.
[38] See, *Mudhākirāt Majlis Awwal*: 272, 273, 316 and 449.
[39] See the English version of the Constitution 1906 in E. G. Browne (1909): 75- 101.

functions of both parliaments before the state and vice versa, instead of presenting a systematic legal document. It is worth noting that the Senate was not established until 1328/1949. Because the Constitution did not have any relative articles pertinent to our main discussion, viz., the rights of religious minorities, the Supplement should be examined for in spite of its name, it was the main Constitution.

The Supplementary Law consisted of ten parts: general dispositions, the rights of the Iranian nation, the powers of sovereignty, the rights of the Iranian monarchy, the rights of the members of the Parliament, the duties of the ministers, the powers of the tribunals of justice, provincial and departmental councils (*anjumans*), finances, and the army which were summed up in 107 articles. The articles, here, which seem to have had more or less some relation to the subject of this study, will be analyzed. They are located in two parts of the Constitution; general dispositions, and the rights of the Persian nation.[40]

3. 1. General Dispositions

The general disposition is made up of seven articles. Articles one and two in this section, which recognize two official religious and political powers in the society and their legitimacy, are highly important for our purpose. Article 1 declared that

> "Islam, under the rubric of the orthodox *Jaʿfarī Ithnā ʿAsharī* or *Twelver Shiʿīsm*, was the official religion of the state, which the Shah must profess and promote."

It is true that in the period of discussion, the majority of Iranians were Shiite, but religious minorities existed as well as non-*Twelver* Shiite Muslim communities such as, Iranian followers of the Shāfiʿī, Ḥanafī, Ḥanbalī, Zaydī and Ismāʿīlī schools in various regions that are not covered in the Constitution. The enactors perhaps did not, or even could not, pay attention to them, but they juxtaposed the adjective of 'orthodox' (*madhhab ḥaqqi*) with the Shiite school which indicates their exclusivist attitudes. There is no sign that indicates a justification of the issue in detail through discussions, but the question remains as to what the enactors intended by the stipulation of 'official religion'. What was the function of the term 'official religion' in the text? Was it mentioned just to show the religion of the majority? Or, was it mentioned as a source for the codification of

[40] See the original text of the articles in Persian in Appendix II.

the laws and regulations? Or even, did they mean that other faiths were not legal or recognizable save those religions or Islamic schools of thought that are mentioned in the Constitution?

As to the probability that article one would be a source, one could say this function is concluded through the contents of Article 2, which insists on conformity between 'Islamic Sacred Rules' and state rules. However, there is not enough evidence to support this probability and the meaning of the stipulation, i.e., 'the official religion' remains concise and, at the same time, ambiguous. It seems that Article 1, besides indicating the religion of the majority of Iranians, is reminiscent of the prevailing theory of legitimacy by the division of power into religious and political spheres in the Qajar period. According to the theory, the Shah's legitimacy, if any, was derived from his duty in professing and promoting the religion. This task for the Shah is also asserted in the text of an oath in Article 39 wherein it is asserted that he should take an oath to do so in the Parliament.[41] Concerning the legality of other faiths, the text of the Supplement remains silent and there is no exceptional circumstance that begs the recognition of the status of non-Shiite Muslims and religious minorities. Perhaps the codifiers of the draft, who did not have religious inclinations, thought that if the Constitution defined nationality it would include all people and realize their rights, hence due to the radical religious context it would have been better to ignore mentioning other faiths. It is also probable that Article 1 in this format was added to the text in the Parliament to satisfy the Shah, the *ʿulamā'*, and the majority of people.

Article 2 confirmed the legality of the laws codified by the Parliament as long as

> "they are not at variance with the sacred rules of Islam or the laws established by the Prophet Muhammad (on whom and whose household be the peace and blessings of God)."[42]

The method of implementing the theme of the article, as mentioned above, was to offer some jurists who were members of the Parliament the power to veto any governmental

[41] The part of Article 39 is "I bear witness to the Almighty and Most High God…that I will exert all my efforts to preserve the independence of Persia, safeguard and protect the frontiers of my Kingdom and the rights of my People,.…endeavor to promote the Shiite *Jaʿfarī* doctrines…".

[42] The part of original text of Article 2 for following analysis is needed. The Persian version is '*…bāyad dar hich ʿaṣrī az aʿṣār mawād qānūnīyya ān mukhālifatī bā qawāʿid muqaddasa Islām wa qawānīn muḍūʿ-i haḍrat khayr al-anām nadāsht-i bāshad..*'. See original text of articles in appendix II.

laws that might contradict the sacred rules. The question, whether this new institution of jurists should be located in the parliament and its members being regarded as deputies like anybody else or whether it should be based outside the parliament and its members considered to be in a superior position to the deputies, was a major problem of disagreement between the clerics and the intelligentsia. Finally, according to the opinion of supportive clerics and intelligentsia, the institution came to be based in the Parliament and its duty was to oversee the laws. In the period of the Islamic Republic, however, in conformity with Sheikh Faḍl Allah Nūrī's view, the law-makers have set up the institution outside and superior to the Parliament and have named it the Guardian Council of the Constitution.

As to the analysis of the content of Article 2, there remain some noteworthy points, positive and negative. As mentioned in the previous chapter, the *ʿulamā'* indeed had a profound influence on the social as well as legal affairs in various regions of the country. In this capacity, each jurist had his own legal opinions, and in some cases, had his own court (*maḥkama*) dealing with legal claims including personal status and criminal and other cases presented to him. Even though their legal opinions were mostly similar, they sometimes had problematic relations with their competitors, the government and people, especially non-Shiite Muslims and religious minorities. The great role played by Article 2 was the centralization and concentration of religious power in the newly recognized institution in the Parliament. If the *mujtahids* in the Parliament gave an opinion, which with the support of the state was ratified as a law, then no jurist would be in opposition with the legitimate laws of the government. The recognition that Article 2, gave the cleric a position of great legal power, led to the creation of limits to the power of influential jurists and people in various regions. Under conditions of centralization, not any jurist could declare any given event or case as "unlawful" by claiming it stood in contradiction with the *Sharīʿa* based on what he might have understood to be a duty. The situation, in the light of Article 2, could bring about safety for religious minorities in local regions from radical religious groups and their low-ranking clerical supporters. The best evidence for the claim is that once the first Parliament was constituted, it received many official complaints a part on religious minorities addressing the *majlis* and especially the cleric representatives, that they were under oppression by local governors

and religious radical groups. The representatives felt that they had a responsibility to respond to these petitions and followed them up by using the power of the Parliament. [43] In practice, however, as we shall see, the new institution did not last long and the disunity of *fiqh*-oriented opinions continued.

Another point concerning Article 2 is that it could have created the background for probable subsequent alterations, both in theory and in practice in spite of the will of the *ʿulamā'*. The alterations could be imagined in two areas: the area of Islamic social precepts and, more importantly, in the theoretical field of the relationship between state and religion. The legal authority of jurists of the highest rank, viz., the Source of Emulation (*marjaʿ taqlīd*) in the society, which was an old institution, included social and individual legal rulings. If the new institution of jurists in the Parliament became in charge of social laws and regulations, it would compromise the authority of the Sources of Emulation in this field. This is because when the Parliament enacted new social laws and regulations, called transactions or (*muʿāmalāt*) in the terminology of the jurists, vis-à-vis acts of devotion (*ʿIbādāt*), people had to obey the rulings without referring to the various *fiqh*-oriented opinions of one or another great jurist as *marjaʿ*. The point could have helped accelerate the process of secularization (*ʿurfī shudan*) or in other word rationalization that might have brought about more security for religious minorities. In the Pahlavi period, however, the function of Article 2 and the new institution were suspended and secularization continued in another manner. We shall see the process of secularization in this sense in the next chapter.

The second area of alterations that perhaps unwittingly resulted from Article 2 was the appearance of a new theory in the area of the relationship between state and religion. In answer to the question as to what the criterion was for the religious legitimacy of the government and its laws, the intelligentsia and revolutionary clergy, in the light of the new paradigm of the Revolution, could offer new theory that indicated the criterion for the religious legitimacy. The theory on legitimacy was the *conformity* between the theme of the law and 'Islamic Sacred Rules' not *permission* of ulema to the Shah for ruling. Thus, as long as the government ratified laws that did not contradict Islamic

[43] See, for example, *Mudhākirāt Majlis Awwal*: 216 for the complaints of Jews who lived in Kāshān in 1907 and for the complaints of Zoroastrians who lived in Yazd in 1907, see p. 246.

rulings, it would have legitimacy. The theory, little by little, would succeed earlier theories that separated power into political and religious realms and regarded the Shah as a Shadow of God and implementer of the *Sharī'a*.[44] The criterion, i.e. *conformity*, was also compatible with a republican form of government.

Yet another point concerning Article 2 was that it would cause the beginning of the rationalization *fiqh*-oriented opinions in the early twentieth century. It was natural that those jurists who were members of the new institution in the Parliament were cognizant of the requirements of the time and had relatively more consistency and open-mindedness in their approach than those jurists were outside the Parliament. They had to look at problems by relying on common sense and had to take social demands, real elements such as internal and international conditions and Iranian public interests into consideration. In this context, religious minorities and non-Shiite Muslims would deal with more tolerantly.

Apart from the points mentioned on its function, structurally speaking, Article 2 caused the appearance of an internal contradiction in the Constitution. As it was mentioned in chapter one, legal opinions in *fiqh* concerning religious minorities do not recognize equal rights between Muslims and non-Muslims. Article 2 approved those of opinions and made them superior to the articles of the Constitution, which implied the equality of the rights of all Iranians before the law whether they are Muslim or not. In addition, Article 2 was able to prevent the approval of any laws and regulations that indicated equality of rights between Muslims and non-Muslims. The Constitution thus possessed a dual nature; the equality of rights of the people, deduced by the part of the rights of nation, and the inequality, which was the result of *fiqh*-oriented opinions that arose through Article 2. Then, according to Article 7, the principle of the Constitution could not be suspended either wholly or in part. As a result, the contradiction became very significant where to preserve one part necessitated the sacrifice of the other. The following analysis further illustrates the internal contradictions of the Constitution.

3. 2. The rights of the Iranian nation

[44] Even in the first Parliament, the clerics did not have any ideological confrontation with the Shah and whenever they remembered Nāṣir al-Dīn Shah, they added the appellative designation of "the martyr" to his name. See, for example, *Mudhākirāt Majlis Awwal*: 381.

The appearance of the term the 'Iranian nation' indicative of all Iranians despite religion or tribe was one of the great achievements of the Constitutional Revolution. In this sense, people would have equal legal and political rights according to the Constitution. The word 'nation' in foreign constitutions, meant all people or citizens and had a precedent in the concept of nationalism in the 19th century. The committee that prepared the draft of the Constitution translated the word, as the Persian nation or '*millat-i Iran*'. This term and other similar words and phrases such as 'no one…save', 'no Persian …save' and 'all individuals' in Articles 8, 9, 10, 11, 12, 13, and 14 appeared for the first time in the Iranian milieu and played a major role in establishing a new identity and rights for Iranians.[45] It was clear that in spite of the prevailing theory that made the legitimacy of government dependent upon its service to religion, it was the new concept of the nation (*millat-i Iran*) that legitimized the power of the Shah.[46] Including the new concept, however, caused some confusion to appear in the Constitution. The confusion would be explained in following way; the law asserted that all powers were derived from the will of the nation. It also said that the sovereignty and legitimacy of the Shah came from God or from his service to religion. The best evidence of this confusion can be seen in Article 35, which ironically states,

> "Sovereignty was a trust bestowed as a divine gift by the nation upon the person of the king".

The stipulation 'as a divine gift' does not make any sense in the context of the new paradigm except where analysis showed that it would affirm the legitimacy of the state, keep the religious coloring of it, or that the lawmakers really did not know that adding this attribution would change the content and make the Constitution paradoxical.

With respect to the rights of the people, Article 8 is of great importance. This article states

> "the people of the Persian nation are to enjoy equal rights (*mutasāwi al-ḥuqūq*) before the Law".

[45] There is one explicit exception in the Constitution in Article 58 that states 'no one can attain the rank of minister unless he is a Muslim by religion, a Persian by birth, and a Persian subject.' Article 77 also gave permission to the government to establish military courts as a capitulation for military men.

[46] The concept might be supported by Article 26, which states: 'the powers of the realm are all derived from the people; and the Fundamental Law regulates the employment of those powers.' See the Persian version in Appendix II.

Subsequent articles concerning the rights of people rely on the article in question. It was this article that became the source of long debates between adherents and opponents of the constitutionalism. The theme of the article, theoretically and indirectly, nullified the content of legal opinions that existed in *fiqh* regarding the rights or duties of religious minorities. The opposing clerics agreed to implement the law equally for all people and supported their view with evidence from the Qur'ān and the *Sunna*. They believed, however, that what had been mentioned in *fiqh*-oriented opinions indicated the inequality of the *amount* or *quantity* of penalties and blood money should also be considered as divine and sacred regulations.

Despite Article 2, those parts of the Supplement that stressed the rights of the people could abrogate traditional legal opinions in *fiqh.* Some examples could be considered as evidence; while in terms of the *Sharīʿa,* the reason for levying the *jizya* and *kharāj* was to protect the lives and lands of religious minorities, according to Articles 9 and 13,

> 'all individuals are protected and safeguarded with respect to their lives, property, homes and honor, from every kind of interference …save in such cases and in such ways as the laws shall determine.'

Thus, unlike *fiqh*-oriented opinions, the life and property of everyone is absolutely protected whether Muslim or non-Muslim, giving the *jizya* or not. This understanding could be proven by the content of Article 97, which states

> 'in the matter of taxes there shall be no distinction or difference amongst the individuals who compose the nation'.

Therefore, according to the Constitution, it did not make sense to levy further taxes such as the *jizya* or *kharāj*, on religious minorities.[47] The analysis of the case in point might also be extended to other legal opinions indicative of the inequity of penalties for Muslims and non-Muslims in the chapters (*books*) on retaliation and punishment in *fiqh*. It is evident that the content and the structure of the Constitution 1907 without Article 2 was closer to the justice and could fulfill the rights of people including religious minorities.

[47] Even though one can interpret the conciseness and ambiguity of article 94 which states 'no tax shall be established save in accordance with the Law' in a way that locates the *jizya* under the title of legal regulations and which gained its legitimacy through Article 2.

Sheikh Faḍl Allāh Nūrī and his followers, protesting the content of some articles, especially Article 8,[48] suggested two alterations; one that the attribution 'governmental' be added to the word of 'the Law' in the Article 8 and other that Article 2 be added into the body of the Constitution. Because most representatives were not familiar with the real meaning of constitutionalism, both suggestions were easily accepted. The final version of Article 8 after adding the stipulation stated that 'all people are to enjoy equal rights before *governmental Law*'. It meant that all people merely in the performance of governmental law and in court procedure were equal, not in all civil and criminal rulings, which could be derived from *fiqh*-oriented opinions. By the first suggestion the division of the courts into religious (*sharʿī*) and customary (*ʿurfī*) remained.[49] Furthermore, everybody merely enjoyed equal political right, not equal legal rights before the law in governmental courts. We shall see that the codifiers of the Penal Code had to accept this division of the courts.

The second suggestion, viz. inserting Article 2 into the Constitution, rather indirectly resulted in an independent package of *fiqh*-oriented opinions to be accepted and legitimated. One could question the role of Article 2. The main critique of the suggestion is that those opinions were not already codified let alone accepted by people and they were not, properly speaking, compatible with the implications of the time. The suggestion, as mentioned above, made the structure of the Constitution become paradoxical and ambiguous. By inserting Article 2, no legal improvements concerning the rights of religious minorities occurred during the Constitutional Revolution. Consequently, there were two types of articles on the rights of religious minorities: a) legal opinions that existed in the Shiite *fiqh* as permanent superior law pointed to unequal rights coming into the text via Article 2; and b) those articles that established equal rights for all people, coming via the sections mentioning the rights of people. Religious minorities, with respect to the second group of the articles, sent many telegrams to the *majlis* in order to thank representatives for approving such rights. On the other hand, the *ʿulamā*' knew that any new alteration in the legal domain did not take place. This

[48] Some of his major legal opinions against the adherents of the constitutionalism were reported in chapter two.

[49] According to article 74 "no tribunal can be constituted save by the authority of the Law". But, in practice, there was no alteration to this until the period of Reza Shah who prevented any jurist from establishing an official tribunal in his home to investigate criminal or civil claims.

paradoxical structure of the Constitution by Article 7, which stated that the principles of the Constitution could not be suspended either wholly or in part, came to be permanent in the field of legislation. It was evident that with respect to the contradiction between the two types of law; those *fiqh*-oriented opinions were superior according to Article 2.

Here some articles such as 15, 16, and 17 can help us understand far better the ambiguous structure of the Constitution. According to Article 15

> 'no property shall be removed from the control of its owner save by legal sanction, and then only after its fair value has been determined and paid.'

What is ambiguous concerning the rights of religious minorities is the condition of 'legal sanction', for it is not known whether the term includes legal opinions in *fiqh* or not. In *fiqh*-oriented opinions for instance, blasphemy (*kufr*) and apostasy (*irtidād*) could prevent the transfer of inheritance. If a non-Muslim inheritor, therefore, became Muslim, his or her conversion to Islam could prevent all non-Muslim relatives from being entitled to inherit. According to Article 2, this case should be taken as a legal sanction. Thus, Article 15 which apparently recognizes and protects the rights of religious minorities remains neutral. Similar analysis might be offered concerning some articles such as 13, 16, and 17 in which the stipulation 'the Law' is applied absolutely and ambiguously. Moreover, under the title of Article 2 the meaning of 'the Law' in various articles in the Constitution could be reduced to *fiqh*-oriented opinions.[50] We shall see below in the period of the second (1909) to the seventh Parliament (1928) and especially before the period in which Reza Khan became the Shah, when the Civil and Penal Code were not codified, the meaning of 'legal sanction' and 'the Law' was explained and reduced accordingly with what generally understood from legal opinions in *fiqh*. Thus, to sum up, by accepting Nūrī's suggestions, it was as if no legal alterations occurred in the legal status of religious minorities in the Revolution.

Article 20 is also worth analyzing with regard to the rights of the people.

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[50] See the application of the term in the following articles: Article 13 asserts that "Every person's house and dwelling is protected and safeguarded, and no dwelling-place may be entered save in such case and in such way as *the Law* has decreed". Article 16 asserts that "The confiscation of the property or possessions of any person under the title of punishment or retribution is forbidden, save in conformity with *the Law*." Article 17 states that "To deprive owners or possessors of the properties or possessions controlled by them on any pretext whatever, is forbidden, save in conformity with *the Law*".

"All publications, except heretical books and matters hurtful to the perspicuous religion of Islam are free, and are exempt from the censorship. If, however, anything should be discovered in them contrary to the Press law, the publisher or writer is liable to punishment according to that law…"

Mahdī Hidāyat, known as Mukhbir al-Salṭana translated the French Press Law into Persian and then the representatives approved it after discussions and modifications.[51] The analysis here, centers on the definition of two concepts: 'heretical books' and 'hurtful to the Islam' (*kutub ḍāll-i*) which were of central importance on the part of the ruler class and the clergy. Both groups had some sensitivity to the content of the press in accordance with their own attitudes and interests. The question is whether or not the printing of the Holy Bible and the Zoroastrian sacred books fell under the heading of 'heretical books' or 'hurtful to the Islam' in the opinion of the jurists. There is no definition of the terms in the Press Law but what is understandable through some discussions of the first *majlis* is that narrow-minded and exclusivist attitudes as to the definition of concepts existed. Some deputies even believed that the printing of books belonging to the *Ashʿarī* school of Islam and books on mystical ideas were heretical and should be forbidden.[52] In this atmosphere, the legal circumstances surrounding the printing of the sacred books of religious minorities which, in the opinion of jurists, were distorted by the People of the Book and abrogated by the Qur'ān, were more problematic.[53] However, as mentioned in the previous chapter, religious minorities, published some newspapers and journals during the Revolution of 1906 and afterward. The policy of printing works, which belonged to non-Muslims during the time, that is, 1906–2004, depended on the various tastes of the ruler.

4. Terminology

4. 1. Nation (Iranian people)

[51] Some sources introduced Ḥusayn Pīrnīyā as a translator of the French Press Law, but the explicit report of the discussions of the first Parliament confirms what is mentioned in the text. Cf.: *Mudhākirāt Majlis Awwal*: 437, 521 and 569.

[52] See, *Mudhākirāt Majlis Awwal*: 302.

[53] According to this justification, most Iranian Muslims, including the students of Islamic studies in the faculties of theology and the seminaries, are not familiar with the Holy Books of the other religions and avoid reading them. This could be regarded as a great obstacle for mutual understanding in Islamic societies.

The word ‘nation’ in foreign Constitutions was translated to the “Iranian people”, *millat-i Irān* or *ahālī mamlikat* by the committee. One of the synonyms, viz. *millat*, was used in literature belonging to the period preceding 1906 and had at least two other meanings. In the first one, *millat* meant the *Sharīʿa* and its followers and was derived from the Qur’ānic term (*millata ibrāhīma ḥanīfā*).[54] Accordingly, the head or the fathers of the *millat* were the jurists who were the general deputies of the Hidden Imam and who safeguarded the *Sharīʿa*. That is why the people regarded the *ʿulamā*' as leaders of the Revolution. It was *millat* in this sense that could justify the legitimacy of the government before 1906 and when jurists said 'the union of *millat*', they meant by the term that government should imitate the rulings of the *Sharīʿa.* In the second sense, *millat* means the people, but in its traditional sense which often meant peasant (*raʿyat*), not citizen, vis-à-vis the ruler class (*salṭanat*). *Millat* in this state did not have any rights to define their destinies, but they had a duty to obey the ruler. With respect to *millat* in the second meaning, it meant that the Shah was the father.

After the 1906 Revolution, according to the Supplement (art. 26), it was *millat* in the new sense of the term, that justified and gave legitimacy to the state in its new sense. The state, along with the ministers was responsible to the Parliament, and as such, it was detached from the legal as well as the actual power of the Shah. The union of *millat* and the state meant that each of them with respect to the other had a right and duty and the people would be the supporters of the state and vice versa. This situation was unprecedented in the history of Iran. The familiarity with the new term, i.e., ‘nation’ and ‘state’ began from the Revolution 1906, but the differences between the two senses of the term '*millat'* in the sources belong to the early twentieth century is still not very clear.[55]

4. 2. The Sacred Rules of Islam (*Sharīʿa* or Shiite *fiqh*)

As already noted, according to Article 2, a group of *ʿulamā*' had to be present in the form of overseeing institution in the Parliament. Their duty was to carefully consider all matters proposed, and they would reject, wholly or in part,

[54] See, Q, 2: 135.
[55] For more information on the meaning of *millat* in the Qajar period, see the Chapters 8, 9, and 10 of following work. M. Ājudānī, *Mashrūṭ-i Irānī* [*Iranian Constitutionalism*] (Tehran: Akhtarān, 1382/2002), esp. Ch. 10: 190- 197.

> ‘any such proposal which may be at variance with the *sacred rules of Islam* or/and *the laws established by the Prophet Muḥammad,* so that it shall not acquire the title of legality.'

First of all, we should examine more closely the relationship between the two terms, i.e., ‘the sacred rules of Islam’ and ‘the laws established by the Prophet’ in the text. The word is used in the Persian version for the conjunction is *wa* (and) which is ambiguous and can be interpreted in two ways. First, it can be interpreted as a conjunction, and consequently, the first term could be the general meaning and the second term would be particularly mentioned for emphasis. According to this presumption, all rulings established by the Prophet, the Imam, and then by the jurists would come under the title of ‘the sacred rules of Islam’. The conjunction *wa* (and) could also be interpreted as an ellipsis, as Edward Browne understood and translated it, and in consequence, ‘*and*’ would simply be used to describe the first term. In this sense, by ‘the sacred rules of Islam’, it was meant the law established only by the Prophet, whether through the Qur’ān or the *Sunna*. It seems that this interpretation, with respect to Shiite doctrines is far from the purpose of the representatives who suggested inserting Article 2 into the body of the text.

Then, there was not a clear and agreed-upon definition among the legislators as to what the sacred rules of Islam (*Sharīʿa*) were, and the legislators conceded their own understanding and interpretation to the *ʿulamāʾ*. Here we are dealing with some major questions, since the source and the meaning of the term are not always clear in all cases. What is the criterion for regarding a rule as "sacred"? Is it sacred, because it was just confirmed by and attributed to the Prophet Muḥammad or the Imams of the Shiite school? In this way, one is entitled to ask why the Prophet confirmed such rulings, especially the rulings that refer to social issues. If a jurist says that they were confirmed or established because they could lead to the realization of benefits for all Muslims and lead to the establishment of social justice, then, in consequence this criterion could be applicable to any ruling that was beneficial and led to social justice. If this were the case, then many rulings would be able to gain the title of *sacred*. Such questions were not discussed in the Constitutional Revolution among the supporters and the opponents. They had a simple understanding of the subject and thought that the meaning and the instances of *the sacred rules* and *laws* established by the Prophet are clear. They were content with

what is said in the history of Shiite *fiqh*, that Islamic rulings had an acceptable rational aspect and at the same time, the secret and real reason for the establishment of the rulings was not completely known.

A number of questions arise concerning the meaning of the sacred rules of Islam. Firstly, how are they perceived from the viewpoint of the jurists? It was not clear how the jurist members of the Parliament should give their legal opinions; would they rely on the connotation of the rulings which could be understood from the literal import of the Qur'ān and the *Sunna*? Would they rely on the understanding of Muslim jurists? Would they rely on the well known legal opinions of Muslim jurists, or would they even rely on their own legal opinions? In the first three options, the jurists would function as recognizers and in the fourth as persons who deduced the rulings (*mujtahid* or *muftī*). Some reports indicated that the jurists acted according to their own legal opinions, while others show that they relied on well known legal opinions. Secondly, what is the meaning of *conformity* between the sacred rules and governmental rulings, including the rules enacted by the Parliament? Would *conformity* mean the agreement of the content of the sacred rules with those of the government, or would it mean a lack of contradiction between them? If there was a rule that did not have any previous record and as to its content the *Sharī'a* did not have any injunction, in what category would it be entitled to be located, as one in conformity with the sacred rules or against them. What are the criteria for *conformity*? Many new social issues need rules which might have not been mentioned in the Qur'ān and the *Sunna*. This area could be regarded as the realm of the permissible (*mubāḥ*) for one jurist and a subject of caution (*iḥtiyāṭ*) and thus acting upon it should be avoided in the opinion of another jurist. The late question has existed for a long time among Shiite jurists whether *akhbārī* or *uṣūlī* and had arrived on the legal scene as a serious issue in revolutions, 1906 and 1979. The solution is dependent on the jurists' views on the role and the realm of *ḥadīth* in understanding legal opinions.

4. 3. The Law

The concise term 'the Law' was applied many times in the Constitution. Since, the government in the new model, viz. the constitutional monarchy, needed various regulations, the committee and the lawmakers, with respect to the revolutionary

atmosphere, rapidly codified the laws case by case. They started codifying the Constitution and its Supplement, and in cases, details needed an independent corpus. Logically, they had to be content to mention the concise word, 'the Law', but they meant by 'the Law' those subsequent laws and regulations that would be codified later. Due to the fact that in the pre-Revolutionary period before 1906, every minister managed the affairs of the office, according to his whim, the first Parliament insisted on enacting the executive bylaws of every ministry. The Parliament succeeded in enacting the Press Law, the executive bylaw of the Ministries of Justice, the Interior, Commercial Affairs, Education and Transportation. It was natural that these efforts took much of the time of the *majlis* and, consequently, the representatives could not codify other necessary laws. The codification of the Civil and Penal Code were postponed to 1307/ 1928. In the meanwhile, the meaning of 'the law' in the Constitution in the field of criminal, civil and tort law was reduced to *fiqh*-oriented opinions, if any, which meant that there was no improvement in the rights of the religious minorities after the Revolution and before the enactment of the new laws.

4. 4. Religious Minorities

Islam according to the *Jaʿfarī* doctrine of *Twelver Shiʿīsm* was introduced as the 'official religion' of the state by the lawmakers. Other Islamic groups as well as religious minorities were ignored in the Constitution and other laws, and the term 'religious minorities' was not applied. In the discussions of the first and the second Parliament, however, whenever representatives discussed any subject concerning other religious groups, they mentioned only Zoroastrians, Jews, and Christians, the term Christian was inclusive of the Armenian and Assyrian and Chaldean communities. Having ignored the Ṣābi'īn, as far as I have researched their discussions, they regarded the Bābīs including the Azalī and Bahā'ī groups as heretical faiths.[56] There is no justification that shows how the representatives only recognized those groups among others. As to Ṣābi'īn, it might be estimated that the deputies relied on the well known legal opinions in Shiite *fiqh* which mostly go back to the period of Sheikh al-Ṭūsī, who did not regard the Ṣābi'īn as the People of the Book.

[56] See for example, *Mudhākirāt Majlis Awwal*: 456.

During 1287/1909 to 1300/1921, viz., from the second Parliament to the fifth, the great modification regarding the rights of religious minorities was the alteration introduced into the Electoral Law. According to the new Electoral Law, which was ratified in October 1909, four groups, i.e. the Armenians in two regions, the north and in the south, Assyrians, Jews and Zoroastrians, could each have one representative in the Parliament.[57] Consequently, they could participate in the election and choose their favorite representative for the second Parliament. This right had two aspects, one positive and the other negative; on the one hand, they had particular representatives who could present relevant concerns and this state would have been in their favor, but, on the other hand, because they were Iranians, it was expected that they could, like others, select more representatives. For example, one Muslim from the city of Tehran could choose 15 candidates but a Zoroastrian from the same city could only choose one.[58] Another shortcoming was that a member of a religious minority could not be a candidate on the assumption that Muslims would give him their votes. The rule for religious minorities has remained an enduring feature of the Electoral Law in subsequent periods of the parliament and even in the period of the Islamic Republic. In practice, the Zoroastrians have had their own representatives in all 24 periods of the Parliament (1906-1979) and they were the most active representatives among the religious minorities. The Assyrians in eight periods of the Parliament (1909 to 1935) did not have any representative.[59]

5. Modifications in the Pahlavi Period (1925 - 1979)

In the period (1287/1907 – 1304/1925) Iran suffered socio-political instability and no law and regulations in the field of civil and criminal code existed. The authority of the Shah and the government after the Revolution was severely weakened and the will of the nation and the authority of the law were not consolidated. In this period, the legal opinions of the jurists as they were before the Revolution were the practical points of reference for the entire people. When the customary courts came to investigate any claim, they would often encounter different *fiqh*-oriented opinions that each litigant would have

[57] See original text in Appendix II.
[58] Some representatives such as Mukhbir al-Mulk, the third brother of Ṣanīʿ al-Dawla, agreed with the proposal that all people could choose their representatives without religious discrimination. See, *Mudhākirāt Majlis Awwal*: 647- 648.
[59] See the list of the religious minorities' representatives in 24 periods of the Parliament in the Appendix I.

prepared from his favored jurist to support their respective claims. The situation led to the emergence of instability in the legal fields. The balance of power between the religious and political spheres was tilted in favor of the clerics and they remained the referees for legal claims.

Reza Khan came to power, firstly, as supreme military commander (1299/1920), and later as the Minister of War, after that, as Prime Minister and then finally, as the Shah in 1925. The equivocal structure of the Constitution, led to appear a fertile field of rivalry for clerics and politicians to get more power. But Reza Shah, who gained in his opinion the legitimacy through the idea that he was of service to the people, as a soldier who loved his country, disrupted this rivalry with his military power, so he ignored the function of Article 2 that indicated the participation of jurists in the Parliament.[60] He felt that he did not need the previous theories and their supporters in vogue during the Safavid and Qajar periods to legitimate his power. He began to interfere in the process of the elections from the fifth Parliament (1924) and finally from the seventh (1928) onwards, he exerted his power, thus the deputies were to be formally appointed through a formal election. Using his power, Reza Shah improved the process of modernization and was able to provide an atmosphere of security for all tribes as well as for the religious minorities. At the same time, he promoted nationalist tendencies that gradually changed into a new ideology harmful to religious identities.[61] For example, after ratifying the law of military service in 1305/1926, the religious minorities welcomed the law, which for the first time made it possible for them to enter the Iranian armed forces but the government considered the phenomenon as a victory of nationalism over religious sectarian identity. According to the new ideology, some of the influential media, taking their cue from the attitude of the government insisted on Iranian identity, held in contempt, and neglected other local interests such as local tribe, languages and dialects,

[60] From the second Parliament down to the fifth, the representatives were content with the unofficial attendance of some jurists, such as Sayyid Ḥasan Mudarris, assassinated by Reza Shah in 1316/1938, in order to realize the content of Article 2. The representatives did not follow the process of electing jurists mentioned in the article. After the sixth Parliament, the attendance of jurists at the Parliament and the function of Article 2 were actually forgotten and gradually the régime lost religious support.

[61] See the social political situation of minorities in the Pahlavi period in E. Sanasarian, *Religious Minorities in Iran* (London: Cambridge University Press, 2000), esp. 34–49.

clothing, customs and religions.[62] As a result, if the Shah showed himself as a religious man or insisted on Islam, his actions would have had roots in the idea that Islam could maintain Iranian unity and identity. Those policies, more or less, continued until the end of the Pahlavi dynasty.[63]

During the Pahlavi period, at the proposal of the Shah and ratification by the *majlis* and the Senate, some articles of the Constitution were revised five times in 1304/1925, 1317/1939, 1328/1949, 1336/1957, 1344/1965. All modifications that were made were based on the establishing as well as the consolidation of the new dynasty. None of them had anything to do with the rights of people and the development of democracy or other elements of modernity. They were initiated simply to expand the power of the Shah. Evaluating those modifications is beyond the scope of our study.[64]

The great development regarding the rights of people in the period of the first Pahlavi was the codification of the Civil and Penal Code. First, the draft of the Penal Code was prepared in 1304/1925 and ratified in the fifth Parliament (1924-1926). The codifiers who translated the Penal French Code in the first step well knew that the content would be subject to harsh debate by the jurists and the Code would contradict Article 2 of the Supplement. Thus, calling it a Public Penal Code, they wrote in the first article

> "the following articles concern the order of the country and will be exercised in the customary courts. All crimes investigated in accordance with Islamic laws will have punishments that would correspond to Islamic penalties, viz. *ḥudūd* and *taʿzīrāt*."[65]

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[62] Such as the *Irānshahr* newspaper published by Ḥusayn Kāẓimzād-i and *Āyand-i* journal published by editor Maḥmūd Afshār.

[63] The policy against religious tendencies was applied to all faiths except the Bahā'īs especially in the period of the second Pahlavi. This attitude besides being a nationalist tendency, gradually led to the emergence of the popular belief that the ruler class intended to oppose Islam and be a supporter of the Baha'ī faith. In the 1979 Revolution, the revolutionary clerics were able to use the current popular belief to attract people to join them.

[64] See the report on the modification in the first 22 years of the second Pahlavi when the Shah intended to show himself as a democrat in F. ʿAẓīmī, *Iran, the Crisis of Democracy (1930- 1952)* (London: I. B. Tauris and Co. Ltd., 1989).

[65] The French Penal Code was translated by Francis Adolph Pierny, the French advisor to the Ministry of Justice, who was invited to come to Iran by Ḥasan Pīrnīyā. The story of inserting Article 1, which recognizes the two kinds of the courts, is mentioned briefly in the memoirs of Dr. Ahmad Matīn Daftarī. See, B. ʿĀqilī, *Khāṭirāt yik Nukhust Wazīr* [*The Memoirs of a Prime Minister*, Aḥmad Matīn Daftarī] (Tehran: ʿIlmī, 1370/1990), esp. Ch. VII: 453- 462.

The article, legally speaking, recognized the previous division of the courts into customary (*ʿurfī*) and religious (*sharʿī*), but in practice, the codifiers were able to keep jurists silent and then the government, used its military power to limit gradually the power of the religious courts to only personal status issues. The articles of the Penal Code were written to include, first implicitly, anyone who committed any crime on Iranian sovereign territory. Then, in light of subsequent amendments to the Penal Code, equality before the law was explicitly mentioned either in application of the law or in the extent of the penalties.[66]

Two other points concerning the content of the Penal Code are worth mentioning. Firstly, the death penalty, which had many cases in *fiqh*-oriented opinion, was limited to the case of the armed action against régime; to the case of retaliation if the heir to the person murdered (*walīī dam*) asked for the death penalty to be imposed; and to one case in family law.[67] Secondly, financial as well as imprisonment penalties, which some jurists regarded it as unlawful,[68] came into the Penal Code and the legislature did not consider any torture, including scourging permissible. The Penal Code had been modified several times rather briefly during the Pahlavi period, but in 1352/1973 when the legislators omitted article one which pointed towards the division of the courts, it had been subject to a relatively great degree of modification. The content of the Penal Code included all claims for all Iranians without any discrimination in sex and religion. As a result, the task of religious courts and the power of the clergy were confined to only a few cases of personal status such as the registration of marriage and divorce in the area of the Civil Code.

Another great development regarding the rights of people in the period of the first Pahlavi was the codification of the Civil Code. The draft of the Civil Code, viz. volume one in 955 articles, was prepared in 1306/1927 by a committee made up of jurists and

[66] The amendment to the Penal Code in 1352/ 1973, article 3 states that the rules of this Code will include anyone who commits any crime in the sovereign state of Iran, save the cases that are excepted according to the law.

[67] See, articles 61, 170 and 179 of Penal Code in Appendix II. According to Article 179 of the Penal Code "if a man surely sees his wife with another man engaging in adultery in her bed, he is entitled to kill both and is forgiven of any punishment". We will see the same article in Islamic Penal Code as well.

[68] That is why in the first Parliament when the representatives came to ratify the Press Law, they didn't agree with financial penalties. See, *Mudhākirāt Majlis Awwal*: 569.

lawyers.[69] ʿAlī Akbar Dāwar (1264/1885–1315/1937), the Minister of Justice, was president of that committee.[70] After that volume one was ratified in 1307/1928 by the sixth Parliament (1926-1928), the second volume, containing articles 956 to 1206, was prepared and enacted in the ninth Parliament in 1314/1935, and finally, the third volume, containing article 1207-1335 including Tort law, was approved by the tenth Parliament after six months in 1935. Following the French model, especially the code of Napoleon, as well as the Belgian and Swiss laws, the committee called the corpora the Civil Code[71] and imitated those foreign laws in a few sections, such as sections dealing with regulations on nationality, documentations and argumentations on proving claims, and tort law. The committee skillfully codified the laws concerning transactions, contracts, personal status, and family law according to well known *fiqh*-oriented opinions of Shiite jurists.[72] It was clear for the committee that those sections of foreign laws did not have a precedent in Shiite *fiqh*. Nonetheless, the codifiers were careful for the laws to be compatible with the *Sharīʿa* or in some cases completely derived from its body. We can conclude from evaluating the data that they could alter the format of *fiqh*-oriented opinions (*fatāwā*) into the new official legal code, and, more importantly, applying Arabic vocabulary and terms, they could write the Civil Code in Persian for the first time.

[69] The members of the committee were Sayyid Kāẓim ʿAṣṣār, Sayyid Muḥsin Ṣadr, Sayyid Naṣr al-Allāh Taqawī, Sayyid Muḥammad Fāṭimī Qummī (major author of the draft), and Muṣṭafā ʿAdl Manṣūr al-Salṭana. Most of them were educated in the traditional system and were judges save the last one who graduated from the legal faculty of Paris. ʿAdl, who wrote the first text book on constitutional and civil law in 1909, later became the first Iranian representative in the U.N. See more on him in Bāmdād, vol. 4: 107-108; See also on Ṣadr his memoirs in Persian, Muḥsin, Ṣadr al-Ashrāf, *Khāṭirāt* [*Memoirs*] (Tehran: Waḥīd, 1364/1985). According to some reports, they could get final permission on the conformity of the content of the draft with the *Sharīʿa* from Sheikh ʿAlī Bābā Fīrūz Kūhī.

[70] He lived and studied for 11 years in Switzerland. He couldn't get his doctorate there but became well experienced in the field of law. He came back in 1300/1920 and became a deputy at the fourth, fifth and sixth Parliaments and tried to change the Constitution for Reza Khan to secure the position of Shah. Afterward he became the Minister of Justice and was able to restore profoundly the structure of the Ministry. During 1307/1928 to 1313/1934, he skillfully codified several legal regulations and proposals ratified by the Parliament, such as the Civil Code in 1307/1928, the Code of registration of deeds and properties 1307/1928, the Code of registration of marriage and divorce in 1310/1931, and the procedure of the Penal Code in 1313/1934. At the end of his life, he was accused of financial corruption and even though he was innocent, committed suicide in 1315/1937 fearing the dictatorial conduct of Reza Shah. See more information concerning his cultural activities in N. Parvin, "Mard-e Āzād", in *EIR*.

[71] The division of the discipline of law into general and private and then the division of the latter into civil and criminal, which had origins in the Roman code, has no previous record in Islamic law. Most jurists according to different criteria divided all rulings into the acts of devotion and acts involving transactions.

[72] The best model for them might be these legal works of Shiite jurists: *Sharāyiʿ al-Islām* of Muḥaqiq al-Ḥillī (d. 676/1277), *Sharḥ al-Lumʿa al-Damishqīyya* by al-Shahīd al-Thānī (d. 966/1558) and *al-Makāsib* by Sheikh Murtaḍā al-Anṣārī (d. 1281/1864).

There are two important points regarding the Civil Code worth noting. The first is that according to article 5, all Iranians [including religious minorities], whether living abroad or in the country should obey the regulations of the Civil Code, save those cases excluded by the Civil Code. As to the personal status of religious minorities, the Civil Code did not make any exception; they are regarded as Iranians while the content of the Code had a complete Islamic Shiite coloring. It meant that since they were Iranians, religious minorities were expected to obey Islamic regulations even in their personal status. After five years however, in 1312/1933, the Parliament, according to the suggestion of A. A. Dāwar, the Minister of Justice, added an additional article to the Civil Code. It was concerned with three provisos to indicate the independence of recognized non-Shiite Muslims, including the *Ahl al-Sunna* and religious minorities in the realm of their personal status, inheritance and testament.[73] According to the article, the courts in such cases should observe the well known and undisputed rules and regulations of those religions and Islamic denominations.[74] In addition, according to article 10 of the Code of Direct Taxes (ratified in 1312/1933), the places of worship for Muslim and non-Muslim were exempted from paying any taxes.[75] Iranian Jews argue that Reza Shah canceled the *jizya* for them, but I couldn't find any evidence for the claim in the laws ratified in the Parliament in the period.[76] We can surmise that under the process of modernization the problem of levying the *jizya* was basically forgotten. In the Pahlavi period the term of 'recognized religious minorities' remained ambiguous and there was no law to clarify it.

The second point concerning the Civil Code is the fact that most members of the committee who prepared the draft did not have a purely radical religious attitude, but regarding the new context where national tendencies triumphed, they were careful that the Civil Code be compatible with legal opinions in *fiqh*.[77] In order to have appropriate

[73] See the whole text of the article in Appendix II and also in *Majmūʿi Qawānīn wa Muqqarrāt Ḥuqūqī* [*The Complex of Legal Laws and Regulations*) (Tehran: Ganj Dānish, 1379/1999): 888- 895.
[74] In the case of marriage and divorce, the courts follow the rules of husband's faith and in the case of inheritance and testament; they obey the rules of dead person's faith.
[75] See original text in Appendix II.
[76] See, Ḥ. Liwī, vol.3: 854 - 855. I would like to thank Dr. Poursinā, the head of *Iranian Official Gazette*, for helping me to search for documents regarding the subject.
[77] One Iranian writer claimed that the committee preparing the Civil Code had seen *Majalla al-Aḥkām al-ʿAdlīyya*, which is regarded as the Civil Code in the period of the Ottoman Empire, but there is not enough evidence for the claim. See, ʿAlī Shāygān, *Qānūn Madanī* (*the Civil Code*) (Qum: Ṭāhā, 1375/1996): 42; see also about *Majalla*, C.V. Findley, 'Medjelle' in *EI* [2].

code of laws, they tried to draft the regulations in such a way to arouse the minimum of debate and conflict with *fiqh*-oriented opinions on the one hand, and to provide for the rights of all people, on the other. To achieve their aims, they drafted all the articles, as far as it was possible, in such a way to include everyone and did not see capitulation for any one. The exceptions that are relevant to our study are articles 1059 and 1313. Article 1059 states that a Muslim woman is not entitled to marry a non-Muslim man. The article, unlike *fiqh*-oriented opinions, does not mention the conditions for the marriage of a Muslim man with non-Muslim woman. Article 1313, which concerns the stipulation for accepting a witness in court, 'faith' is not stipulated, unlike *fiqh*-oriented opinions that 'faith' is considered by jurists as one stipulation for someone who is going to be a witness. As we shall see, the legislators in the period of Islamic Republic will add the stipulation of 'faith' in the Civil Code. It is not clear in the legislation what was meant by the stipulation of faith. If it meant the Islamic faith, it would imply that the witness of religious minorities could not be accepted in any court. Regarding social facts in codifying the Civil Code, the committee also ignored some radical *fiqh*-oriented opinions such as the ruling preventing infidelity (*kufr*) from taking possession of inheritance.[78] The Civil Code on this issue was a great benefit for the religious minorities compared to their former situation in accordance with Shiite *fiqh*. Since they had their own independence in the realm of personal status on the one hand, and on the other, Islamic courts or clerics could not claim that someone had converted to Islam by which to the conversion could prevent the inheritors from taking possession of inheritance.

By enacting the Civil and Penal Codes, Reza Shah unilaterally cancelled the right of capitulation in 1927, which remained from the Turkamanchāy treaty (February 1828) that covered Russia and fifteen other countries. Then in 1928, he also canceled the tribunal office in the Ministry of Foreign Affairs, which was responsible for investigating the claims of foreigners. Afterwards, there was no excuse for foreigners living in Iran and for the people who took refuge at foreign embassies to have any capitulation or chance to escape from the decrees of the courts. During the period of Pahlavi rule until 1979, some

[78] In Articles 875 to 885 of the Civil Code that belongs to the Pahlavi period, the legislature ignored infidelity as a factor that could prevent inheritors from inheritance, unlike the legal opinions in *fiqh*. We shall see, in chapter four in the time of the Islamic Republic, that the legislators added the stipulation in one independent code (881 *ilḥāqī*) to the Civil Code in order to make the Code more compatible with the *Sharīʿa*.

articles of the Civil Code were very briefly modified twice in 1337/1958 and 1348/1970. None of the modifications has relevance to the issue of our study, nonetheless.

By the end of World War II, when the international political legal paradigm basically changed, the Iranian government in the period of Muḥammad Reza Shah apparently intended to join other countries in making a resolution to improve the situation of human rights. Therefore, Iran was one of the forty-eight countries among the fifty-six countries of the world at that time that voted for approving the Universal Declaration of Human Rights in the U.N. (1948). From 1948 to 1979, when the U.N. ratified some international conventions and protocols that were considered compulsory and *jus gentium* rather than the internal laws of countries, Iran annexed them and ratified the Covenants in the Parliament.[79] Muhammad Reza Shah and his government tried to show themselves to international associations as the supporters of human rights and the supporters of the international will to improve the situation.[80] He started some reformations in 1341/1962 regarding the rights of people through the movement, called the White Revolution of the Shah and the Nation.[81] Ayatollah Khomeini and some clerics protested to the Shah, and declared some of the elements of White Revolution, such as Land reforms and women's right to participate in the election as unlawful. He also criticized the Shah's policy two years later for again restoring the right of capitulation for American military advisors, and for this reason he was exiled to Turkey and then to Iraq.

Among international conventions, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Cultural Rights, G.A. res. 2200A both ratified on 16th December of 1966 in the U.N., are worth mentioning. The state of Iran signed them in 1347/1968 and afterwards the National Assembly in

[79] The history of the encounter of Iranian scholars and clerics with the question of Human Rights deserves an independent inquiry. But, for a short history of the conduct of the Iranian State during last 60 years, see Shīrīn ʿIbādī, *Tārīkhch-i wa Asnād Ḥuqūq Bashar dar Irān* [*History and Documentation of Human Rights in Iran*] (Tehran: Rushangarān wa Muṭāliʿāt Zanān, 1383/2003), esp. Ch.12; H. Mihr Pour, *Niẓām Bayn al-Milalī Ḥuqūq Bashar* [*International System of Human Rights*] (Tehran: Iṭṭilāʿāt, 1383/2003), esp. 408-413.

[80] In 1968, which was called the year of human rights, Iran organized a seminar for the Committee of Human Rights in Tehran and the representatives of the organizations affiliated to the U.N. participated there. This conference issued the Tehran Declaration on Human Rights and chose Mrs. Ashraf, a half sister of the Shah, as a head of the conference. See, ʿIbādī, *op. cit*, 62-65.

[81] On the positive and negative role of the reformation, see, M. R. Pahlavi, *Inqilāb Safīd* [*the White Revolution*] (Tehran: Kitābkhān-i Salṭanatī, 1345/1965); F. Halliday, *Iran: Dictatorship and Development*, tr. by F. Nīk Ā'īn (Tehran, Amīr Kabīr, 1358/1979), esp.: 112-146; Ḥ. Nabawī, *Tarīkh Muʿāṣir Irān: Az Inqilāb Mashrūṭ-i tā Inqilāb Safīd* (Tehran: Dānishgāh Tarbiyat Muʿallim, 1357/1978), esp.: Ch, XI.

1351/ 1972 and the Senate in 1354/1976 ratified them in full.[82] Some of the articles in both covenants like those articles that existed in the section of the rights of the people in the Constitution contrasted with *fiqh*-oriented opinions or the sacred rules of Islam (as mentioned in article 2 of the Constitution). For example, article 2 of the Covenant that says,

> 'the States Parties to the present Covenants should undertake to respect the rights recognized in them for all individuals without any kind of distinction including religious, and strive to take the necessary steps to adopt appropriate legislative or other measures to give effect to these rights.'[83]

might be regarded by the jurists as contrary with Islamic law. According to article 26 of the first Covenant,

> 'all individuals have equal rights before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

The theme of article 26 is the same content that Sheikh Faḍl Allāh Nūrī and other Shiite jurists could not accept. Further example is Article 27 of the Covenant on Civil and Political Rights. It gives the right of implementing those privileges mentioned in the Constitution 1907 for minorities.[84] An even better example of instances that are clearly incompatible with the sacred rules of Islam is article 18 of the International Covenant on Civil and Political Rights which enshrines the right of freedom of religion. This is a

[82] See *Iranian Official Gazette*, 1354: 75- 79.

[83] Some cases such as public emergencies are excluded in the article 4 of the International Covenant on Civil and Political Rights.

[84] Article 27 states "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

notion where some instances exist that jurists regard as instances of apostasy (*irtidād*) in Islamic legal opinion, which is an act that might result in the death penalty.[85]

By ignoring the implementation of article 2 of the Constitution and in a situation where the clerics were absent from the Parliament, the government did not have any obstacles to ratifying the Covenants. Most clerics on the political scene had a conservative approach and were silent towards the decisions of the government, but privately regarded the government as illegitimate. The anti-religious attitude of the government gradually increased somewhat in 1351/1972, when Muslim countries came together to establish the Islamic Conference in order to codify an Islamic Charter of Human Rights in Saudi Arabia, Iran annexed them with the stipulation. The stipulation was that if there was any contradiction between the decisions of the two organizations, viz. the Universal and the Islamic, the former should be given priority. The Shah showed his commitment to international human rights via such stipulation and activities.[86] Nevertheless, the dictatorial manner of the Shah and the corruption of the administrations during 1968 to 1977 practically prevented the government from reforming or modifying those internal laws and regulations regarded as not corresponding to the Declaration of Human Rights and its Covenants. However, religious minorities believe that their status in the second period of the Pahlavi dynasty was being improved socially not legally speaking.[87] From 1977 to 1979, a complex of factors constituted the backgrounds for the Revolution. Most Iranians, including religious minorities, participated in the movement to save the country from the dictatorial conduct of the régime and to gain freedom and more independence. In this atmosphere, like that of 1906 Revolution, none of the Muslim

[85] The whole text of article 18 deserves further consideration here. 1) Everyone shall have the right of the freedom of thought, conscience, and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[86] The evidence for this claim is limited to what Mrs. Shīrīn ʿIbādī narrated in her book. However, in the archives of the Foreign Ministry I could not find any document that indicates on it.

[87] They asserted the point to me in a number of interviews.

groups and religious leaders of the Revolution regarded the religious minorities as *dhimmī* instead; they saw them as Iranians who participated in the protest to improve their situation.

Chapter Four:

The Codification of Laws and Regulations in The Islamic Republic 1979- 2004

There are various theories and analyses concerning the reasons for the victory of the 1979 Islamic Revolution. Some of those reasons that are more or less emphasized in the relevant literature are as follows: international political pressures on the Pahlavi régime to commit to international covenants on human rights; increasing secret armed activities on the part of (pseudo-) Marxist groups against the régime; the explicit and courageous position of Ayatollah Khomeini against the Shah's policies through his speeches to the people during 1978 and the important role of cassette tapes and pamphlets in the dissemination of his views; increase in the price of oil in the world and the income of the state vis-à-vis increasing poverty and unfair conditions for people, and finally, the popular belief that existed among Iranians including non-Shiite Muslims and religious minorities, that the dictatorial manner of the Pahlavi régime had become incorrigible and Iran was in need of a democratic government. Among grassroots leaders and revolutionary groups, people relied more on Ayatollah Khomeini and participated in protests.[1]

In his opposition strategy against the Pahlavi régime, Ayatollah Khomeini initially intended to introduce political Islam as a major aspect of Islam which would be able to solve the problems of Iranians in the contemporary world. Initially he did not intend to change the régime and simply asked the Shah to accept the Constitution of 1906-7, to keep his commitment to the independence of country and to encourage political openness. From 1977, however, the idea of changing the government began to

[1] See explanations for the various theories regarding the victory of the 1979 Revolution, S. S. Haghighat (ed.), *Six Theories about the Victory of the Islamic Revolution* (Tehran: Al-Hudā, 2000); Bernard, Chery, *The Government of God: Iran's Islamic Republic* (New York: Colombia University Press, 1984); Cf. D. Humāyūn. *Dīrūz wa Fardā: Si Guftār dar bārih Irān-i Inqilābī* [*Yesterday and Tomorrow: Three Essays on Revolutionary Iran*] (U.S.A: without the name of publisher, 1981), esp.: 7-33, 48-60, 74-88. Dāryūsh Humāyūn who was one of the influential courtiers in the last years of Pahlavi régime, criticizes the policy of the Shah and believes that the failed economic strategies of the Shah after increasing the price of oil and the income of the state caused an "unnecessary revolution" to appear. He was able to achieve the post of Minister of Information and Tourism from 1976 to 1977; see also, H. Jalā'īpour, "Iran's Islamic Revolution: Achievements and Failures", *Critical Middle Studies*, vol. 15/ 3 (2006): 207-215.

occur to some leaders, especially Ayatollah Khomeini.[2] Gradually, most people participated in the protests against the Shah, and a consensus came to exist among various groups on an inevitable change of the régime; nevertheless, the nature of the ideal government to ensue was yet unclear. Very little materials, whether in the form of books, articles, or conference papers, existed concerning the ideal government during the years 1977- 1979.[3] Religious leaders gave an Islamic form to the demands to encourage greater participation of ordinary people in the demonstrations. In the later phase of the Pahlavi period, Ayatollah Khomeini promised an Islamic government in which all people including women and religious minorities would have a better situation.[4] After this, a popular slogan gained popularity among the people which was 'Independence, Freedom, and Islamic Republic'.[5] Even though no clear explanation on the nature of the ideal Islamic Republic had been offered, most people, whether Muslim or non-Muslim, educated or illiterate, believed that such a government, with such a charismatic spiritual, religious leader, would be the ideal they had been dreaming and longing for.[6] There is evidence indicative of the point that nobody, including even Ayatollah Khomeini himself, knew the precise political model and structure of the government on which the Islamic Republic would be shaped.[7]

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[2] One can find a shift in the content of Ayatollah Khomeini's sayings from 1977 onwards. See, R. Khomeini, *Ṣaḥīf-i Nūr* [*The Book of Light*: *the Collection of Ayatollah Khomeini's Speeches and Letters*] (Tehran: Sāzmān Madārik Farhangī Inqilāb, 1370/1991), vol. 1: 445-447, 542-544. See a biography of Ayatollah Khomeini in Baqir Moin, *Khomeini: Life of the Ayatollah* (London: Tauris Publishers, 1999).

[3] The lectures offered by Ayatollah Khomeini in Najaf regarding the theory of the rule of the jurist (*wilāyat faqīh*) in the political sense, printed there in Arabic (*Kitāb al-Bayʿ*) and only some of his popular speeches on the theory were published in a Persian book with an assumed name *Nāmi-'ī az al-Imām Kāshif al-Ghiṭā'* [*A Letter on Behalf of the al-Imām Kāshif al-Ghiṭā'*] in Iran. These two books were the main references to justify the theory.

[4] See, R. Khomeini, *Ṣaḥīf-i Nūr,* vol. 2:37, 295-296. The Ayatollah promised, "The conditions of life for non-Shiite Muslim and religious minorities in the Islamic government would be better than that which existed during the Pahlavi regime". "Dictatorship and Islamic government are contradictory", he added in vol. 2:103. Responding to anxieties concerning Islamic regulations, he said, "The implementation of *ḥudūd* in Islam needs many conditions for it to be carried out…if you consider the conditions you will see the Islamic code is less violent than other regulations in the world…the Islamic Republic should not be compared to what exists in Saudi Arabia or Libya… I myself am not going to be the leader but I will only guide the people to choose their favorite government". See, vol. 2: 163-165 in interview with the *Guardian* (10.08.1357/01.11.1978).

[5] The motto in Persian is "Istiqlāl, Āzādī, Jumhūrī Islāmī".

[6] Many reports could be found through the newspapers published at that time on participating non-Shiites in the Revolution.

[7] One piece of evidence is the conduct of Ayatollah Khomeini after the Revolution. He first went to Qum to continue the policy of the traditional role of the clerics there and strongly believed that the clerics should not directly interfere in governmental affairs. See also, R. Khomeini, *Ṣaḥīf-i Nūr,* vol. 2: 295-296.

1. The draft of the Constitution 1979

In the revolutionary atmosphere of 1978–1980, the legacy remaining from the last régime including the 1906 Constitution, the Supplement and other laws and regulations were regarded as the heritage of an arrogant despot (*ṭāghūt*) or the Satan which should be changed. The revolutionaries aimed to change the laws and regulations into something else, and later on, into an Islamic Shiite legal corpus. When Ayatollah Khomeini had to leave Iraq and went to France on 6 October 1978, the first efforts began as a preparation of a draft of the Constitution. He asked Dr. Ḥasan Ḥabībī, a religious lawyer educated in Paris who afterwards became a member of the Council of the Revolution and, later on, the first deputy of president Akbar Hāshimī Rafsanjānī (r. 1989-1997), to put together a team to prepare a draft of the Constitution before the victory of the Revolution. The committee, residing in Tehran and nominated by Ḥ. Ḥabībī consisted of the following persons: Dr. Nāṣir Kātūzīyān, professor of law at the University of Tehran; Dr. ʿAbd al-Karīm Lāhījī, a secular professional lawyer who due to his opposition to the proposal of retaliation (*qiṣāṣ*) after the Revolution was accused of apostasy and had to leave Iran; Dr. Muḥammad Jaʿfar Langrūdī, a clerical lawyer who was professor at the University of Tehran and after the Revolution migrated to Canada; Dr. Fatḥ Allāh Banī Ṣadr, a lawyer and brother of Abū al-Ḥasan Banī Ṣadr (r. 1980- 1981), the first president of the Islamic Republic; and Nāṣir Mīnāchī, who cooperated with the committee for a short time. Mīnāchī was a member of a liberal religious group, known as the Freedom Movement of Iran (*Nahḍat Āzādī*)[8] which was banned from political activities after the resignation (November 1979) of Mahdī Bāzargān,[9] leader of the Freedom of Movement and the first Prime Minister after the Revolution. Among the committee members, it was M. J. Langrūdī who had a traditional education; the rest had graduated from the new system of education. The structure of the proposed constitution was the same as that of the 1907 Supplement with some modifications. Its model was akin to that of the Constitution of the Fifth Republic of France that gives more power to the president rather than the prime

[8] See as regard to this group, H. E. Chehabi, "The Liberation Movement of Iran" in *OEMIW*.
[9] Concerning his biography see, Gh. ʿAlī Haddād ʿĀdil, "Bāzargān, Mahdī" in *EWI*; M. Dorraj, "Bāzargān" in *OEMIW*.

minister. Thus, the authors gave the power and the rights of the ex-Shah to the president in the new draft.[10]

On 1 February 1979, Ayatollah Khomeini returned to Iran and on 5 February, he appointed Mahdī Bāzargān (1907-1995) as the Prime Minister of the provisional state. His state had a parallel power, the Council of the Revolution, initially established in Paris and which had main role in policy-making. It was composed of some clerics and intellectuals, i.e. individuals educated in the new system of education, who were appointed by Ayatollah Khomeini. The decisions of the provisional state had to be endorsed by the Council. The draft of the Constitution was one of the first controversial subjects between the two powers. Both groups had religious, revolutionary attitudes but with different tastes; the members of the provisional state and the intellectual members of the Council believed that Islamic principles and norms should be realized in the society in accordance with the realities of the time and perhaps some of them should be ignored. They did not agree with the radical efforts of the Revolutionary Guards and the courts. In this position, the non- revolutionary clergy and Ayatollahs agreed with the intellectuals and greatly sympathized with their position.[11] In contrast, most of the clerical members of the Council who were closer to Ayatollah Khomeini were opposed to the intellectuals including the members of provisional state, and strove to implement all Islamic rulings manifested in the universally accepted *fiqh*-oriented opinions of the Shiite jurists. They gradually argued that the Revolution took place basically for the implementation of Islamic rulings, and that the people came onto the political scene to realize that aim. The argumentation was also later on incorporated into the Introduction to the final version of the Constitution.[12]

The debates among the intellectuals and revolutionary clergy nominated by Ayatollah Khomeini were similar to those that occurred between Sheikh Faḍl Allāh Nūrī and the supporters of constitutionalism in 1906. The problem was the same, i.e., the

[10] Concerning the features of the draft, see, N. Kātuzīyān, "Analytical Criticism on the Draft of the Constitution", in *Gāmī Bi Sūy-i ʿAdalāt* [*A Step Towards Justice*] (Tehran: Dānishgāh Tehran, 1378/ 1998), vol. 1: 243-290.

[11] Ayatollah Sayyid Kāẓim Sharīʿatmadārī (d.1986) was an Ayatollah who was later on accused of activity against the Revolution. In 1962, he was in the group that confirmed that Ayatollah Khomeini was a *mujtahid*, and by this opinion saved him from death penalty in the period of Muḥammad Reza Shah.

[12] We shall see below the analysis of the ideological preamble of the Constitution. See a part of Introduction in Appendix II.

relationship between tradition and modernity, and most responses were similar. However, today, that is, seventy years later, the clerics had experience and were in a better situation compared with that of 1906.[13] The revolution had a charismatic leader who had immense popularity and had captivated the hearts of the youth. His life was not tainted by any financial or other kind of corruption. Among the revolutionary clerical leaders, there were also those who received a modern education.[14] Some of them had the experience of living in Western countries, especially Germany.[15] Others had more or less become familiar with the experiences of Egyptian groups such as the Muslim Brotherhood (*Ikhwān al-Muslimīn*).[16] With regard to those elements, the clergy unlike the clergy of 1906 became either revolutionary, the opponents of dictatorship, or advocates for the implementation of the *Sharīʿa*, but in 1979, this was to be achieved through a modern instrument, which is the parliamentary system.

The process of a complete implementation of the *Sharīʿa* and Islamization of the laws and regulations began from the first days after the Revolution. The last story of the conflict between traditional and modern ideas in 1906 appeared onto the social scene from a new door. In March 1979, the Council of the Revolution announced that the draft, prepared by the committee and ratified by the provisional state, should be revised according to 'Islamic rules and the principle of freedom'. The criterion was repeated many times by the members of the Council but it was not adequately explained. Nevertheless, the Council revised the text and the main result of the revision was highlighting one section (arts. 151- 156 of the draft) which like article 2 of the 1907 Supplement, gave to a group of jurists the right to veto any rule which might not be in conformity with 'undisputed Islamic principles' (*usūl-i musallam sharʿī*).[17] This superior

[13] It is clear from Ayatollah Khomeini's utterances of support in favor of Sheikh Faḍl Allāh Nūrī in the first days after the Revolution that he knew more or less the details of the history of the Constitutional Revolution. See, R. Khomeini, *Ṣaḥīf-i Nūr*, vol. 8: 489, vol. 10: 336-337, 388-389.

[14] The best example was Dr. M. J. Bāhunar who was assassinated by a radical militant group, the *Mujāhidin Khalq,* in 1981.

[15] Ayatollah Dr. Muḥammad Ḥusaynī-Bihishtī, an influential cleric who had a major role in codifying the new Constitution, was educated in both the traditional and the new educational system and lived in Germany for about ten years.

[16] Some of the clerical leaders of the Revolution, such as Ayatollah ʿAlī Khāmini'ī, translated some works of Sayyid Quṭb (1906-1966), the Egyptian Muslim writer, into Persian before the 1979 Revolution.

[17] The term, 'the Sacred Rules of Islam' in the 1907 Supplement was changed to 'Undisputed Islamic Principles' in the draft of the 1979 Constitution and then the term in the ratified Constitution was changed into 'Islamic Norms'. The significance of this alteration will be discussed in the present chapter.

institution was called the Guardian Council of the Constitution, and was based outside the Parliament. The main function of the Guardian Council was akin to the function of a supreme court that protects the Constitution against probable acts exceeding the Assembly's limits. After incorporating some modifications, the draft dealt with some inconsistencies, especially on the part of the rights of the people. The Council of the Revolution gave Ayatollah Dr. Bihishtī, a leader of the Islamic Republican Party[18] and a member of the Council, the mission to remove the shortcomings and arrange it more properly. There is as yet no clear evidence on what he did to make the draft law harmonious. However, from his subsequent efforts in amending the Constitution, it is estimated that he understood the draft was not yet Islamic.

In the final step, the process of revision came to the end and the draft was ratified by the Council of Revolution as well as by Ayatollah Khomeini on May 1979.[19] In the codification of the draft, representatives from various groups contributed and it was perhaps why the draft Constitution had some remarkable points including, among them, a democratic face, an emphasis on a republican as well as an Islamic form of government (Art. 4), the division of powers (Art. 16), asserting the rights of the people (Art. 22- 47), and the transfer of the power and duties of the Shah to the President (Art. 75, 89, 90, 93, 95). It recognized the religions of Zoroastrian, Jewish and Christian and regarded them like other Muslim Iranians to have equal rights before the law, at the same time entitling them to the observance of their rites and customs in the realm of personal status (Art. 24). More importantly, it lacked articles indicative of the rule of the jurist (*wilāyat faqīh*).[20] A number of articles also had a weak relation to the Constitution such as those that covered the duties of the administration of Radio and Television, free education for the people at all levels, and the lack of enough respect and protection for private ownership, and so

[18] See concerning the role of this party after the revolution, E. Sanasarian, "Islamic Republican Party", in *OEMIW*.

[19] This is evidence again that there was no definite model and structure of the new government in the mind of the revolutionary leaders. It is worth noting that some of grand clerics who were Sources of Emulation, such as Ayatollah Sayyid Muḥammad Reza Gulpāygānī, did not agree with the theory of the rule of jurist (*wilāyat faqīh*). Ayatollah Khomeini, regarding the issue, did not intend to encourage debate in the society concerning the subject.

[20] All the articles mentioned here belonged to the draft; see original text of the draft in N. Kātuzīyān, (1378/ 1998), vol.1: 197- 228.

forth, which, under the influence of the Marxist environment, made their way into the draft Constitution.

The turn came for the people to declare their agreement with the Constitution. The main question among high-ranking official members of government concerned the manner in which the people could do so. One opinion was that the final version of the Constitution would be published in the media and everybody, including experts, clerics and the Sources of Emulation would give their opinions within two months' time. Then it was suggested that a group of experts on behalf of Ayatollah Khomeini evaluate the proposed opinions and afterwards the final version would be subject to agreement by a referendum. The suggestion was attributed to Ayatollah Khomeini and Hāshimī Rafsanjānī. If this suggestion were accepted, subsequent events would not have happened and the Constitution of the Islamic Republic would have been approved without the part indicative of the rule of jurist. There was another suggestion, which according to one of the Ayatollah's speeches in Paris and Tehran, was emphasized by M. Bāzargān and A. Banī-Sadr. This was that a particular *majlis* be formed that was to be called the Constituent Assembly, which was to be in charge of evaluating and ratifying the draft.[21] After serious discussions, in June 1979, the Council of the Revolution decided, via a referendum, to constitute a *majlis* composed of seventy-three selected individuals, including four representatives of the religious minorities, to evaluate the final version of the Constitution after which the people would again register their agreement by referendum. The Assembly, called the *Majlis Barrisī Nahā'ī Qānūn Asāsī* [The Assembly for Final Revision of the Constitution] (henceforth referred to as the Assembly FRC) was expected to accomplish their duty within one month according to the order of Ayatollah Khomeini. But due to circumstances that will be mentioned below, it actually took about three months of sixty-seven intense meetings from 19th August to 15th of November 1979 for the draft to be evaluated. During the time, the Assembly could unexpectedly change the content. Concluding their discussions, we can say that, through including extra provisions and articles, they created an entirely new Constitution with an Islamic Shiite coloring.

[21] Ayatollah Khomeini promised the people to establish such a *majlis* on the first of February, see, R. Khomeini, *Ṣaḥīf-i Nūr,* vol. 3: 204.

While the Assembly FRC was engaged in revising the draft of the Constitution, the overall political atmosphere was rather unstable. On the one hand, ethnic riots, in various regions, such as Kurdistān and Balūchistān occurred where these ethnic minorities demanded autonomy from the central government. On the other hand, while leftist parties, i.e., Marxist groups of various ideological persuasions, insisted on their ambiguous idealistic fantasies, Islamic groups led by clerics, reacting to the leftist parties spoke with one voice, wanting more and more the implementation of Islamic laws and the acceleration of the Islamizing process. The debates between the provisional government and the Council of the Revolution reached its climax concerning various issues, including policy-making, the interferences of the Revolutionary Guards and Revolutionary Courts, and the way of evaluating the draft of the Constitution by the Assembly FRC. There was a debate even on the name of the new government; the state called it the 'Islamic Democratic Republic' and the Council of the Revolution and Ayatollah Khomeini definitively called it the 'Islamic Republic'. Objecting to the methods of the Assembly FRC, the provisional government and some advocates of equal rights wanted to cancel the task of the Assembly, but due to the influential power of Ayatollah Khomeini all their efforts proved fruitless.[22] In the midst of such unstable conditions, a group of radical students occupied the American Embassy in Tehran (November 1979) and sixty-six Americans were taken as hostages protesting the U.S. government's interference in the internal affairs of Iran and the decision to admit the Shah for medical treatment.[23] One of the aims of those students was indeed to exert pressure on the provisional state, and they were successful in this regard, for the interim government resigned right away. Then the Assembly FRC accomplished its task and the Council of Revolution held a referendum on 2nd and 3rd December 1979. According to official sources, 79 percent of those who were entitled to vote participated in the election and 99.5 percent of them voted 'Yes' to the new Constitution.

2. The Analysis of the members of the Assembly FRC

[22] A valid point is that I could not find any report that indicated that the religious minorities participated in the protests, but they had objections concerning unequal rights through their representatives in the Assembly FRC.

[23] Those students fifteen years later moved from a radical attitude to a reformist one and gathered around President Sayyid Muḥammad Khātamī.

It was noted earlier that the modifications of the Assembly FRC were more extensive in comparison with what the committee had done in the first draft. The following brief analysis focuses upon the profile of those personalities who proved influential either in support or in opposition to the discussions among the seventy-three deputies of the Assembly. It was natural that in the Islamic revolutionary atmosphere and according to the recommendation of Ayatollah Khomeini to the people, two-thirds of the chosen representatives were clerics, who were in the eyes of people reliable experts, while the rest had more or less a religious view.[24] We can categorize the representatives' in three groups: a group of traditional conservative clerics who constituted the majority of the members of the Assembly who merely intended to attend the Assembly and approve Islamic laws; they played no important role or had no significant idea to contribute to the discussions. The second group which was planning the details of the ideal Constitution outside the Assembly and had the major role in its codification was comprised of those who were mostly affiliated with the Islamic Republican Party and were directed by Ayatollah Dr. M. Ḥusayn Bihishtī.[25] The third group was those who stood in opposition to some of the positions held by the second group and might be provisionally called the 'opponents'. This group was a minority and either did not have enough expertise over legal matters, or the prevailing atmosphere did not allow them to express their ideas, if any. In fact, they were rather silent, or more exactly, defeated.[26] One could uncover the role of the two latter categories through the details of their discussions, which were published in 1364/1985.[27]

The members were elected by the people who participated from all provinces except the religious minorities who were elected only by their coreligionists. The method of electing representatives of the religious minorities followed the same process as that

[24] Ayatollah Khomeini argued that since the deputies were going to prepare the Islamic Constitution, the people should select those who have Islamic qualities. He added, "Since God sent down the regulations for us, Westernized lawyers are not entitled to give their opinion regarding the laws". See, R. Khomeini, *Ṣaḥīf-i Nūr*, vol. 4: 431-432.

[25] It is appropriate to note here that after Ayatollah M. H. Bihishtī (1928-1981), the following persons were in this category: Dr. Ḥasan Āyat, Ayatollah Sayyid ʿAlī Khāmini'ī, Muḥammad Jawād Bāhunar, and Ayatollah Ḥusayn-ʿAlī Muntaẓirī. Muntaẓirī was elected by the deputies as the official head of the Assembly, but most sessions were in practice directed by Bihishtī.

[26] One can find these following important people in this group; Ayatollah Nāṣir Makārim Shīrāzī, Abū al-Ḥasan Banī-Ṣadr, ʿIzzat Allāh Saḥābī, Raḥmat Allāh Muqaddam Marāghi'ī, Mīr Murād Zihī, and Rustam Mūbad Shahzādī.

[27] *Mudhākirāt of the Assembly FRC* (Tehran: the Islamic Consultative Assembly, 1364/1985).

practiced for the 23 periods of elections to the Parliament from 1909 to 1979. The religious minorities in this election chose the following persons: Dr. Sirgin Bayt Ūshānā and Dr. Harāyir Khālātīyān were the representatives of the Christians, Mr. ʿAzīz Dānish Rād was the representative of the Jews and Rustam Mūbad Shahzādī was the representative of the Zoroastrians. Among them the deputy representing the Zoroastrians was more active and after him the representative of the Jews. While the former in his speeches was concerned about the rights of religious minorities, the Jewish deputy who had a great deal of sympathy for the idea of an Islamic revolution gave three speeches mostly concerning the loyalty of Iranian Jews to Ayatollah Khomeini and emphasizing the separation between Zionism and Judaism mentioned by Ayatollah Khomeini in one of his speeches.[28] Besides the four deputies of the religious minorities, there were also two active representatives from the *Sunni* Muslim community: Mulawī ʿAbd al-ʿAzīz, and Ḥamīd Allāh Mīr Murād Zihī, from the province of Blūchistān.[29]

One interesting piece of information is that there was a female preacher, Munīr-i Gurjī who was a member of the Islamic Republican Party and also a member of the Assembly. For the time she participated in the Assembly, she only gave one speech that showed where she stood. In her speech she said,

> "Since Iranian women have not been educated enough they have not been entitled to high political position."[30]

Another point is that a famous popular cleric of the Assembly, Sayyid Maḥmūd Ṭāliqānī (1910-1979), who had long history of struggle against the Pahlavi régime and had been imprisoned for a long time for his activities, passed away in mid September 1979 after participating in fourteen sessions of the Assembly.[31]

3. The Method

It is appropriate to take a look at the form and content of what the authors did from the point of view of methodology. As to the form, the draft presented to the Assembly FRC was arranged in 12 chapters and 160 articles. At first, the members of the Assembly

[28] See, *Mudhākirāt of the Assembly FRC,* vol.1: 488-490, 722.
[29] Dr. ʿAbd Al-Raḥmān Qāsimlū, who was elected from Kurdistān because of his position against Muslim groups and clerics, could never attend in the Assembly.
[30] See, *Mudhākirāt of the Assembly FRC,* vol. 1: 190-191.
[31] See his biography in "Ṭāleqānī, Maḥmūd" by H. E. Chehabi in *OEMIW*.

rejected the executive bylaw for evaluating the articles prepared by the provisional government and chose a committee to codify the new one. According to the new bylaw, the members and the articles were divided into seven committees and parts. Every morning each committee had a session and every afternoon a council composed of two representatives from each committee (fourteen persons) came together to discuss and prepare the edited final version of each article. They thought in this method all members could give their opinions concerning all the articles. Each edited article was then discussed in an intensive general session in order to be approved. The general session determined its legality by the presence of the majority, i.e., half the total plus one; however, each article had to be approved by two-thirds of the votes present. In practice, most sessions were made up of about fifty and, maximally, of sixty representatives, but all ratified articles could easily gain two-thirds of the votes.

As to the content, some of the representatives, mostly affiliated to the Islamic Republican Party, initially suggested that the content of the draft prepared by the provisional state be ignored and instead their new draft which contained the additional section such as the part on 'the rule of jurist' (*wilāyat faqīh*) be discussed.[32] The suggestion could not gain enough support and, as a result, the same draft suggested by the state underwent evaluation. The predominant attitude of most the deputies was a focus on Islamizing more and more of various parts of the draft. One could find a great deal of evidence for the claim through Ayatollah Khomeini's message at the inception of the Assembly and through his subsequent orations.[33] To achieve the purpose, three steps were taken: a) the creation of a new institution in the Constitution, viz., what was called the rule of jurist; b) expanding the supervisory role of the Guardian Council; and c) inserting the proviso, 'in the realm of Islamic norms' (*mawāzīn islāmī*) in several articles in the section concerning the rights of the nation. It is believed that the following three

[32] See, *Mudhākirāt of the Assembly FRC,* vol. 1: 179 - 181.

[33] It was usual for some ideas to be first asserted by Ayatollah Khomeini and then repeated in other orations. He explicitly rejected using terms from Western schools in the process of codifying the Constitution and asked the representatives to insist on Islamic concepts. See, *Mudhākirāt of the Assembly FRC,* vol.1: 6 - 7. Ayatollah ʿAlī Khāmini'ī in his first critique regarding the draft said, "It is full of Western terms such as democracy and division of powers…Islam with its rich culture does not need such terms. There is no gap in Islam to be filled by such terms…the division of powers is a useful idea in cases where the conduct of government could lead to dictatorship, but we have the jurist ruler who is in the position of being God's deputy and such a person could not naturally be a dictator". See, *Ibid,* vol. 1: 54 - 55.

persons, Muhammad Ḥusayn Bihishtī, Ḥasan Āyat, and Ḥusayn ʿAlī Muntaẓirī had key roles in suggesting and establishing the new institution of the Rule of Jurist in the Constitution. However, since the issue is not directly relevant to our discussions, only the function of the Guardian Council and the insertion of the condition, 'Islamic norms' will be evaluated in the following analysis.[34]

The content of article 2 in the 1907 Supplement simply affirmed that there should be at least five jurists to oversee ratified laws in a way that they would not contradict the 'Sacred Rules of Islam'. Ambiguity concerning the number of jurists, their position, the nature of the oversight, and events subsequent to 1907, were factors that prevented the institution from being established whether inside or outside the Parliament. But the new format of the article in the 1979 Constitution, (that is, article 4) firstly, explains that

> '…This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations…'[35]

Then, articles 91-99 explicitly changed the position of simple oversight into a new institution with expanding powers including the right of interpretation of the Constitution. According to those articles, the Guardian Council is composed of six jurists appointed by the leader and six lawyers introduced to the National Assembly by the Judiciary Branch of the government and chosen by the deputies of the Assembly (Art. 91). However, determining the compatibility of ratified laws with Islamic norms is limited to a majority vote of the jurists of the Guardian Council, not to the lawyers. However, determining the compatibility of ratified laws with the Constitution rests with a majority vote of all the members of the Guardian Council.[36]

The Guardian Council with an expanding discretion is responsible for maintaining the Islamic coloring of the laws and regulations in the field of social affairs. This function

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[34] See, *Mudhākirāt of the Assembly FRC,* vol. 1: 375-381, vol. 3:1092-1093, 1114-1119; see also concerning the Rule of the Jurist, R. Mottahedeh, "Wilāyat al-Faqīh" in *OEMIW*; M. Ājudānī (1382/2002): 73-96.

[35] The English version of the 1979 Constitution, which I used here in the text, was prepared by the Iranian Embassy in London and then endorsed and published by the Center for Research of the Islamic Consultative Assembly. See *Majmūʿiy-i Qawānīn wa Muqarrarāt kishwar* 1285-1385 [*Loḥ-i Ḥaqq*, CD Rom, third edition] (Tehran: Markaz Pazhuhishhāy Majlis Shūrāy-i Islāmī, 1387/2008). It seems that the translation of this part of article Four was not very precise. The precise translation of the article would be 'the generality and non-specificity of this article is superior to all articles of the Constitution as well as to all other laws and regulations'.

[36] See, article 96.

also had a notable aspect, which was to practically and inadvertently decrease the influence and power of the Sources of Emulation in the society. This is because all rulings in the field of social issues are ratified under the authority of the *fiqh*-oriented opinions of the jurists in the Guardian Council. While people have to go to offices such as insurance companies, courts, banks, the stock exchange and so on, they have to obey government laws ratified by the National Assembly and the Guardian Council, not act according to opinions of their own the Source of Emulation. The great shift that has occurred is that a modern institution has been substituted for a traditional one and this has caused a decrease in the power of the Sources of Emulation. The National Assembly practically becomes a new *marjaʿ* in the Islamic Republic. Of course, non-governmental jurists whether they are sources of emulation or not, had their own *fiqh*-oriented opinions on acts of devotion (*ʿibādāt*) as well as social issues but those social *fiqh*-oriented opinions might be used as a theoretical basis for the Guardian Council and they are not official regulations for people. It is expected from jurists who cooperated with the Parliament to understand the implications and necessities of the time and change narrow–minded opinions to appropriate rationalized ones. We shall see that ten years after the Revolution, while the jurists of the Council insisted on their literal understanding of Islamic sources and did not change appropriately their opinions, the conditions compelled Ayatollah Khomeini to create a new institution, the Expediency Council, which led to the codification of more appropriate rulings.

To conclude this section, it may be argued that the final version of the Constitution, after passing the above three steps, had a more Islamic Shiite coloring than the first authors intended. In addition, regarding the global and internal conditions of 1979, the members of the Assembly FRC had to preserve some modern terms and concepts such as the rights of the nation, the division of powers and various councils in the structure of the Constitution. In the next section, we shall see the relationship between traditional elements and modern ones. The final version of the Constitution was approved by sixty-one representatives of the Assembly FRC, then by Ayatollah Khomeini, and finally by the people through a referendum held on 3 December 1979.

4. Textual Analysis of the Constitution

The 1979 Constitution includes twelve chapters and 175 articles. Chapter One, general articles (Arts. 1-14) include a definition of the government, the official religion, recognized religions, the institution of the leadership, emphasizing the necessity of conforming the content of laws and regulations to Islamic norms, and the role of the people in determining the fate of the country. Chapter two (Arts. 15-18) includes a definition of the language, character and flag of Iran; Chapter three (Arts. 19-42) deals with the rights of the nation; Chapter four (Arts. 43-55) concerns the definition of economic policy; Chapters five, six, nine and eleven deal with the principle of the division of powers and their duties; Chapter seven (Arts. 100-106) outlines the duties of city and provincial councils; Chapter eight (Arts. 107-112) concerns the election of the Leader and his duties; Chapter ten (Arts. 152-155) outlines foreign policy; Chapter twelve (Art. 175) concerns the management of the only government radio and television. The textual analyses provided here are limited to those articles that have some direct relation to the subject of the present study. Most of them are located in two sections of the Constitution; the general section and the rights of the nation.[37]

4. 1. General

The Constitution begins with a preamble, which the authors would like to stress, is not regarded as a part of the Constitution. It explains the ideologies and principles that were bases of the Revolution and perhaps simply shows the revolutionary eagerness of Iranians in the 1980s to establish a new régime. The frequency of the term 'school' (*maktabī*), referring to the school of Islam vis-à-vis other Eastern and Western schools of thought, in the introduction of the Constitution as well as in the discussions of the deputies indicates that the revolutionary leaders' minds and the their 'third world'[38] was under the influence of Marxist thought. Just as every idea and attitude appearing in leftist groups are evaluated based on the rules of the party, similarly the Islamic Republic evaluated or accepted modern concepts, institutions and cultures according to the principles of the

[37] See relevant articles to our discussion in Appendix II.

[38] The term is borrowed from Sir Karl Raimund Popper (1902–94), Anglo-Austrian philosopher. Popper distinguishes three worlds: the first world concerns that of physical objects; the second world refers to the mental acts (or dispositions to behavior) that we direct towards physical or mental objects; and the concern of the third world are those mental objects themselves that form the contents of our theories, arguments, books, libraries, etc.

Shiite tradition.[39] According to this view, since Shiite dogma is permanent, every new idea could be revised, and however, Shiite principles per se should not be modified save in case of dire necessity (*ḍarūra*).

In the first article, the form of government, the 'Islamic Republic', is defined. Adding inappropriate information to the text of the Constitution, article 1 asserted that this form of government was endorsed by Iranians, they chose the form

> "on the basis of their longstanding belief in the sovereignty of truth and Qurānic justice in the referendum of 29 and 30 March 1979 through the affirmative vote of a majority of 98.2% of eligible voters…".

Thus, the legitimacy of the government is based on the vote of the people but with the assumption that the people are seeking this form of government which can be understood through the Qur'ān and the *Sunna*.[40] The first article prepares the ground for article 5 which says that

> "during the Occultation of the *Walīī ʿAṣr* (May God hasten his reappearance) [the Hidden Imam], the leadership of the *umma* devolves upon the just and pious person [jurist], who is fully aware of the circumstances of his age, courageous, resourceful, and possessed of administrative ability, and will assume the responsibilities of this office in accordance with article 107."[41]

According to Shiite doctrines, part of which is illustrated by article five, by choosing the Imam and jurists in their role as religious leaders to be his successors God has already defined the form of the government and the fate of people. A number of questions may appear concerning the justification of the role of the people in such a government and the legitimacy and the popularity of the state. The reply to these crucial questions is beyond of the scope of this study. But one could conclude that if God had already made His decision on the form of the government, He should have ordained the status of religious

[39] One can find the arguments in the discussions of deputies on which Dr. M. H. Bihishtī intended to defend the theory of the rule of jurist. See, *Mudhākirāt of the Assembly FRC*, vol. 1: 376 - 381. The Marxian terms also frequently repeated in the speeches offered by Abū al-Ḥasan Banī-Ṣadr and his rival in the first Presidential election, Jalal al-Dīn Fārsī, an Afghan-by-origin member of the Islamic Republican Party. Both of them tried to mix Marxist terms with the Islamic ones.

[40] The proviso of the *Sunna* added in article three in the clause 6a.

[41] The translation of the Constitution is again not so precise. The brackets here and below are mine.

minorities in those societies too. The prevailing understanding among the jurists indicate that He has indeed already done so.

Analysis of the data in article 1 reveals that the 1979 Constitution, like the 1907 one, Islam in its *Twelver Shiite Jaʿfarī* denomination is the official religion and article 12 added "this principle will remain eternally immutable". However, it lacks the shortcomings of the 1907 Constitution which did not mention anything concerning other Iranian Islamic denominations. The representatives of *Ahl al-Sunna* in the Assembly FRC insisted on this suggestion that Islam without any additional attribution be mentioned in the Constitution as the "official religion". They argued that in this state, it would keep the unity of Iranians, and the Constitution could be accepted as a model for other Muslims in the world. They added,

> "if the attribution of 'Shiite' was mentioned in the text, it would result in limiting the Revolution to Iran". [42]

On the other hand, their opponents argued that the term "official religion" was mentioned so that the Shiite tradition would be a source of legal affairs and if 'Islam' were mentioned instead without qualification, it would lead to disunity and disorder in the codification of legal regulations. Some radical Shiite clerics, in addition, insisted on inserting the attribution of "righteous" or "orthodox" (*haqqi*) juxtaposing *Jaʿfarī* as it mentioned in the 1907 Constitution as well as in the draft offered by the provisional state. After discussions, the article was finally approved in a form that firstly mentions "Shiite" without attribution "orthodox" as an official religion and secondly recognizes other Islamic Schools including Ḥanafī, Shāfiʿī, Mālikī, Ḥanbalī [43] and Zaydī stating that they

> "are to be accorded full respect and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.[44] These schools enjoy official status in matters pertaining to religious education, affairs of

[42] See the argument of Mulawī ʿAbd al-ʿAzīz, a Sunnite representative of Blūchistān and that of his opponent Murtḍā Ḥā'irī, who left the Assembly when the deputies did not pay attention to his suggestion, inserting the designation 'orthodox' beside *Jaʿfarī*, in *Mudhākirāt of the Assembly FRC*, vol. 1: 459- 463.

[43] I followed the Constitution in mentioning the order of the Islamic schools, but the order does not have a logical justification. This is because they are, historically speaking, in the following order: Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī. As to the population of the *Ahl al-Sunna* in Iran, which might be regarded as a criterion for mentioning that order, it is not known that the Ḥanafī, and Shāfiʿī have more followers than the other groups in Iran.

[44] Surprisingly, In the English version of the Constitution, the translator and/or those who were in charge omitted the name of the other schools and simply mentioned 'other Islamic Schools'.

personal status (marriage and divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools constitute the majority,[45] local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school, without infringing upon the rights of the followers of other schools".

One final point concerning the 'official religion' has to do with the name of the other schools. It was not clear why the authors first of all, selected Zaydīsm, which is a Shiite school and ignored other Shiite denominations such as the Shiite *Ismāʿīlī* and Shiite *Ahl al-Ḥaqq* that have more followers in Iran than Shiite Zaydī, and secondly why they connected it to the Schools of the *Ahl-al-Sunna.* In the recorded discussions, there was no justification for the question.

In article thirteen, only Zoroastrians, Jews, and Christians are mentioned as recognized religious minorities. The authors of the 1979 draft Constitution in recognizing only those religious groups followed the regulation remaining from the 1909 Election Law, the second period of the *majlis*, to the end of the Pahlavi period. As already noted in chapter three, religious minorities were not defined in the 1907 Supplement. Following the *fiqh*-oriented opinions of Shiite jurists, the members of the Assembly FRC relied on some inquiries that determined only those religions as recognized. They argued that most jurists, whether *Sunnī* or *Shīʿa*, believed that the People of the Book includes only Zoroastrians, Jews and Christians. In the session where the deputies discussed the article, some of the Ṣābi'īn were attending the Assembly and requested to be recognized.[46] Ayatollah Nāṣir Makārim Shīrāzī, a member jurist of the Assembly, giving a brief report on behalf of the committee who had inquired on the identity of the Ṣābi'īn*,* said,

"According to Islamic sources, they are a part of the Jews or Christians or both of them". He added, "I have heard that they introduce themselves as Jews in some regions. Thus, to their satisfaction, we can put them in the Constitution under the class of Jews or Christians; otherwise, we should codify an independent article

[45] Such as Kurdistān in the north- west, Turkaman Ṣaḥrā in north-east and Baluchistān in south- east where those schools constitute the majority.
[46] The session 27 Sharīwar 1358/18 September 1979.

which deals with the legal status of non-Muslims, by and large in the Islamic Republic, if we are going to deal with them fairly".[47]

Article thirteen, in the last version was approved without mentioning the Ṣābi'īn.[48] Another discussion on Article 13 clearly demonstrates the atmosphere of the Assembly on the legal status of religious minorities in the Constitution. The controversial discussion took place between the deputies of the religious minorities and the others, especially the group who had the main role in the Assembly, concerning the stipulation "within the limits of the law" in article thirteen. The main debate referred to the third step in Islamizing all of the articles. In the process of Islamizing, even though article four guaranteed that the laws are in accordance with Islamic norms (*mawāzīn Islāmī*), some deputies insisted on mentioning the stipulation "Islamic norms" again in some articles, including article thirteen. Rejecting the suggestion, Rustam Shahzādī, the Zoroastrian deputy, argued that, by approving the stipulation, the Assembly was going to consider them as a *dhimmī* class, who had a special status in *fiqh*-oriented opinions.

"But we are Iranians who joined the Revolution and supported Ayatollah Khomeini against the Shah. We are not *dhimmī* who were on the line opposing Muslims, who were, until yesterday bearing weapons, then taking refuge and wanting the Caliph to support them. You should not repeat the events of history", he added.[49]

When, he gave some examples for his claim which were not the intention of the legislators, such as "you are going to ask us to say prayer and fast like you?", the head of the Assembly, Dr. M. H. Bihishtī explained that what they meant by 'Islamic norms' was what was mentioned in the codified law which would naturally be in accordance with Islamic norms.[50] After the discussion, the deputies mentioned "within the limits of the law", not 'Islamic norms' in article thirteen. However, it seems that Shahzādī, in spite of giving inappropriate examples, identified the key point on the subject and we will discuss

[47] See, *Mudhākirāt of the Assembly FRC*, vol.1: 493-494.
[48] Article 13 states, "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who within the limits of the law are free to perform their religious rites and ceremonies and to act according to their own canon in matters of personal affairs and religious education".
[49] See, *Mudhākirāt of the Assembly FRC*, vol. 3: 1531- 32, 1779.
[50] The ambiguity of his argument is understandable in the Persian version of the discussions.

this later in chapter five. He was entitled to object to the content of the stipulation; which the law-makers approved in article 167 which stated that

> "The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatawā* [legal opinions]…"

As we shall see, for the first ten years after the Revolution when the law had not been codified in the matter of criminal cases, judges would refer to the *fiqh*-oriented opinions of Ayatollah Khomeini, which are similar to those of other jurists, as they were noted in chapter one and they regarded religious minorities as *dhimmī*.

In the following discussions on Article 13, the deputies of the religious minorities had made two requests none of which was finally accepted. Firstly, they requested a change from the attribution of 'minorities' to 'communities'. They argued that the term was humiliating, and that they were all Iranians with a long history who have lived in a brotherly fashion and in peace with their Muslim compatriots. Recalling the religious minorities' satisfaction with what Ayatollah Khomeini mentioned in Paris on their future rights in the Islamic Republic, Bayt Ūshānā, a Christian deputy, argued that it was their Iranian ancestors who translated from his mother tongue, Aramaic and Syriac great philosophical scientific works for the Muslims in the Eighth and Ninth Centuries. Thus, they should be treated as Iranians. The opponents of the first suggestion believed that it was true that they were Iranians who had equal rights before the Law, but the term just referred to a measure of the population, that is, the minority vis-à-vis the majority.[51] Secondly, the deputies of the religious minorities offered a proposed version of article thirteen, containing the additional phrase,

> "they are in support of the government in forming religious ethnic [communal] councils and in teaching their culture and language".

Their opponents argued that the second suggestion, indeed, had two parts; the freedom of religious minorities in practicing their religious rites and secondly in their social

[51] The main opponent on this subject was A. Banī Ṣadr; see, *Mudhākirāt of the Assembly FRC*, vol. 1: 472. When one of the representatives suggested applying the phrase 'religious non-Islamic communities', Mr. Dānishrād, a Jewish deputy, said 'we do not agree with the designation 'non-Islamic', because we believe in what is mentioned in the Constitution and in this state as if we are Islamic save looking for the freedom in practicing our personal status'. See, *Ibid*: 472- 3.

activities. The former was mentioned in article thirteen and the latter would be added in the section on the rights of the nation where the freedom of activities of all parties, communities, religious societies and so forth are explained in article 26.[52]

The last point in this section concerns the legal status of non-Muslims in the Islamic Republic. As noted in chapter one, according to some *ḥadīth* and the *fiqh*-oriented opinions of *Shiite* and *Sunnite* jurists, the adherents of other religions save Zoroastrians, Jews and Christians, whether they belong to the great historical religions or to new religious movements, or whether they converted from Islam to other religions, are regarded as 'infidels'. These groups do not have any rights whatsoever in *dār al-Islām* save death or accepting Islam. Under the situation of the modern world, however, the law-makers did not follow up on those *fiqh*-oriented opinions and *ignored* them. This stance taken by the codifiers is subject to question which needs more evaluation. In chapter five, this policy will be discussed and highlighted. The enactors, theoretically speaking, respected the followers of other religions in Article fourteen and relied on the explicit verses of the Qur'ān, such as Q, 2: 83, which are indicative of treating others with good conduct. The members of the Assembly FRC did not pay attention to some interpretations and *fiqh*-oriented opinions, which believed that those verses were abrogated by Q, 9: 29.[53] One can rarely find in any of the articles in the Constitution sources or argument for the claim. However, since Article fourteen has an important role in accepting religious pluralism in the Islamic Republic, perhaps, law-makers, quite unusually, mentioned the evidence or argument in the text. It states,

> "In accordance with the sacred verse "God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes" (Q, 60:8). The government of the

[52] Article 26 states, "The formation of parties, societies, political or professional associations, as well as religious societies, whether Islamic or pertaining to one of the recognized religious minorities, is permitted provided they do not violate the principles of independence, freedom, national unity, the criteria of Islam, or the basis of the Islamic Republic. No one may be prevented from participating in the aforementioned groups or to be compelled to participate in them". In the draft version of article 26 (see: article 31 of the draft) the religious minorities were not mentioned in the text and as to what deputies promised, they were added in the final version.

[53] We discussed those *fiqh*-oriented opinions in chapter one. The verse 9: 29 of the Qur'ān is "Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His Messenger, and follow not the Religion of Truth, until they pay the tribute [*jizya*] readily, being brought low."

> Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity [equality] and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran."

Theoretically, there is an ambiguity concerning the concept of 'conspiracy or activity against Islam and Islamic Republic'. Since it is not an offence that law-makers have defined, there is a possibility that those non-Muslims could find themselves under pressures on the pretext that they had engaged in such activity, or even a particular belief could be regarded a conspiracy and then as an actor against Islam. Apart from this ambiguity, according to the content of article, the entire non-Muslim population is free in their beliefs even those followers of new religious movements.

4. 2. The Rights of the Nation

The term 'the rights of the nation' applied in this part of the 1979 Constitution, has been duplicated from the 1907 Supplement. The rights of the nation and equality before the law are illustrated in detail in chapter three of the 1979 Constitution and are implicit in the explanation of the duties of the three branches of the government. Both 'nation' and 'right' are here applied in the new sense of the terms. Some articles that explicitly confirm rights for everyone, including the religious minorities, are as follows: the indisputable right for every citizen to seek justice by recourse to competent courts;[54] the right of selecting an attorney in every court;[55] the right of choosing any occupation,[56] any appropriate home;[57] the right of participation in determining their political, economic, social, and cultural destiny;[58] and that the private affairs of people should be inviolable.[59] In addition, article three which explicates the duties of the government, ordains that it should try to realize

[54] Article 34.
[55] Article 35.
[56] Article 28.
[57] Article 31.
[58] Article 3, proviso 8.
[59] Article 25 states "The inspection of letters and the failure to deliver them, the recording and disclosure of telephone conversations, the disclosure of telegraphic and telex communications, censorship, or the willful failure to transmit them and all forms of covert investigation are forbidden, except as provided by law."

> "the abolition of all forms of undesirable discrimination and the provision of equitable opportunities for all in both the material and intellectual spheres" and "securing the multifarious rights of all citizens both women and men and providing legal protection for all as well as the equality of all before the law."[60]

Through these articles, one could find a new context as well as new modern concepts explicitly entering into the body of law. There is no reference to *fiqh*-oriented opinions or to what the Caliphs did in the early centuries of Islam. The law-makers intended to show the audience and the readers that in Islam the new teachings have existed which may prove indicative of the equality of all people. To arrive at their aim, they mentioned in the appendix of the Constitution the references of the Qur'ān and the *Sunna* for each part and sometimes for each article. The references cited for the equality of people before the Law are 49: 13 of the Qur'ān and one *ḥadīth* attributed to the Prophet Muhammad, indicating that there was no superiority of man over woman, Arab over non-Arab, and the white race over the black, save according to piety (*taqwā*).[61] It has been claimed that modern teachings, such as those that exist in the Universal Declaration of Human Rights, might be found in Islamic principles. It seems that this claim, at least in this context, ignores different epistemological bases for the two kinds of teachings. In addition, it has taken great pains to justify the existence of legal discrimination between men and women, and between Muslims and non-Muslims in Islamic sources. Furthermore, one part of those Islamic teachings that indicate a condition as a criterion, like that of piety as a basis for superiority, violates the other part of the teaching, which indicates equality for all. Since piety is not a concrete object, to be borne by everyone, it naturally brings about superiority for a group that claims piety or for those who are believed to have some sort of piety. In other words, since piety has no outward representation and objectivity, it might be abused by someone or groups who might be involved in political social affairs. Thus, the yardstick of (*taqwā*) would violate equality before the law. As long as piety is regarded as a criterion of superiority before God but not before the individuals, as the Qur'ān asserts, it would be an acceptable subjective criterion for believers.

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[60] Article 3, proviso 9 and 14.

[61] It is quoted by Muḥammad b. Aḥmad al-Qurṭubī al-Anṣārī (d. 671/1272) *al-Jāmiᶜ li Aḥkām al-Qur'ān* (Beirut: Dār al-Iḥyā' al-Turāth al-ᶜArabī, 1985), vol.16: 342.

Apart from establishing the rights of the nation in the Constitution, the principle of freedom (*aṣl āzādī*) in the Constitution is considered as a vital principle. Respect the opinions of non-Muslims (Art. 14), the forbiddance of inquisition, viz. inspecting others' opinions (Art. 23),[62] and especially emphasizing on the unity of freedom and independence (Art. 9) are samples of the significance which the enactors gave to this principle.[63] That is why in article 79, the proclamation of martial law is forbidden and in the case of war or emergency conditions comparable to war, the government is entitled to impose temporarily necessary restrictions with the agreement of the National Consultative Assembly for only thirty days. The freedom of the press and protest against the policies of the state are authorized, provided that they are not detrimental to the fundamental principles of Islam.[64] The executive and juridical branches of the government should guarantee and protect the legal freedom for all people.[65] To sum up, according to these principles, compared with the 1906-7 Constitution, we can see that the 1979 Constitution enshrines more rights and freedom for people including the religious minorities. It is asserted that religious minorities are recognized as well as their freedom in their personal status according to their own rulings.

The freedom and greater rights asserted in the Constitution for religious minorities, however, is one aspect of the subject. There are some ambiguous terms and conditions which make the Constitution more contradictory compared with the corpus of the laws enacted between 1907- 1979. In addition, there are some articles in the Penal Code, which contradict those of the rights and the types of freedoms asserted for non-

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[62] Article 23 is akin to part of article 18 of the International Covenant on Civil and Political Rights, which states, "Everyone shall have the right to freedom of thought, conscience and religion." But in article 23 of the Constitution the second part of article 18 is omitted. The second part states, "This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

[63] Article 9 is worth mentioning in full: "In the Islamic Republic of Iran, the freedom, independence, unity and territorial integrity of the country are inseparable from one another and their preservation is the duty of the government and all individual citizens. No individual group or authority has the right to infringe in the slightest way upon the political cultural economic and military independence or the territorial integrity of Iran under the pretext of exercising freedom .Similarly, no authority has the right to abrogate legitimate freedoms not even by enacting laws and regulations for that purpose under the pretext of preserving the independence and territorial integrity of the country."

[64] See, articles 24 and 27. In this relation, see also article 26 in footnote 39.

[65] See respectively, article 3 proviso seven, and article 156, proviso two.

Muslims. At the same time, there is some potentiality to explain the ambiguous terms and to supersede the Penal Code in order to have more rights and freedoms for non-Muslims in the Islamic Republic. The issue will be dealt with in chapter five but here we shall pay attention those ambiguities.

The ambiguities in the 1979 Constitution concerning the rights of religious minorities can be seen in the following cases: Quite ambiguously, article 19 considers all people, including every tribe or ethnic group, equal before the law.

> (*mardum Irān az har qawm wa qabīli az ḥuqūq musāwī barkhurdārand wa rang, nejād wa mānand īnhā sabab imtiyāz nīst*). It asserts that some characteristics, such as "color, race, language and the like (*mānand īnhā*) do not bestow any privilege".

The ambiguity refers to 'the like', since three factors are mentioned explicitly but it is not known whether 'the like' includes religion or not. The evidence indicates that the law-makers knew the legal implications of adding religion. We can say that article 19 is apparently an imperfect duplicate of article 2 of the Universal Declaration of Human Rights.

Another ambiguous instance is in article 20. While the article points out that all citizens of the country have equal enjoyment and protection of the law, it adds a condition "in conformity with Islamic criteria [norms]".[66] In the article, if the stipulation 'Islamic norms' is reduced to *fiqh*-oriented current opinions, article 20 would become paradoxical; since in accordance with Islamic Shiite sources, the rights of Muslims and non-Muslims are not equal. Then, the first part of the article indicates equal rights and the stipulation at the end violates them. Some Iranian lawyers, such as Dr. Ḥusayn Mihr Pūr, who was a member of the Guardian Council for about ten years, argued that

> "the vague stipulation 'Islamic norms' is tantamount to such stipulations as protect national security, public order, public health or morals or the rights and

[66] Article 20: "All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights in conformity with Islamic criteria" (*ham-i millat …yiksān dar ḥimāyat qānūn qarār dārand wa az ham-i ḥuqūq insānī, sīyāsī,…bā riʿāyat mawāzīn islām barkhurdārand*". See also original text in Appendix II.

freedoms of others, which are ambiguous terms applied in the text to limit the unrestricted freedom found in the Universal Declaration and its Covenants." [67]

He added that in every country the rulers might understand and interpret the stipulations in accordance with their own interests.[68] His argumentation should be treated with great caution, since it is true that every rule may be abused and it is also true that the designation "Islamic norms" includes public health and morals, but at the same time those stipulations that exist in *fiqh*-oriented opinions concerning religious minorities do not have permanent reliable justifications like that of the Universal Declaration which do have rationally acceptable justifications in common understanding.

Another point concerning some ambiguities, concerns article 26. The very article permits the formation of parties, societies and associations only for Muslims and recognized religious minorities, not for non-Muslims in general. The conditions stand in contrast with articles such as article 23, which absolutely legalizes different freedom of activity for all citizens and forbids the inspection of others' opinions.

The great paradox in the structure of the Constitution in the section on the rights of the nation appears in the justification of the legality of the ruler or the government in the Islamic Republic. On the one hand, it is the people who, by referenda, give the government legitimacy and, on other hand, as the theory of the political rule of the jurist instructs, the status of leadership is awarded to the jurist by virtue of general succession to the Hidden Imam in the period of the Occultation. The Assembly of Experts for choosing the supreme Leader (*majlis khubrigān rahbarī*), consists of competent jurists who are chosen by the people to determine the case for leadership.[69] In the Constitution, the position of leadership or the Council of Leadership is superior to the three branches of the government and oversees them. In the opinion of some jurists, the status of the Leader is even far beyond that of the Constitution and he can virtually violate some matters in critical cases. To solve this paradox, some solutions were offered, but the evaluation of the subject per se is beyond of the scope of this study.

From the above data and analyses a number of tentative conclusions can be drawn. The 1979 Revolution and the codification of the Constitution are a reaction of a

[67] See, as an example, article 12, proviso three of the International Covenant on Civil and Political Rights.
[68] See, H. Mihr Pūr (1383/2003): 367- 395, esp. 385-86.
[69] See Arts.107 and 108.

part of Shiite tradition to modernity.[70] The Constitution, as a manifest of this approach, contains new concepts from the modern period with the assumption that political Islam can and should have a form of government and with the assumption that these modern concepts are acceptable in the light of Islamic norms. The compounded format consists, on the one hand, of the recognition of the rights of the nation, determining who the religious minorities are and respect for the life and freedom of non-Muslims, and on the other hand, some elements that comply with Islamic rules and regulations. The importance of the people's votes, the development of the National Assembly, the acceptance of the division of powers, and the consideration of most articles of the International Declaration of Human Rights were the Modern elements that are welcomed, and the legislators as well as the government Islamized them. In this period, instead of denying the importance of those modern teachings and institutions or referring to *fiqh*-oriented opinions which were not compatible with the implications of the time as it was the strategy of the opponent clergies of constitutionalism in 1906, the leaders of the Revolution 1979 firstly accepted them, then step by step, applying a practical approach or more precisely an utilitarian one tried to Islamize the format and content of modern concepts and institutions such as democracy and parliament. The advocates of this approach sometimes argued that those modern concepts have their origins in Islamic teachings and tried to create, as far as it might be possible, the relevant terminology. By this argument, they could attract ordinary religious people as well as religious authorities to support the new régime. However, the nature of new events and issues in the society led them firstly to *ignore* some *fiqh*-oriented opinions, and secondly to accept secularized customs, rules and regulations (*qawānīn wa muqarrāt ʿurfī*). Thus, the Islamic government has had a twofold solution to resolve the problems: a solution, i.e. Islamizing, that satisfies the religious levels of the society by which it could get their support and, in consequence, the government would keep its legitimacy, and a solution by which it could find a way, if any, to encounter real objective problems. As a result, the second solution causes to bring about a secularized or rationalized approach in the

[70] The opposite approach in the Shiite tradition belongs to the great non-political clerics, such as Ayatollah Sayyid Abū al-Qāsim Khū'ī and Ayatollah Sayyid ʿAlī Sīstānī, who negated the assumption that the political rule for jurists has any basis in Islamic law. This approach has some similarities with that of the *Sunnī* version in Egypt, which was offered for the first time by ʿAlī ʿAbd al-Rāziq in *al-Islām wa Uṣūl al-Ḥukm*.

codification laws and regulations, in spite of the will of the clerics. A number of legal questions concerning religious minorities have been solved by this dilemmatic policy in the Islamic Republic.

5. Terminology

The first encounter of the Shiite tradition with modernity in 1906 led to the appearance of modern concepts and terms in the Constitution. In the 1979 Revolution, the leaders could not ignore the role of those new terms and concepts that were popular among the people. In the second phase of encountering with modernity, the religious leaders claimed that modern terms and concepts might be considered and revised in light of Islamic teachings. To Islamize the terms and the format of the government, the legislators offered some new terms, which are the central focus of the study here.

5. 1. The rule of the jurist (*wilāyat faqīh*)

The rule or sovereignty of the jurist, as already mentioned, came into the Constitution in the first months after the victory of the Revolution.[71] The popularity of Ayatollah Khomeini vis-à-vis other Sources of Emulation caused the theory to be quickly accepted. Even a few deputies in the Assembly FRC who opposed the theory such as Abū al-Ḥasan Banī-Ṣadr and R. Muqaddam-Marāghi'ī agreed with the leadership of Ayatollah Khomeini in principle, but, they argued that the theory will be a problematic after his death. The rule of the jurist in Islamic law has a longstanding history, but, it was bestowed regarding legal cases in which there was no guardianship or protection for individuals such as the orphan (*yatīm*), the lunatic (*majnūn*), the insane (*safīh*), the destitute (*muflis*), the minor (*ṣahgīr*) and so on. In addition, the *walī* in *Ṣufī* terminology is also applied with the assumption that every disciple who is seeking spirituality in general sense or God in the Islamic sense needs to a master (*walī*). Since the master, or *walī* in this term, had found his way to God and could see the inner aspect of matters in the very world as they are, he could guide the individuals to a fortune destiny. Ayatollah

[71] In the speeches and interviews of Ayatollah Khomeini in France, one cannot find the term. Even as we have already seen he explicitly insisted on his guiding role in the revolution. See as an example, R. Khomeini, *Ṣahīf-i Nūr*, vol. 2: 295-296. The term and position of leader appeared on the socio- political scene after the debates took place on the draft Constitution in the Assembly FRC. Afterwards Ayatollah Khomeini in this phase agreed with the position of the rule of jurist in the Constitution and regarded it as "a pillar of Islam". See, *op.cit.* Vol. 5: 522.

Khomeini, who studied and practiced in *fiqh* (jurisprudence) and *ʿIrfān* (mysticism), integrated the two meanings of the terms with a political coloring. He relied on some *ḥadīth,* which contextually are stated in the field of judgment.[72] Then, he defended the expansion of the power of the jurists from pure legal cases to the socio-political realm to lead the people to their felicity.[73] In the seminary (*ḥawza*) atmosphere in Qum and Najaf the argument was not taken seriously before and after the Revolution and had serious opponents. The intellectuals also were mostly silent concerning the theory during 1978-1979.

The term '*wilāyat amr wa imāmat-i ummat*' applied in the Constitution (Arts. 5, 107, and 109) refers to the position, role and duties of the Leader. It shows legal and mystical aspects of the term. The term *wilāyat* on one hand signifies the legal rule or sovereignty of the jurist, that is, 'guardianship' towards those who do not have any protection. On the other hand, *wilāyat* has a mystical application and bespeaks of the authority and superiority of the 'master' because of his spiritual state with respect to the 'disciple'. *Amr* means affair, which is derived from two origins: from the affair of individuals in 'those legal limited subjects', who do not have guardianship or protection, and from the situation of 'the personal spiritual state of the disciple' in mysticism. In this context, the meaning of *amr* is expanded to include either all personal or general affairs of those subjects and disciples. *Imāmat-i ummat,* is synonymous with the former term (*wilāyat amr*); it refers to a Shiite doctrine says that God by virtue of His grace does not leave the community without a religious leader (*qāʿida luṭf*) at all. Consequently, in the period of the Occultation of the Hidden Imam, the jurists are his general successors

[72] The main *ḥadīth,* which Ayatollah Khomeini applied in his argument, is related from ʿUmar b. Ḥanẓala that reads, "I asked Abū ʿAbd Allāh Jaʿfar b. Muḥammad [The Sixth Imam] concerning two of our companions who are involved in a dispute over debt or inheritance and who seek judgment before a sultan or *Qāḍī*. Is this legal? Abū ʿAbd Allāh replied, 'He who seeks judgment from the *ṭāghūt* (i.e. tyrants) and obtains judgment receives only abomination, even if his claim is valid, because he has accepted the decision of the *ṭāghūt*. God has commanded that (such a one) be considered an unbeliever (*kāfir*). ʿUmar b. Ḥanẓala said, 'What should they do? Abū Jaʿfar replied, 'Look to one of your number who relates our *ḥadīth*, who observes our lawful (*ḥalāl*) and our forbiddance (*ḥarām*) and who knows our rulings (*aḥkām*). Accept his judgment for I have made him a *ḥākim* over you. If he gives a decision in accord with our judgment and (the litigant) does not accept it, then it is God's judgment he has scorned and us has he rejected. One who rejects us rejects God and he is subject to the punishment due for polytheism (ʿAlā hadd-i al-shirk). See, al-Kulaynī, *Fruʿ al-Kāfī*, vol. 1, 357-9. Ayatollah Khomeini emphasized the term of '*ḥākim*' in the *ḥadīth* and interpreted it in the political sense of the word i.e. the ruler. I quoted the English version of *ḥadīth* from *EI* [2].

[73] See, R. Khomeini, *Kitāb al-Bayʿ* (Qum: Ismāʿīlīyān, 1410/1989), vol. 3: 125- 138.

(*nuwāb ʿām*) and the role of the people is simply imitating their *fiqh*-oriented opinions. By inserting the Shiite Islamic institution, i.e. *wilāyat faqīh* in the body of law, the legislators succeeded in Islamizing the Constitution, while at the same time keeping modern elements and institutions, such as the division of powers, the parliament, the election, and the outward form of democracy. Even the modern instrument, i.e., the elections, has been applied in choosing the members of the Assembly of Experts in order to select the leader or '*wilāyat amr wa imāmat-i ummat*'.

5. 2. The Islamic Republic

The term, which has been applied in article one, shows the form of the government. The codifiers including jurists and revolutionaries have not offered precise meanings in their discussions for republic or the democratic form of the government. The question is yet on the table as to what the intent of the codifiers was by the designation 'Islamic Republic'. However, through subsequent discussions by the rulers and through what the government did after the years of the Revolution, it might be said that the meaning of the term is compatible with what Dr. Bihishtī, a head of Islamic Republican Party, described on the meaning of the criterion of "superiority" of 'the school of Islam' (*maktab Islām*). He explained that every term and concept is only accepted in light of Islamic norms. According to this attitude, the vote of all the people is worth regarding as long as the result gained would not stand in contradiction with Islamic norms. In this framework, the responsibility for recognizing the compatibility of results as well as regulations with Islamic norms is the responsibility of the Leader and the jurists of the Guardian Council. One can conclude that it is the vote of a group of particular believers, as a matter of fact, which has importance for the rulers in defining the destiny of and the maintenance of the form of the government. This conclusion has gradually appeared in the utterances of the leaders and some theologians in interpreting the term 'democracy' to be the will of religious people (*mardum sālārī dīnī*). Through this attitude, the meaning of democracy, which has various definitions and models in the framework of modernity, was reduced to applying the means of democracy such as elections, the parliament and so on, in order to maintain a new model of government, called the Islamic Republic. It is worth mentioning that in articles 5 and 107 to 111 of the Constitution, which explain the status of

leadership, the Leader has authority beyond the three branches of the government in such a form of democracy.

5. 3. Islamic Norms

In the draft version of article 4 (i.e. article 78 of draft) prepared by the provisional state, it was mentioned that 'all rules must be ratified with complete consideration for undisputed Islamic principles (*usūl-i musallam sharʿī*)'. The term was superseded by the one applied in the 1907 Constitution, i.e., the 'Sacred Rules of Islam'. Some deputies of the Assembly FRC argued that the draft article in this form was ambiguous, since in the case of conflicts between two groups of laws, i.e. Islamic as well as international, we have to consider and to act according to both regulations. They believed that in the future it is possible that some regulations ratified in the Assembly might not have any origin or data in the Islamic sources. Thus, to solve the problem, instead of mentioning 'undisputed Islamic principles' it is enough to mention 'Islamic norms' (*mawāzīn islāmī*) which does not mean that all regulations should be based on or derived from the Qur'ān and the *Sunna*.

> 'What we mean by the term is that regulations should be in conformity with the general framework of Islam, but not necessarily driven from Islamic sources.'[74]

In this case, they argued that a way to the hermeneutic understanding of the norms is opened in the future. The opponents of this idea believed that all regulations should be based on, and taken precisely from the Qur'ān and the *Sunna*, for these sources are imbued with answers to the needs and requests of human beings.[75] It seems that the change of the term the 'Sacred Rules of Islam' to 'Islamic norms' was a result of the experience of the Shiite jurists with modernity. Since the crude concept of the 'Sacred Rules of Islam', which is easily found in the debates of the members of the 1907 National Assembly, exists more or less among the members of the Assembly FRC, too. However,

[74] See, *Mudhākirāt of the Assembly FRC,* vol.1: 314-316. The great adherents of this idea were Ayatollah Muntaẓirī and Ayatollah Bihishtī, Ayatollah Ṭāhirī Khurram Ābādī. The role of Bihishtī in approving the article with the final format was effective. Unlike most of the deputies he knew that it would be impossible to say that all regulations which the country needs already existed in the Qur'ān and the *Sunna*.

[75] See, *op. cit.* p. 318 and 350. Ḥasan Āyat and Ayatollah Murtḍā Ḥā'irī were in the ranks of the opponents. Finally, according to the suggestion of the opponents, the Assembly added the following phrase to the text of article 4 to comply more with Islamic rules: "the generality and non-specificity of this article is superior to all articles of the Constitution as well as to all other laws and regulations".

the head and the group that managed the Assembly did know that some Islamic rules do not have the appropriate grounds to be realized in modern times. Thus, they changed the term 'undisputed Islamic principles' or 'the Sacred Rule' to 'Islamic norms' which has a greater capacity for *interpretation*, and perhaps for *changing*, or even *ignoring* some *fiqh*-oriented opinions in accordance with the demands of the age. In addition, 'the sacred rule' implicitly presupposed that the rules of Islam, since they are sacred, would never be subject to question or change. The position of the deputies of the religious minorities in this argument is worth mentioning. They supported the change, since they believed that the content of 'Islamic norms' implied justice for all people and that the decision of the deputies contains the interests for Iranians, hence they voted 'Yes' to endorse the article.[76]

It is asserted in the draft of the Constitution (arts. 151-156) that there would be an institution called, the Guardian Council of the Constitution, which is responsible for ensuring that the laws and regulations be in conformity with Islamic norms. Accordingly, the position of the Council is located outside of and has superiority over the Parliament. The Assembly of FRC ratified the articles concerning the Guardian Council and in addition gave it an authority that led to it having more powers than a simple supreme court which gives injunctions in conflict cases. The Guardian Council during the last 27 years, practically speaking, reduced the meaning of 'Islamic norms' to their own *fiqh*-oriented opinions, despite the original intent of the codifiers who open-mindedly ratified the term in an expanded meaning.[77] One cannot find a case where the Guardians would have given an opinion in terms of 'Islamic norms' and would have rejected such and such a ratified law by the Parliament, because it was contradictory to justice which is one of the Islamic norms.

5. 4. Non- Shiite *Twelver*

[76] See, *op. cit.* p.326-332.

[77] The Guardian Council is asked on what they meant by 'conformity'. The Council replied that the meaning of 'conformity' is lack of contradiction between the ratified laws and regulations with the rules of *Sharīʿa* in accordance with their own *fiqh*-oriented opinions and recognition, not necessarily all ratified laws should be taken from Islamic sources. See, *Muṣawwabāt Shūrāy Nigahbān* [*Ratified Laws by the Guardian Council*] (Tehran: the National Assembly, 1986): 345- 346.

The title chosen refers to non-Muslims, including religious minorities except the Ṣābi'īn. It also refers to non-Shiite *Twelver* Muslims, including the followers of the four Sunni Islamic schools and also to the other groups of Shiite Islam, e.g., the Zaydī and the Ismāʿīlī. The legal status of these groups as already noted and analyzed is defined in articles 12, 13, and 14 of the Constitution.[78] It may be argued that the position of the law-makers, regarding mentioning these groups in the Constitution, is regarded as a great step towards accepting pluralism in a Shiite society. As already stated, some of the deputies suggested adding the designation 'orthodox' (*madhhab ḥaqq-i*) in juxtaposition to *Twelver Shīʿīsm* in the first article wherein the 'official religion' is introduced as mentioned in the 1907 Supplement. The codifiers, most of whom were clerics, did not have a theoretical basis for a pluralistic position and were actually exclusivists. Regarding utilitarian considerations and the revolutionary atmosphere in 1979, however, they agreed to recognize those groups and determine rights for them. This is because they needed the unity of Iranians against the Shah and their enemies, and the point is understandable for those clerics who had a role to play on the political governmental scene. Among the other faiths, the Bahā'ī group is not recognized in the Islamic Republic and is regarded as a heresy.

5. 5. The Expediency Council

After establishing the Islamic Republic, difficulties appeared in the international political as well as legal fields for the government. The problematic legal subjects were the first ones that the Islamic Republic faced in practice. Gradually further subjects in socio-theological and political areas were raised. The religious leaders of the 1979 Revolution like the cleric leaders of the 1906 Revolution at first thought that the solutions to all modern legal issues could be found in Islamic literature, especially in those of jurisprudence. The capacity of jurisprudence was thought to be larger than expected. This imagination had existed among Shiite clerics and then became the paradigm of the Guardian Council for the first years after the 1979 Revolution.

[78] One of the representatives of the Assembly FRC regarded the Ismāʿīlī Shiite group as an instance for the article fourteen. See, *Mudhākirāt of the Assembly FRC*, vol. 3: 1784.

On the other hand, the Parliament, which consisted of members from various groups of the society and the state which dealt with social facts, were trying to find solutions to legal issues and relations through common understanding and rational methods which other countries had experienced. They had to ratify laws and regulations that sometimes were in contrast with the *Sharīʿa* or with the Constitution as the Guardian Council understood. Those regulations were naturally rejected by the Guardian Council. There were some laws and regulations such as labor, employment and insurance law that the Parliament and the State had an opinion which was in contrast with the Guardian Council's opinion. Ayatollah Khomeini blamed the Guardian Council several times for their narrow-mindedness and their method in deducing legal subjects irrespective of the impact of factors such as place (*makān*) and time (*zamān*). However, the Council is legally entitled to remain firm on their opinion. Ayatollah Khomeini resolved some cases directly by issuing appropriate rulings and then legally regarded his actions as secondary rulings (*aḥkām thānawīyya*) in Islam. Due to the fact that the secondary injunctions are limited in Islamic law to the state of recognizing a dire necessity (*ḍarūra*), or public interest (*maṣlaḥa*), and the leader could not recognize the conditions every time by himself, he left the responsibility of recognizing these conditions to two-third of the deputies of the National Consultative Assembly. But for most issues, it was difficult to convince the deputies on the existence of necessity in such and such issue. In addition, the verification of necessity took more time-consuming for the Assembly and the state could not wait for such long processes. Finally, on 17 Bahman 1366 / 5 February 1987 Ayatollah Khomeini established a new council, known as the Expediency Council (*majmaʿ tashkhīṣ maṣlaḥat niẓām*), which included the jurist members of the Guardian Council, the head of three powers, some deputies of the Assembly, the relevant ministers, and some experts (totally 25 persons) in order to solve conflicts between the Assembly and the Guardians. Two years later, the function and duties of the Expediency Council were inserted in the amendment of the Constitution and became legitimized.[79]

[79] Additional article 112 of the 1989 Constitution states thus: "Upon the order of the Leader, the Nation's Exigency [Expediency] Council shall meet at any time the Guardian Council judges 1) a proposed bill of the Islamic Consultative Assembly to be against the principles of *Sharīʿa* or the Constitution and the Assembly is unable to meet the expectations of the Guardian Council. Also, the Council shall meet for consideration on any issue forwarded to it by the Leader and shall carry out any other responsibility as mentioned in this Constitution. 2) The permanent and changeable members of the Council shall be

By forming the new Council, the process of rationalization or *secularization* (*ʿurfī shudan*) laws and regulations was accelerated. For the first time, the Shiite tradition has accepted cases in which jurists in the government have to officially commit to rational arguments and social facts, not to pure evidence from the Qur'ān and the *Sunna*. It is true that reason (*ʿaql*) is considered as one source for understanding and interpreting the scriptures and one means for giving legal opinions, but, as a matter of fact, no Shiite jurist has applied reason as an independent argument.[80] The jurists relied on the reason in the history of the Shiite jurisprudence as a means for reconciling contradictions between the Qur'ān and the *Sunna* or between their internal discrepancies, if any. In addition, the terms "necessity" (*ḍarūra*) and "interest" (*maṣlaḥa*) used to be applied in Shiite jurisprudence mostly in cases of individual affairs or in the cases of what is regarded today as a branch of private law. The Islamic Republic recognizes these terms in the context of social affairs too but needs to formulate the relevant logic and method. This way of argumentation in the Shiite school does not have extended precedents and records like the Sunnite school. Given that the Shiite school vis-à-vis the Sunnite one, especially in the early centuries, was a minority and an opposition group in the history of Islam, the element of public interest (*maṣlaḥat ʿāmm-i*) in Shiite jurisprudential literature did not have a long precedent and important role in deducing *fiqh*-oriented opinions.[81] Shiite jurists did not pay attention to such methods as Q*iyās* (analogy), *Maṣlaḥa,* (public interest)*, Maṣāliḥ Mursala* (unregulated benefits), *Sadd-i Dharīʿa* (the stopping of the means) by which a jurist theoretically would have more instruments to understand and interpret Islamic rulings. The Shiites believe that some of those methods, such as *qiyās* have been forbidden by the Imams, since when human beings make comparisons of divine precepts by using their reason, they often being misled. At the same time, they regard some other methods lawful such as *ḥukm thānawī* (the second ruling vis-à-vis primitive one) or *ḥukm ḥukūmatī* (governmental injunction), *tanqīḥ manāṭ* (explaining the criterion existed in the sayings of the Imam and generalizing that criterion, not that one

appointed by the Leader. 3) The rule for the Council shall be formulated and approved by the Council members subject to the confirmation by the Leader."

[80] See some function of the reason in Shiite jurisprudence in M. al-Anṣārī, *Farā'id al-Uṣūl* (Qum: Majmʿ al-Fikr al-Islāmī, 1419/1998) vol. 2: 54-59, vol. 3: 17- 25, 318-319.

[81] See, Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998), esp. 160 ff.; Cf., W. Hallāq, "Considerations on the Function and Character of Sunni Legal Theory", *Journal of the American Oriental Society* 104 (1984): 679- 89.

made by the jurists) and applying the state of *ḍarūra* (dire necessity). The Shiite jurists have had long discussions concerning the differences between these terms and those of the Sunnites but at the same time, they need more clarification.[82]

Nevertheless, as far as our study is concerned, the opinions of the Expediency Council in the last sixteen years have become more secularized and more appropriate for all Iranians including religious minorities compared with what is current among Shiite jurists, including the Guardian Council. We shall see in following discussions modification of some rulings and laws made by the Expediency Council in favor of religious minorities in the fields of the Civil and Penal Codes. The attitude of the Expediency Council, which might be called the utilitarian approach[83] helped to create a process in which Shiite *fiqh* came to be gradually secularized (*ʿurfī*). *Secularization*, which has been borrowed from the sociology of religion, is used here in the sense of giving priority to matters of the world rather than the hereafter. The term, as Max Weber has interpreted, means the *rationalization* of social affairs and regulations irrespective of the beliefs of individuals.

6. Modification of the Laws and Regulations in the Period of 1980 to 2004

From 1979, along with the process of codifying the new Constitution, there were other efforts to codify regulations made by the provisional state, the Council of Revolution, and the judiciary branch of the government.[84] In the revolutionary atmosphere, all previous laws and regulations were regarded as "satanic".[85] Since the government as yet had not had the National Assembly, the Council of Revolution played that role, and was therefore responsible for the final approval of the laws and regulations. One of the achievements of the provisional state was to declare the Capitulation, which Muhammad Reza Shah Pahlavi ordained for the American military advisors who lived in Iran, abrogated.[86]

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[82] See concerning these methods, M. H. Mudarressī Ṭabāṭabā'ī (1984): 10-28.
[83] Further explanations on the term will be offered in chapter five.
[84] The 1907 Supplement set up the judiciary affairs in the Ministry of justice. But according to Arts.57, 156-174 of the 1979 Constitution, the judiciary affairs gained independency from the state and could offer the proposals to the Assembly to be ratified.
[85] Ayatollah Khomeini declared a general, absolute decree that all ratified laws, regulations and even executive bylaws in the courts, administrative affairs and municipalities, which are contradictory to Islam, are automatically abrogated. See, Khomeini, *Ṣaḥīf-i Nūr*, vol. 5: 234- 235.
[86] See, *Rūznām-i Rasmī* [*Official Gazette*] on 23/02/1358 / 15/05/1979.

6. 1. The Penal Code

A few days after the victory of the Revolution, the Penal Code (1304/1925), which was regarded as contrary to Islam, abrogated. The penal procedure code was also completely removed from the office of the judiciary. Lacking a newly ratified penal code, the judges, who were mostly clerics at that time practiced *fiqh* not law, being entitled, according to article 167 of the Constitution, to refer to well known *fiqh*-oriented juristic opinions. Thus, in the Islamic Republic the courts became purely religious courts for investigating civil and criminal claims unlike the Qajar period until the first period of Pahlavi rule, when the courts were divided into customary (*ʿurfī*) and religious courts. Later on, during the rule of Muhammad Reza Shah, they became completely common courts. The source for clerical judges was often the jurisprudential work of Ayatollah Khomeini, *Taḥrīr al-Wasīla* in Arabic*,* which a large amount of evidence indicates that that is very much akin to Sheikh al-Ṭūsī's works and opinions. Therefore, in every subject related to non-Muslims in general and to religious minorities in particular, the judges based their injunctions upon those opinions we have identified already in chapter one. In addition, the judges did not distinguish between *fiqh* and law in the new term and they didn't pay attention to differences between 'sins' and 'crimes'. They imagined that every sinner is a criminal, hence deserving punishment. While, the criminal in the law is one who performs the criminal act that the legislature had already defined and had determined its punishment, the legal opinions of the *faqīh* are not so. When every judge was entitled to refer to *fiqh*-oriented works and find his favorite sources to make his injunction, it was natural for this state of affairs to bring about inconsistency in the injunctions issued by the courts.

Three years after the Revolution (on 21st *Tīr* 1361/12 July 1982), the Committee for Judicial Affairs of the first National Assembly provided a proposed articles as the Penal Code. The articles were indeed the organized translated form of *fiqh*-oriented opinions that had existed in jurisprudential Arabic works, especially those extracted from *Taḥrīr al-Wasīla*. Since it was believed that those regulations were sent down by God, the articles were translated and codified by the Parliament without regard to common sense, a general understanding of criminal acts and the demands of time. Some issues, irrelevant

to the contemporary world do exist in the Islamic Penal Code. The Committee passed a corpus of the Penal Code in the field of *ḥudūd* and *qiṣāṣ* in 218 articles, known as Chapter One and Chapter Two of the Islamic Penal Code.[87] The Parliament provisionally approved the corpus for five years to test it. The process of preparing the code expanded in the field of *diyāt*, comprising Chapter Three of the Islamic Penal Code in 210 articles and ratified by the Assembly on 24 *Adhar* 1361/15th December 1982. From 1982 to 1990, the only reference judges had in criminal cases was this very corpus which had few alterations. After five years, the implementation was extended for five more years by the Assembly. On 18th July 1990, the Assembly passed a new Islamic Penal Code with the ratification of the Guardian Council in 497 articles and 103 provisos including *ḥudūd*, *qiṣāṣ*, *diyāt*, *taʿzīrāt*, and *mujāzāthāy bāzdārand-i* (preventive penalties).[88] The new version was reorganized and was included more chapters. Included in it were some cases selected from the Penal Code (1304/1925 and its subsequent amendments) and others gained through working experiences over last eleven years. The final version of the Islamic Penal Code ratified on 2nd *Khurdād* 1375/ 23rd May 1995 includes 233 additional articles and 44 provisos, which were included in some chapters on tort law, preventive penalties and a few revised articles (totally 730 arts.). Between 1995 and 2007, every five years the Assembly extended the validity of the Islamic Penal Code for five more years to test it.

Now it is pertinent to take a look at the content of the Islamic Penal Code as far as our study is concerned. The corpus includes some articles that contradict the content of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which the Iranian government accepted the former in 1948 and the latter in 1968 and ratified by the National Assembly in 1972.[89] Due to the fact that the Islamic Repulic had not offered enough legal justifications for the implementation of this Penal

[87] Those chapters, *ḥudūd* and *qiṣāṣ* have been translated to English in 1986 in Pakistan. While I quoted the articles of Islamic Penal Code, here, I used by the translation with revision and caution. See, *Islamic Penal Code of Iran*, A. R. Naqavi (tr.) (Islamabad: Institute of Persian Studies, 1986).
[88] The definitions of the terms will follow. See also relevant articles of Islamic Penal Code in Appendix II.
[89] Among 25 International Conventions, Iran accepted seven conventions in the Pahlavi period and three in the period of the Islamic Republic concerning genocide, racial discrimination, the children's rights, apartheid in sports, and so on. However, the Islamic Republic did not accept the Second Optional Protocol to the I Covenant on Civil and Political Rights aiming towards the abolition of the death penalty (ratified 1989 in UN). See, H. Mihr Pūr (1383/2003): 407-417.

Code, the Human Rights Committee (HRC) in the U.N. accused and condemned Iran of violating human rights several times. Those codes contain various kinds of penalties and regulations, which make a discrimination towards women and non-Muslims. Unfortunately, any discussion on the problem is reduced to politics in Iran and few intelluctuals are ready to pay attention to the issue.

The language of the articles in the Islamic Penal Code has gradually found a generality and absoluteness in a way that that includes all Iranians.[90] The Penal Code was ratified on the assumption that those governed by the Code were Iranian Muslims. Thus, religious minorities would have to refer to Islamic courts for criminal claims and accept their injunctions according to current *fiqh*-oriented opinions. For example, if an article explains the amount of penalties for stealing, drinking intoxicating beverages (*muskir*), committing adultery, or not wearing the veil (*ḥijāb*), the Code has presupposed that the agent would be Muslim and determined the punishment accordingly, irrespective of the different cultures that might be involved. Here those examples have been chosen to illustrate that some of these activities are not regarded as crimes in different cultures. The tone of the last version of the Islamic Penal Code, however, is of generality without discrimination. This is true in all cases, especially in the fifth chapter concerning preventive penalties (*mujāzāthāy bāzdārandih*) in which no hint of their application to different cultures could be discerned which could be a positive aspect for religious minorities. In chapters One to Three of the Islamic Penal Code, a few cases concerning *ḥudūd*, *qiṣāṣ* and *diyāt*, according to *fiqh*-oriented opinions distinguish between Muslims and non-Muslims. It is clear that religious minorities in those cases, as we shall see, are regarded as *dhimmī* in *fiqh*-oriented opinions. This is the point that Mr. Shahzādī, deputy of Zoroastrians, remarked in the Assembly of FRC. In following discussion, we refer briefly to those cases.

Let us begin with the definitions of the three terms *ḥudūd, qiṣāṣ* and *diyāt* in accordance with the last version of the Penal Code. According to article 13, '*ḥudūd* are the penalties whose nature and amount have been prescribed by the *Sharīʿa*'. The term '*taʿzīrāt*', on the other hand, is applied to another kind of penalty whose nature and

[90] Article three of the Islamic Penal Code states 'The Penal Code applies to all the persons who commit an offence within the territorial jurisdiction of the Islamic Republic of Iran ..'.

amount have not been prescribed by the *Sharīʿa*, and it is left to the discretion of the judge; such as the pain of imprisonment, pecuniary punishment, and lashes which are to be less than the amount prescribed by *ḥadd.*[91] Concerning the second term, article 14 states that '*qiṣāṣ* (retaliation) is the penalty to which an offender is sentenced, and which is equivalent to his offense'. The retaliation is of two kinds: *qiṣāṣ* for a life and *qiṣāṣ* for a part of a human body. Due to the fact that the separation Muslims and non-Muslims in the Penal Code is limited to *qiṣāṣ* for life, the second kind of *qiṣāṣ* here is not explicated. Monetary compensation (*diyāt*) is what is prescribed by the *Sharīʿa*' for an offence.[92]

Now we can see the discrimination in three areas, starting with *ḥudūd*. The Islamic Penal Code bases the sentence for committing illegal sexual intercourse (*zinā*) between men or women on the condition of *Iḥṣān* (whether the perpetrator is married and could enjoy sex any time s/he desires).[93] In contrast to this are those who do not fulfill the conditions above. In the former, the *ḥadd* is death, and in the latter, it is one hundred lashes[94] and except for four cases there is no difference between young or old person, married or un-married. Theses four cases in which the *ḥadd* is also death are: a) *zinā* committed with relatives whether close blood relatives (*maḥārim nasabī*) or close in-laws (*maḥārim sababī*); b) *zinā* committed with ones father's wife or step-mother; c) *zinā* committed by a non-Muslim man with a Muslim woman, not vice versa; and d) *zinā* committed by compelling the victim (*tajawuz bi ʿunf*).[95] The other discrimination in punishment concerns mutual masturbation and similar acts between males. As article 121 and its proviso states 'the *ḥadd* for masturbation and similar acts between two men done without penetration shall be one hundred lashes to each. If the person committing the offence happens to be a non-Muslim and the person with whom the act is done is a Muslim, the *ḥadd* for the former shall be death'. But according to the proviso of article 130, one hundred lashes is the *ḥadd* for lesbianism and there is no difference between

[91] See article 16 on the term.
[92] Article 15.
[93] See article 83a and 83b.
[94] Articles 83, 88. According to the article 83 the execution of death shall be realized through stoning to death (*rajm*).
[95] See article 82. It is worth noting that it may be understood by absoluteness of article 83a that if a Muslim who married committed *zinā* with a non-Muslim woman, he would receive the death penalty. Thus, the (c) case in article 82 is limited to the case that if even a non-Muslim committed *zinā* with a Muslim woman, whether married or unmarried, he would receive the death penalty.

Muslim and non-Muslim. Other discrimination on the part of *ḥudūd* concerns drinking liquor or alcoholic beverages. The *ḥadd* for it is eighty lashes for a man or woman, broadly speaking, without regard to differences in Iranian culture or to differences between drunken behavior which might lead to social disorder and drinking as entertainment or as part of a ritual ceremony. However, according to the proviso of article 174,

> "A non-Muslim shall be sentenced to eighty lashes only when he is convicted of drinking alcoholic beverages in public".

Religious minorities after the Revolution are entitled to drink those beverages only in their clubs and special restaurants, while they should prevent Muslims from joining them.

There is discrimination in the right of retaliation for religious minorities in the Islamic Penal Code. According to article 207, "whenever a Muslim person is killed, the murderer shall be liable to *qiṣāṣ* and his accessory in the voluntary murder (*qatl ʿamdī*) shall be bear the pain of imprisonment from three to fifteen years". The adjoined stipulation 'Muslim' in the article leads to barring non-Muslims from the right of retaliation in cases where the murderer is a Muslim and the victim a non-Muslim. In such cases, which are completely derived from the *fiqh*-oriented opinions, the heir of the victim (*walīī dam*) is only entitled to receive a *diya*. The stipulation binds the right of retaliation to those cases where both the murderer and the victim are non-Muslim. The point is explicitly asserted in article 210 which states,

> 'Whenever an infidel *dhimmī* voluntary murders another infidel *dhimmī*, he shall be liable to *qiṣāṣ,* even though they may be the followers of two different faiths (*dīn*)'.

Here, the legislators explicitly regarded Iranian religious minorities as *dhimmī* in spite of the atmosphere that existed in the first days of the Revolution. The representatives of religious minorities in the National Consultative Assembly (later on the Islamic Consultative Assembly), as far as I researched in the discussions, did not protest against ratifying the article concerning the attribution *dhimmī*. The other point worth noting concerns the sequel of the article which states,

> "If the person murdered happens to be a woman, her heir (*walī*) shall, before the execution of the *qiṣāṣ*, pay half of the *diya* of a male *dhimmī* to the murderer".

This is the best evidence for the claim, as already illustrated, that the legislators assumed that all the subjects are Muslim. Since, the ruling here, which is devoted to a Muslim woman's *diya* in accordance with the current *fiqh*-oriented opinions, is expanded to include the followers of other faiths as well. The last point is concerned with one of the ways of proving voluntary murder (*qatl ʿamdī*). According to article 237,

> "A voluntary murder may be proved through the testimony of two men of reputed integrity (*mard-i ʿādil*)".

Even though the definition of the term '*ʿādil*' does not exist in the text, what is mentioned in *fiqh*-oriented opinions is tantamount to meaning a faithful man. There is still serious doubt whether the term includes the faithful people of other religions.

The first and second versions of the Islamic Penal Code (1982, article 3) and (1990, article 297) specified only the amount of *diya* for 'a Muslim man' and they are silent concerning the required amount for non-Muslims including religious minorities. It meant that the amount of *diya* for Muslims and non-Muslims is not equal. In practice, from 1979 to 2002, judges issued their injunctions in accordance with the *fiqh*-oriented opinions. During that time, the case and its ruling had to deal with many instances that involved non-Muslims, especially incidents of homicide by misadventure (*qatl khaṭā'ī*), such as what could happen in driving accidents. Ironically in cases where driving accidents were concerned, the insurance companies in practice, asked about the religion of the victim before paying the *diya*. They made differences between Muslim and non-Muslim and paid the blood money discriminatorily in conformity with the *Sharīʿa*. The representatives of the religious minorities in the Assembly and the human rights activists protesting against the injunction tried to reform it. Finally, in accordance with the proposal the judiciary branch of the government had given to the Assembly (a proviso to article 297, ratified in 2002,) the law left the determination of the amount of *diya* only for recognized religious minorities (not all non-Muslims indiscriminately) to the decree of the Supreme Leader (*ḥukm walīī amr*). The article added,

> "The courts should give their injunctions regarding the decree and other conditions, such as the gender of the victim and the time of the crime".

The article remains ambiguous concerning the amount. In addition, it is not known how the decree is to be implemented, whether in every case, the courts should ask the Leader,

or whether he – the Leader – gives his opinion in a general sense. Since the issue was clearly in contrast with what exists in *fiqh*-oriented opinions, the Assembly passed the subject on to the Expediency Council to determine the amount. The Council on the sixth of Diy 1382/24 December 2002 added the proviso to article 297 that states

> "according to governmental decree (*ḥukm ḥukūmatī*) [not the *fiqh*-oriented opinion] of *walīī amr,* [Ayatollah Khāmini'ī], the amount of *diya* for Muslims and for recognized religious minorities are equal".[96]

Some Iranian jurists, such as Ayatollah Yūsuf Ṣāniʿī, had proposed the idea of equality of blood money for men and women, Muslims and non-Muslims several times from 1996 to 2006. But since he didn't offer his suggestion in accordance with current legal argumentations as it is known for jurists, his suggestion could not gain adequate legal justification. The atmosphere of the seminaries and also the Guardian Council expect to hear legal arguments based on well known methods in jurisprudence (derived from the Qur'ān and the *Sunna*). At the time this chapter was being written, May 2008,[97] the judiciary branch of the government had issued a bylaw addressing to the courts by which the blood money for men and women, Muslims and non-Muslims (not only religious minorities) is equal only in cases brought about in driving accidents. The justification is that the process of giving blood money is up to the internal bylaws of insurance companies. Since the companies that are in charge for such matters do not mention in their contracts any stipulation indicative of discrimination between gender and religion. Be that as it may, equality between Muslims and non-Muslims, even though in limited cases, i.e., driving accidents, is a great step towards accepting human rights. It was a step achieved, not through theological legal discussions, but through socio-political elements in the light of secularization. The point that is intended to be the main theory for solving those discriminations will be taken up in following chapter.

6. 2. The Civil Code

From 1979 to 2004, the Civil Code had very minute modifications. As far as the present study concerns, one article in the realm of inheritance is worth evaluating. In accordance

[96] See original text in Appendix II.

[97] The date is beyond the time of this study (1906- 2004), but due to the fact that the issue is of great importance, it would be worth mentioning here.

with article 12 of the Constitution, religious minorities in their personal status, including inheritance, are entitled to refer to their own courts or institutions. To achieve the purpose, they formed new institutions, generally known as *anjuman,* made up of their own religio-political representatives.[98] However, twelve years after the Revolution, on which the courts, according to article 167 of the Constitution, were entitle to relying on *fiqh*-oriented opinions, they asserted on implementing one rule of inheritance with regard to non-Muslims. The rule is 'if a non-Muslim inheritor became Muslim, his or her conversion to Islam could prevent all the other relatives from entitlement to inherit the property'. In chapter two of this study, some cases were mentioned of Jews and Zoroastrians who (in the Qajar period) converted into Islam, whether faithfully or not, to prevent other relatives from inheritance. Through some legal documents, one could find some instances of the issue concerning the non-recognized religions after the 1979 Revolution. The implementation of this rule continued from 1979 to 1991 without having any ratified independent law. The Islamic Consultative Assembly then added one article to the section concerned with the law of inheritance in the Civil Code, calling it the 881 additional (*mukarrar* or *ilḥāqī*), legitimized the implementation of that rule for all non-Muslims without exception. Protesting against the content of the additional article, representatives of the religious minorities argued that it would be in contrast with article 12 of the Constitution and with an additional article in the Civil Code ratified in 1312/1933 that affirmed the independence of the recognized religious minorities in their personal status. Consequently, limiting the content of the 881 article (additional) to those non-Muslims who were not recognized in the Constitution, the Expediency Council amended the article in September 1993.[99] The final version of the article states:

> "If one of the inheritors of a deceased non-Muslim became, or later on becomes a Muslim, then the division of the inheritance is done only according to the regulations of the faith of the deceased person."[100]

[98] Those *Anjuman*s were formed before the 1979 Revolution, but article 4 of the law for recognizing the activities of parties, societies, and so on confirmed these activities of the religious minorities in Shahrīwar 1360/ August 1980.
[99] See original documents in Appendix II.
[100] See, *Majmūʿ-i Qawānīn wa Muqarrarāt Ḥuqūqī*: 980- 981.

To sum up, after amending article 881 by the Expediency Council, it remained ambiguous in a way that non-Muslim in general and even religious minorities as yet are not satisfied with its content. They want to be removed it totally from the Civil Code.

6. 3. Extra Regulations

In every society, the rulers may have some unwritten laws concerning their own nation. They can prevent some classes or ethnic groups, including even their opponent coreligionists, from holding governmental office or their desired goals or occupations. According to International Convention No. 111 concerning Discrimination with respect to Employment and Occupation, which Iran accepted in 1963, and also according to article 28 of the 1979 Constitution, everyone is entitled to choose the occupation s/he pleases. But, some official positions, according to the Constitution, such as the leadership, the presidency, the dean and most judges of the judiciary branch, and membership of the Guardian Council, must be managed by Shiite Muslims.[101] Apart from those exceptions, there is no other stipulation for a person who is seeking a job in a government office or to choosing her/his favorite job. However, it is mentioned in bylaws and regulations concerning the employment for all governmental offices, including universities that all applicants are welcome provided they are not only Muslim but also practicing Muslims at that.[102] It is not clear in the regulation that how the employer can recognize the stipulation in applicants. Then, the regulation adds,

> "the religious minorities are excepted provided that they do not show themselves as acting contrary to Islamic law".

The regulations, which are in contrast with the Constitution and the International Convention, are approved by the Islamic Consultative Assembly. Between 1979 and 2004, practically speaking, *Sunnī* Muslims, let alone religious minorities, could not achieve high ranks or positions in various levels of ministerial management, provincial governorship, municipalities, the military, the foreign ministry, and other offices.

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[101] Most positions, excluded the President and the lawyers of Guardian Council, limited to who are graduated from religious schools or seminaries (*Ḥawza*). In addition, the candidates should wear turban and mantle to achieve those posts in office.

[102] See in Appendix II the employment regulations which firstly was declared by Ayatollah Khomeini in 1361/1982 and then ratified by the Assembly. The regulations in the first step applied only for teachers in Ministry of Education and then expanded to all governmental administration. The recognition this stipulation, i.e. practicing according Islamic Law, has been dealt usually with some problems.

The conditions surrounding the laws and regulations of employment in the Islamic Republic compelled most religious minorities to opt for non-governmental occupations. For a few non-Muslim employees the government enacted some regulations that can be considered as some sort of privilege, such as giving special leave on those days when they had their own ceremonies, e.g., Pesach, Rosh Hashanah, the Day of Atonement (*yawm kīpūr*), Easter, Christmas, the anniversaries of the birth and death of Zoroaster, Jesus Christ, and so on.[103] But, the official vacation for all Iranians is still Friday. Such rights of leave mentioned for religious minorities does not exist for non-Shiite Muslims.

Three further short points in this last section need to be mentioned. Firstly, according to article 67 of the Constitution, the deputies of the religious minorities in the Assembly as well as any person from those communities in the court will take an oath by their own sacred books whenever it would be necessary. Secondly, the exemption of their places of worship and their societies from any form of taxation which was ratified by the National Assembly in 28 Isfand 1345/19 March 1966, was continued in the Islamic Republic. In addition, since 1380/2001, the societies affiliated to the religious minorities receive a monthly subsidy, in the same way other parties receive, from the Ministry of Home Affairs.[104] Thirdly, after the Revolution, religious minorities have been living in the society without conflict enjoying their own relationships, culture, language, ceremonies, parties, schools, and societies (*anjuman*s) and they have had very friendly relations with their Muslim compatriots. They have, during this time, their own deputies in the Assembly. Since 1984 the name of a non-Muslim's religion has been recorded on his/her national identity card (*shināsnām-i*), and religious minorities could participate in the election of the Assembly and vote only to choose their own co-religionist deputies. In

[103] There is a list of those days, revised several times, which the state announced them in the last circular No. 20302/28518 on 30.05.1378/18.08.1999. See the complete list in the Appendix II. It contains five leave days for Zoroastrians, six days for Jews, eight days for Assyrian Christians, seven days for Catholic Armenian Christians and six days for Gregorian Armenian Christians. A few of Christians belongs to Evangelical Churches and the government due to their missionary activities does not pay attention them as much as to other Christians. There is further privilege for Jewish soldiers who are going to pass their compulsory military service in the army. They can do their service in their own cities or in cities where Jews are living in order to get easily prepared kosher meals. See a report on the subject in *Ufuq Binā*, vol. 3/16 (1378/1998): 13. The journal is affiliated to the Iranian Jewish Society (*Anjuman Kalimīyān*).

[104] There is a certain ratified bylaw (No. 1417, on 30/08/1380/ November 12, 2001) for paying subsidies to parties, societies and communities including religious minorities by the Ministry of Home Affairs. See, *Official Gazette*, No. 16557, 08/10/1380.

spite of the regulation, after 2002, the registration of religion on ones identity card became voluntary in practice.[105]

6. 4. The Amendment of the Constitution

In 1989, after ten years of the implementation of the Constitution, Ayatollah Khomeini thought that it had shortcomings, which should be quickly amended. Since the Constitution, codified in the revolutionary atmosphere, the codifiers emphasized on removing the signs of dictatorship of the last régime and that is why they avoided gathering powers in one office. They put into the Constitution a number of councils to manage the affairs of the government such as the Supreme Council for the Judiciary Branch, the Council for the Management of the Radio and Television Organization, and even in the case of the lack of a reliable popular leader, the council of jurists who should be Sources of Emulation would have been the leaders. Several further suggestions led to the idea of amendments of the Constitution, including expanding the power of the president and leader, superseding the councils by a centralized power, legitimizing the Expediency Council, and changing the name of the National Assembly to the Islamic Consultative Assembly and more important of the all, replacing the designation '*marja*' as leader by only designation 'jurist'.

According to the decree of Ayatollah Khomeini in the last days of his life, on 24 Urdībihisht 1368/24th May 1989, a council was established to amend the Constitution in two months. The new council was comprised of twenty-five persons, twenty appointed by Ayatollah Khomeini himself, including the jurists of the Guardian Council, the heads of the three Branches, some lawyers, and five deputies selected by the National Assembly. The scope of the activities of the new council, known the Council of Amendment of the Constitution, henceforth CAC (*Shurāy Bāznigarī Qānūn Asāsī*) was also determined. As far as our study is concerned, there are a few points worth noting in their amendments and discussions. A notable amendment was made in the Constitution concerning the qualifications of the Leader and his power (Arts. 109 and 110). In spite of article 107

[105] See article 20, proviso 4 of the Civil Status Registration Office ratified in 18.10.1363/ 07. 01.1984. This regulation has not been abrogated until today but some of the religious minorities in an interview (no. 4, 15th September 2007) told me that since 2002 they have been free to mention or not mention the name of their religion on their identity cards.

which indicates that 'the Leader is equal with the rest of the people of the country before the law', the term 'the rule of the jurist' (*wilāyat faqīh*) was changed into 'the absolute rule of the jurist' (*wilāyat moṭlaq-i faqīh*) in the Constitution (article 57) in order to express the superiority of the position of the Leader above the three Branches and even above the Constitution per se. The amendment, after being ratified by the new leader Ayatollah Sayiid ʿAlī Khāmini'ī, was approved in a referendum on 8th Murdād 1368/ 17th August 1989 after the death of ayatollah Khomeini.

According to article 64, the numbers of the representatives of the Islamic Consultative Assembly

> 'are to be two hundred and seventy members and with regard to human, political, geographic, and other similar factors, it may increase by not more than twenty for each ten-year period from the date of the national referendum of the year 1368 [1989].'

In the 1979 version of the article, it was predicted that every ten years increase of the population, one deputy for every 150,000 persons would be added. If the article remained the way it was, the number of deputies after ten years would be doubled. Regarding the deputies of religious minorities, the situation was the focal point of attention for the CAC. According to the last version, the deputies of the religious minorities would be increased after every ten years, but, according to the new amendment the number was fixed and the article states,

> 'the Zoroastrians and Jews will each elect one representative, Assyrian and Chaldean Christians will jointly elect one representative and Armenian Christians in the north and those in the south of the country will each elect one representative'.[106]

There was also a brief discussion concerning the terms Assyrian and Chaldean. In the beginning, the deputies of CAC thought that these names might be synonymous and intended to omit the latter. Then, after some discussions between supporters and opponents, some of them argued that Chaldean is the name of four Churches in Iran and Assyrian is the ethnic identity for some Iranians and Iraqis including Chaldeans; consequently, they could omit the latter. A further probe on the issue through the

[106] See, *Mudhākirāt of the CAC*: 423- 426, 430.

Assyrian deputy in the National Assembly clarified that Chaldean makes up a part of the Assyrians, but this part is of great importance so that it is better to retain the name in the article.[107]

[107] See, *op. cit.*: 758- 761, 1570- 1572.

Chapter Five:

Towards a New *Ijtihād*

The status of religious minorities in Iranian law has improved over the last century (1906 - 2004), compared with their status in *fiqh*-oriented opinions that was the general paradigm until the end of the 19 century. One can find that there has been a clear shift from explaining the duties of religious minorities in *fiqh*-oriented opinions to the codification of new rights which has emerged in the law. Today, some issues including the imposition of the *jizya*, the *kharāj*, the imposition of special limiting regulations and forcible conversion, the problem of purity and impurity, and discrimination in specifying the amount of blood money as it pertains to religious minorities have been changed or forgotten. It is pertinent to our discussion to emphasize the major factor that has had an influence on changing, or more precisely, ignoring those opinions that were indicative of discrimination. The favorite theory on explaining the development is that that alteration was one result of the encounter of Shiite tradition with modernity. This claim needs further explanation.

According to sociologists of knowledge, it is a fundamental tendency that, among a range of factors, socio-historical context might exert an influence on generating the knowledge and theories of thinkers. This rule is true in the formation of the *fiqh*-oriented opinions of Shiite jurists as well. The jurists have had stable and unchanging sources, methods, and contexts that belonged to pre-modern times in inferring their opinions and that are why those opinions have remained stagnant over a long period of time. Their sources as well as their methods have so far been unchanged, unlike the context, which has changed profoundly in last century. Apart from taking the context into consideration, if a jurist, who is going to make *ijtihād* on any subject at any time, follows the pioneers, he will reach at the same conclusion. However, we cannot deny that most aspects of social communications have changed and developments could greatly influence the production of new theories and attitudes relevant to understanding new legal relations. The social situation that came into existence as a result of modernization naturally negates or changes old issues and consequently, subjects the old rulings and judgments of jurists to change.

Modernity and modernization have created a brand new world with particular social relations in our time. The social developments in Iranian society during the last century have

caused the modification of *fiqh*-oriented opinions, including those concerning the rights of religious minorities. No theoretical discussion, be it theological or legal, has exerted such an impact on the laws changing them in essence, and altering the attitude of legislators and jurists. Thus, the main question remains whether and how Shiite jurists, broadly speaking, has encountered modernization in the society, particularly with respect to the rights of religious minorities. To answer the question, I would like briefly to mention what modernity is and what the differences are between modernity and modernization.

As far as the present study is concerned, it is not necessary to enter into the long discussions regarding the essence of these phenomena. However, we can assume that "modernity" is a set of new interpretations of God, the world, nature, man, society and their relations, which came into the existence by the founders of the modern school of rationalism, especially Rene Descartes (d. 1650), and followed up by later thinkers, which stand in contrast with those ideas that existed in the Middle Ages. Hence, modernization is a process of development through which some technological instruments and their implications have been created and produced over the last three centuries. It seems that the characteristics of modernity could not be found in Islamic societies, while those of modernization could be more or less noticeable. Islamic societies, including the Shiite Iran, came to reject the former and to favor the latter with the assumption that there was no necessary relation between modernity and modernization, or without paying attention to the implications of the above relation. In practice, when the effects of modernization appeared in the society, the new question, i.e., the relationship between religion and modernity is aroused. As a matter of fact, the discussion has definitely revolved around the relationship between religion and modernization. Some characteristics of modernity never came into Iran, such as skepticism, incredulity towards scientific statements in the Scriptures, the demythologization of the Qur'ān and the *Sunna*, humanism, civil society, and liberalism. However, more or less in an incomplete form, the consequences of modernization such as the growth of large cities, easy communications, rapid transportation, industrial factories, new arms, banks, new systems of levying taxes, the rationalization of laws and regulations, came during the last century. In the other words, the software aspects of modernity were rejected and the hardware aspects were welcomed. Modernization, quite unexpectedly, led to the bringing about of new attitudes, experiences and relations among the entire people and, in consequence, the legislators little by little had to codify laws and regulations that would include all the people

without discrimination. Shiite jurists also had to adapt themselves to the new conditions. If cities did not expand, for example, there would still have been walls around them and religious minorities would have had to live outside the cities or in special quarters or *maḥalli* as we saw in the early years of this century in Yazd and Kirmān. It was not legal or theological discussions that destroyed the walls; it was the new geographical situation under the development of modernization that created new legal relations, and in consequence, the walls disappeared. We saw in the last chapters more evidence for the claim and one could add more instances of the case in order to clearly see the role of modernization. I am content here to discuss a theological subject that has a fundamental role in the legal status of religious minorities.[1] The following analysis could make the new method for *ijtihād* clearer.

The *fiqh*-oriented opinions concerning the rights and duties of religious minorities in the early centuries were formed by the assumption that conversion to Islam, whether by coercion or by free choice, was a contingent and desirable purpose. This idea remained policy of the Muslim rulers and was supported by jurists, theologically and legally speaking. The adherents of the policy argued that conversion led to an increase in the Muslim population and would strengthen the political system of Islam. Since that strength is a desirable phenomenon, the conversion is desirable too. One result of the argument was that the jurists divided the world into *dār al-ḥarb* and *dār al-Islām*, regarded religious minorities as *dhimmī* and imposed them special duties and social limitations to prepare a background for the increase in a number of Muslim. Moreover, first the caliphs and then the jurists considered whoever converted from Islam to another religion as an apostate (*murtad*) and ordained severe penalties for them.[2] In our analysis, conversion, whether from another religion to Islam or vice versa, is considered as a political act not faithful. In addition, the explanation of conversion here is offered with the assumption that much of those who converted have had socio-political reasons to do so and by and large their conversion was

[1] Further clear evidence that shows the role of modernization is a trade Code, a branch of private law, which was entered into Islamic countries, including Iran. Since the regulations in the *Sharī'a* in this realm are not compatible with modern times, those countries codified the trade Code in the last century by translating the French Trade Code and other international regulations. For example, the Iranian Trade Code is a translation of the French Trade Code, ratified in 1925 in the sixth Parliament. The discussion was not able to satisfy the jurists to lead them to forget or change the old traditional regulations of *fiqh* concerning the subject before 1925 but modernization could compel them.

[2] I am aware that the analysis provided here is based on a functionalistic attitude and one can methodologically criticize the argument and justify conversion in accordance with theological bases.

devoid of any orientation towards the particular faith.[3] Modernization gradually enfeebled the first premise of the argument by replacing increasing population with alternative factors instead, such as an increase in the number of thinkers, income, economic power, etc. which could strengthen of any political system. In both revolutions, 1906 and 1979, national unity (*waḥdat-i millat*) against the dictatorial manner of the régime was the element that was considered as a basis for strengthening the political system of Islam in Iran and was preferred over elements such as conversion. National unity was an inclusive concept that embraced anyone regardless of religion. That is why during both revolutions, much of the *fiqh*-oriented opinions regarding religious minorities, such as the conditions prescribed for the *dhimma*, were changed or forgotten. In addition, the ulema and the government came to recognize, legally and politically but not theologically, the identity of non-Shiite Iranians, including Sunni Muslims and religious minorities in the 1979 Constitution. This acceptance might be regarded as a kind of pluralism gained through the process of modernization, not through theological and/or legal debates.

In the last century, modernization resulted in easy communications by which one could become familiar with the beliefs of other communities. This familiarity might be able to decrease the strength of irrational convictions and inappropriate regulations on all sides. The process could develop in practice the pluralistic idea that every society and religious community has its own culture and one group is not exclusively correct in its beliefs. It is a fact that the religion one chooses does not depend on her/his own will but depends on where and when s/he is born. Such a conclusion may not be easily reached through discussion but it can through modernization, socio-cultural communications and global information. Under politico-geographical changes, especially those emerged after the formation of international organizations, such as the U.N., dividing societies into *dār al-ḥarb* and *dār al-Islām*, have been forgotten and have lost their meaning. However, the acceptance of religious pluralism seems, theoretically speaking, to be impossible from the viewpoint of religious governments in which one religion is introduced in the Constitution as the official religion. The failed attempts of Iranian intellectuals in the last century to introduce pluralism theoretically could be presented as evidence for the claim that the Shiite tradition would accept religious pluralism only based on the circumstances.

[3] One can conjecture that most Iranians who converted from Islam to Christianity or Bahā'īsm in post-Revolution 1979 intended to get asylum and nationality in the U.S. or European countries and were not faithful converts.

Recalling and learning from what happened in the last century regarding the encounter of Shiite tradition with modernity, I would like to emphasize the necessity of offering a new *ijtihād*. The new method or strategy based on the lessons of history is much more appropriate than that of giving a subjective solution based on the rules of jurisprudence that might not be compatible with the facts of Iranian society. To reach the nature of the new method, let us review the Islamic sources very briefly as well as the reaction of clerics and intellectuals to the implications of modern times.[4] As noted in chapter one, there is some evidence and grounds in Islamic sources that undoubtedly inspire intolerance towards non-Muslims and imposition of social limitations upon them. At the same time, one can find other evidence that imply tolerance, coexistence and respect of the rights of others in general, and of recognized religious minorities in particular. Based on these sources, there have been two trends in Iran. In the period of our study, local governors, some clerics, and radical Islamic groups on the one hand, appealed to those intolerant aspects to defend their understanding of Islamic teachings. On the other hand, moderate intellectual groups and high-ranking clerics who politically but not legally understood the demands of the time, emphasized on those tolerant aspects of the teachings and gradually ignored the other one. The legal hegemony more or less belonged to the opinions of the first group until 1906 when there was no alternative to them on the social and legal scene. With the inception of the Constitutional Revolution, two groups of clerics had serious debates on the rights of the nation in codifying the Constitution and the Supplement. Finally, all clerics agreed on inserting Article 2 in the Supplement in addition to mentioning a section on the rights of Iranians, including the religious minorities. As a matter of fact, it was the previous legal, i.e. *fiqh*-oriented hegemony that took on the new garb and retained its role on the scene by means of Article 2. In the Pahlavi period, the debates between the two trends continued in the process of codifying the Civil and Penal Code. However, a committee responsible for preparing the Civil Code that consisted of both clerics and lawyers wrote articles drawing upon Shiite *fiqh* and taking the rights of all Iranians into consideration. The presence of clerics in making decisions and codifying laws and regulations brought about some customary or secular regulations with somewhat of a religiously legitimizing tone. This experience, the presence of clerics, did not

[4] Concerning the reaction of Iranian intellectuals and clerics to modernity in the last century, see: F. Vaḥdat, *God and Juggernaut: Iran's Intellectual Encounter with Modernity* (New York: Syracuse University Press, 2003); see also, Boroujerdi, Mehzad, *Iranian Intellectuals and the West* (Syracuse, NY: Syracuse University Press, 1992).
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exist in the codification of the Penal Code simply because it was translated from the French one. By Reza Shah's expanding the process of modernization, the role of the clergy decreased to the extent that they could not attend the Parliament after 1926 and the role of the jurists as designated in Article 2 was forgotten.

In the last decade of the Pahlavi period, the clerics came onto the scene again in reaction to the modern atmosphere as well as to the Marxist groups. The clerics argued that the Shiite branch of Islam had a large capacity to give solutions for modern issues. In their analysis of modernity, just some instruments have been changed and, intellectually speaking, no serious development has happened in the world. Most revolutionary clerics and religious groups belonged to this category. They intended to show Islamic teachings as being rational and it is in this atmosphere that we should consider the words of Ayatollah Khomeini in Paris regarding the rights of religious minorities and the future of government. By establishing the Islamic Republic, the clerics who came to power had to accept some of the demands of modernization. To represent Islamic Shiite rulings as rational, flexible and compatible with modernity, they changed the term 'Sacred Rules of Islam' in the Article 2 of the Supplement 1907 to 'Islamic Norms' as an umbrella term in Article 4 of the 1979 Constitution in order to make it more possible to change or interpret *fiqh*-oriented opinions. In addition, those jurists who engaged themselves in Revolution considered any anti-rational precepts as anti-religion in discussions on jurisprudence.[5] Thus, they came to rationalize or, as they would accept, Islamize what modernization had basically prepared for its existence, such as the Constitution, the parliament and democracy. As a result, it was sufficient to prove some cases of *fiqh*-oriented opinions as anti-rational precepts to justify whether they were to be changed or to be ignored. In other words, as sociologists say, the role of *fiqh* and the *faqīh* have been usually passive and posteriori. The jurists end up waiting for social developments to be carried out and afterwards they give their *fiqh*-oriented opinions on the developments or Islamize their content. In the first encounter with new phenomena, they are likely to resist and consider sometimes the new subjects as forbidden. Then when people welcome those phenomena and the phenomena in question gradually become common, they have to change their opinions. The argumentation in such a way makes it possible to accelerate the process of secularization or rationalization with a religiously legitimate veneer.

[5] The works of two influential Ayatollah, Sayyid Muḥammad Ḥusayn Ṭabāṭabā'ī (d. 1981) and Murtaḍā Muṭahharī (d. 1980), who had theological approach, are the best example for approving this claim.

There is much evidence for this process in the last century and it has been repeated many times in the Islamic Republic.[6]

Contrary to the activities of clerics in the last century, laic groups, highlighting some radical Arabic features of Islam, believed that the time for Islamic teachings and rulings had completely passed and the solution for Iranian society is simply to welcome Western culture, including its laws and regulations. Propagated in the form of Iranian identity, this way of thinking had advocates during the last century ranging from Fataḥ ʿAlī Ākhundzād-i, Malkam Khān (for most of his life) to Aḥmad Kasrawī, Fireydūn Ādamīyyat, Ṣādiq Hidāyat, and others. In the Pahlavi period, the idea found strong support in practice, but due to cultural characteristics of Iranians, it was defeated in the end. Now most of the Iranian intellectuals who live abroad belong to this category.

The third group which is sometimes called "religious intellectuals" (*rushanfikrān dīnī*) believe that Islamic teachings have a capacity to be compatible with new situations in modern times in the light of applying new interpretations. They do not deny the essence of modernity and new developments in the world of thought and physics and try to introduce various aspects of modernity to their audiences. They argue that it might be possible to rationalize Islamic teachings in a way that they would be compatible with the demands. Thus, for example in the political field, they believe that Islam and democracy would be compatible and that an Islamic democratic system has a clear meaning which is commendable.[7] In addition, by giving secular and sometimes laic responses to the *fiqh*-oriented opinions of jurists, these intellectuals have criticized and deconstructed the traditional beliefs of the community in the field of Islamic theology and law.[8] Their manner, either in discussion or in practice, has brought them closer to laic groups. On the other hand, by relying on some Persian poems and Gnostic teachings of Islam, those thinkers have reintroduced a new spiritual attitude that is necessary in their opinion for every Muslim in anytime. They rely more on the mystic aspects of Shiite Islam than on

[6] The reaction of clerics to new systems of education, media, and the achievements of science and technology might be regarded as the best examples for the claim. At first, the achievements are rejected and then with some stipulations are considered lawful and accepted. Then, in the final step, some of those stipulations are sometimes gradually forgotten.

[7] See their argumentation in F. Jahanbakhsh, *Islam, Democracy and Religious Modernism in Iran (1953-2000)* (Leiden: Brill, 2001), esp. Chapters four and five. The author located some clerics such as Murtaḍā Muṭahharī, S. M. Ḥ. Ṭabāṭabā'ī and Ayatollah Khomeini, vis-à-vis traditional clerics, in the class of "religious intellectuals ".

[8] See some of criticisms by intellectuals such as Dr. A. Soroush and M. M. Shabistarī in , Ashk Dahlen, *Islamic Law, Epistemology and Modernity* (London: Taylor and Francis, 2003); S. Edalatnejad (ed.) *Andar Bāb Ijtihād* [*On Ijtihād*: *On the Effectiveness of Islamic Jurisprudence in Today's World*] (Tehran: Ṭarh-i Nuw, 1382/2002).

juristic opinions which are the main obstacles for coexistence between the followers of various religions. The main question that has been facing them concerns how they can harmonize the teachings and elements of modernity and tradition. Further clarification is required to give any judgment on their attempts, however, over time it seems that they have not been able to give a satisfactory justification for their theories. While they often limit their discussions to theological and philosophical subjects and while they sometimes seriously criticize the *fiqh*-oriented opinions of jurists, they have not had a definite theory that would be compatible with social facts on the legal affairs of Iranians in such a way to set up equal rights for the entire people, including religious minorities. Mustashār al-Dawla, Mahdī Bāzargān, ʿAlī Sharīʿatī, ʿAbd al-Karīm Soroush, Muḥammad Mujtahid Shabistarī, Muṣṭafā Malikīyān, Muḥammad Khātamī and other intellectuals are found in this group. An evaluation of their opinions and solutions, which are not similar in all aspects, is beyond the scope of the present study. Even though their opinions in theological, philosophical, and political discussions have captivated some audiences both inside and outside Iran, practically speaking they could not create any alteration in the legal opinions of the jurists or in the laws and regulations codified by the legislatures in the period, which have a direct impact on the lives of Iranians.

In the light of this very brief review of the social reactions of the clerics and intellectuals, one can say whether we like it or not, that the clerics in both revolutions won the game in the legal realm. With respect to those facts, some suggestions are systematically offered as the 'new method or strategy of *ijtihād*' in order to improve the legal status of religious minorities. To achieve the purpose, I would offer two parallel ways. The first way is expanding modernization in various aspects as much as possible instead of pursuing and implementing the elements of modernity. In the light of economic reforms, as experience has already showed, the process naturally leads to bringing about new attitudes, legal relations, and political reform and to the ignoring of some *fiqh*-oriented opinions which are indicative of discrimination. As we saw, most regulations concerning religious minorities had been practically and gradually changed in the last century according to the strategy of modernization. Minor unfair rulings in the field of retaliation, blood money and social and political rights have remained and the expectation is that they will be changed sooner or later. To improve the conditions of human rights and to arrive at the conditions of civil society, the present author, with regard to his experience in the International Center for Dialogue among Civilizations, would suggest holding serious

negotiations with Ayatollahs, judges and the directors of the Judiciary Power who belong to the conservative group. By participating in the dialogue, those groups will try to justify their legal opinions and to learn from others. This process would lead to an improvement in the legal status of the entire Iranian community. The dialogue has a previous record in Iran but they were limited to politicians, philosophers, and theologians.

The second way is to suggest some points on the method of *ijtihād* to the target audience. As we saw in chapter one, there are some Qur'ānic verses[9] and *ḥadīth* in Shiite tradition that imply a kind of pluralism, greater tolerance and more respect for the rights of non-Muslims in various legal matters. The first suggestion is highlighting and paying more attention to evidence for this type of attitude in the sources and ignoring the evidence that support exclusivist views.[10] For example, why would a jurist not rely on the content of the *ḥadīth* attributed to the Sixth Imam speaking on the complete freedom of non-Muslims in the context of inheritance?[11] Would not it be possible to generalize the indication of the *ḥadīth*, accordingly as an obligatory rule (*qāʿida ilzām*) in Shiite jurisprudence,[12] to the entire field of personal status? In addition, we have already quoted some *ḥadīth* attributed to the Sixth Imam that the right of retaliation is fully recognized for the heirs of the *dhimmī* victim, even if the killer is not professional.[13] We also examined such cases where a murderer, after committing the crime becomes a Muslim to escape from punishment; the indications of those *ḥadīth* were divergent. Some of them point out that the conversion saves the life of the murderer and s/he should pay the blood money; others bespeak that s/he should be executed and conversion plays no role here.[14] Why did most Shiite jurists rely on the *ḥadīth* that confirm the first view?[15] Why shouldn't Shiite jurists choose such traditions whose content are more compatible with our time and seem to be based on justifications that are

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[9] See, Q, 5: 48-49; 2: 256; 109: 6.

[10] I don't agree with the strategy that hides or denies those exclusivist aspects of Islam and highlights pluralistic ones, but my suggestion is ignoring the first category. Cf. A. Sachedina, *the Islamic Roots of Democratic Pluralism* (New York: Oxford University Press, 2001); J. ʿAṭīyya Muḥammad, *Naḥwa Fiqhin Jadīdin li al-Aqallīyāt* [*Towards New Figh for Minorities*] (Cairo: Dār al-Salām, 2003).

[11] There is a rule in the book of inheritance (*kitāb al-farā'iḍ*) attributed to the Sixth Imam which indicates that it is lawful for every religionist to obey what is legally in his faith, (*tajūzu ʿalā ahli kull-i dhawī dīnin mā yastaḥillūn*), Al-Ḥurr al-ʿAmilī, vol. 26: 158, no. 4.

[12] As regards to this rule in Shiite jurisprudence, see S. M. H. Bujnūrdī, *al-Qawāʿid al-Fiqhīyya* (Qum: al-Hādī, 1419/1998), vol. 3: 179-209.

[13] Al-Kulaynī, vol. 7: 310-311, no. 2, 8.

[14] Al-Kulaynī, *Ibid*; Al-Ṭūsī (1365/1986): vol. 10: 190-191; al-Ḥurr al-ʿĀmilī, vol. 29: 110-111.

[15] See, al-Shahīd al-Thānī (1413/1992): vol. 15: 144; al-Najafī, vol. 42: 156; al-Khū'ī, *Mabānī Takmila al-Minhāj* (Qum: Dār al-Hādī, 1407/ 1986): 65, Question no. 68; Al-Shahīd al-Thānī (*ibid*) claimed that there is no opposing *ḥadīth* and al-Najafī claimed the consensus of Shiite jurists in this *fiqh*-oriented opinion.

more rationale? One perhaps would reply to the suggestion that these verses were abrogated or those *ḥadīth* had not been taken into consideration by the earlier jurists, or even that they have not been transmitted by reliable transmitters. Given the criticism, restoring the rational orientation and public interests of Islam would have been more important for Muslims than leveling this kind of criticism at those evidences. As we saw, the jurists used a verse of the Qur'ān[16] in article 14 of the 1979 Constitution which implied tolerance and good conduct with others, while the content of such verses according to some traditions were regarded as abrogated.

The second point concerns paying attention to the semantic changes of Islamic terminology. As explained in semantics, the concept of any term such as apostasy, *dhimmī*, slave, *rajm*, and so on was created in a particular context belonging to the world-view of a nation in a particular period of time. A jurist who wants to apply those terms in another context should examine the meaning to see whether it is relevant to and appropriate for the new context or not. We have already seen in chapter one a clear example of semantic change in the term "impurity" (*najas*) in Islamic sources including the Qur'ān.[17] Thus, some terms such as *dhimmī*, *jizya*, and *kharāj*, applied within the context of the duties of religious minorities, do not have justification and evidence to be used in the modern times. We should not imagine that in our time wherever religious minorities live in Islamic societies, one could call them *dhimmī* and expect the same regulations that belonged to the early centuries of the advent of Islam to be carried out. This is because, by creating the legal political term of the 'Iranian nation' in the 1906 Revolution, the application of those terms that refer to various identities become subject to question. It is appropriate to use the term 'Iranian' in legal documents whether referring to Muslim or non-Muslim.

The rule mentioned in semantics is true also concerning the terms usually used as criteria such as "rationality" and "justice". They do not have a fixed meaning and unchanging instances of use in all periods. To recognize instances of the precepts 'equitable' and 'rational' one must refer to their meanings in the common understanding of every period. Therefore, it is probable that one ruling would sound fair and justified before people in a particular time but in another time, the same ruling might not seem so. It is the common understanding that is entitled to recognize the instances of the rationality and justice. This kind of reference is very much like

[16] Q, 60: 8.
[17] For more explanation and examples, see T. Izutsu, *God and Man in the Koran: Semantics of the Koranic Weltanschaung* (Tokyo: Minatoku Press, 1964), esp.Ch. One.

that which is sometimes called "the conduct of reasonable people" (*sīrih ʿuqalā*) in Islamic jurisprudence.[18] The conduct and the ruling of reasonable people are not fixed things in every place and time. The paradigm of modernization, has led to a confluence in people's tastes in recognizing right (*ḥasan*) and wrong (*qabīḥ*). In this paradigm, reasonable people (*ʿuqalā*) believe that everyone should have the right of freedom of thought, conscience and religion, and they dislike various kinds of unfair discrimination or preferences made based on race, color, sex, religion, political opinion, national extraction, or social origin. Shiite jurists have accepted in discussion the authority of the conduct of reasonable people in recognizing right and wrong things. The decisions and judgments of reasonable people are embodied in the consensus of the various representatives of nations in the U.N. and in the form of international covenants emphasizing the elimination of all unfair forms of discrimination. In consequence, the elimination of discrimination is not Western (European or American) thought that imposes itself upon Islamic rulings; rather, it is a set of decisions made by the *ʿuqalā* that could have authority for Muslim jurists too. It seems that the misuse of human rights in political affairs and some prejudices towards Western powers which have historical reasons, prevent jurists from understanding the new form and function of *sīrih ʿuqalā*, as constituted in the U.N. and its international covenants. It takes much time to change those impressions in Muslim societies.

The last point to be made is the suggestion to Muslim jurists to ignore not to deny some *fiqh*-oriented opinions that are regarded as contrary to the main aims of *Sharīʿa*. Given that those aims, including the establishment of social justice, security and the protection of religion, the life and property of human beings are explained in many juristic works, two questions remain concerning the suggestion. Firstly, how can one recognize that a legal opinion is contrary to the aims of *Sharīʿa*, and secondly, are there any jurisprudential bases for jurists to ignore any religious precept?

Let us begin with the answer to the first question. It is argued in the Shiite school that Islamic precepts are based on reliable justification in such a way that the rulings of the *Sharīʿa* are in one accord with what reason recognizes and confirms.[19] Accordingly, the *Sharʿ* would also

[18] The conduct of reasonable people is a major reason also for accepting single-source accounts of *ḥadīths* (*khabar wāḥid*) and indications (*amārāt*) in Shiite jurisprudence. See concerning *sīrih ʿuqalā*, M. Anṣārī, *Farā'id al-Uṣūl* (Qum: Majmʿ al-Fikr al-Islāmī, 1419/1998), vol. 1: 346-347, vol. 2: 318-319; M. R. Muẓaffar, *al-Uṣūl al-Fiqh* (Qum: Daftar Tablīghāt Ḥawza, 1370/1991), fourth edition, vol. 2: 81-84, 126-127, 156-158.

[19] There is a rule in Shiite jurisprudence called *Qāʿida Mulāzama* that is attributed to the Fifth Imam and has many interpretations, it says 'Whatever is lawful according to the injunction of reason, it would be lawful by the injunction

accept and confirm the rulings of reason which is understood through the process of independent reasoning or through asking reasonable people (*ʿuqalā*). [20] Thus if one could find through the process of reasoning or through the ruling of reasonable people that the elimination of discrimination is an absolutely good thing, the *Sharīʿa* would also confirm it. Therefore, those legal opinions that are recognized by common sense (*ʿqal*) or reasonable people (*ʿuqalā*) as contrary to the ruling of reason stand in contradiction with the aims of the *Sharʿ*, too.

As to the second question, there are various methods in jurisprudence by which a jurist can ignore some rulings. One method applied in the conflict of arguments (*taʿāruḍ adilla*) is to prefer an option that has more interest for Muslims than the other ones. This is a kind of rule-utilitarianism approach vis-à-vis act-utilitarianism or a kind of rationality, of which one can find in Shiite jurisprudence.[21] According to rule-utilitarianism, the better rule is that which has those consequences that promote happiness, as John Stuart Mill put it, or promote more benefits for Muslim societies, as the jurists would like to say. Given that, the evidence and arguments that imply the imposition of regulations on religious minorities have significant authority in jurisprudence but when a jurist notices some abuse of the regulation in society by local oppressing governors or radical religious groups which would lead to bringing dishonor to Islam, it would be lawful to forget or ignore those regulations. Reporting some cases in chapter two, I examined about two hundred documents of the Foreign Ministry Archives, which implied that some activity against religious minorities took place from 1848 to 1911. One could easily find the interests of local governors behind much of those riots against religious minorities. To achieve their interests, they made use of radical Muslim groups and low-ranking clerics on the pretext of defending Islam. One can rarely find a *fatwā* by a high-ranking jurist legitimizing forcible conversion or the imposition of unfair discriminations on religious minorities. High-ranking jurists such as Sheikh Murtaḍā al-Anṣārī and Akhund al-khurāsānī practically ignored

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of the *Sharīʿa,* and vice versa, i.e. whatever is lawful according to the injunction of the *Sharīʿa,* it would be also lawful by reason'. (*kulu mā ḥakama bihī al-ʿaql, ḥakama bihi al-Sharʿ wa kulu mā ḥakama bihi al-Sharʿ, ḥakama bihī al-ʿaql*). See concerning the rule and its application, M. Anṣārī (1419/1998), vol. 1: 54 - 64; M. R. Muẓaffar (130/1991), vol.1: 201- 217.

[20] Two meanings of reason applied in Shiite jurisprudence, i.e. the power of reasoning and the injunction of reasonable people, are distinguished in this sentence.

[21] Here, I mean by the term 'utilitarianism', what is narrated according to John Stuart Mill in *Utilitarianism* (1861). His version is plausible if not a very defensible ethical theory. See, J. S. Mill, *Utilitarianism* in *Essays on Ethics, Religion and Society*, vol. 10 in *Collected Works of John Stuart Mill,* ed. by J. M. Robson (Toronto: University of Toronto Press, 1969).

those *fiqh*-oriented opinions mentioned in juristic works and advised Muslims to have fair conduct with, and avoid attacking religious minorities.

The other proposed method leads to ignoring those legal opinions in cases where those *fiqh*-oriented opinions bring about greatly difficult (*ʿusr*) and distressful (*ḥaraj*) conditions for Muslims. The method has been applied to various matters in the history of Shiite *fiqh*. The most famous example is the rulings concerning the purity and impurity of well water. Before ʿAllama al-Ḥillī (d. 726/1325) Shiite jurists, according to some *ḥadīth,*[22] believed that well water was tantamount to a little water which could become impure when it came into contact with impure things. They argued that if one draws out some water from the well after it came into contact with an impure thing, it would make the well pure. Detailed legal opinions exist concerning the amount of water that should be drawn. The measure depended on the kind of dead animal or impure thing that had fallen into the well. Since those *fiqh*-oriented opinions led to a tremendous amount of trouble for Muslims, al-Ḥillī and later jurists changed or ignored their opinions concerning the issue. Another example is a set of *fiqh*-oriented opinions concerning slaves which have been forgotten in modern times because of the official acceptance of the abolition of slavery. The method would be a model for ignoring some legal opinions that would bring about the difficulties in the relations between Muslims and non-Muslims. The application of the method will find vital importance when we remember that from the beginning of the twentieth century there are many Muslims living in non-Muslim countries who have a comparatively better legal status than those religious minorities in Muslim countries.

The major obstacle to the application of the new method of *ijtihād* is the assumption that by this method many Islamic laws which are considered divine and constitute the Islamic identity would be changed. It is true that many Islamic laws in the field of social affairs vis-à-vis acts of devotion would be changed; however, one is entitled to ask whether the Muslim identity actually depends on rulings that contain unjustified discrimination. Would it not be possible to construct new elements derived from Islamic teachings to make the Muslim identity? Furthermore, some inquiries in Islamic studies have shown that most rulings in *fiqh* are not *a priori* divine and sacred laws and regulations but that they were produced in a particular context under the influence of Arab society, and neighboring foreign traditions and religions to make an identity

[22] See, Al-Ḥurr al-ʿĀmilī, vol.1: 179-197.

for the Muslim community.[23] Bearing in mind new legal rational relations in the world as well as Islamic norms, the experience of formatting Islamic appropriate law would be repeated in modern times. The Muslim community should preserve its identity through suitable means which more or less have some evidence in the Qur'ān and the *Sunna*, such as emphasizing the elimination of all forms of unfair discriminations and apartheids, including sexual, genealogical, and geographical.

[23] See for example, Joseph Schacht, "Foreign Elements in Ancient Islamic Law", *Journal of Comparative Law and International Law*, 32 (1950): 9-17; Idem, "Pre-Islamic Background and Early Development of Jurisprudence", in Wael B. Hallaq (ed.) *The Formation of Islamic Law* (Britain and USA: Ashgate Publishing Company, 2004): 29-59; Judith Romney Wegner, "Islamic and Talmudic Jurisprudence Law: The Four Roots of Islamic Law and their Talmudic Counterparts", *the American Journal of Legal History*, vol. 26 (1982): 25-71.

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Appendix I:

Deputies' Name of Religious Minorities (1906-2008)

فهرست اسامی نمایندگان اقلیت های دینی در ۲٤ دوره مجلس شورای ملی (۱۲۸۵– ۱۳۵۷)

دوره مجلس	زرتشتیان	ارامنه شمال	ارامنه جنوب	کلیمیان	آشوریان، کلدانیان	سال
اول	ارباب جمشید	-	-	-	-	۱۹۰۶/۱۲۸۵-۱۹۰۸/۱۲۸۷
دوم	ارباب کیخسرو شاهرخ	-	یوسف خان میرزا یانس	لقمان نهورای	-	۱۹۰۹/۱۲۸۸-۱۹۱۱/۱۲۹۰
سوم	"	-	" (به مجلس نیامد)	"	-	۱۹۱۴/۱۲۹۳-۱۹۱۵/۱۲۹۴
چهارم	"	-	یوسف خان میرزا یانس	"	-	۱۹۲۱/۱۳۰۰-۱۹۲۳/۱۳۰۲
پنجم	"	مسیو سهراب خان ساگینیان	الکساندر آقایان	لقمان نهورای	-	۱۹۲۴/۱۳۰۲-۱۹۲۶/۱۳۰۴
ششم	"	"	اوانس خان مساعد (۱۳۰۶ استعفا داد)	لقمان نهورای	-	۱۹۲۶/۱۳۰۵-۱۹۲۸/۱۳۰۷
هفتم	"	"	یوسف خان میرزایانس	"	-	۱۹۲۸/۱۳۰۷-۱۹۳۰/۱۳۰۹
هشتم	"	"	"	"	-	۱۹۳۰/۱۳۰۹-۱۹۳۳/۱۳۱۱
نهم	"	"	"	"	-	۱۹۳۳/۱۳۱۱-۱۹۳۵/۱۳۱۴
دهم	"	"	" (درگذشت)	"	-	۱۹۳۵/۱۳۱۴-۱۹۳۷/۱۳۱۶
یازدهم	" (درگذشت)	"	جبرائیل بوداغیان	"	-	۱۹۳۷/۱۳۱۶-۱۹۳۹/۱۳۱۸
دوازدهم	رستم گیو	"	"	"	-	۱۹۳۹/۱۳۱۸-۱۹۴۱/۱۳۲۰
سیزدهم	"	"	"	"	-	۱۹۴۱/۱۳۲۰-۱۹۴۳/۱۳۲۲
چهاردهم	"	ارداشس آوانسیان	الکساندر آقایان	مراد اریه	-	۱۹۴۴/۱۳۲۲-۱۹۴۶/۱۳۲۴
پانزدهم	"	آرام بوداغیان	(در این حوزه انتخابات	" (رد اعتبار	-	۱۹۴۷/۱۳۲۶-۱۹۴۹/۱۳۲۸

			برقرار نشد)	نامه)		
شانزدهم	"	"	پطرس آبکار	موسی برال	-	۱۹۵۰/۱۳۲۸-۱۹۵۲/۱۳۳۰
هفدهم	انتخابات انجام نشد	انتخابات انجام نشد	انتخابات انجام نشد	انتخابات انجام نشد	انتخابات انجام نشد	۱۹۵۲/۱۳۳۱-۱۹۵۳/۱۳۳۲
هیجدهم	رستم گیو	آرام بوداغیان سلماسی	بهرام سهرابیان	مراد اریه	-	۱۹۵۴/۱۳۳۳-۱۹۵۶/۱۳۳۵
نوزدهم	"	سواک ساگینیان	فلیکس آقایان	"	-	۱۹۵۶/۱۳۳۵-۱۹۶۰/۱۳۳۹
بیستم	اسفندیار یگانگی	فلیکس آقایان	سواک ساگینیان	"	(انتخابات انجام نشد)	۱۹۶۰/۱۳۳۹-۱۹۶۱/۱۳۴۰
بیست ویکم	"	"	"	جمشید کشفی	ویلهلم (ویلیام) ابراهیم	۱۹۶۳/۱۳۴۲-۱۹۶۷/۱۳۴۶
بیست ودوم	"	گاگیک هواکیمیان	"	لطف الله حی	ویلسون بیت منصور	۱۹۶۷/۱۳۴۶-۱۹۷۱/۱۳۵۰
بیست وسوم	اسفندیار یگانگی (فوت: ۱۳۵۱) و بوذرجمهر مهر	"	"	"	"	۱۹۷۱/۱۳۵۰-۱۹۷۵/۱۳۵۴
بیست وچهارم	بوذرجمهر مهر	بانواما (اردوخانیان) آقایان	"	یوسف کهن	هومر آشوریان	۱۹۷۵/۱۳۵۴-۱۹۷؟/۱۳۵؟

فهرست اسامی نمایندگان اقلیت های دینی در مجلس بررسی نهایی قانون اساسی و هشت دوره مجلس شورای اسلامی (۱۳۵۹- ۱۳۸۷)

دوره مجلس	زرتشتیان	ارامنه شمال	ارامنه جنوب	کلیمیان	آشوریان، کلدانیان	سال
مجلس بررسی نهایی قانون اساسی	رستم شهزادی	هرایر خالاتیان	-	عزیز دانش راد	سرگون بیت اوشانا	۱۹۷۹/۱۳۵۸
اول	پرویز ملک پور	هرایر خالاتیان	هراچ خاچاطوریان	خسرو ناقی	سرگون بیت اوشانا	۱۹۸۰/۱۳۵۹- ۱۹۸۴/۱۳۶۳
دوم	پرویز ملک پور	وارطان وارتانیان	آرطاواس باغومیان	منوچهر کلیمی نیکروز	آتور خنانشو	۱۹۸۴/۱۳۶۳- ۱۹۸۸/۱۳۶۷
سوم	افلاطون ضیافت	"	"	منوچهر کلیمی نیکروز	"	۱۹۸۸/۱۳۶۷- ۱۹۹۲/۱۳۷۱
چهارم	پرویزروانی	"	"	کورس کیوانی	شمشون مقصود پور سیر	۱۹۹۲/۱۳۷۱- ۱۹۹۶/۱۳۷۵
پنجم	پرویز روانی	"	"	منوچهر الیاسی	"	۱۹۹۶/۱۳۷۵- ۲۰۰۰/۱۳۷۹
ششم	خسرو دبستانی	لون داویدیان	ژرژیک ابرامیان	موریس معتمد	یوناتن بت کلیا	۲۰۰۰/۱۳۷۹- ۲۰۰۵/۱۳۸۳
هفتم	کوروش نیکنام	گیورگ وارطان	روبرت بگلریان	"	"	۲۰۰۵/۱۳۸۳- ۲۰۰۸/۱۳۸۷
هشتم	اسفندیار اختیاری	"	"	سیامک مره صدق	"	۲۰۰۸/۱۳۸۷- ۲۰۱۲/۱۳۹۱

Appendix II

The Selected Laws and Regulations (1906-2004)

*** قانون (نظام نامه) انتخابات مجلس شورای ملی ۱۹۰۶/۱۳۲٤**

– ماده اول: انتخاب کنندگان ملت در ممالک محروسه ایران از ایالات و ولایات باید از طبقات ذیل باشند:

شاهزادگان و قاجاریه، علما و طلاب، اعیان و اشراف، تجار، مَلاکین و فلاحین و اصناف.

– ماده سوم: اشخاصی که از انتخاب نمودن کلیتا محروم هستند از قرار تفصیل اند:

اولا طایفه نسوان.

ثانیا اشخاص خارج از رشد و آنهایی که محتاج به قیم شرعی می باشند.

ثالثا تبعه خارجه.

رابعا اشخاصی که سن آنها کمتر از بیست و پنج سال باشد.

خامسا اشخاصی که معروف به فساد عقیده هستند.

– ماده پنجم: اشخاصی که از انتخاب شدن محروم هستند:

اولا طایفه اناثیه

ثانیا تبعه خارجه

سادسا آنهایی که سنشان از سی سال کمتر باشد.

سابعا اشخاصی که معروف به فساد عقیده هستند و متظاهر به فسق.

– ماده هفتم: هر یک از انتخاب کنندگان صاحب یک رای می باشند و فقط در یک طبقه می توانند انتخاب کنند.

*** قانون (نظام نامه) انتخابات ۱۹۱۱/۱۲۹۰**

فصل اول در کلیات

ماده اول – عده نمایندگان ملت برای مجلس شورای ملی در مملکت ایران یکصد و سی و شش نفر است.

ماده دوم – تقسیم نمایندگان ملت نسبت به جمعیت تخمینی ولایات از قرار شرح جدولی است که به آخر این قانون منضم شده است (مطابق جدول هر یک از اقلیتهای زرتشتی، کلیمی، مسیحی ارمنی و آشوری حق یک نماینده در مجلس شورای ملی دارند).

ماده دهم – کسانی که از حق انتخاب کردن محرومند:

– نسوان.

– کسانی که خارج از رشد و آنهایی که در تحت قیمومیت شرعی هستند.

– تبعه خارجه.

– اشخاصی که خروجشان از دین حنیف اسلام در حضور یکی از حکام شرع جامع‌الشرایط به ثبوت رسیده باشد.

ماده دوازدهم – انتخاب‌شوندگان باید دارای صفات ذیل باشند:

– متدین به دین حضرت محمدبن‌عبدالله صلی‌الله علیه و آله باشند مگر اهل دیانت از نمایندگان ملل متنوعه (مسیحی و

زرتشتی و کلیمی).
– تبعه ایران باشند.
– در محل انتخاب معروف باشند.
– سن ایشان کمتر از سی و زیاده از هفتاد سال نباشد.
– معروف به امانت و درستکاری باشند.

* قانون اساسی ۱٤/۱۹۰٦ جمادی الآخره ۱۳۲٤

– اصل اول: مجلس شورای ملی به موجب فرمان مَعدلت بنیان مورخهٔ چهاردهم جمادی الآخره ۱۳۲٤ مُوسَس و مُقدَر است.
– اصل دوم: مجلس شورای ملی نمایندهٔ قاطبهٔ اهالی مملکت ایران است که در امور معاشی و سیاسی وطن خود مشارکت دارند.
– اصل بیست و سوم: بدون تصویب مجلس شورای ملی امتیاز تشکیل کمپانی و شرکت های عمومی از هر قبیل و به هر عنوان از طرف دولت داده نخواهد شد.
– اصل بیست و پنجم: استقراض دولتی به هر عنوان که باشد، خواه از داخله خواه از خارجه، با اطلاع و تصویب مجلس شورای ملی خواهد بود.

* متمم قانون اساسی ۱۹۰۷/۱۲۸٦

کلیات

– اصل اول: مذهب رسمی ایران اسلام و طریقهٔ حقهٔ جعفریه اثنی عشریه است. باید پادشاه ایران دارا و مروج این مذهب باشد.
– اصل دوم: مجلس مقدس شورای ملی که به توجه و تأیید حضرت امام عصر عجل الله فرجه و بذل مَرحمت اعلیحضرت شاهنشاه اسلام خَلَدَ اللهُ و مراقبت حُجَج اسلامیه کَثَّرَاللهُ اَمثالَهُم و عامهٔ ملت ایران تأسیس شده است، باید در هیچ عصری از اعصار مواد قانونیهٔ آن مخالفتی با قواعد مقدسهٔ اسلام و قوانین موضوعهٔ حضرت خَیرالانام صلی الله علیه و آله و سلم نداشته باشد و معین است که تشخیص مخالفت قوانین موضوعه با قواعد اسلامیه برعهدهٔ علمای اعلام اَدامَ اللهُ برکات وجودِهم بوده و هست، لهذا رسماً مقرر است در هر عصری از اعصار هیئتی که کمتر از پنج نفر نباشد از مجتهدین و فقهای متدینین که مُطلّع از مُقتضیات زمان هم باشند، به این طریق که علمای اعلام و حجج اسلام مرجع تقلید شیعه، اسامی بیست نفر از علما که دارای صفات مذکوره باشند معرفی به مجلس شورای ملی بنمایند، پنج نفر از آن ها را یا بیشتر به مقتضای عصر، اعضای مجلس شورای ملی بالاتفاق یا به حکم قرعه تعیین نموده به سمت عضویت بشناسند تا موادی که در مَجلسَین عنوان می شود، به دقت مذاکره و غوررسی نموده هریک از آن مواد مُعَنوَنه که مخالفت با قواعد مقدسهٔ اسلام داشته باشد طرح و رد نمایند که عنوان قانونیت پیدا نکند و رأی این هیئت علما در این باب مُطاع و مُتَبَع خواهد بود و این ماده تا زمان ظهور حضرت حجّت عصر عجل الله فرجه تغییر پذیر نخواهد بود.

– اصل ششم: جان و مال اتباع خارجه مقیمین خاک ایران مأمون و محفوظ است، مگر در مواردی که قوانین مملکتی استثنا می کند.

– اصل هفتم: اساس مشروطیت جزءً و کلاً تعطیل بردار نیست.

حقوق ملت ایران

– اصل هشتم: اهالی مملکت ایران در مقابل قانون دولتی متساوی الحقوق خواهند بود.

– اصل نهم: افراد مردم از حیث جان و مال و مسکن و شرف محفوظ و مصون از هر نوع تعرض هستند و متعرض احدی نمی توان شد مگر به حکم و ترتیبی که قوانین مملکت تعیین می نماید.

– اصل دهم: غیر از مواقع ارتکاب جُنحه و جنایات و تقصیرات عمده هیچ کس را نمی توان فوراً دستگیر نمود مگر به حکم کتبی رئیس محکمه عدلیه برطبق قانون، و در آن صورت نیز باید گناه مقصر فوراً یا منتهی در ظرف بیست و چهار ساعت به او اعلام و اشعار شود.

– اصل دوازدهم: حکم و اجرای هیچ مجازاتی نمی شود مگر به موجب قانون.

– اصل سیزدهم: منزل و خانهٔ هرکس در حفظ و امان است. در هیچ مسکنی قهراً نمی توان داخل شد مگر به حکم و ترتیبی که قانون مقرر نموده.

– اصل چهاردهم: هیچ یک از ایرانیان را نمی توان نفی بلد یا منع از اقامت در محلی یا مجبور به اقامت محل معینی نمود، مگر در مواردی که قانون تصریح می کند.

– اصل پانزدهم: هیچ مِلکی را از تصرف صاحب مِلک نمی توان بیرون کرد، مگر با مجوز شرعی و آن نیز پس از تعیین و تأدیه قیمت عادله است.

– اصل هفدهم: سلب تسلط ملاکین و متصرفین از املاک و اموال متصرفه ی ایشان به هر عنوان که باشد ممنوع است مگر به حکم قانون.

– اصل هیجدهم: تحصیل و تعلیم علوم و معارف و صنایع آزاد است، مگر آنچه شرعاً ممنوع باشد.

– اصل بیستم: عامه مطبوعات غیر از کتب ضِلال و مواد مُضرّه به دین مبین آزاد و ممیزی در آن ها ممنوع است، ولی هرگاه چیزی مخالف قانون مطبوعات در آن ها مشاهده شود، نشر دهنده یا نویسنده برطبق قانون مطبوعات مجازات می شود. اگر نویسنده معروف و مقیم ایران باشد ناشر و طابع و مُوزِّع از تَعَرُّض مَصون هستند.

– اصل بیست و یکم: انجمن ها و اجتماعاتی که مُولد فتنهٔ دینی و دنیوی و مُخِلّ به نظم نباشند در تمام مملکت آزاد است، ولی مجتمعین با خود اسلحه نباید داشته باشند و ترتیباتی را که قانون در این خصوص مُقرَر می کند باید متابعت نمایند. اجتماعات در شوارع و میدان های عمومی هم باید تابع قوانین نظمیه باشند.

قوای مملکت

– اصل بیست و ششم: قوای مملکت ناشی از ملت است، طریقه ی استعمال آن قوا را قانون اساسی معین می نماید.

– اصل بیست و هفتم: قوای مملکت به سه شعبه تجزیه می شود:

اول) قوهٔ مقننه که مخصوص است به وضع و تهذیب قوانین، و این قوه ناشی می شود از اعلیحضرت شاهنشاهی و مجلس شورای ملی و مجلس سنا، و هر یک از این سه منشأ حق انشاء قانون را دارد، ولی استقرار آن موقوف است به

عدم مخالفت با موازین شرعیه و تصویب مجلِسَین و توشیح به صحه ی همایونی، لکن وضع و تصویب قوانین راجعه به دخل و خرج مملکت از مختصات مجلس شورای ملی است، شرح و تفسیر قوانین از وظایف مختصهٔ مجلس شورای ملی است.

دویم) قوهٔ قضاییه و حکمیه، که عبارت است از تمیز حقوق واین قوه مخصوص است به محاکم شرعیه در شرعیات و به محاکم عدلیه در عرفیات.

سیم) قوهٔ اجرائیه که مخصوص پادشاه است، یعنی قوانین و احکام به توسط وزراء و مأمورین دولت به نام نامی اعلیحضرت همایونی اجرا می شود به ترتیبی که قانون معین می کند.

– اصل بیست و هشتم: قوای ثلثهٔ مزبوره همیشه از یکدیگر ممتاز و منفصل خواهد بود.

حقوق سلطنت ایران

– اصل سی و پنجم: سلطنت ودیعه ای است که به موهبت الهی از طرف ملت به شخص پادشاه مفوض شده.

– اصل سی و ششم: سلطنت مشروطه ی ایران در شخص اعلیحضرت شاهنشاهی السلطان محمدعلی شاه قاجار ادام الله سلطنته و اعقاب ایشان نسلاً بعد نسل برقرار خواهد بود.

– اصل چهل و چهارم: شخص پادشاه از مسئولیت مبرّا است، وزرای دولت در هرگونه امور مسئول مجلسین هستند.

– اصل چهل و پنجم: کلیهٔ قوانین و دستخط های پادشاه در امور مملکتی وقتی اجرا می شود که به امضای وزیر مسئول رسیده باشد و مسئول صحت مدلول آن فرمان و دستخط همان وزیر است.

– اصل چهل و هفتم: اعطای درجات نظامی و نشان و امتیازات افتخاری با مراعات قانون مختص شخص پادشاه است.

– اصل پنجاهم: فرمانفرمایی کل قشون برّی و بحری با شخص پادشاه است.

– اصل پنجاهم و یکم: اعلان جنگ و عقد صلح با پادشاه است.

– اصل پنجاه و چهارم: پادشاه می تواند مجلس شورای ملی و مجلس سنا را به طور فوق العاده امر به انعقاد فرمایند.

راجع به وزرا

– اصل پنجاه و هشتم: هیچ کس نمی تواند به مقام وزارت برسد مگر آن که مسلمان و ایرانی الاصل و تبعه ایران باشد.

– اصل پنجاه و نهم: شاهزادگان طبقه اول یعنی پسر و برادر و عموی پادشاه عصر نمی توانند به وزارت منتخب شوند.

– اصل شصت و یکم: وزرا علاوه بر این که به تنهایی مسئول مشاغل مختصه ی وزارت خود هستند، به هیئت اتفاق نیز در کلیات امور در مقابل مجلسین مسئول و ضامن اعمال یکدیگرند.

مَحاکم

– اصل هفتاد و یکم: دیوان عدالت عُظمی و مَحاکم عدلیه مرجع رسمی تَظَلُّمات عمومی هستند و قضاوت در امور شرعیه با عُدول مجتهدین جامع الشرایط است.

– اصل هفتاد و دوم: مُنازعات راجعه به حقوق سیاسیه مربوط به مَحاکم عدلیه است، مگر در مواقعی که قانون استثنا نماید.

– اصل هفتاد و سیم: تعیین محاکم عُرفیه منوط به حکم قانون است و کسی نمی تواند به هیچ اسم و رسم محکمه ای برخلاف مقررات قانون تشکیل نماید.

– اصل هفتاد و ششم: انعقاد کلیه محاکمات علنی است، مگر آن که علنی بودن آن مخل نظم یا منافی عصمت باشد. در این صورت لزوم اخفا را محکمه اعلان می نماید.

اصل هفتاد و نهم: در مواد تقصیرات سیاسیه و مطبوعات، هیئت منصفین در محاکم حاضر خواهند بود.

اصل هشتاد و دوم: تبدیل مأموریت حاکم محکمه عدلیه ممکن نمی شود مگر به رضای خود او.

اصل هشتاد و ششم: در هر کرسی ایالتی یک محکمه ی استیناف برای امور عدلیه مقرر خواهد شد به ترتیبی که در قوانین عدلیه مطرح است.

اصل هشتاد و هفتم: حکمیت منازعه در حدود ادارات و مشاغل دولتی به موجب مقررات قانون به محکمه ی تمیز راجع است.

در خصوص مالیه

– اصل نود و چهارم: هیچ قسم مالیات برقرار نمی شود مگر به حکم قانون.

– اصل نود و پنجم: مواردی را که از دادن مالیات معاف توانند شد قانون مشخص خواهد نمود.

– اصل نود و هفتم: در موارد مالیاتی هیچ تفاوت و امتیازی فیمابین افراد ملت گذارده نخواهد شد.

– اصل نود و هشتم: تخفیف و معافیت از مالیات منوط به قانون مخصوص است.

– اصل نود و نهم: غیر از مواقعی که قانون صراحتاً مستثنی می دارد به هیچ عنوان از اهالی چیزی مطالبه نمی شود، مگر به اسم مالیات مملکتی و ایالتی و ولایتی و بلدی.

* قانون مجازات عمومی (۱۳۰٤/۱۹۲۵– ۱۳۵۷/۱۹۷۹)

– ماده ۱: مجازاتهای مصرحه در این قانون از نقطه نظر حفظ انتظامات مملکتی مقرر و در محاکم عدلیه مجری خواهد بود و جرمهایی که موافق‌موازین اسلامی تعقیب و کشف شود بر طبق حدود و تعزیرات مقرره در شرع مجازات می‌شوند.

– ماده ۱: (اصلاحیه ۱۳۵۲/۱۹۷۲) قانون مجازات راجع است به تعیین انواع جرائم و مجازاتها و اقدامات تأمینی و تربیتی که درباره مجرم اعمال می‌شود.

– ماده ۲: هیچ عملی را نمی‌توان جرم دانست مگر آن چه که به موجب قانون جرم شناخته شده.

– ماده ۲: (اصلاحیه ۱۳۵۲/۱۹۷۲) هر فعل یا ترک فعل که مطابق قانون قابل مجازات یا مستلزم اقدامات تأمینی یا تربیتی باشد جرم محسوب است و هیچ امری را نمی‌توان‌جرم دانست مگر آنکه به موجب قانون برای آن مجازات یا اقدامات تأمینی یا تربیتی تعیین شده باشد.

– ماده ۳: (نسخه ۱۳۵۲/۱۹۷۲) قوانین جزایی درباره کلیه کسانی که در قلمرو حاکمیت ایران (اعم از زمینی و دریایی و هوایی) مرتکب جرم شوند اعمال می‌گردد مگر آنکه‌به موجب قانون ترتیب دیگری مقرر شده باشد.

– ماده ۷: جرم از حیث شدت و ضعف مجازاتها به چهار نوع تقسیم می‌شود:۱ – جنایت ۲ – جنحه مهم ۳ – جنحه کوچک (تقصیر) ٤ – خلاف.

– ماده ۸: مجازات جنایت از قرار ذیل است: ۱ – اعدام. ۲ – حبس مؤبد با اعمال شاقه. ۳ – حبس موقت با اعمال شاقه. ٤ – حبس مجرد. ٥ – تبعید. ٦ – محرومیت از حقوق اجتماعی.

– تبصره (اصلاحیه ۱۹۷۲/۱۳۵۲): از تاریخ اجرای این قانون هیچیک از حبسهای جنایی توأم با اعمال شاقه نخواهد بود و به جای حبسهای مؤبد یا ابد یا دائم با اعمال شاقه حبس دائم و به جای حبس موقت یا غیر دائم با اعمال شاقه حبس جنایی درجه یک و به جای حبس مجرد حبس جنایی درجه دو تعیین می‌شود.

– ماده ۹: مجازات جنحه مهم از قرار ذیل است: ۱ – حبس تأدیبی بیش از یک ماه. ۲ – اقامت اجباری در نقطه یا نقاط معین یا ممنوعیت از اقامت در نقطه یا نقاط معین. ۳ – محرومیت از بعضی حقوق اجتماعی. ٤ – غرامت در صورتی که مجازات اصلی باشد.

– ماده ٤٦: در حق مردانی که عمر آنها متجاوز از شصت سال است و همچنین کلیه زنها حبس با اعمال شاقه و حکم اعدام جاری نمی‌شود ومجازات آنها به حبس مجرد تبدیل خواهد شد مگر این که حکم برای ارتکاب قتل عمدی صادر شود.

– ماده ٦۱: هر کس با دول خارجه یا مأمورین آنها در اسباب چینی داخل شود که آنها را به خصومت یا جنگ با دولت ایران وادار کند یا اسباب‌عداوت و جنگ آنها را به هر نحو دسیسه و وسیله فراهم کند محکوم به اعدام می‌شود در صورتی که اقدامات مذکوره مؤثر واقع نشود مجازات مرتکب از هفت تا پانزده سال حبس با اعمال شاقه است.

– ماده ۸۲: هر یک از وزراء و اعضاء پارلمان و صاحب‌منصبان و مأمورین دولتی که بر ضد حکومت ملی قیام نماید یا حکم قیام را بدهد محکوم به‌اعدام است.

– ماده ۱۷۰: مجازات مرتکب قتل عمدی اعدام است مگر در مواردی که قانوناً استثنا شده باشد.

– ماده ۱۷۹: هر گاه شوهری زن خود را با مرد اجنبی در یک فراش یا در حالی که به منزله وجود در یک فراش است مشاهده کند و مرتکب قتل یاجرح یا ضرب یکی از آنها یا هر دو شود معاف از مجازات است.

– ماده ۲۰۷: الف – هر کس به عنف یا تهدید هتک ناموس زنی را بنماید به حبس با اعمال شاقه از سه تا ده سال محکوم خواهد شد و همین مجازات مقرر است درباره کسی که مرتکب لواط شود. در صورت وجود یکی از علل مشدده ذیل مرتکب به حداکثر مجازات مزبور محکوم می‌شود:

۱ – هر گاه مرتکب معلم یا مستخدم مجنی‌علیه یا مستخدم کسی باشد که نسبت به مجنی‌علیه سمت صاحب اختیاری دارد یا کسی باشد که‌مجنی‌علیه در تحت اختیار یا نفوذ او واقع شده.

۲ – اگر مجنی‌علیه کمتر از ۱۸ سال تمام داشته باشد.

۳ – اگر مجنی‌علیه زن شوهردار باشد.

٤ – اگر مجنی‌علیه دختر باکره بوده باشد.

٥ – اگر مجنی‌علیه به واسطه ضعف قوای دماغی یا بدنی قادر به مقاومت نبوده باشد.

٦ – اگر مرتکب مرد متأهل باشد.

۷ – در مورد لواط هر گاه به عنف یا تهدید باشد.

– ماده ۲۲۲: هر گاه سرقت جامع تمام شرایط مقرره در شرع نبوده ولی مقرون به تمام پنج شرط ذیل باشد جزای مرتکب حبس دائم با اعمال شاقه‌است: ۱ – سرقت در شب واقع شده ۲ – سارقین دو نفر یا بیشتر باشند. ۳ – یک یا

چند نفر از آنها حامل سلاح ظاهر یا مخفی باشد. ٤ – از دیوار بالا رفته یا جرز را شکسته یا کلید ساختگی به کار برده یا این که عنوان یا لباس مستخدم دولت را اختیار کرده یا بر خلاف حقیقت خودرا مأمور دولتی قلمداد کرده و یا در جایی که محل سکنی یا مهیا برای سکنی یا توابع آن است سرقت کرده باشد. ٥ – در ضمن سرقت کسی را آزار یا تهدید کرده باشد.

*** قانون مدنی (۱۹۲۸/۱۳۰۷– ۱۹۷۹/۱۳۵۷)**

– ماده ۱ – قوانین باید در ظرف سه روز از تاریخ توشیح به صحه ملوکانه منتشر شود.

– ماده ۳ – انتشار قوانین باید در روزنامه رسمی به عمل آید.

– ماده ٥: کلیه سکنهٔ ایران اعم از اتباع داخله و خارجه مطیع قوانین ایران خواهند بود مگر در مواردی که قانون استثناء کرده باشد.

– ماده ٦: قوانین مربوط باحوال شخصیه از قبیل نکاح و طلاق و اهلیت اشخاص و ارث در مورد کلیه اتباع ایران ولو اینکه مقیم در خارجه باشند مجری خواهد بود.

– قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم (مصوب ۱۰ مرداد ماه ۱۹۳۳/۱۳۱۲)

ماده واحده – نسبت به احوال شخصیه و حقوق ارثیه و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده محاکم باید قواعد و عادات مسلمه متداوله در مذهب آنان را جز در مواردی که مقررات قانون راجع به انتظامات عمومی باشد به طریق ذیل رعایت نمایند:

۱– در مسائل مربوط به نکاح و طلاق: عادات و قواعد مسلمه متداوله در مذهبی که شوهر پیرو آن است.

۲– در مسائل مربوط به ارث و وصیت: عادات و قواعد مسلمه متداوله در مذهب متوفی.

۳– در مسائل مربوط به فرزند خواندگی: عادات و قواعد مسلمه متداوله در مذهبی که پدرخوانده یا مادرخوانده پیرو آن است.

– ماده ۸۸۰: قتل از موانع ارث است، بنابراین کسی که مورث خود را عمداً بکشد از ارث او ممنوع می‌شود اعم از این که قتل بالمباشره باشد یابالتسبیب و منفرداً باشد یا به شرکت دیگری.

ماده ۸۸۱: در صورتی که قتل مورث غیر عمدی یا به حکم قانون یا برای دفاع باشد مفاد ماده فوق مجری نخواهد بود.

– ماده ۹٦۱: جز در موارد ذیل اتباع خارجه نیز از حقوق مدنی متمتع خواهند بود:

۱ – در مورد حقوقی که قانون آن را صراحتاً منحصر به اتباع ایران نموده و یا آن را صراحتاً از اتباع خارجه سلب کرده است.

۲ – در مورد حقوق مربوط به احوال شخصی که قانون دولت متبوع تبعه خارجه آن را قبول نکرده.

۳ – در مورد حقوق مخصوصه که صرفاً از نقطه نظر جامعه ایرانی ایجاد شده باشد.

– ماده ۹۷۰: مأمورین سیاسی یا قنسولی دول خارجه در ایران وقتی می‌توانند به اجرای عقد نکاح مبادرت نمایند که طرفین عقد هر دو تبعه دولت‌متبوع آنها بوده و قوانین دولت مزبور نیز این اجازه را به آنها داده باشد – در هر حال نکاح باید در دفاتر سجل احوال ثبت شود.

– ماده ۹۷٤: مقررات ماده ۷ و مواد ۹٦۲ تا ۹۷٤ این قانون تا حدی به موقع اجراء گذارده می‌شود که مخالف عهود بین‌المللی که دولت ایران آن راامضاء کرده و یا مخالف با قوانین مخصوصه نباشد.

– ماده ۹۷۵: محکمه نمی‌تواند قوانین خارجی و یا قراردادهای خصوصی را که بر خلاف اخلاق حسنه بوده و یا به واسطه جریحه‌دار کردن‌احساسات جامعه یا به علت دیگر مخالف با نظم عمومی محسوب می‌شود به موقع اجراء گذارد اگر چه اجراء قوانین مزبور اصولاً مجاز باشد.

– ماده ۱۰۵۹: نکاح مسلمه با غیر مسلم جایز نیست.

– ماده ۱۰٦۰: ازدواج زن ایرانی با تبعه خارجه در مواردی هم که مانع قانونی ندارد موکول به اجازه مخصوص از طرف دولت است.

– ماده ۱۳۱۳: شهادت اشخاص ذیل پذیرفته نمی‌شود:

۱ – محکومین به مجازات جنایی.

۲ – محکومین به امر جنحه که محکمه در حکم خود آنها را از حق شهادت دادن در محاکمه محروم کرده باشد.

۳ – اشخاص ولگرد و کسانی که تکدی را شغل خود قرار دهند.

٤ – اشخاص معروف به فساد اخلاق.

۵ – کسی که نفع شخصی در دعوی داشته باشد.

٦ – شهادت دیوانه در حال دیوانگی.

– ماده ۱۳۱٤: شهادت اطفالی را که به سن پانزده سال تمام نرسیده‌اند فقط ممکن است برای مزید اطلاع استعمال نمود مگر در مواردی که قانون شهادت این قبیل اطفال را معتبر شناخته باشد.

* قوانین متفرقه (۱۹۰٦– ۱۹۷۹)

قانون مطبوعات ۲٤ محرم ۱۹۰۸/۱۳۲٦

ماده ٤– طبع کتب متداوله، غیر از کتب ممنوعه و کتب جدیده و غیر از کتب مذهبی، آزاد است. کتب جدیده مذهبی باید قبل از طبع به نظر ممیزی هیئتی که در اداره معارف به نام مجمع علوم دینیه تشکیل می شود، رسیده و تصویب شده باشد.

قانون مالیاتهای مستقیم (اصلاحیه ۱۹٦٦/۱۳٤۵/۱۲/۲۸)

ماده ۲ – اشخاص زیر مشمول پرداخت مالیات بر درآمد به شرح زیر نمی‌باشند:

۱ – اعلیحضرت همایون شاهنشاه و علیاحضرت شهبانو و والاحضرت ولایتعهد.

۳ – رؤسا و اعضای مأموریتهای کنسولی خارجی در ایران و همچنین کارمندان مؤسسات فرهنگی دول خارجی نسبت به حقوق دریافتی از دول‌متبوع خود به شرط معامله متقابل.

٤ – کارشناسان خارجی که با موافقت دولت ایران از محل کمکهای بلاعوض فنی و اقتصادی و علمی و فرهنگی دول خارجی یا مؤسسات‌بین‌المللی به ایران اعزام می‌شوند نسبت به حقوق دریافتی آنان از دول متبوعه یا مؤسسات بین‌المللی مذکور.

شده باشند.

۷ – موقوفات آستان قدس رضوی – مسجد گوهرشاد – آستانه حضرت معصومه – آستانه حضرت عبدالعظیم – شاه نعمت‌الله ولی – شاه چراغ –مدرسه عالی سپهسالار سلطان علی شاه گنابادی – مسجد سلطانی تهران – سازمان شاهنشاهی خدمات اجتماعی – شیر و خورشید سرخ – بنیاد پهلوی– سازمان بیمه‌های اجتماعی – بنگاه حمایت مادران و نوزادان.

۱۰ – انجمنهای مربوط به اقلیتهای مذهبی زرتشتی – مسیحی – کلیمی که درآمد آن به وسیله هیأتهای رسمی ملی صرف معابد و امور تعلیم وتربیت و بهداشتی می‌شود، مشروط بر این که رسمیت انجمنها یا هیأتهای مزبور به تصویب مراجع رسمی مذهبی آنها و وزارت کشور رسیده باشد.

آئین نامه اجرائی معافیتهای مالیاتی (۱۹٦۷/۱۳٤٦)

فصل سوم– معافیت انجمنهای اقلیتهای مذهبی موضوع بند ۱۰

ماده ۱٤– انجمنهای مربوط به اقلیت های مذاهب زردشتی– کلیمی– مسیحی هنگامی می توانند از معافیت موضوع بند ۱۰ ماده ۲ قانون مالیاتهای مستقیم استفاده کنند که رعایت مقررات این فصل را بنمایند.

ماده ۱۵– هیئتهای رسمی ملی انجمنهای مورد بحث مکلفند گواهی لازم مبنی بر رسمیت انجمن یا هیئتهای مزبور را از مرجع رسمی مذهبی مربوط خود تحصیل و برای تصویب وزارت کشور تسلیم کنند.

ماده ۱٦– وزارت کشور گواهی رسمیت انجمنهای مذکور را با رعایت مقررات مربوط در دو نسخه صادر کرده و یک نسخه آنرا به اداره دارائی اقامتگاه انجمن ارسال خواهد داشت.

* قانون اساسی ۱۹۷۹/۱۳۵۸ جمهوری اسلامی ایران

مقدمه

قانون اساسی جمهوری اسلامی ایران مبین نهادهای فرهنگی، اجتماعی، سیاسی و اقتصادی جامعه ایران بر اساس اصول و ضوابط اسلامی است که انعکاس خواست قلبی امت اسلامی میباشد. ماهیت انقلاب عظیم اسلامی ایران و روند مبارزه مردم مسلمان از ابتدا تا پیروزی که در شعارهای قاطع و کوبنده همه قشرهای مردم تبلورمی‌یافت این خواست اساسی را مشخص کرده و اکنون در طلیعه این پیروزی بزرگ ملت ما با تمام وجود نیل به آن را می‌طلبد.

ویژگی بنیادی این انقلاب نسبت به دیگر نهضت‌های ایران در سده اخیر مکتبی و اسلامی بودن آن است، ملت مسلمان ایران پس از گذر از نهضت ضد استبدادی مشروطه و نهضت ضد استعماری ملی شدن نفت به این تجربه گرانبار دست یافت که علت اساسی و مشخص عدم موفقیت این نهضت‌ها مکتبی نبودن مبارزات بوده است. گرچه در نهضت‌های اخیر خط فکری اسلامی و رهبری روحانیت مبارز سهم اصلی و اساسی را بر عهده داشت، ولی به دلیل دور شدن این مبارزات از مواضع اصیل اسلامی، جنبش‌ها به سرعت به رکورد کشانده شد. از اینجا وجدان بیدار ملت به رهبری مرجع عالیقدر تقلید حضرت آیت الله العظمی امام خمینی ضرورت پیگیری خط نهضت اصیل مکتبی و اسلامی را دریافت و این بار روحانیت مبارز کشور که همواره در صف مقدم نهضت‌های مردمی بوده و نویسندگان و روشنفکران متعهد با رهبری ایشان تحرک نوینی یافت...

فصل اول: اصول کلی

اصل اول: حکومت ایران جمهوری اسلامی است که ملت ایران، بر اساس اعتقاد دیرینه اش به حکومت حق و عدل قرآن، در پی انقلاب اسلامی پیروزمند خود به رهبری مرجع عالیقدر تقلید آیت الله العظمی امام خمینی، در همه پرسی دهم و یازدهم فروردین ماه یکهزار و سیصد و پنجاه و هشت هجری شمسی برابر با اول و دوم جمادی الاولی سال یکهزار و سیصد و نود و نه هجری قمری با اکثریت ۹۸/۲٪ کلیه کسانی که حق رای داشتند، به آن رای مثبت داد.

اصل دوم:جمهور اسلامی، نظامی است بر پایه ایمان به:

۱- خدای یکتا (لااله الاالله) و اختصاص حاکمیت و تشریع به او و لزوم تسلیم در برابر امر او.

۲ – وحی الهی و نقش بنیادی آن در بیان قوانین.

۳ – معاد و نقش سازنده آن در سیر تکاملی انسان به سوی خدا.

٤ – عدل خدا در خلقت و تشریع.

۵ – امامت و رهبری مستمر و نقش اساسی آن در تداوم انقلاب اسلام.

٦ – کرامت و ارزش والای انسان و آزادی توام با مسئولیت او در برابر خدا، که از راه : الف – اجتهاد مستمر فقهای جامع الشرایط بر اساس کتاب و سنت معصومین سلام الله علیهم اجمعین، ب – استفاده از علوم و فنون و تجارب پیشرفته بشری و تلاش در پیشبرد آنها، ج – نفی هر گونه ستمگری و ستم کشی و سلطه گری و سلطه پذیری، قسط و عدل و استقلال سیاسی و اقتصادی و اجتماعی و فرهنگی و همبستگی ملی را تأمین می کند.

اصل سوم: دولت جمهوری اسلامی ایران موظف است برای نیل به اهداف مذکور در اصل دوم، همه امکانات خود را برای امور زیر به کار برد:

۱ – ایجاد محیط مساعد برای رشد فضایل اخلاقی بر اساس ایمان و تقوی و مبارزه با کلیه مظاهر فساد و تباهی.

۲ – بالا بردن سطح آگاهی های عمومی در همه زمینه ها با استفاده صحیح از مطبوعات و رسانه های گروهی و وسایل دیگر.

۳ – آموزش و پرورش و تربیت بدنی رایگان برای همه در تمام سطوح، و تسهیل و تعمیم آموزش عالی.

٤- طرد کامل استعمار و جلوگیری از نفوذ اجانب.

۵- محو هر گونه استبداد و خودکامگی و انحصارطلبی.

۷ – تأمین آزادیهای سیاسی و اجتماعی در حدود قانون.

۸ – مشارکت عامه مردم در تعیین سرنوشت سیاسی، اقتصادی، اجتماعی و فرهنگی خویش.

۹- رفع تبعیضات ناروا و ایجاد امکانات عادلانه برای همه، در تمام زمینه های مادی و معنوی.

۱۱ – تقویت کامل بنیه دفاع ملی از طریق آموزش نظامی عمومی برای حفظ استقلال و تمامیت ارضی و نظام اسلامی کشور.

١٤- تأمین حقوق همه جانبه افراد از زن و مرد و ایجاد امنیت قضایی عادلانه برای همه و تساوی عموم در برابر قانون.
١٥ - توسعه و تحکیم برادری اسلامی و تعاون عمومی بین همه مردم.
١٦ - تنظیم سیاست خارجی کشور بر اساس معیارهای اسلام، تعهد برادرانه نسبت به همه مسلمانان و حمایت بی دریغ از مستضعفان جهان.
اصل چهارم: کلیه قوانین و مقررات مدنی، جزایی، مالی، اقتصادی، اداری، فرهنگی، نظامی، سیاسی و غیر اینها باید بر اساس موازین اسلامی باشد. این اصل بر اطلاق یا عموم همه اصول قانون اساسی و قوانین و مقررات دیگر حاکم است و تشخیص این امر بر عهده فقهای شورای نگهبان است.

اصل پنجم (اصلاحیه ١٩٨٩): در زمان غیب حضرت ولی عصر "عجل الله تعالی فرجه" در جمهوری اسلامی ایران ولایت امر و امامت امت بر عهده فقیه عادل و با تقوی، آگاه به زمان، شجاع، مدیر و مدبر است که طبق اصل یکصد و هفتم عهده دار آن می گردد.
اصل پنجم (مصوب ١٩٧٩): در زمان غیبت حضرت ولی عصر، عجل الله تعالی فرجه، در جمهوری اسلامی ایران ولایت امر و امامت امت بر عهده فقیه عادل و با تقوی، آگاه به زمان، شجاع، مدیر و مدبر است، که اکثریت مردم او را به رهبری شناخته و پذیرفته باشند و در صورتی که هیچ فقیهی دارای چنین اکثریتی نباشد رهبر یا شورای رهبری مرکب از فقهای واجد شرایط بالا طبق اصل یکصد و هفتم عهده دار آن می گردد.

اصل ششم: در جمهوری اسلامی ایران امور کشور باید به اتکاء آراء عمومی اداره شود از راه انتخابات: انتخاب رئیس جمهور، نمایندگان مجلس شورای اسلامی، اعضاءی شوراها و نظایر اینها، یا از راه همه پرسی در مواردی که در اصول دیگر این قانون معین می گردد.

اصل هفتم: طبق دستور قرآن کریم: "و امرهم شوری بینهم" و "شاورهم فی الامر" شوراها، مجلس شورای اسلامی، شورای استان، شهرستان، شهر، محل، بخش، روستا و نظایر اینها از ارکان تصمیم گیری و اداره امور کشورند. موارد، طرز تشکیل و حدود اختیارات و وظایف شوراها را این قانون و قوانین ناشی از آن معین می کند.

اصل نهم: در جمهوری اسلامی ایران آزادی و استقلال و وحدت و تمامیت اراضی کشور از یکدیگر تفکیک ناپذیرند و حفظ آنها وظیفه دولت و آحاد ملت است. هیچ فرد یا گروه یا مقامی حق ندارد به نام استفاده از آزادی، به استقلال سیاسی، فرهنگی، اقتصادی، نظامی و تمامیت ارضی ایران کمترین خدشه ای وارد کند و هیچ مقامی حق ندارد به نام حفظ استقلال و تمامیت ارضی کشور آزادیهای مشروع را، هر چند با وضع قوانین و مقررات، سلب کند.

اصل یازدهم: به حکم آیه کریمه "ان هذه امتکم امهٔ واحده و انا ربکم فاعبدون" همه مسلمانان یک امت‌اند و دولت جمهوری اسلامی ایران موظف است سیاست کلی خود را بر پایه ائتلاف و اتحاد ملل اسلامی قرار دهد و کوشش پیگیر به عمل آورد تا وحدت سیاسی، اقتصادی و فرهنگی جهان اسلام را تحقق بخشد.

اصل دوازدهم : دین رسمی ایران، اسلام و مذهب جعفری اثنی عشری است و این اصل الی الابد غیر قابل تغییر است و مذاهب دیگر اسلامی اعم از حنفی، شافعی، مالکی، حنبلی و زیدی دارای احترام کامل می باشند و پیروان این مذاهب در انجام مراسم مذهبی، طبق فقه خودشان آزادند و در تعلیم و تربیت دینی و احوال شخصیه (ازدواج، طلاق، ارث و وصیت) و دعاوی مربوط به آن در دادگاه ها رسمیت دارند و در هر منطقه ای که پیروان هر یک از این مذاهب اکثریت داشته باشند، مقررات محلی در حدود اختیارات شوراها بر طبق آن مذهب خواهد بود، با حفظ حقوق پیروان سایر مذاهب.

اصل سیزدهم: ایرانیان زرتشتی، کلیمی و مسیحی تنها اقلیتهای دینی شناخته می شوند که در حدود قانون در انجام مراسم دینی خود آزادند و در احوال شخصیه و تعلیمات دینی بر طبق آیین خود عمل می کنند.

اصل چهاردهم: به حکم آیه شریفه "لاینهاکم الله عن الذین لم یقاتلوکم فی الدین و لم یخرجوکم من دیارکم ان تبروهم و تقسطوا الیهم ان الله یحب المقسطین" دولت جمهوری اسلامی ایران و مسلمانان موظفند نسبت به افراد غیر مسلمان با اخلاق حسنه و قسط و عدل اسلامی عمل نمایند و حقوق انسانی آنان را رعایت کنند. این اصل در حق کسانی اعتبار دارد که بر ضد اسلام و جمهوری اسلامی ایران توطئه و اقدام نکنند.

فصل دوم: زبان، خط، تاریخ و پرچم کشور

اصل پانزدهم: زبان و خط رسمی و مشترک مردم ایران فارسی است. اسناد و مکاتبات و متون رسمی و کتب درسی باید با این زبان و خط باشد ولی استفاده از زبانهای محلی و قومی در مطبوعات و رسانه های گروهی و تدریس ادبیات آنها در مدارس، در کنار زبان فارسی ازاد است.

فصل سوم: حقوق ملت

اصل نوزدهم: مردم ایران از هر قوم و قبیله که باشند از حقوق مساوی برخوردارند و رنگ، نژاد، زبان و مانند اینها سبب امتیاز نخواهد بود.

اصل بیستم: همه افراد ملت اعم از زن و مرد یکسان در حمایت قانون قرار دارند و از همه حقوق انسانی، سیاسی، اقتصادی، اجتماعی و فرهنگی با رعایت موازین اسلام برخوردارند.

اصل بیست و یکم: دولت موظف است حقوق زن را در تمام جهات با رعایت موازین اسلامی تضمین نماید و امور زیر را انجام دهد:

۱ – ایجاد زمینه های مساعد برای رشد شخصیت زن و احیاء حقوق مادی و معنوی او.

۲ – حمایت مادران، بالخصوص در دوران بارداری و حضانت فرزند، و حمایت از کودکان بی سرپرست.

۳– ایجاد دادگاه صالح برای حفظ کیان و بقای خانواده.

٤ – ایجاد بیمه خاص بیوگان و زنان سالخورده و بی سرپرست.
٥ – اعطای قیمومت فرزندان به مادران شایسته در جهت غبطه آنها در صورت نبودن ولی شرعی.

اصل بیست و دوم: حیثیت، جان، مال، حقوق، مسکن و شغل اشخاص از تعرض مصون است مگر در مواردی که قانون تجویز کند.

اصل بیست و سوم: تفتیش عقاید ممنوع است و هیچکس را نمی توان به صرف داشتن عقیده ای مورد تعرض و مؤاخذه قرار داد.

اصل بیست و چهارم: نشریات و مطبوعات در بیان مطالب آزادند مگر آنکه مخل به مبانی اسلام یا حقوق عمومی باشد. تفصیل آن را قانون معین می کند.

اصل بیست و پنجم: بازرسی و نرساندن نامه ها، ضبط و فاش کردن مکالمات تلفنی، افشای مخابرات تلگرافی و تلکس، سانسور، عدم مخابره و نرساندن آنها، استراق سمع و هر گونه تجسس ممنوع است مگر به حکم قانون.

اصل بیست و ششم: احزاب، جمعیت ها، انجمن های سیاسی و صنفی و انجمنهای اسلامی یا اقلیتهای دینی شناخته شده آزادند، مشروط به این که اصول استقلال، آزادی، وحدت ملی، موازین اسلامی و اساس جمهور اسلامی را نقض نکنند. هیچکس را نمی توان از شرکت در آنها منع کرد یا به شرکت در یکی از آنها مجبور ساخت.

اصل بیست و هفتم: تشکیل اجتماعات و راه پیمایی ها، بدون حمل سلاح، به شرط آن که مخل به مبانی اسلام نباشد آزاد است.

اصل بیست و هشتم: هر کس حق دارد شغلی را که بدان مایل است و مخالف اسلام و مصالح عمومی و حقوق دیگران نیست برگزیند. دولت موظف است با رعایت نیاز جامعه به مشاغل گوناگون، برای همه افراد امکان اشتغال به کار و شرایط مساوی را برای احراز مشاغل ایجاد نماید.

اصل بیست و نهم: برخورداری از تأمین اجتماعی از نظر بازنشستگی، بیکاری، پیری، ازکارافتادگی، بی سرپرستی، در راه ماندگی، حوادث و سوانح، نیاز به خدمات بهداشتی و درمانی و مراقبتهای پزشکی به صورت بیمه و غیره، حقی است همگانی. دولت موظف است طبق قوانین از محل درآمدهای عمومی و درآمدهای حاصل از مشارکت مردم، خدمات و حمایتهای مالی فوق را برای یک یک افراد کشور تأمین کند.

اصل سی ام: دولت موظف است وسایل آموزش و پرورش رایگان را برای همه ملت تا پایان دوره متوسطه فراهم سازد و وسایل تحصیلات عالی را تا سر حد خودکفایی کشور به طور رایگان گسترش دهد.

اصل سی و یکم: داشتن مسکن متناسب با نیاز، حق هر فرد و خانواده ایرانی است. دولت موظف است با رعایت اولویت برای آنها که نیازمندترند به خصوص روستانشینان و کارگران زمینه اجرای این اصل را فراهم کند.

اصل سی و دوم: هیچکس را نمی توان دستگیر کرد مگر به حکم و ترتیبی که قانون معین می کند. در صورت بازداشت، موضوع اتهام باید با ذکر دلایل بلافاصله کتباً به متهم ابلاغ و تفهیم شود و حداکثر ظرف مدت بیست و چهار ساعت پرونده مقدماتی به مراجع صالحه قضایی ارسال و مقدمات محاکمه، در اسرع وقت فراهم گردد. متخلف از این اصل طبق قانون مجازات می شود.

اصل سی و سوم: هیچکس را نمی توان از محل اقامت خود تبعید کرد یا از اقامت در محل مورد علاقه اش ممنوع یا به اقامت در محلی مجبور ساخت، مگر در مواردی که قانون مقرر می دارد.

اصل سی و چهارم: دادخواهی حق مسلم هر فرد است و هر کس می تواند به منظور دادخواهی به دادگاه های صالح رجوع نماید. همه افراد ملت حق دارند این گونه دادگاه ها را در دسترس داشته باشند و هیچکس را نمی توان از دادگاهی که به موجب قانون حق مراجعه به آن را دارد منع کرد.

اصل سی و پنجم: در همه دادگاه ها طرفین دعوی حق دارند برای خود وکیل انتخاب نمایند و اگر توانایی انتخاب وکیل را نداشته باشند باید برای آنها امکانات تعیین وکیل فراهم گردد.

اصل سی و ششم: حکم به مجازات و اجرا آن باید تنها از طریق دادگاه صالح و به موجب قانون باشد.

اصل سی و هفتم: اصل، برائت است و هیچکس از نظر قانون مجرم شناخته نمی شود، مگر این که جرم او در دادگاه صالح ثابت گردد.

اصل سی و هشتم: هر گونه شکنجه برای گرفتن اقرار و یا کسب اطلاع ممنوع است. اجبار شخص به شهادت، اقرار یا سوگند، مجاز نیست و چنین شهادت و اقرار و سوگندی فاقد ارزش و اعتبار است. متخلف از این اصل طبق قانون مجازات می شود.

اصل سی و نهم: هتک حرمت و حیثیت کسی که به حکم قانون دستگیر، بازداشت، زندانی یا تبعید شده، به هر صورت که باشد ممنوع و موجب مجازات است.

اصل چهلم: هیچکس نمی تواند اعمال حق خویش را وسیله اضرار به غیر یا تجاوز به منافع عمومی قرار دهد.

اصل چهل و یکم: تابعیت کشور ایران حق مسلّم هر فرد ایرانی است و دولت نمی تواند از هیچ ایرانی سلب تابعیت کند، مگر به درخواست خود او یا در صورتی که به تابعیت کشور دیگری درآید.

اصل چهل و دوم: اتباع خارجه می توانند در حدود قوانین به تابعیت ایران در آیند و سلب تابعیت این گونه اشخاص در صورتی ممکن است که دولت دیگری تابعیت آنها را بپذیرد یا خود آنها درخواست کنند.

فصل پنجم: حق حاکمیت ملت و قوای ناشی از آن

اصل پنجاه و ششم: حاکمیت مطلق بر جهان و انسان از آن خداست و هم او، انسان را بر سرنوشت اجتماعی خویش حاکم ساخته است. هیچکس نمی تواند این حق الهی را از انسان سلب کند یا در خدمت منافع فرد یا گروهی خاص قرار دهد و ملت این حق خداداد را از طرقی که در اصول بعد می آید اعمال می کند.

اصل پنجاه و هفتم (مصوب ۱۹۸۹): قوای حاکم در جمهوری اسلامی ایران عبارتند از: قوه مقننه، قوه مجریه و قوه قضائیه که زیر نظر ولایت مطلقه امر و امامت امت بر طبق اصول آینده این قانون اعمال می گردند. این قوا مستقل از یکدیگرند.

اصل پنجاه و هفتم (مصوب ۱۹۷۹): قوای حاکم در جمهوری اسلامی ایران عبارتند از : قوه مقننه، قوه مجریه و قوه قضائیه که زیر نظر ولایت امر و امامت امت، بر طبق اصول آینده این قانون اعمال می گردند. این قوا مستقل از یکدیگرند و ارتباط میان آنها به وسیله رئیس جمهور برقرار می گردد.

اصل پنجاه و هشتم: اعمال قوه مقننه از طریق مجلس شورای اسلامی است که از نمایندگان منتخب مردم تشکیل می شود و مصوبات آن پس از طی مراحلی که در اصول بعد می آید برای اجرا به قوه مجریه و قضائیه ابلاغ می گردد.

اصل پنجاه و نهم: در مسائل بسیار مهم اقتصادی، سیاسی، اجتماعی و فرهنگی ممکن است اعمال قوه مقننه از راه همه پرسی و مراجعه مستقیم به آراء مردم صورت گیرد. در خواست مراجعه به آراء عمومی باید به تصویب دو سوم مجموع نمایندگان مجلس برسد.

اصل شصتم (مصوب ۱۹۸۹): اعمال قوه مجریه جز در اموری که در این قانون مستقیماً بر عهده رهبری گذارده شده، از طریق رئیس جمهور و وزرا است.

اصل شصتم (مصوب ۱۹۷۹): اعمال قوه مجریه جز در اموری که در این قانون مستقیماً بر عهده رهبری گذارده شده، از طریق رئیس جمهور و نخست وزیر و وزرا است.

اصل شصت و یکم: اعمال قوه قضائیه به وسیله دادگاه های دادگستری است که باید طبق موازین اسلامی تشکیل شود و به حل و فصل دعاوی و حفظ حقوق عمومی و گسترش و اجرای عدالت و اقامه حدود الهی بپردازد.

فصل ششم : قوه مقننه

اصل شصت و چهارم (مصوب ۱۹۸۹): عده نمایندگان مجلس شورای اسلامی دویست و هفتاد نفر است و از تاریخ همه پرسی سال یکهزار و سیصد و شصت و هشت هجری شمسی پس از هر ده سال، با در نظر گرفتن عوامل انسانی،

سیاسی، جغرافیایی و نظایر آنها حداکثر بیست نفر نماینده می تواند اضافه شود. زرتشتیان و کلیمیان هر کدام یک نماینده و مسیحیان آشوری و کلدانی مجموعاً یک نماینده و مسیحیان ارمنی جنوب و شمال هر کدام یک نماینده انتخاب می کنند. محدوده حوزه های انتخابیه و تعداد نمایندگان را قانون معین می کند.
اصل شصت و چهارم (مصوب ۱۹۷۹): عده نمایندگان مجلس شورای ملی دویست و هفتاد نفر است و پس از هر ده سال در صورت زیاد شدن جمعیت کشور در هر حوزه انتخابی به نسبت هر یکصد و پنجاه هزار نفر یک نماینده اضافه می شود. زرتشتیان و کلیمیان هر کدام یک نماینده و مسیحیان آشوری و کلدانی مجموعا یک نماینده و مسیحیان ارمنی جنوب و شمال هر کدام یک نماینده انتخاب می کنند و در صورت افزایش جمعیت هر یک از اقلیت ها پس از هر ده سال به ازای هر یکصد و پنجاه هزار نفر اضافی یک نماینده اضافی خواهند داشت. مقررات مربوط به انتخابات را قانون معین می کند.

اصل شصت و هفتم: نمایندگان باید در نخستین جلسه مجلس به ترتیب زیر سوگند یاد کنند و متن قسم نامه را امضا نمایند.
بسم الله الرحمن الرحیم
"من در برابر قرآن مجید، به خدای قادر متعال سوگند یاد می کنم ...."

نمایندگان اقلیتهای دینی این سوگند را با ذکر کتاب آسمانی خود یاد خواهند کرد. نمایندگانی که در جلسه نخست شرکت ندارند باید در اولین جلسه ای که حضور پیدا می کنند مراسم سوگند را به جای آوردند.

اصل هفتاد و دوم: مجلس شورای اسلامی نمی تواند قوانینی وضع کند که با اصول و احکام مذهب رسمی کشور یا قانون اساسی مغایرت داشته باشد. تشخیص این امر به ترتیبی که در اصل نود و ششم آمده بر عهده شورای نگهبان است.

اصل هفتاد و نهم: برقراری حکومت نظامی ممنوع است. در حالت جنگ و شرایط اضطراری نظیر آن، دولت حق دارد با تصویب مجلس شورای اسلامی موقتاً محدودیتهای ضروری را برقرار نماید، ولی مدت آن به هر حال نمی تواند بیش از سی روز باشد و در صورتی که ضرورت همچنان باقی باشد دولت موظف است مجدداً از مجلس کسب مجوز کند.

اصل نود و یکم (مصوب ۱۹۸۹): به منظور پاسداری از احکام اسلام و قانون اساسی از نظر عدم مغایرت مصوبات مجلس شورای ملی با آنها، شورایی به نام شورای نگهبان با ترکیب زیر تشکیل می شود.
۱ – شش نفر از فقهای عادل و آگاه به مقتضیات زمان و مسائل روز. انتخاب این عده با مقام رهبری است.
۲ – شش نفر حقوقدان، در رشته های مختلف حقوقی، از میان حقوقدانان مسلمانی که به وسیله رئیس قوه قضائیه به مجلس شورای ملی معرفی می شوند و با رای مجلس انتخاب می گردند.
اصل نود و یکم (مصوب ۱۹۷۹): به منظور پاسداری از احکام اسلام و قانون اساسی از نظر عدم مغایرت مصوبات مجلس شورای ملی با آنها، شورایی به نام شورای نگهبان با ترکیب زیر تشکیل می شود:

۱ – شش نفر از فقهای عادل و آگاه به مقتضیات زمان و مسائل روز. انتخاب این عده با رهبر یا شورای رهبری است.
۲ – شش نفر حقوقدان، در رشته های مختلف حقوقی، از میان حقوقدانان مسلمانی که به وسیله شورای عالی قضایی به مجلس شورای ملی معرفی می شوند وبا رای مجلس انتخاب می گردند.

اصل نود و دوم: اعضای شورای نگهبان برای مدت شش سال انتخاب می شوند ولی در نخستین دوره پس از گذشتن سه سال، نیمی از اعضا هر گروه به قید قرعه تغییر می یابند و اعضای تازه ای به جای آنها انتخاب می شوند.

اصل نود و ششم: تشخیص عدم مغایرت مصوبات مجلس شورای اسلامی با احکام اسلام با اکثریت فقهای شورای نگهبان و تشخیص عدم تعارض آنها با قانون اساسی بر عهده اکثریت همه اعضای شورای نگهبان است.

اصل نود و نهم (مصوب ۱۹۸۹): شورای نگهبان نظارت بر انتخابات مجلس خبرگان رهبری، ریاست جمهوری، مجلس شورای اسلامی و مراجعه به آراء عمومی و همه پرسی را بر عهده دارد.
اصل نود و نهم (مصوب ۱۹۷۹): شورای نگهبان نظارت بر انتخاب رئیس جمهور، انتخابات مجلس شورای ملی و مراجعه به آراء عمومی و همه پرسی را بر عهده دارد.

اصل یکصد و پنجم: تصمیمات شوراها نباید مخالف موازین اسلام و قوانین کشور باشد.

فصل هشتم : رهبر یا شورای رهبری

اصل یکصد و هفتم (مصوب ۱۹۸۹): پس از مرجع عالیقدر تقلید و رهبر کبیر انقلاب جهانی اسلام و بنیانگذار جمهوری اسلامی ایران حضرت آیت الله العظمی امام خمینی "قدس سره الشریف" که از طرف اکثریت قاطع مردم به مرجعیت و رهبری شناخته و پذیرفته شدند، تعیین رهبر به عهده خبرگان منتخب مردم است. خبرگان رهبری درباره همه فقها واجد شرایط مذکور در اصول پنجم و یکصد و نهم بررسی و مشورت می کنند؛ هر گاه یکی از آنان را اعلم به احکام و موضوعات فقهی یا مسائل سیاسی و اجتماعی یا دارای مقبولیت عامه یا واجد برجستگی خاص در یکی از صفات مذکور در اصل یکصد و نهم تشخیص دهند او را به رهبری انتخاب می کنند و در غیر این صورت یکی از آنان را به عنوان رهبر انتخاب و معرفی می نمایند. رهبر منتخب خبرگان، ولایت امر و همه مسئولیت های ناشی از آن را بر عهده خواهد داشت. رهبر در برابر قوانین با سایر افراد کشور مساوی است.
اصل یکصد و هفتم (مصوب ۱۹۷۹): هر گاه یکی از فقهای واجد شرایط مذکور در اصل پنجم این قانون از طرف اکثریت قاطع مردم به مرجعیت و رهبری شناخته و پذیرفته شده باشد، همانگونه که در مورد مرجع عالیقدر تقلید و رهبر انقلاب آیت الله العظمی امام خمینی چنین شده است، این رهبر، ولایت امر و همه مسئولیتهای ناشی از آن را بر عهده دارد، در غیر این صورت خبرگان منتخب مردم درباره همه کسانی که صلاحیت مرجعیت و رهبری دارند بررسی و مشورت می کنند، هر گاه یک مرجع را دارای برجستگی خاص برای رهبری بیابند او را به عنوان رهبر به مردم معرفی می نمایند، وگرنه سه یا پنج مرجع واجد شرایط رهبری را به عنوان اعضاءی شورای رهبری تعیین و به مردم معرفی می کنند.

اصل یکصد و نهم (مصوب ۱۹۸۹): شرایط و صفات رهبر:

۱ – صلاحیت علمی لازم برای افتاء در ابواب مختلف فقه.

۲– عدالت و تقوای لازم برای رهبری امت اسلام.

۳– بینش صحیح سیاسی و اجتماعی، تدبیر، شجاعت، مدیریت و قدرت کافی برای رهبری. در صورت تعدد واجدین شرایط فوق، شخصی که دارای بینش فقهی و سیاسی قوی تر باشد مقدم است.

اصل یکصد و نهم (مصوب ۱۹۷۹): شرایط و صفات رهبر یا اعضای شورای رهبری:

۱ – صلاحیت علمی و تقوایی لازم برای افتا و مرجعیت.

۲ – بینش سیاسی و اجتماعی و شجاعت و قدرت و مدیریت کافی برای رهبری.

اصل یکصد و دهم (مصوب ۱۹۸۹): وظایف و اختیرات رهبر:

۱ – تعیین سیاستها کلی نظام جمهوری اسلامی ایران پس از مشورت با مجمع تشخیص مصلحت نظام.

۲ – نظارت بر حسن اجرای سیاستهای کلی نظام.

۳ – فرمان همه پرسی.

٤ – فرماندهی کل نیروهای مسلح.

۵ – اعلام جنگ و صلح و بسیج نیروها.

٦ – نصب و عزل و قبول استعفای : الف – فقهای شورای نگهبان. ب – عالیترین مقام قوه قضائیه. ج – رئیس سازمان صدا و سیمای جمهوری اسلامی ایران. د – رئیس ستاد مشترک. هـ – فرمانده کل سپاه پاسداران انقلاب اسلامی. و – فرماندهان عالی نیروهای نظامی و انتظامی.

۷– حل اختلاف و تنظیم روابط قوای سه گانه.

۸ – حل معضلات نظام که از طرق عادی قابل حل نیست، از طریق مجمع تشخیص مصلحت نظام.

۹ – امضا حکم ریاست جمهوری پس از انتخاب مردم. صلاحیت داوطلبان ریاست جمهوری از جهت دارا بودن شرایطی که در این قانون می آید، باید قبل از انتخابات به تأیید شورای نگهبان و در دوره اول به تأیید رهبری برسد.

۱۰ – عزل رئیس جمهور با در نظر گرفتن مصالح کشور پس از حکم دیوان عالی کشور به تخلف وی از وظایف قانونی، یا رای مجلس شورای اسلامی به عدم کفایت وی بر اساس اصل هشتاد و نهم.

۱۱– عفو یا تخفیف مجازات محکومین در حدود موازین اسلامی پس از پیشنهاد رئیس قوه قضائیه. رهبر می تواند بعضی از وظایف و اختیارات خود را به شخص دیگری تفویض کند.

اصل یکصد و دهم (مصوب ۱۹۷۹): وظایف و اختیارات رهبری:

۱ – تعیین فقهای شورای نگهبان.

۲ – نصب عالیترین مقام قضایی کشور.

۳ – فرماندهی کلی نیروهای مسلح به ترتیب زیر: الف – نصب و عزل رئیس ستاد مشترک. ب – نصب و عزل فرمانده کل سپاه پاسداران انقلاب اسلامی. ج – تشکیل شورای عالی دفاع ملی، مرکب از هفت نفر از اعضاءی زیر: – رئیس جمهور. – نخست وزیر. – وزیر دفاع. – رئیس ستاد مشترک. – فرمانده کل سپاه پاسداران انقلاب اسلامی. – دو مشاور

به تعیین رهبر. د – تعیین فرماندهان عالی نیروهای سه گانه به پیشنهاد شورای عالی دفاع.
هـ– اعلام جنگ و صلح و بسیج نیروها به پیشنهاد شورای عالی دفاع.
و – امضای حکم ریاست جمهور پس از انتخاب مردم. صلاحیت داوطلبان ریاست جمهوری از جهت دارا بودن شرایطی که در این قانون می آید باید قبل از انتخابات به تأیید شورای نگهبان و در دوره اول به تأیید رهبری برسد.
۵– عزل رئیس جمهور با در نظر گرفتن مصالح کشور، پس از حکم دیوان عالی کشور به تخلف وی از وظایف قانونی یا رای مجلس شورای ملی به عدم کفایت سیاسی او.
٦– عفو یا تخفیف مجازات محکومین، در حدود موازین اسلامی، پس از پیشنهاد دیوان عالی کشور.

اصل یکصد و یازدهم (مصوب ۱۹۸۹): هر گاه رهبر از انجام وظایف قانونی خود ناتوان شود یا فاقد یکی از شرایط مذکور در اصول پنجم و یکصد و نهم گردد، یا معلوم شود از آغاز فاقد بعضی از شرایط بوده است، از مقام خود بر کنار خواهد شد. تشخیص این امر به عهده خبرگان مذکور در اصل یکصد و هشتم می باشد. در صورت فوت یا کناره گیری یا عزل رهبر، خبرگان موظفند، در اسرع وقت نسبت به تعیین و معرفی رهبر جدید اقدام نمایند. تا هنگام معرفی رهبر، شورایی مرکب از رئیس جمهور، رئیس قوه قضائیه و یکی از فقهای شورای نگهبان به انتخاب مجمع تشخیص مصلحت نظام، همه وظایف رهبری را به طور موقت به عهده می گیرد و چنانچه در این مدت یکی از آنان به هر دلیل نتواند انجام وظیفه نماید، فرد دیگری به انتخاب مجمع، با حفظ اکثریت فقها، در شورا به جای وی منصوب می گردد. این شورا در خصوص وظایف بندهای ۱ و ۳ و ۵ و ۱۰ و قسمت‌های (د) و (هـ) و (و) بند ٦ اصل یکصد و دهم، پس از تصویب سه چهارم اعضاء مجمع تشخیص مصلحت نظام اقدام می کند. هر گاه رهبر بر اثر بیماری یا حادثه دیگری موقتاً از انجام وظایف رهبری ناتوان شود، در این مدت شورای مذکور در این اصل وظایف او را عهده دار خواهد بود.
اصل یکصد و یازدهم (مصوب ۱۹۷۹): هر گاه رهبر یا یکی از اعضاءی شورای رهبر یا یکی از اعضاءی شورای رهبری از انجام وظایف قانونی رهبری ناتوان شود یا فاقد یکی از شرایط مذکور در اصل یکصد و نهم گردد از مقام خود بر کنار خواهد شد. تشخیص این امر به عهده خبرگان مذکور در اصل یکصد و هشتم است. مقررات تشکیل خبرگان برای رسیدگی و عمل به این اصل در اولین اجلاسیه خبرگان تعیین می شود.

فصل نهم : قوه مجریه

مبحث اول– ریاست جمهوری و وزراء

اصل یکصد و سیزدهم (مصوب ۱۹۸۹): پس از مقام رهبری رئیس جمهور عالیترین مقام رسمی کشور است و مسئولیت اجرای قانون اساسی و ریاست قوه مجریه را جز در اموری که مستقیماً به رهبری مربوط می شود، بر عهده دارد.
اصل یکصد و سیزدهم (مصوب ۱۹۷۹): پس از مقام رهبری رئیس جمهور عالیترین مقام رسمی کشور است و مسئولیت اجرای قانون اساسی و تنظیم روابط قوای سه گانه و ریاست قوه مجریه را جز در اموری که مستقیما به رهبری مربوط می شود، بر عهده دارد.

اصل یکصد و پانزدهم: رئیس جمهور باید از میان رجال مذهبی و سیاسی که واجد شرایط زیر باشند انتخاب گردد: ایرانی الاصل، تابع ایران، مدیر و مدبر، دارای حسن سابقه و امانت و تقوی، مومن و معتقد به مبانی جمهوری اسلامی ایران و مذهب رسمی کشور.

اصل یکصد و بیست و دوم (مصوب ۱۹۸۹): رئیس جمهور در حدود اختیارات و وظایفی که به موجب قانون اساسی و یا قوانین عادی به عهده دارد در برابر ملت و رهبر و مجلس شورای اسلامی مسئول است.
اصل یکصد و بیست و دوم (مصوب ۱۹۷۹): رئیس جمهور در حدود اختیارات و وظایف خویش در برابر ملت مسئول است، نحوه رسیدگی به تخلف از این مسئولیت را قانون معین می کند.

اصل یکصد و سی و هفتم: هر یک از وزیران مسئول وظایف خاص خویش در برابر رئیس جمهور و مجلس است و در اموری که به تصویب هیأت وزیران می رسد مسئول اعمال دیگران نیز هست.
اصل سابق: اصل یکصد و سی و هفتم: هر یک از وزیران، مسئول وظایف خاص خویش در برابر مجلس است، ولی در اموری که به تصویب هیأت وزیران می رسد مسئول اعمال دیگران نیز هست.

اصل یکصد و چهل و دوم (مصوب ۱۹۸۹): دارایی رهبر، رئیس جمهور، معاونان رئیس جمهور، وزیران و همسر و فرزندان آنان قبل و بعد از خدمت، توسط رئیس قوه قضائیه رسیدگی می شود که بر خلاف حق، افزایش نیافته باشد.
اصل یکصد و چهل و دوم (مصوب ۱۹۷۹): دارایی رهبر یا اعضاءی شورای رهبری، رئیس جمهور، نخست وزیر، وزیران و همسر و فرزندان آنان قبل و بعد از خدمت، توسط دیوان عالی کشور رسیدگی می شود که بر خلاف حق افزایش نیافته باشد.

اصل یکصد و چهل و ششم: استقرار هر گونه پایگاه نظامی خارجی در کشور هر چند به عنوان استفاده های صلح آمیز باشد ممنوع است.

اصل یکصد و پنجاهم: سپاه پاسداران انقلاب اسلامی که در نخستین روزهای پیروزی این انقلاب تشکیل شد، برای ادامه نقش خود در نگهبانی از انقلاب و دستاوردهای آن پابرجا می ماند. حدود وظایف و قلمرو مسئولیت این سپاه در رابطه با وظایف و قلمرو مسئولیت نیروهای مسلح دیگر با تاکید بر همکاری و هماهنگی برادرانه میان آنها به وسیله قانون تعیین می شود.

فصل یازدهم: قوه قضائیه

اصل یکصد و پنجاه و نهم: مرجع رسمی تظلمات و شکایات، دادگستری است. تشکیل دادگاه ها و تعیین صلاحیت آنها منوط به حکم قانون است.

اصل یکصد و شصت و دوم (مصوب ۱۹۸۹): رئیس دیوان عالی کشور و دادستان کل باید مجتهد عادل و آگاه به امور قضایی باشند و رئیس قوه قضائیه با مشورت قضایت دیوان عالی کشور آنها را برای مدت پنج سال به این سمت منصوب می کند.
اصل یکصد و شصت و دوم (مصوب ۱۹۷۹): رئیس دیوان عالی کشور و دادستان کل باید مجتهد عادل و آگاه به امور قضایی باشند و رهبری با مشورت قضات دیوان عالی کشور آنها را برای مدت پنج سال به این سمت منصوب می کند.

اصل یکصد و شصت و سوم : صفات و شرایط قاضی طبق موازین فقهی به وسیله قانون معین می شود.

اصل یکصد و شصت و پنجم : محاکمات، علنی انجام می شود و حضور افراد بلامانع است مگر آن که به تشخیص دادگاه، علنی بودن آن منافی عفت عمومی یا نظم عمومی باشد یا در دعاوی خصوصی طرفین دعوا تقاضا کنند که محاکمه علنی نباشد.

اصل یکصد و شصت و ششم: احکام دادگاه ها باید مستدل و مستند به مواد قانون و اصولی باشد که بر اساس آن حکم صادر شده است.

اصل یکصد و شصت و هفتم : قاضی موظف است کوشش کند حکم هر دعوا را در قوانین مدونه بیابد و اگر نیابد با استناد به منابع معتبر اسلامی یا فتاوای معتبر، حکم قضیه را صادر نماید و نمی تواند به بهانه سکوت یا نقص یا اجمال یا تعارض قوانین مدونه از رسیدگی به دعوا و صدور حکم امتناع ورزد.

* قانون مجازات اسلامی (۱۹۸۲/۱۳٦۱-)

ماده ۱ – قانون مجازات اسلامی راجع است به تعیین انواع جرائم و مجازات و اقدامات تامینی و تربیتی که درباره مجرم اعمال می شود .
ماده ۲ – هر فعل یا ترک فعلی که درقانون برای آن مجازات تعیین شده باشد جرم محسوب می شود .
ماده ۳ – قوانین جزائی درباره کلیه کسانیکه در قلمرو حاکمیت زمینی ، دریائی و هوائی جمهوری اسلامی ایران مرتکب جرم شوند اعمال می گردد مگر آنکه بموجب قانون ترتیب دیگری مقرر شده باشد .

ماده ۱۲ – مجازاتهای مقرر در این قانون پنج قسم است: ۱ – حدود۲ – قصاص ۳ – دیات ٤ – تعزیرات ٥ – مجازاتهای بازدارنده ۰
ماده ۱۳ – حد ، به مجازاتی گفته می شود که نوع و میزان و کیفیت آن در شرع تعیین شده است .
ماده ١٤ – قصاص، کیفری است که جانی به آن محکوم می شود وباید با جنایت او برابر باشد .
ماده ١٥ – دیه، مالی است که از طرف شارع برای جنایت تعیین شده است.
ماده ١٦ – تعزیر، تادیب و یا عقوبتی است که نوع ومقدار آن در شرع تعیین نشده و به نظرحاکم واگذار شده است از قبیل حبس و جزای نقدی و شلاق که میزان شلاق بایستی از مقدار حد کمتر باشد.

ماده ۱۷ – مجازات بازدارنده، تادیب یا عقوبتی است که از طرف حکومت به منظور حفظ نظم و مراعات مصلحت اجتماع در قبال تخلف از مقررات و نظامات حکومتی تعیین می گردد از قبیل حبس ، و جزای نقدی و شلاق که میزان شلاق بایستی از مقدار حد کمتر باشد.

ماده ۸۲ – حد زنا در موارد زیر قتل است و فرقی بین جوان وغیر جوان و محصن و غیرمحصن نیست.

الف – زنا با محارم نسبی

ب – زنا با زن پدر که موجب قتل زانی است.

ج – زنای غیر مسلمان با زن مسلمان که موجب قتل زانی است.

د – زنای به عنف و اکراه که موجب قتل زانی اکراه کننده است.

ماده ۸۳ – حد زنا در موارد زیر رجم است:

الف – زنای مرد محصن ، یعنی مردی که دارای همسر دائمی است و با او در حالی که عاقل بوده جماع کرده و هر وقت نیز بخواهد می تواند به او جماع کند.

ب – زنای زن محصنه با مرد بالغ، زن محصنه زنی است که دارای شوهر دائمی است و شوهر در حالی که زن عاقل بوده با او جماع کرده است و امکان جماع با شوهر را نیز داشته باشد.

تبصره– زنای زن محصنه با نابالغ موجب حد تازیانه است.

ماده ۸۸ – حد زنای زن یا مردی که واجد شرایط احصان نباشند صد تازیانه است.

ماده ۱۲۱ – حد تفخیذ و نظایر آن بین دو مرد بدون دخول برای هر یک صد تازیانه است.

تبصره – در صورتی که فاعل غیر مسلمان و مفعول مسلمان باشد حداقل قتل است.

ماده ۱۳۰ – حد مساحقه درباره کسی ثابت می شود که بالغ ، عاقل ، مختار و دارای قصد باشد .

تبصره – در حد مساحقه فرقی بین فاعل و مفعول و همچنین فرقی بین مسلمان و غیرمسلمان نیست .

ماده ١٤٦– قذف در مواردی موجب حد می شود که قذف کننده بالغ و عاقل و مختار و دارای قصد باشد و قذف شونده نیز بالغ و عاقل و مسلمان و عفیف باشد ، در صورتیکه قذف کننده و یا قذف شونده فاقد یکی از اوصاف فوق باشند حد ثابت نمی شود.

ماده ١٤٧ – هرگاه نابالغ ممیز کسی را قذف کند به نظر حاکم تادیب می شود و هرگاه یک فرد بالغ و عاقل شخص نابالغ یا غیر مسلمان را قذف کند تا٧٤ ضربه شلاق تعزیر می شود .

ماده ١٧٤ – حد شرب مسکر برای مرد و یا زن ، هشتادتازیانه است .

تبصره – غیر مسلمان فقط در صورت تظاهر به شرب مسکر به هشتاد تازیانه محکوم می شود.

ماده ۲۰۷ – هرگاه مسلمانی کشته شود قاتل قصاص می شود و مُعاون در قتل عمد به سه تا ۱۵سال حبس محکوم می شود.

ماده ۲۱۰ – هرگاه کافر ذمی عمدا" کافر ذمی دیگر را بکشد قصاص می شود اگرچه پیرو دو دین مختلف باشند و اگر مقتول زن ذمی باشد باید ولی او قبل از قصاص نصف دیه مرد ذمی را به قاتل بپردازد.

ماده ۲۱۲ – هرگاه دو یا چند مرد مسلمان مشترکا" مرد مسلمانی را بکشند ولی دم می تواند با اذن ولی امر همه آنها را قصاص کند و در صورتی که قاتل دو نفر باشند باید به هر کدام از آنها نصف دیه و اگر سه نفر باشند باید به هرکدام از آنها دو ثلث دیه و اگرچهار نفر باشند باید به هر کدام از آنها سه ربع دیه را بپردازد و به همین نسبت در افراد بیشتر.
تبصره ۱ – ولی دم می تواند برخی از شرکای در قتل را با پرداخت دیه مذکور در این ماده قصاص نماید و از بقیه شرکاء نسبت به سهم دیه اخذ نماید.
تبصره ۲ – در صورتیکه قاتلان و مقتول همگی از کفار ذمی باشند همین حکم جاری است .
ماده ۲۱۳ – در هر مورد که باید مقداری از دیه را به قاتل بدهند و قصاص کنند باید پرداخت دیه قبل از قصاص باشد.
ماده ۲۵۸ – هرگاه مردی زنی را به قتل رساند ولی دم حق قصاص قاتل را با پرداخت نصف دیه دارد و در صورت رضایت قاتل می تواند به مقدار دیه یا کمتر یا بیشتر از آن مصالحه نماید.

ماده ۲۹٤ – دیه مالی است که به سبب جنایت بر نفس یا عضو به مجنی علیه یا به ولی یا اولیاء دم او داده می شود .
باب دوم – مقدار دیه قتل نفس
ماده ۲۹۷ – دیه قتل مرد مسلمان یکی از امور ششگانه ذیل است که قاتل در انتخاب هر یک از آنها مخیرمیباشدوتلفیق آنها جایزنیست:
۱ – یکصد شتر سالم وبدون عیب که خیلی لاغر نباشند .
۲ – دویست گاو سالم و بدون عیب که خیلی لاغر نباشند .
۳ – یکهزار گوسفند سالم و بدون عیب که خیلی لاغر نباشند .
٤ – دویست دست لباس سالم از حله های یمنی
۵ – یکهزار دینار مسکوک سالم وغیر مغشوش که هردینار یک مثقال شرعی طلا به وزن ۱۸ نخود است .
٦ – ده هزار درهم مسکوک سالم و غیر مغشوش که هر درهم به وزن ۱۲/٦ نخود نقره می باشد .
تبصره ۱ – قیمت هر یک از امور ششگانه در صورت تراضی طرفین ویا تعذر همه آنها پرداخت می شود.

تبصره ۲ـ میزان دیه اقلیت‌های دینی شناخته شده در قانون اساسی جمهوری اسلامی ایران با نظر ولی امر است که توسط قوه قضاییه استعلام و به دادگاه‌ها ابلاغ می‌شود. دادگاه‌ها مکلفند مطابق نظر مذکور و با رعایت سایر مقررات این قانون از قبیل جنسیت مجنی علیه و زمان وقوع جنایت رای مقتضی صادر کنند. اصلاحی مطابق قانون الحاق یک تبصره به ماده (۲۹۷) قانون مجازات اسلامی مصوب ۱۹۹۱/۱۳۷۰

تبصره ۳ (الحاقی ۲۰۰۲/۱۳۸۲/۱۰/٦ مجمع تشخیص مصلحت نظام)- طبق نظر حکومتی ولی امر، دیه اقلیتهای دینی شناخته شده در قانون اساسی جمهوری اسلامی ایران به اندازه دیه مسلمان تعیین می گردد.[1]

[1]– نظریه ۷/٦۲۵۷ –۱۳۸٤/۹/۲ اداره کل امور حقوقی قوه قضاییه: با توجه به قانون الحاق یک تبصره به ماده ۲۹۷ قانون مجازات اسلامی که دیه اقلیتهای مذهبی را نیز به میزان دیه فرد مسلمان تعیین کرده است و فرقی بین ماههای حرام و غیر حرام قائل نشده است لذا فاضل دیه نیز به اقلیتهای مذهبی تعلق می گیرد.

– به موجب بخشنامه ۸ خرداد ۱۳۸۷ قوه قضائیه دیه زن و مرد، مسلمان و غیر مسلمان صرفا در تصادفات رانندگی منجر به مرگ مساوی است.

ماده ۲۰۰ – دیه قتل زن مسلمان خواه عمدی خواه غیرعمدی نصف دیه مرد مسلمان است .

* تغییرات قانون مدنی (۱۹۷۹/۱۳۵۷– ۲۰۰٤/۱۳۸٤)

– ماده ۱: مصوبات مجلس شورای اسلامی به رئیس جمهور ابلاغ و رئیس جمهور باید ظرف ۵ روز آن را امضاء و به دولت ابلاغ نموده و دولت موظف‌است ظرف مدت ٤۸ ساعت آن را منتشر نماید.

تبصره – در صورت استنکاف رئیس جمهور از امضاء یا ابلاغ به دولت در مهلت مقرر دولت موظف است مصوبه یا نتیجه همه پرسی را پس از انقضای‌مدت مذکور ظرف چهل و هشت ساعت منتشر نماید.

– ماده ۱ – ماده ۱ قانون مدنی به شرح زیر اصلاح می‌گردد (۱۳۷۰/ ۱۹۹۱):

ماده ۱ – مصوبات مجلس شورای اسلامی و نتیجه همه‌پرسی پس از طی مراحل قانونی به رئیس جمهور ابلاغ می‌شود. رئیس جمهور باید ظرف مدت پنج روز آنرا امضاء و به مجریان ابلاغ نماید و دستور انتشار آنرا صادر کند و روزنامه رسمی موظف است ظرف مدت ۷۲ ساعت پس از ابلاغ منتشرنماید.

تبصره – در صورت استنکاف رئیس جمهور از امضاء یا ابلاغ در مدت مذکور در این ماده به دستور رئیس مجلس شورای اسلامی روزنامه رسمی موظف است ظرف مدت ۷۲ ساعت مصوبه را چاپ و منتشر نماید.

– ماده ۸۸۱ – در صورتی که قتل عمدی مورث به حکم قانون یا برای دفاع باشد مفاد ماده فوق مجری نخواهد بود.

ماده ۸۸۱ مکرر (الحاقی آزمایشی ۱۰/۸/ ۱۹۸۲/۱۳٦۱ و بعدا مصوب ۱۳۷۰/۸/۱٤) – کافر از مسلم ارث نمی برد و اگر در بین ورثه متوفای کافری، مسلم باشد وراث کافر ارث نمی برند اگر چه از لحاظ طبقه و درجه مقدم بر مسلم باشند.[۲]

ماده ۸۸۱ مکرر (الحاقی آزمایشی ۱۹۸۲/۱۳٦۱/۱۰/۸)– کافر از مسلم ارث نمی برد و اگر در بین ورثه متوفای کافری مسلم باشد وراث کافر ارث نمی برند اگر چه از لحاظ طبقه و درجه مقدم بر مسلم باشند.

۲– نظریات اداره کل حقوقی و تدوین قوانین قوه قضاییه:

الف– نظریه شماره ۷/۱۰۷٦ مورخ ۱۳۷۹/۲/۲۳:

مستنداً به قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب ۱۳۷۲/٤/۳ مجمع تشخیص مصلحت نظام چنانچه احد از وراث متوفای غیرمسلمان، مسلمان باشد یا بعداً مسلمان شود، تقسیم ماترک وی فقط براساس قواعد مسلمه حین الموت متوفی به عمل می آید. و مقررات ماده ۸۸۱ مکرر قانون مدنی در مورد متوفای مسلمان یا غیرمسلمانی است که مشمول قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم نباشد.

ب– نظریه شماره ۷/٦۷۷۹ مورخ ۱۳۷٤/۱۲/۲۳:

تا زمانی که به حکم دادگاه صالحه و با عنوان ارتداد، کسی محکومیت پیدا نکند نمی توان به لحاظ مرتد بودن او را از ارث محروم دانست.

ج– نظریه شماره ۷/۱۲۹۸ مورخ ۱۳۷٦/۲/۳۱:

ماده ۸۸۱ مکرر قانون مدنی، مصوب ۱۳۷۰ مجلس شورای اسلامی است و قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب شهریور ۱۳۷۲ مجمع تشخیص مصلحت نظام است، لذا در موارد مغایرت بایستی طبق مصوبه موخرالتاریخ مجمع تشخیص مصلحت نظام عمل شود.

د– نظریه شماره ۷/٦۳۷۳ مورخ ۱۳۸۱/۸/۲۰:

قانون «رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی» مصوب ۱۹۹۲/۱۳۷۲/٤/۳ مجمع تشخیص مصلحت نظام

ماده واحده- رای وحدت رویه شماره ۳۷ مورخ ۱۳٦۹/۹/۱۹ هیات عمومی دیوان عالی کشور، عیناً و به شرح ذیل به تصویب رسید:

نظر به اصل سیزدهم قانون اساسی جمهوری اسلامی ایران و این که به موجب ماده واحده قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه درمحاکم مصوب مرداد ماه ۱۳۱۲ نسبت به احوال شخصیه و حقوق ارثیه و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده لزوم رعایت قواعد و عادات مسلمه متداوله در مذهب آنان در دادگاه ها جز در مواردی که مقررات قانون راجع به انتظامات عمومی باشد تصریح گردیده فلذا دادگاه ها در مقام رسیدگی به امور مذکور و همچنین در رسیدگی به درخواست تنفیذ وصیت نامه ملزم به رعایت قواعد و عادات مسلمه در مذهب آنان جز در مورد مقررات قانون راجع به انتظامات عمومی بوده و باید احکام خود را برطبق آن صادر نمایند. این رای برابر ماده ٤۳ قانون امور حسبی و ماده ۳ از مواد اضافه شده به قانون آیین دادرسی کیفری مرداد ماه ۱۳۳۷ برای دادگاه ها در موارد مشابه لازم الاتباع است.[۳]

چون در قانون مدنی کافر تعریف نشده است طبق اصل ۱٦۷ قانون اساسی جمهوری اسلامی ایران و ماده ۸ قانون تشکیل دادگاه های عمومی و انقلاب باید به منابع فقهی وفتاوی معتبر رجوع شود و در این مورد نظر حضرت آیه الله مرعشی معاون قضایی محترم ریاست قوه قضاییه به شرح زیر است:

تعریف کافر در فقه آمده و چنین است الکافر و هو من انتحل غیرالاسلام (تحریرالوسیله ج ۱ ص ۱۱۸ خ بیان النجاسات) و بهایی ها معتقدند که دین مقدس اسلام نسخ گردیده و خاتمیت پیامبر اسلام را انکار می کنند با توجه به ماده «۸۸۱ مکرر قانون مدنی» و مساله یک از جلد دوم تحریرالوسیله صفحه ۳٦٤ و مساله ۹ صفحه ۳٦٦ همان جلد فقط وارث مسلم – در صورت تعدد ورثه ارث می برد در مورد استعلام ارث بهایی به وارث مسلمان او منتقل می شود و سایر ورثه حقی از ارث ندارد.

ه- نظریه شماره ۷/۷٤۳۰ مورخ ۱۳۷۸/۱۰/۲۱:

بنابر اصل سیزدهم قانون اساسی قانون رسیدگی به دعاوی مطروحه شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب سال ۱۳۷۲ مجمع تشخیص مصلحت نظام و توجهاً به ماده واحده قانون رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب سال ۱۳۱۲، در این گونه موارد باید قواعد و عادات مسلمه متداوله در مذهب آنان رعایت شود بنابراین چنانچه احد از وراث متوفی غیرمسلمان، مسلمان باشد یا بعداً مسلمان شود تقسیم ماترک وی براساس قواعد مسلمه حین الموت متوفی به عمل می آید.

۳- نظریات اداره کل حقوقی و تدوین قوانین قوه قضاییه:

الف- نظریه شماره ۷/۳۳۳ مورخ ۱۳۸۰/۲/۲:

با عنایت به مصوبه مورخ ۱۳۷۲/٤/۳ مجمع تشخیص مصلحت نظام به عنوان قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی و قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه مصوب ۳۱ تیرماه ۱۳۱۲، جز در مواردی که مقررات قانون راجع به انتظامات عمومی باشد، در مسائل مربوط به نکاح و طلاق ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده است، عادات و قواعد مسلمه متداوله در مذهبی که شوهر پیرو آن است باید رعایت شود.

در مورد کلیمیان ایرانی امور مذکور باید از دارالشرع کلیمیان وابسته به انجمن کلیمیان به نشانی تهران خیابان شیخ هادی پلاک ۳۸۵ طبقه سوم سئوال شود.

ب- نظریه شماره ۷/۵۱۵۹ مورخ ۱۳۷۷/۹/۲٦:

- تایید قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم[٤] مصوب ۱۰ مرداد ماه ۱۳۱۲

ماده واحده – نسبت به احوال شخصیه و حقوق ارثیه و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده محاکم باید قواعد و عادات مسلمه متداوله در مذهب آنان را جز در مواردی که مقررات قانون راجع به انتظامات عمومی باشد به طریق ذیل رعایت نمایند:

۱- در مسائل مربوط به نکاح و طلاق: عادات و قواعد مسلمه متداوله در مذهبی که شوهر پیرو آن است.[٥]

طبق قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب مجمع تشخیص مصلحت نظام دادگاه در مورد اقلیت های یاد شده بایستی احوال شخصیه و حقوق ارثیه متداوله در مذهب آنان رعایت کند و در مورد ارث باید طبق مقررات مذهبی متوفی عمل شود بنابراین با توجه به مقررات یاد شده درخواست فرد مسلم (احد از ورثه) از دادگاه دائر بر حذف نام بقیه فرزندان و عیال متوفای زرتشتی از گواهی حصر وراثت صادره، وجاهت قانونی ندارد و به وصیت متوفی هم طبق مقررات دین زرتشتی باید عمل گردد.

ج- نظریه شماره ۷/۵۱۱۲ مورخ ۱۳۷۷/۷/۱۱:

بنابر اصل سیزدهم قانون اساسی و قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب ۱۳۷۲ مجمع تشخیص مصلحت نظام و توجهاً به ماده واحده قانون رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲ در این گونه موارد باید قواعد و عادات مسلمه متداوله در مذهب آنان رعایت شود.

بنابراین چنانچه احد از وراث متوفای غیر مسلمان، مسلمان باشد، یا بعداً مسلمان شود، تقسیم ماترک وی بر اساس قواعد مسلمه حین الموت متوقی به عمل می آید، و در این خصوص مقررات ۸۸۱ مکرر قانون مدنی رعایت نمی گردد.

٤- رجوع شود به رأی وحدت رویه شماره ۳۷ مورخ ۱۳٦۳/۹/۱۹ هیأت عمومی دیوان عالی کشور که ذیلاً درج می شود:

« نظر به اصل سیزدهم قانون اساسی جمهوری اسلامی ایران و این که به موجب ماده واحده قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب مرداده ماه ۱۳۱۲ نسبت به احوال شخصیه و حقوق ارثیه و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده لزوم رعایت قواعد و عادات مسلمه متداوله در مذهب آنان به رسمیت شناخته شده لزوم رعایت قواعد و عادات مسلمه متداوله در مذهب آنان در دادگاه ها جز در مواردی که مقررات قانونی راجع به انتظامات عمومی باشد تصریح گردید فلذا دادگاه ها در مقام رسیدگی به امور مذکور و همچنین در رسیدگی به درخواست تنفیذ وصیت نامه ملزم به رعایت قواعد و عادت مسلمه در مذهب آنان جز در مورد مقررات قانونی راجع به انتظامات عمومی بوده و باید احکام خود را بر طبق آن صادر نمایند این رأی برابر ماده ٤۳ قانون امور حسبی و ماده ۳ از مواد اضافه شده به قانون آیین دادرسی کیفری مصوب مرداد ماه ۱۳۳۷ برای دادگاه ها در موارد مشابه لازم الاتباع است. »

۵- نظریات اداره کل حقوقی و تدوین قوانین قوه قضائیه:

الف- نظریه شماره ۷/۷۰۱٤ مورخ ۱۳۸۱/۸/۱٤:

با تذکر این نکته که ماده واحده قانون اصلاح مقررات طلاق مصوب ۱۳۷۱ مجمع تشخیص مصلحت نظام و قانون اختصاص تعدادی از دادگاه های عمومی به دادگاه های اصل ۲۱ قانون اساسی (دادگاه خانواده) مصوب ۱۳۷٦ از قواعد آمره است و وفق مقررات مزبور، اصدار اجازه طلاق، گواهی عدم امکان سازش و یا صدور حکم طلاق حسب مورد منحصراً در صلاحیت دادگاه خانواده یا دادگاه عمومی است که در مورد ارامنه گریگوریان ایران باید طبق قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه به دعوی رسیدگی و با استعلام از خلیفه گری ارامنه مذکور رای مقتضی صادر کند، اضافه می شود که مع ذلک چنانچه دادگاه صحت واقعه طلاق در خلیفه گری ارامنه را مطابق قواعد مسلمه متداوله مذهبی آنان احراز کند می تواند آن را تنفیذ کند.

ب- نظریه شماره ۷/۲۰۹۵ مورخ ۱۳۸۰/۱۱/٤:

۲- در مسائل مربوط به ارث و وصیت: عادات و قواعد مسلمه متداوله در مذهب متوفی.[٦]

با عنایت به بند «۱» ماده واحده قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲/۵/۱۰ در مورد طلاق زوجه شافعی مذهب باید عادات و قواعد مسلمه متداوله در مذهبی که شوهر پیرو آن است رعایت شود و در مورد زوج شیعه اثناعشری باید براساس مقررات قانون مدنی عمل و اتخاذ تصمیم شود.

ج- نظریه شماره ۷/٤٤۲٦ مورخ ۱۳۷٦/۸/۸:

مقررات راجع به تقاضای طلاق زن در مذهب شافعی به طور مدون تنظیم و منتشر نشده است و فتاوی رئیس این مذهب در کتب فقهی موجود است، با مراجعه به این کتب موارد تقاضای طلاق زن بررسی می شود.

د- نظریه شماره ۷/۲۳۰۲ مورخ ۱۳۷٤/۵/۲۸:

راجع به نکاح و طلاق قواعد مسلمه متداوله در مذهب ایرانیان غیرشیعه به رسمیت شناخته شده است، لذا در صورتی که طبق قواعد مسلمه متداوله در مذهب ایرانیان غیرشیعه، اجازه ولی برای ازدواج دختر لازم نباشد طبق قانون رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲ برطبق همان قواعد عمل خواهد شد.

٦- نظریات اداره کل حقوقی و تدوین قوانین قوه قضائیه:

الف- نظریه شماره ۷/٤۰۳۲ مورخ ۱۳۸۱/۷/۱:

با توجه به اصل ۱۳ قانون اساسی جمهوری اسلامی ایران ایرانیانی که مذهب آنان به رسمیت شناخته شده است عبارتند از: زرتشتی ها، مسیحی ها، و کلیمی ها.

ب- نظریه شماره ۷/۳۳۳ مورخ ۱۳۸۰/۲/۲:

انجمن کلیمیان تهران طی نامه شماره ۸۳۵۵ مورخ ۱۳۷۸/۹/۱۷ اعلام کرده است «... هیچ کتاب و یا متن ترجمه شده به زبان فارسی در احوال شخصیه و حقوق کلیمیان در ایران وجود ندارد و به فرض وجود نیز دارای اعتبار شرعی نیست در مواردی که به موجب اصل سیزده قانون اساسی اعلام نظر مرجع دینی کلیمیان در احوال شخصیه به موجب قوانین فقهی کلیمیان ضرورت پیدا کند از طرف دادگاه در آن مورد خاص سئوال می شود و مرجع دینی کلیمیان با مراجعه و استناد به کتب فقهی هالاخا- جواب برای دادگاه ارسال می نماید» در ضمن انجمن مزبور طی نامه ۸۳۱۷- ۱۳۷۸/۸/۱۷ اعلام نموده است: قوانین مربوط به حق الارث کلیمیان از سال ۱۳۵۵ تغییراتی نموده که هر دو شکل آن به شرح زیر اعلام می شود:

۱- تا قبل از سال ۱۳۵۵، همسر متوفی تا وقتی در قید حیات است و یا ازدواج مجدد ننموده، می تواند از محل سکونت مشترک با همسر خود واثاث البیت استفاده نموده و سایر وراث با پرداخت مهریه دین دیگری ندارند.

دختران متوفی در صورتی که در موقع ازدواج جهیزیه دریافت داشته باشند نسبت به ماترک متوفی حقی نخواهند داشت.

فرزند ذکور در صورت پرداخت حقوق قانونی سایر وراث با رعایت موازین قانونی وارث ماترک خواهد بود.

۲- از سال ۱۳۵۵ تاکنون تقسیم ماترک متوفی به شرح ذیل می باشد:

I- فرزند ذکور دو برابر هز یک از دختران و یا همسر متوفی، حق الارث خواهد داشت و در مورد (یک پسر و دو دختر و یک همسر) به طور مثال ماترک او بعد از وضع حقوق قانونی به پنج قسمت مساوی تقسیم می گردد و فرزند ذکور دو سهم و دختران و همسر متوفی هریک از مال الارث یک سهم خواهد داشت.

II- در صورتی که دختران در زمان حیات پدر ازدواج کرده باشد مبلغ جهیزیه از سهم آنها کسر می گردد.

III- در صورتی که مبلغ مهریه همسر متوفی از سهم الارث باشد سایر وراث موظفند مهریه را پرداخت نمایند.

ج- نظریه شماره ۷/٦٦۰ مورخ ۱۳۷۹/۳/۱۸:

با توجه به قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی کلیمی و مسیحی، مصوب تیرماه ۱۳۷۲ مجمع تشخیص مصلحت نظام تقسیم ترکه متوفای ایرانی زرتشتی تابع مقررات مذهب متوفی می باشد.

د – نظریه شماره ۷/۱۰۷٦ مورخ ۱۳۷۹/۲/۲۳:

مستنداً به قانون رسیدگی به دعاوی مطروحه راجع به احوال شخصیه و تعلیمات دینی ایرانیان زرتشتی، کلیمی و مسیحی مصوب ۱۳۷۲/٤/۳ مجمع تشخیص مصلحت نظام چنانچه احد از وراث متوفای غیرمسلمان، مسلمان باشد یا بعداً مسلمان شود، تقسیم ماترک وی فقط براساس قواعد مسلم حین الفوت متوفی به عمل می آید و مقررات ماده (۸۸۱) مکرر قانون مدنی در مورد متوفای مسلمان است.

ه– نظریه شماره ۷/۳٤۱۲ مورخ ۱۳۷۷/۵/۱۲:

I– در صورتی که دو تبعه ایرانی با همدیگر ازدواج نموده و قرارداد جداگانه در مورد تقسیم اموال اکتسابی در دوره زناشویی بین خود تنظیم نکرده باشند، با رعایت مقررات مربوطه به ارث (در صورت فوت احد از آنها) یا مقررات مربوط به طلاق (در صورت وقوع طلاق) هریک مالک اموال اکتسابی خود خواهند بود.

II– چنانچه زوج تبعه ایران در دوره زناشویی فوت نماید دو حالت ممکن است پیش آید:

الف– زوج شیعه بوده و دارای اولاد باشد، زوجه یک هشتم بهای اعیانی اشجار موجود را ارث می برد (مواد ۹۰۱ و ۹٤۷ قانون مدنی) و چنانچه اولاد نداشته باشد یک چهارم بهای اعیانی و اشجار موجود در غیر منقول ارث می برد (مواد ۹۰۱ و ۹٤۷ قانون مدنی).

ب– چنانچه زوج پیرو مذهب اهل سنت یا مسیحی یا کلیمی یا زرتشتی باشد، سهم زوجه مطابق مقررات مربوط به مذهب متوفی خواهد بود (اصول ۱۲و ۱۳ قانون اساسی و قانون رعایت احوال شخصیه ایرانیان غیرشیعه مصوب ۱۳۱۲ و رأی لازم الاتباع هیأت عمومی).

و– نظریه شماره ۷/۵۱٦۰ مورخ ۱۳۷۵/۸/۷:

با لحاظ این که متقاضی حصر وراثت دارای کارت پناهندگی است و با توجه به ماده ۱۲ و بند «۱» و «۲» ماده ۱٦ کنوانسیون ژنو، پناهندگان حق دارند برای تظلم و احقاق حق خود به دادگاه های کشور محل پناهندگی مراجعه کنند و از جهت احوال شخصیه نیز تابع قوانین همان محل خواهند بود، بنابراین چنانچه متقاضی دارای مذهب رسمی ایران «شیعه» باشد وفق مقررات مبحث ارث در قانون مدنی ماترک متوفی پس از کسر هزینه کفن و دفن و دیون متوفی یک هشتم اموال غیرمتفول و قیمت اعیان غیرمتقول سهم زوجه و مابقی ماترک او بین فرزندانش به نسبت سهم پسر دو برابر دختر تقسیم می گردد. و چنانچه متوفی اهل سنت باشد با رعایت ماده و احده راجع به رعایت احوال شخصیه ایرانیان غیرشیعه د رمحاکم مصوب ۱۳۱۲ طبق مذهب متوفی «شوهر» و براساس فتوای علمای آن مذهب ماترک وی تقسیم می گردد، اضافه می نماید که در مذهب عامه زن از تمام ماترک متوفی ارث می برد نه از قیمت اعیانی غیرمنقول.

ز– نظریه شماره ۷/٤۱۱۹۷ مورخ ۱۳۷۰/۷/۱۰:

« به موجب اصل سیزدهم قانون اساسی جمهوری اسلامی ایران ایرانیان زرتشتی، کلیمی و مسیحی تنها اقلیت های دینی شناخته می شوند که در حدود قانون در انجام مراسم دینی خود آزادند و در احوال شخصیه و تعلیمات دینی برطبق آیین خود عمل می کنند و همچنین طبق قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲ محاکم باید قواعد و عادات مسلمه متداوله ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده در مسائل مربوط به ارث و وصیت در مذهب متوفی را رعایت نمایند و رأی وحدت رویه شماره ۳۷ مورخ ۱۳٦۳/۹/۱۹ هیأت عمومی دیوان عالی کشور نیز مبین موضوع است.

به موجب ماده ٦٦ آیین نامه مربوط به احوال شخصیه ارامنه که به وسیله شورای خلیفه گری ارامنه تدوین شده اگر متوفی راجع به ترکه نه وصیت کرده و نه وارث قانونی باقی گذارده باشد آخرین وارث او خلیفه گری محسوب و خلیفه گری ترکه متوفی را برای مقاصد عام المنفعه و خیریه به کار خواهد برد. بنابراین با توجه به مراتب فوق الاشعار چنانچه متوفی وصیتی ننموده و بلا ارث بودن وی نیز محرز باشد باید طبق قواعد و عادات مسلم در مذهب متوفی عمل شده و وجوه باقیمانده از متوفی به خلیفه گری ارامنه تسلیم گردد.

ح– نظریه شماره ۷/٦۱٤۹ مورخ ۱۳۷۵/۱۰/۱۱:

اگر متوفی اهل سنت باشد با رعایت ماده واحده راجع به رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲ طبق مذهب متوفی و بر اساس فتوای علمای آن مذهب، ماترک وی تفسیم می گردد که در این خصوص، متقاضی می تواند فتوای معتبر یکی از علمای مذهب متوفی را اخذ و ضمیمه دادخواست نماید و دادگاه با استناد به آن نسبت تقسیم ماترک پس از کسر هزینه کفن و دفن و دیون متوفی اظهارنظر کند که به هرحال، در مورد سئوال، یک هشتم از کل ماترک متوفی اعم از متقول و غیرمنقول سهمی زوجه و مابقی ترکه به نسبت سهم پسر دو برابر دختر بین فرزندان او تقسیم می گردد.

۳- در مسائل مربوط به فرزند خواندگی: عادات و قواعد مسلمه متداوله در مذهبی که پدرخوانده یا مادرخوانده پیرو آن است.[۷]

- ماده ۹۸۰: کسانی که به امور عام‌المنفعه ایران خدمت یا مساعدت شایانی کرده باشند و همچنین اشخاصی که دارای عیال ایرانی و از او اولاد دارند و یادارای مقامات عالی علمی و متخصص در امور عام‌المنفعه هستند و تقاضای ورود به تابعیت دولت جمهوری اسلامی ایران را می‌نمایند در صورتی که‌دولت ورود آنها را به تابعیت دولت جمهوری اسلامی ایران صلاح بداند بدون رعایت شرط اقامت ممکن است با تصویب هیأت وزراء به تبعیت ایران‌قبول شوند.

- ماده ۱۳۱۳: شهادت اشخاص ذیل پذیرفته نمی‌شود.

۱ - اشخاص ولگرد و کسانی که تکدی را شغل خود قرار دهند.

ط- نظریه شماره ۷/٦۱٤۹ مورخ ۱۳۷۵/۱۰/۱۱: اگر متوفی اهل سنت باشد با رعایت ماده واحده راجع به رعایت احوال شخصیه ایرانیان غیر شیعه و رای لازم الاتباع هیات عمومی دیوان عالی کشور ماترک وی با اخذ فتوای معتبر از یکی از علمای مذهب متوفی تقسیم می شود. درخصوص مورد یک هشتم کل ماترک به همسر و بقیه به فرزندانشان به نسبت پسر دو برابر دختر تعلق می گیرد.

ی- نظریه شماره ۷/۷۷۹۱ مورخ ۱۱/۲۹/ ۱۳۷۳:

I- با توجه به عام و کلی بودن مواد ۳٦۰و ۳٦۲ قانون امور حسبی در مورد تصدیق انحصار وراثت پذیرش درخواست و صدور گواهی حصر وراثت، الزامی است.

II- با توجه به اصل سیزدهم قانون اساسی جمهوری اسلامی ایران اقلیت های دینی شناخته شده شامل ایرانیان زرتشتی، کلیمی و مسیحی می باشد محاکم ایران با لحاظ ماده واحده قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب ۱۳۱۲ مکلفند قواعد و عادات مسلمه متداول در مذهب آنان را نسبت به احوال شخصیه و حقوق ارثیه و وصیت جز در مواردی که مقررات قانون راجع به انتظامات عمومی باشد رعایت کنند، در مورد اشخاص موضوع استعلام و سایر ایرانیانی که فاقد مذهب شناخته شده هستند صدور گواهی حصر وراثت تابع مقررات قانون مدنی است.

یا- نظریه شماره ۷/٦۹٦۵ مورخ ۱۳٦٦/۱۰/۲۰:

با توجه به اصل (۱۳) قانون اساسی جمهوری اسلامی ایران، ایرانیانی که مذهب آنه ها به رسمیت شناخته شده عبارتند از زرتشتی ها، مسیحی ها، و کلیمی ها و پیروان این مذاهب با لحاظ ماده واحده قانون اجازه رعایت شخصیه ایرانیان غیرشیعه و رأی وحدت رویه دیوان کشور نسبت به انجام مراسم دینی وارث و وصیت و موارد دیگر آزاد هستند ولی پیروان فرقه بهائیت مثل سایر ایرانیان غیر از پیروان مذهب اسلام و مذاهب به رسمیت شناخته شده از لحاظ ارث تابع مقررات جمهوری اسلامی ایران هستند.

یب- نظریه شماره ۷/۵۱۳۵ مورخ ۱۳٦۲/۱۲/۲:

بنابر مستنبط از ماده واحده قانون اجازه رعایت احوال شخصیه ایرانیان غیرشیعه در محاکم مصوب مرداد ماه ۱۳۱۲ که مقرر داشته نسبت به احوال شخصیه و حقوق ارثیه و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده محاکم باید قواعد و عادات مسلمه متداوله در مذهب آنان را جز در موردی که مقرات قانون راجع به انتظامات عمومی باشد به طریق مذکور در بندهای آن ماده واحده رعایت نمایند به نظر می رسد در صورتی که متوفی ایرانی غیرشیعه بوده که مذهب او به رسمیت شناخته شده ورثه قانونی ندارد بر فرض صحت مرتب عنوان شده از طرف مقامات ذی صلاح در مذهب متوفی باید برطبق قواعد و عادات مسلمه در مذهب متوفی رفتار گردد.

۷- بخشنامه شماره ۷/۲۸۷۳ مورخ ۱۳۳۷/٤/۱۵ وزیر دادگستری به کلیه محاکم دادسرا:

برطبق ماده واحده مصوب تیر ماه ۱۳۱۲ محاکم باید در احوال شخصیه و احکام ارث و وصیت ایرانیان غیرشیعه که مذهب آنان به رسمیت شناخته شده قواعد و عادات مسلمه متداوله در مذهب آنان را رعایت نمایند مگر آن که آن قواعد مخالف قوانین راجع به انتظامات عمومی باشد و چون مذهب تسنن و جماعت یکی از مذاهب رسمی است در مورد ارث و سایر امور مربوط به احوال شخصیه قواعد مسلمه و متداوله آن مذهب (به فتوی و اعلام مراجع صلاحیت دار مذهبی آنها) بایستی از طرف محاکم مورد توجه قرار گیرد.

۲ – اشخاص معروف به فساد اخلاق.
۳ – کسی که نفع شخصی در دعوی داشته باشد.
٤ – شهادت دیوانه در حال دیوانگی.
۵ – کسانی که عدالت شرعی آنها محرز نباشد.
– ماده ۱۳۱۳ مکرر: در شاهد بلوغ – عقل – عدالت – ایمان و طهارت مولد شرط است.
تبصره: عدالت شاهد باید با یکی از طرق شرعی برای دادگاه احراز شود.

*** قوانین متفرقه (۱۹۷۹– ۲۰۰٦)**

*** قانون فعالیت احزاب، ... اقلیتهای دینی (۱۹۸۲/۱۳٦۱/۳/۳۰)**

فصل چهارم – اقلیتهای دینی
ماده ۳۷ – متقاضیان تشکیل انجمن اقلیتهای دینی موضوع اصل ۱۳ قانون اساسی باید همگی از اعضای یک اقلیت شناخته شده باشند.
ماده ۳۸ – در مرامنامه تشکیل انجمن باید اهداف کاملاً مشخص و در برگیرنده حل مشکلات و مسائل دینی فرهنگی، اجتماعی و رفاهی ویژه آن اقلیت باشد.
تبصره ۱ – مسائل دینی شامل موارد زیر می‌باشد.
الف – برگزاری مراسم مذهبی عادی
ب – برگزاری جشنها و اعیاد و مراسم سوگواری مذهبی
ج – برگزاری سخنرانیها و یا سمینارهای تبلیغی
د – نشر کتب و مقالات و مجلات مذهبی
ه – دعوت از مبلغین مذهبی سایر کشورها
و – تعمیر معابد و امکنه مقدسه
تبصره ۲ – بررسی مسائل فرهنگی شامل موارد زیر می‌باشد.
الف – نشر زبان خاص مربوط به خود از طریق تشکیل کلاسهای خصوصی و نشریه
ب – ایجاد مدارس و سایر مؤسسات فرهنگی مانند چاپخانه، زبانکده و هنرکده
تبصره ۳ – بررسی مسائل اجتماعی شامل موارد زیر می‌باشد.
الف – ایجاد صندوق و مؤسسات خیریه
ب – ایجاد مراکز درمانی
ج – ایجاد تعاونیهای تولید و توزیع
د – ایجاد مهد کودک و مراکز نگهداری سالمندان
ه – ایجاد باشگاه‌های ورزشی و تفریحات سالم
و – برگزاری مراسم و اعیاد قومی

ز – انجام گردشهای علمی، تفریحی و مذهبی

ماده ۳۹ – کلیه موارد مطرح شد که در ماده ۳۸ و تبصره‌های ذیل آن نباید ناقض قوانین و مقررات مملکتی باشد و تشخیص انطباق یا عدم آن به عهده کمیسیون ماده ۱۰ قانون احزاب می‌باشد.

ماده ٤٠ – اساسنامه انجمن اقلیتهای دینی علاوه بر شرایط قید شده در تبصره ۳ ماده ۳ آیین‌نامه اجرایی قانون احزاب باید در برگیرنده نکات زیر باشد.

الف – رابطه انجمن با سایر اقلیتهای دینی

ب – رابطه انجمن با همکیشان سایر کشورها

د – رابطه انجمن با همکیشان خارجی مقیم ایران

ه – رابطه انجمن با همکیشان ایرانی مقیم خارج

ماده ٤١ – انجمنهای مذاهب مختلف یا اقلیت می‌توانند تشکیل یک انجمن مشترک دهند.

– اصلاح قانون ثبت احوال (١٩٨٤/١٣٦٣/١٠/٢٤)

ماده ۹ – ماده ۲۰ قانون مذکور (مصوب ۱۹۷۷/۱۳۵۵) به شرح زیر اصلاح و ٦ تبصره به آن الحاق می‌گردد:

ماده ۲۰ – انتخاب نام با اعلام‌کننده است، برای نامگذاری یک نام ساده یا مرکب (حسین، محمد مهدی و مانند آن) که عرفا یک نام محسوب می‌شودانتخاب خواهد شد.

تبصره ۱ – انتخاب نامهایی که موجب هتک حیثیت مقدسات اسلامی می‌گردد و همچنین انتخاب عناوین و القاب و نامهایی زننده و مستهجن یا نامتناسب با جنس ممنوع است.

تبصره ۲ – تشخیص نامهای ممنوع با شورای عالی ثبت احوال می‌باشد و این شورا نمونه‌های آن را تعیین و به سازمان اعلام می‌کند.

تبصره ۳ – انتخاب نام در مورد اقلیتهای دینی شناخته شده در قانون اساسی تابع زبان و فرهنگ دینی آنان است.

تبصره ٤ – در اسناد سجلی اقلیتهای دینی شناخته شده در قانون اساسی کشور نوع دین آنان قید می‌شود.

تبصره ۵ – ذکر سیادت در اسناد سجلی ساداتی که سیادت آنان در اسناد سجلی پدر و یا جد پدری مندرج باشد و یا سیادت آنان به دلائل شرعی ثابت‌گردد الزامی است مگر کسانی که خود را سید ندانند و یا عدم سیادت آنان شرعاً احراز شود.

تبصره ٦ – مراتب تشرف پیروان ادیان دیگر به دین مبین اسلام همراه با تغییرات مربوط به نام و نام خانوادگی آنان در اسناد سجلی ثبت می‌شود.

– قانون مالیاتهای مستقیم (اصلاحیه ۱۹۸۷/۱۳٦٦/۱۲/۳)

ماده ۲ – اشخاص زیر مشمول پرداخت مالیات‌های موضوع این قانون نمی‌باشند.

۱ – وزارتخانه‌ها و مؤسسات دولتی و دستگاههایی که بودجه آنها وسیله دولت تأمین می‌شود و شهرداری‌ها و مؤسسات وابسته به دولت وشهرداری‌ها که به صورتی غیر از شرکت طبق قوانین تأسیس شده باشند.

۲ – جمعیت هلال احمر جمهوری اسلامی ایران، سازمان تأمین اجتماعی، صندوق‌های پس‌انداز بازنشستگی، مدارس علوم اسلامی، جامعه‌الامام‌الصادق (ع) و نهادهای انقلاب اسلامی و صندوق عمران موقوفات کشور مادام که درآمد صندوق مزبور صرف امور عمران موقوفات وتأمین هزینه‌های سازمان حج و اوقاف و امور خیریه می‌گردد.

تشخیص مدارس علوم اسلامی به عهده شورای مدیریت حوزه علمیه قم و نهادهای انقلاب اسلامی با هیأت وزیران است.

۵ – انجمن‌ها یا هیأتهای مذهبی مربوط به اقلیت‌های دینی مذکور در قانون اساسی مشروط بر این که رسمیت آنها به تصویب وزارت کشور رسیده و درآمد و هزینه آنها توسط سازمان حج و اوقاف و امور خیریه تأیید شده باشد.

– قانون گزینش معلمان و کارکنان آموزش و پرورش (۱۳۷٤/٦/۱٤/ ۱۹۹۵)

ماده ۱ – گزینش مربیان پرورشی، معلمان و کلیه کارکنان آموزش و پرورش بر اساس فرمان مورخ ۱۵، ۱، ۱۳٦۱ حضرت امام خمینی به شرح زیر خواهد بود:

ضوابط:

ماده ۲ – ضوابط عمومی گزینش اخلاقی، اعتقادی و سیاسی کارکنان آموزش و پرورش و .... علاوه بر داشتن شرایط عمومی استخدام، (صلاحیت علمی و توانائی جسمی و روانی)، به قرار ذیل است:

۱ – اعتقاد به دین مبین اسلام و یا یکی از ادیان رسمی مصرح در قانون اساسی جمهوری اسلامی ایران.

۲ – التزام عملی به احکام اسلام.

۳ – اعتقاد و التزام به ولایت فقیه، نظام جمهوری اسلامی و قانون اساسی.

٤ – عدم اشتهار به فساد اخلاقی و تجاهر به فسق.

۵ – عدم سابقه وابستگی تشکیلاتی، هواداری از احزاب و سازمان‌ها و گروه‌هائی که غیر قانونی بودن آن‌ها از طرف مقامات صالحه اعلام شده و یا می‌شود مگر آن که توبه ایشان احراز شود.

٦ – عدم سابقه محکومیت کیفری مؤثر.

۷ – عدم اعتیاد به مواد مخدر.

تبصره ۱ – در خصوص بند ۲ اقلیت‌های مذهبی مصرح در قانون اساسی از نظر اعتقادی و عملی با رعایت قوانین و مقررات مربوطه تابع شرائط خاص خود می‌باشند و در هر حال نباید متجاهر به نقض احکام اسلامی باشند.

تبصره ۲ – ایثارگران در گزینش دارای اولویت می‌باشند ودر موارد محدودیت ظرفیت و کثرت تقاضا، ملاک‌های تقدم (مانند مناطق محروم، فعالیت در نهادهای انقلاب، شرکت در نماز جمعه و جماعات، پوشش چادر برای خواهران) نیز نسبت به داوطلبان اعمال می‌گردد.

– قانون تسری قانون گزینش معلمان و کارکنان آموزش و پرورش به کارکنان سایر وزارتخانه‌ها و سازمان‌ها و مؤسسات وشرکت‌های دولتی (۱۹۹۳/۱۳۷۵/۲/۹)

ماده واحده – به منظور اجرای کامل فرمان حضرت امام (ره) و اعمال سیاست واحد در گزینش‌های سراسر کشور، امر گزینش و اجرای ضوابط و مقررات مربوط به آن در کلیه وزارتخانه‌ها، سازمان‌ها، مؤسسات و شرکت‌های دولتی، شرکت‌های ملی نفت و گاز و پتروشیمی، سازمان گسترش و نوسازی صنایع ایران، سازمان صنایع ملی ایران، جمعیت هلال احمر، شهرداری‌ها، سازمان تأمین اجتماعی، بانک‌ها، مؤسسات و شرکت‌های دولتی که‌شمول قانون بر آن‌ها مستلزم ذکر نام است، مؤسسات و شرکت‌هایی که تمام یا قسمتی از بودجه آن‌ها از بودجه عمومی تأمین می‌شود و همچنین‌گزینش کارکنانی که به دستگاه‌های مشمول قانون گزینش معلمان و کارکنان آموزش و پرورش مأمور یا منتقل گردند و نهادهای انقلاب اسلامی تابع‌احکام مقرر در قانون مذکور خواهند بود.

- قانون رسیدگی به تخلفات اداری (مصوبه ۱۹۹۳/۱۳۷۲/۹/۱۷)

ماده ۸ – تخلفات اداری به قرار زیر است:

۱ – اعمال و رفتار خلاف شئون شغلی یا اداری.

۵ – اخاذی.

٦ – اختلاس.

۱۲ – ارتباط و تماس غیر مجاز با اتباع بیگانه.

۱۷ – گرفتن وجوهی غیر از آن چه در قوانین و مقررات تعیین شده یا اخذ هر گونه مالی که در عرف رشوه‌خواری تلقی می‌شود.

۲۰ – رعایت نکردن حجاب اسلامی.

۲۱ – رعایت نکردن شئون و شعایر اسلامی.

۲۳ – استعمال یا اعتیاد به مواد مخدر.

۳٤ – عضویت در یکی از فرقه‌های ضاله که از نظر اسلام مردود شناخته شده‌اند.

۳٦ – عضویت در سازمانهایی که مرامنامه یا اساسنامه آنها مبتنی بر نفی ادیان الهی است یا طرفداری و فعالیت به نفع آنها.

۳۷ – عضویت در گروه‌های محارب یا طرفداری و فعالیت به نفع آنها.

۳۸ – عضویت در تشکیلات فراماسونری.

- قانون مرخصی ویژه اقلیتهای دینی

بخشنامه شماره ۲۰۳۰۲/۲۸۵۱۸ مورخ ۱۳۷۸/۵/۳۰ (۱۹۹۹) سازمان امور اداری و استخدامی کشور. پیرو بخشنامه‌های شماره ۹۹٤۱٦ مورخ ۱۳٦٦/۱۰/۳، شماره ۱۰٦۳۲ مورخ ۱۳٦۹/۱/۲۹ و شماره ۱۰۰٤٦ مورخ۱۳۷۲/۷/۵ و نظر به تأکید بر حقوق ایرانیان زرتشتی، کلیمی، و مسیحی در اصل سیزدهم قانون اساسی جمهوری اسلامی‌ایران در خصوص انجام مراسم دینی طبق آیین‌نامه مربوط و با عنایت به احترام دولت و ملت اسلامی ایران نسبت به اعیاد مذهبی و مناسبتهای قومی پیروان ادیان و مذاهب مختلف، مقتضی است کلیه وزارتخانه‌ها، مؤسسات و شرکتهای دولتی ونهادهای انقلاب اسلامی در خصوص اعطای مرخصی استحقاقی به کارکنان اقلیتهای دینی در ایام اعیاد مذهبی و مناسبتهای ویژه، به شرح تکمیلی پیوست همکاری لازم مبذول دارند.

- فهرست اعیاد مذهبی و مناسبتهای قومی اقلیتهای زرتشتی ،کلیمی و مسیحی

الف ـ اعیاد مذهبی و مناسبتهای ویژه اقلیت زرتشتی

ـ تولد زرتشت پیامبر(زاد روز اشو زرتشت)

ـ روز بزرگداشت شهدا و درگذشتگان

ـ جشن مهرگان

- درگذشت زرتشت پیامبر(درگذشت آشو زرتشت)

ـ جشن سده

ب ـ اعیاد مذهبی و مناسبتهای ویژه اقلیت کلیمی

ـ پسح عید فطیر

– شاو و عوت(نزول تورات)

– روش هشانا (اول سال نو)

– کیپور(روزه بزرگ)

– سوکرت (عید سایبانها)

– پوریم

ج ـ اعیاد مذهبی و مناسبتهای ویژه مسیحیان آشوری

– عید میلاد مسیح (ع)

– سال نو میلادی

ـ عید تعمید حضرت مسیح(ع)

ـ روزه نینوا

– عید اوشانا

ـ عید پاک

– عید عروج مسیح (ع)

– عید نیطیکاست

د ـ اعیاد مذهبی و مناسبتهای ویژه مسیحیان ارمنی کاتولیک

ـ عید میلاد مسیح (ع)

– عید سال نو میلادی

ـ عید تعمید مسیح(ع)

– عید رهبران مذهبی ارامنه

ـ عید شهدای وارطاناش

ـ عید پاک

ـ روز شهدای ارمنی

هـ ـ اعیاد مذهبی و مناسبتهای ویژه مسیحیان ارمنی گریگوری

– روز مسروب مقدس

ـ سال نو مسیحی

ـ تولد و غسل تعمید مسیح (ع)

ـ روز وارطان مقدس

– عید پاک

ـ روز شهدای ارمنی

- آیین‌نامه نحوه پرداخت یارانه به احزاب و گروه‌های مشمول «قانون فعالیت احزاب، جمعیتها و انجمنهای سیاسی و صنفی و انجمنهای اسلامی با اقلیتهای دینی شناخته شده». ۲۰۰۱/۱۳۸۰.۰۸.۳۰

شماره ۳۸٤۸۰ . ت ۲۵۵٦ هـ ۱۳۸۰.۹.۱۷ وزارت کشور

هیأت وزیران در جلسه مورخ ۱۳۸۰.۸.۳۰ بنا به پیشنهاد شماره ۸۲۵۳۵.۱.۱۱ مورخ ۱۳۸۰.۸.۲۱ وزارت کشور و به استناد اصل یکصد و سی وهشتم قانون اساسی جمهوری اسلامی ایران، آیین‌نامه نحوه پرداخت یارانه به احزاب و گروه‌های مشمول« قانون فعالیت احزاب، جمعیت‌ها وانجمن‌های سیاسی و صنفی و انجمن‌های اسلامی یا اقلیت‌های دینی شناخته شده را به شرح زیر تصویب نمود:

ماده ۱ـ پرداخت یارانه‌های تخصیصی طبق دستورالعملی که متعاقباً توسط وزارت کشور تهیه و به تصویب کمیسیون ماده (۱۰) قانون فعالیت احزاب،جمعیت‌ها و انجمن‌های سیاسی و صنفی و انجمن‌های اسلامی یا اقلیت‌های دینی شناخته‌شده - مصوب ۱۹۸۱/۱۳٦۰ می‌رسد انجام می‌گیرد.

- تخصیص اعتبار به وزارت کشور به منظور کمک جهت انجام امور اقلیتهای دینی

شماره : .٤۷٤۸۱ت۲۹۷۲۹ه¨ تاریخ : ۲۰۰۳/۱۳۸۲.۰۹.۰٤

سازمان مدیریت و برنامه‌ریزی کشور

هیأت وزیران در جلسه مورخ ۱۳۸۲.۸.۲۸ بنا به پیشنهاد شماره ۱۰۱.۱۵۹٦٦۷ مورخ ۱۳۸۲.۸.۲۲سازمان مدیریت و برنامه‌ریزی کشور و به استناد ماده (۵۵) قانون محاسبات عمومی کشور ـ مصوب ۱۳٦٦ ـ تصویب نمود:

۱ ـ مبلغ هشت میلیارد و هفتصد و پنجاه میلیون (۸٫۷۵۰.۰۰۰.۰۰۰) ریال از محل اعتبار ردیف ۵۰۳۰۰۱ (هزینه‌های پیش‌بینی نشده) قانون بودجه سال ۱۳۸۲ کل کشور، به منظور کمک جهت انجام امور اقلیتهای دینی دراختیار وزارت کشور قرار گیرد تا برابر قوانین و مقررات مربوط به مصرف برسد.

۲ ـ به استناد بند (ت) تبصره (۱) قانون بودجه سال ۱۳۸۲ کل کشور، اعتبار یادشده به صورت خارج از شمول قانون محاسبات عمومی هزینه خواهد شد.

Synopses

English Abstract

Shiite Tradition, Rationalism and Modernity: The Codification of the Rights of Religious Minorities in Iranian Law (1906 - 2004)

The Constitutional Revolution (1905-1911) represents the first direct encounter between traditional Shiite Islam and modernity in Iran. All the earlier attempts at modernization, although involving important changes were conducted in areas only marginally connected with underlying traditional values. In this Revolution, new ideas and terms emerged for the first time, among them, the idea of a Constitution, the limitation and separation of government power, freedom, state, the nation (*millat*) of Iran and especially the equality of all people before the law. The traditionalist, whether governors or clerics, who held their criteria on the basis on the Islamic Shiite doctrines, opposed with some new concepts such as the equality of all people before the law. The main subject of this dissertation concerns a study and evaluation of the encounter of the Shiite legal doctrines with modern ideas, especially those which have something to deal with the rights of religious minorities in Iranian laws. It was not until 1906 that Iran did not have the official, legislative body; hence, the legal status of the religious minorities was based on the legal opinions that had been firmly rooted based on such Islamic sources, as the Quran and the *Sunna* and the *fiqh*-oriented opinions of precedent jurists. The explanation of those opinions and their developments in the Iranian laws during last century constitutes the content of the chapters of dissertation. The result of the explanation is that the status of religious minorities in Iranian law has improved over the last century, compared with their situation in *fiqh*-oriented opinions but the new social legal situation was a result of modernization and its influence on the governors and clerics, not of purely theological legal discussions existed among theologians and jurists. Finally, two strategic solutions are suggested the result of which is expected to find expression in a new modus operandi of *ijtihad which* would try to offer some suggestions to improve the status of the religious minorities in the Iranian law.

Key Words: Modernism, Shiite *fiqh*, Islamic Law, Religious Minorities, Iranian Law

German Abstract

Kurze Darstellung der Doktorarbeit

Shiitische Tradition, Rationalität und Modernität:

die Kodifizierung der Rechte der religiösen Minderheiten im iranischen Gesetz zwischen 1906 - 2004

Die hinter dieser Dissertation steckende Hauptmotivation ist mein Wunsch gewesen, die Kultur des Dialoges und Gedankenaustausches im Iran zu unterstützen. Die Sache geht zurück in die Zeit, als ich ein wichtiges Werk des Christentums, d.h. *Die Nachahmung Christi* von Thomas A. Kémpis ins Persische übersetzte (2002); das Werk erheischte viel Aufmerksamkeit und ich merkte, dass es einen wirklichen Bedarf gibt, diesen Aspekt der iranischen Kultur zu verstärken. Es besteht jedoch ein Haupthindernis für mehr Dialog und eine bessere Koexistenz von verschiedenen Anhängern der Religionen im Iran, und zwar *fiqh* (islamisches Recht)-orientierte Meinungen (*fatāwā*) der schiitischen Rechtsgelehrten, eingebettet in der Geschichte der nicht ethisch-mystischen Lehren der schiitischen Tradition. Diese Meinungen als nicht-kodifizierte Vorschriften existierten bis zum Ende des neunzehnten Jahrhunderts unter normalen Menschen, Geistlichen sowie Eliten. Das ist der Grund, warum die Dissertation auf die Bewertung der muslimischen Quellen setzt, vor allem der schiitischen, im Hinblick auf die Rechte der religiösen Minderheiten, um den Prozess der Bildung jener juristischen Meinungen herauszufinden. In den ersten Jahren des zwanzigsten Jahrhunderts, während der konstitutionellen Revolution von 1906, erlebte die schiitische Tradition die Begegnung mit neuen Konzepten und Institutionen der modernen Zeit, und einige der *fiqh*-orientierten Meinungen gingen in neuer Kleidung in die Verfassung und andere Gesetze und Verordnungen ein.

Jetzt, nach über hundert Jahren, sind nur noch wenige von diesen *fiqh*-orientierten Meinungen über religiöse Minderheiten in den iranischen Gesetzen übrig geblieben. Diese aus fünf Kapiteln bestehende Studie bewertet im **Kapitel Eins** die Bildung der Rechte und / oder Pflichten der religiösen Minderheiten in den schiitischen Quellen

einschließlich des Koran, der *Sunna* und der *fiqh*-orientierten Meinungen. Angesichts der Tatsache, dass der erste Einfluss auf den Status der religiösen Minderheiten in der iranischen Gesellschaft im neunzehnten Jahrhundert auf das zurückgeht, was in diesen Quellen eingebettet ist, erscheint es als notwendig, sie ausführlich zu prüfen, um die Grundlagen und wahrscheinlich Veränderungen der Rechte der religiösen Minderheiten in den iranischen Gesetzen herauszufinden.

Während diese Quellen so unklare Aussagen bezüglich des Themas haben, dass es schwierig ist, sie konsequent zu kategorisieren und ein endgültiges Urteil abzugeben, bildeten die meisten schiitischen Rechtsgelehrten, im Anschluss an die Pioniere, einen juristischen Korpus, durch den die religiösen Minderheiten einen minderwertigen rechtlichen Status in den muslimischen Gesellschaften zugesprochen bekamen. Die Regelungen, die allmählich eine göttliche Färbung annahmen, wurden ihnen aufgedrängt, verbunden mit der Hoffnung auf ihre Konvertierung zum Islam. Die Annahme, dass die Erlösung auf eine bestimmte Religion beschränkt ist, war die Basis der Gestaltung von *fiqh*-orientierten Meinungen über Nicht-Muslime in *Dar al-Islam*. Mit diesen Rechtsmeinungen beschäftigt sich **Kapitel Eins.**

Dann, von 1906 an, fand Iran zum ersten Mal kodifizierte Rechts- und Verwaltungsvorschriften. Die sozio-kulturellen und wirtschaftlichen Hintergründe der Revolution von 1906 und die Umstände der religiösen Minderheiten in der zweiten Hälfte des neunzehnten Jahrhunderts ist die wichtigste Frage des **Kapitels Zwei**. Nach den Analysen wird sich zeigen, dass der iranische Konstitutionalismus, unter dem Einfluss des Nationalismus-Paradigmas jener Zeit, ein Instrument zur Reformierung der Qājār-Regierung und zur Konsolidierung des Prestiges Irans in der Region war. Die allgemeinen Merkmale von Musaffar al-Din Shāh und vor allem die politische Situation in der Region waren Mitursache für einen Bedarf an Reformen in den ersten Jahren des zwanzigsten Jahrhunderts.

Die Forderung nach Reformen wurde dann gleichzeitig unterstützt durch Proteste der Bevölkerung gegen die Diktatur des Regimes sowie gegen die Tyrannei und die Korruption der lokalen Gouverneure. Die Architekten der Verfassung haben neue Begriffe und Konzepte eingefügt, die in ihren Gesprächen als erste Schritte in Richtung einer Modernisierung Irans angesehen werden. Die Debatten zwischen Gegnern und

Anhängern des Konstitutionalismus waren die ersten Konflikte zwischen den Vertretern der Tradition und der Moderne im Iran. Für ein besseres Verständnis dieser Atmosphäre erscheint ein kurzer Bericht dieser Gespräche in diesem Kapitel. Der relevante Punkt ist, dass die religiösen Minderheiten ernsthaft zu der konstitutionellen Revolution von 1906 beigetragen haben. Es ist interessant, dass in dem revolutionären Milieu, wo das ganze Volk zur Reformation geeinigt war, die *fiqh*-orientierten Meinungen über die religiösen Minderheiten ignoriert wurden. Der Punkt wird bei der vorgeschlagenen neuen Methode des *ijtihād* im fünften Kapitel verwendet, wo es um eine Lösung für die Verbesserung des rechtlichen Status der iranischen religiösen Minderheiten geht.

Kapitel drei befasst sich mit der großen Errungenschaft der Revolution, d.h. der Kodifizierung der Verfassung (1906) und ihrer Ergänzung (1907). Durch die Einführung der Autoren der Verfassung und ihrer Methode versucht die vorliegende Studie zu beweisen, dass die Idee der Revolution ursprünglich von der aristokratischen und intellektuellen Klasse der Gesellschaft geplant war. Der größte Teil des Kapitels befasst sich mit der Analyse des Inhalts der Artikel, die die Rechte der religiösen Minderheiten betreffen, und mit der Bedeutung der neuen Begriffe, die in der Verfassung Anwendung fanden. In dem gleichen Kapitel versucht die Untersuchung die Annahme zu beweisen, dass neben solchen Werken wie *Yik Kalama* [ein Wort: die Essenz der Moderne, eine Abhandlung über kodifiziertes Recht], geschrieben von Mustashār al-Dawla im Jahre 1895, die Autoren der Verfassung verschiedene Modelle vor Augen hatten, einschließlich der französischen, belgischen und osmanischen Verfassungen.

Kapitel drei fährt mit der Geschichte der Kodifizierung der Rechts- und Verwaltungsvorschriften in der Pahlawi-Zeit fort. Wir werden sehen, dass Rezā Schāh durch seine Kraft und Autorität, eine neue Dynastie gründete und die Modernisierung in verschiedenen Aspekten zu erweitern versuchte. Die Kodifizierung des Zivil- und Strafgesetzbuches, was der Wunsch der Revolutionäre von 1906 war, verwirklichte sich in jener Zeit. Nach der Kodifizierung des Code civile konnte, Rezā Schāh das Recht der Kapitulation für Ausländer, die im Iran lebten, beenden. Die säkulare Haltung vom Pahlawi-Regim und die Entwicklung der Modernisierung zu jener Zeit gab den religiösen Minderheiten das Gefühl, einen etwas besseren rechtlichen Status in der neuen Situation gewonnen zu haben. Allerdings stellte sich heraus, dass das Regime im Großen und

Ganzen jetzt den Nationalismus und die iranische Identität als eine neue Ideologie den religiösen Tendenzen gegenüber bevorzugte. Die religiösen Gruppen hatten den Eindruck, verloren zu haben. Neben dem despotischen Verhalten des Regimes und dem ausländischen Druck für die Durchführung einiger internationaler Bündnisse, war die gewählte Strategie nicht kompatibel mit den sozialen Tatsachen; das waren die wichtigsten Faktoren, die die meisten Menschen, einschließlich der religiösen Minderheiten, zu dem Glauben brachten, das Regime sei unverbesserlich; sie protestierten gegen Muhammad Rezā Schāh, um eine Änderung der herrschenden Politik und Regierung zugunsten einer demokratischeren zu gewinnen, also gleiche Rechte und mehr Freiheit.

Kapitel vier ist der Erklärung von Entwicklungen zur Zeit der Islamischen Republik gewidmet. 1979 gab es einen Konsens zwischen den verschiedenen Gruppen der Gesellschaft und Politik für eine unvermeidliche Alternative zum Pahlawi Regime. Die religiösen Führer, insbesondere Ayatollah Khomeini, der einen tief greifenden Einfluss auf die Bevölkerung hatte, verlangten allmählich eine islamische Regierung, in der alle Anforderungen erfüllt werden würden. Dementsprechend gelangten die religiösen Führer nach der Revolution zur Islamisierung der Verfassung sowie andrer Gesetze und Verordnungen aus dem Erbe des früheren Regimes. Das Kapitel enthält die Geschichte der Vorbereitung der ersten Entwürfe der Verfassung von 1979 und dann die Verbesserungen, die zur Kodifizierung der letzten Version führten. Darüber hinaus werden die neuen Begriffe und die Artikel analysiert, die eine Verbindung haben mit den Rechten der religiösen Minderheiten in der Verfassung, dem Bürgerlichem Gesetzbuch, dem Islamischen Strafgesetzbuch, und anderen Vorschriften in der betreffenden Periode. Der entscheidende Punkt ist, dass die religiösen Minderheiten, welche über ein Prozent der Bevölkerung sind, einen schlechteren rechtlichen Status in den Rechts- und Verwaltungsvorschriften der neuen Zeit bekamen und wieder mehr oder weniger als *dhimma* galten. Abgesehen vom Radikalismus in den frühen post-revolutionären Jahren, und trotz der islamischen Färbung der Rechts- und Verwaltungsvorschriften, kann man während der Islamischen Republik einen säkularen (*orfi*) Prozess finden, mit einer Art religiös- legitimer Färbung basierend auf einer " totalitären Haltung".

Man könnte es auch für "Rationalität" unter den Gesetzgebern halten. Der Prozess basiert offenbar auf der Grundlage dieser sozialwissenschaftlichen Regel, dass Säkularismus ständig die Folge Radikalismus ist. Von diesem Zeitpunkt an, bei dem Prozess der Islamisierung der Gesetze, ist die Regierung nicht zurückgekehrt zu *jizya*, *kharāj*, und anderen Vorschriften, wie in schiitischem *fiqh* beschrieben. Wir werden sehen, dass die Säkularisierung langsam bei dem Prozess der Modernisierung weitergeht, und gestärkt wird durch die Einrichtung von einer neuen Institution, d.h. dem "Der Rat zur Feststellung der Regierungsinteressen" (*majmaʿ tashkhīṣ maṣlaḥa*), in der Verfassung und in dem politischen System. Der Rat ratifizierte doch einige Regelungen zu Gunsten der religiösen Minderheiten.

Im **Kapitel Fünf**, als Abschluss der Arbeit, werde ich unter Hinweis auf die Lektionen, die sich aus der Geschichte ableiten lassen, und basierend auf schiitischen Quellen und Methoden, zwei parallele Wege anbieten als Lösung zur Verbesserung des rechtlichen Status der religiösen Minderheiten im Iran. Die Lösung, die man als eine neue Methode des *ijtihād* betrachten kann, ist nicht nur subjektiv, sie scheint vielmehr mit den Tatsachen der iranischen Gesellschaft in Übereinstimmung zu sein.

Dieser Studie liegt in mehrfacher Hinsicht eine phänomenologische Methode zu Grunde. Im Gegensatz zu einigen muslimischen Denkern, die versuchen, einige Aspekte der Rechte der religiösen Minderheiten in den muslimischen Quellen und Gesellschaften zu unterstreichen und andere Aspekte zu leugnen, versucht diese Untersuchung eine Prüfung von Rechten und Pflichten der religiösen Minderheiten als einem Phänomen in den islamischen Quellen sowie iranischen Rechts- und Verwaltungsvorschriften, wie sie *per se* erschienen sind. Auf diesem Wege ließen sich vielleicht die größten Hindernisse für die Durchführung und Einhaltung der Rechte von Nicht-Muslimen als Bürgern herausfinden.

Stichwörter: Shitisches Recht, Iranisches Gesetz, Religiöse Minderheiten, Rationalität und Modernität im Iran.