The Legal Status of Non-Muslims in the Shiite *Fiqh* and Iranian Laws (1906–2020)

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The Legal Status of Non-Muslims in the Shiite *Fiqh* and Iranian Laws (1906–2020)

By

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Contents

Preface

It is estimated that 1 per cent of the Iranian population is non-Muslim and 30 per cent non-Shiite. The rest have been Shiites since the Safavid dynasty (1501–1722). Isfahan, the city in which I was born, is one of the main places in which Zoroastrians, Jews, Christians, and Sunni Muslims have lived. My desire to help their dialogues emerge developed when I was studying in high school. My motivation was strengthened twenty years later when I translated *The Imitation of Christ*, the classic Christian ethical work by Thomas à Kempis (d.1471), in 2002 in Tehran. As Kempis's book contains global ethical-mystical teachings that are similar to the Islamic ones, the Persian translation is enthusiastically welcomed by all Iranians and provides an opportunity to help advance the dialogue. On the other hand, the experience of learning and teaching legal theory and jurisprudence in the Seminary of Qum (*Ḥawza*) between 1982 and 1997 led me to the conclusion that the main obstacle standing in way of expanding the dialogue and improving the coexistence of the followers of different faiths lies in some rulings held by Shiite jurists whose legacy has gradually taken shape in history. These *fiqhī* opinions, which by the end of the nineteenth century were circulating among ordinary people, clergymen, and the elite, are claimed to be based on scripture and hence the jurists look upon them as the prevailing Islamic rulings. Consequently, the global ethical Islamic teachings that must have affected our lives and better prepared the ground for coexistence, lost their effectiveness in Muslim contexts because of the pressure of the *fiqhī* legal climate. In this work, which is a partial history of Iranian laws between 1906 and 2020, I demonstrate that the main obstacles standing in the way of improving the legal status of non-Muslims in Muslim contexts are *fiqhī* opinions, which are mistakenly regarded as integral to the Islamic faith. I aim to clarify how Islamic Shiite rulings on the legal status of non-Muslims came to be codified in Iranian laws.

The last point is that I tried to evaluate all aspects of the status of non-Muslims in their respective contexts. Thus, unlike some Muslim authors who try to highlight some political and ethical aspects of the issue in Islamic sources and societies and to deny or ignore the contrary legal aspects, I intend to examine the rights and duties of non-Muslims as they are described in the Islamic sources to identify the main obstacles in respecting them as citizens and in observing their rights. It is worth noting that this intention in no way affects the impartiality of my observations.

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Abbreviations

BDF	*British Documents on Foreign Affairs*
CAC Council	the Council of Amendments to the 1979 Constitution
EI2, *EI3*	*Encyclopaedia of Islam*, printed by Brill (2nd and 3rd editions)
EIr	*Encyclopaedia Iranica*
EJ2	*Encyclopaedia Judaica* (second edition)
EQ	*Encyclopaedia of the Quran*, edited by Jane D. McAuliffe
ER	*Encyclopedia of Religion*
EWI	*Encyclopedia of the World of Islam* (*Dānishnāmih Jahān-i Islām*)
FRC Assembly	Assembly for the Final Revision of the 1979 Constitution
HRC	Human Rights Committee
IDF	*Iranian Documents of the Ministry of Foreign Affairs*
IHRC	Iranian Islamic Human Rights Commission
IPC	Islamic Penal Code
ISIS	Islamic State of Iraq and Syria
JE	*Jewish Encyclopedia*
OEMIW	*Oxford Encyclopedia of the Modern Islamic World* (1st edn)
Q	*Quran*
n.d.	no date of publication
n.p.	no place of publication
s.v.	*sub verbo* or under the entry

A Note on Transliterations and Dates

Transliterations of Arabic words follow the system adopted by the *Encyclopaedia of the Quran* (edited by Jane D. McAuliffe) but of Persian words they are done in accordance with their Persian pronunciations. In addition, non-English names and words entered into English, like *Shiite*, *Sunnite*, *Sheikh*, *Ayatollah*, *ulama*, *hadith*, *Ali*, *Hassan*, and *Hussein*, are written in accordance with the *Webster's Third New International Dictionary*. All dates are given in terms of the Common Era, whether they were originally in lunar (*Hijrī*) or solar (*Shamsī*) formats.

Chronology

1848	The reign of Nāṣir al-Dīn Shah
1849	Revolt of Sayyid Ali Muhammad Bāb
1849	Return of first group of students dispatched abroad
1850	Establishment of *Dār al-Funūn* by Amir Kabīr
1850	First unofficial Jewish societies
1852	Death of Amīr Kabīr
1854	Legal support of Zoroastrians by Parsis of India
1854	Establishment of Zoroastrian societies, first in Yazd and Kerman and later in other cities
1858–62	Five legal-governmental treatises by Mīrzā Malkam Khan
1871	Serious famine; shah in a pilgrimage to the religious cities of Iraq
1871–82	Reign of Mīrzā Hussein Khan Sipahsālār, *ṣadr-i aʿẓam*
1873	Shah's first trip to Europe
1875	Publication of *Akhtar* newspaper in Istanbul
1876	Lazarus and Presbyterian missionaries come to Tabriz and Tehran
1878	Death of Fataḥ Ali Ākhundzādih
1878	Shah's second trip to Europe
1880–9	*Qānūn* newspaper published in London by Mīrzā Malkam Khan
1882	Cancellation of *jizya* for Zoroastrians by Nāṣir al-Dīn Shah
1885	Publication of James Morier's *ḥājī bābā iṣfahānī*
1886	Establishment of first schools with new educational system by Mīrzā Hassan Khan Rushdīyyah
1889	Shah's third trip to Europe
1891–2	Protest against Tobacco Regie Concession; *fatwā* on prohibition of tobacco by Mīrzā Hassan Āshtīyānī in Tehran or probably by Mīrzā Hassan Shīrāzī in Iraq
1893	Publication of *Ḥabl al-Matīn* weekly in Calcutta and then in Tehran and Rasht
1895	Death of Mīrzā Yūsuf Khan Mustashār al-Dawla
1896	Execution of Mirzā Āqā Khan Kirmānī
1896	Execution of Mirzā Reza Kirmānī
1896	Reign of Muẓaffar al-Dīn Shah
1898	Inception of Alliance activities in Iran
1899	Establishment of School of Law and Political Sciences by Hassan Pīrnīyā
1901	Publication of Hassan Pīrnīya's *International Law*

1901	Establishment of first schools and orphanages in Tabriz and Tehran by Lazarus and Presbyterian missionaries
1905	12 December: protest against governor of Tehran
1906	January: shah establishes House of Justice
1906	August: declaration of Muẓaffar al-Dīn on constitutional monarchy
1906	8 September: ratification of electoral law by shah
1906	Muhammad Ṣadīq Ḥaḍrat's *General International Law*
1906	7 October: inauguration of parliament
1906	30 December: ratification of Constitution
1907	9 January: death of Muẓaffar al-Dīn
1907	Reign of Muhammad Ali Shah (19 January)
1907	August: Anglo-Russian Agreement on dividing Iran into three regions
1907	7 October: preparation of Supplement and its ratification by the shah and parliament
1908	Translation of the French Press Law into Persian by Mahdi Hidāyat or Hussein Pīrnīyā and its ratification with some amendments by first Parliament
1908	Assassination of Malik al-Mutakallimīn
1908	Death of Mīrzā Malkam Khan
1908	23 June: bombardment of parliament backed by Russian military forces; Colonel Liakhoff temporarily serving as governor of Tehran
1909	13 July: capture of Tehran by revolutionaries
1909	31 July: execution of Sheikh Faḍlu Allah Nūrī
1909	Na'īnī's *tanbīh al-umma wa tanzīh al-milla*
1909	13 June: dismissal of Mohammad Ali Shah from monarchy and exile from Iran
1909	First textbook on constitutional and civil law by Muṣṭafā ʿAdl Manṣūr al-Salṭana
1909	1 July: ratification of the new electoral law by second parliament; accordingly, Armenians, Assyrians, Jews, and Zoroastrians could each have one representative in parliament
1910	16 July: assassination of Sayyid ʿAbd Allah Bihbahānī
1911	11 March: death of ʿAbd al-Raḥīm Ṭālbov
1911	12 December: death of Muhammad Kāzim Ākhūnd-i Khurāsānī
1912	21 October: death of ʿAbdu Allah Māzandarānī
1914	21 July: Ahmad Shah's coronation day
1917	October: Bolshevik revolution and exit of Russian forces from Iran
1919	Friendship and Assistance Agreement between Iran and Britain
1920	28 January: death of Sayyid Muhammad Ṭabāṭabā'ī
1921	22 February: *coup d'état* by Reza Khan

1924–5	Translation of French penal code by Francis Adolph Pierny and its ratification by fifth Parliament
1925	31 October: Reign of Reza Shah Pahlavi
1925	Translation of French business law and then its ratification
1927	Cancellation of right of capitulation
1927	Cancellation of *jizya* for Iranian Jews
1928	Ratification of first volume of Civil Code by sixth Parliament
1928	Ratification of Code of Deeds and Properties Registration
1931	Ratification of Code of Marriage and Divorce Registration
1933	Ratification of Article 10 of civil code on direct taxes, exempting Muslim and non-Muslim places of worship from any tax
1933	Completion and ratification of business law in eleventh Parliament
1933	Ratification of the independence of recognized non-Shiite Muslims, *ahl al-Sunna*, and religious minorities in their personal status
1933	Establishment of first official Jewish society
1934	Approval of the Procedure of the Public Penal Code
1935	Ratification of second and third volumes of the civil code by ninth and tenth Parliament
1937	9 February: Ali Akbar Dāwar's suicide
1941	Forced resignation of Reza Shah
1941	Reign of Muhammad Reza Shah Pahlavi
1948	Acceptance of the Declaration of Human Rights
1958	Minor modifications of the Civil Code
1962	White Revolution of shah and nation
1968	Tehran conference for Committee of Human Rights
1968	Iranian ratification of International Covenant on Civil and Political Rights and International Covenant on Economic and Cultural Rights
1970	Minor modifications of Civil Code
1971	Establishment of first official Mandaeian society by Sālim Ṣābūrī in Ahwaz
1972	May: ratification of Islamic Charter of Human Rights by Muslim countries in Saudi Arabia
1973	Modifications of the Public Penal Code
1979	Establishment of Islamic Republic
1978	October: initial draft of constitution by Council of Revolution
1979	March: Council of Revolution announced that the draft ratified by the provisional state must be revised
1979	May: revision came to an end and was ratified by the Council of Revolution and Ayatollah Khomeini

1979	Between 19 August and 15 November, new revision of the draft by the FRC Assembly
1979	3 December: final version of the Constitution approved by FRC Assembly, then by Ayatollah Khomeini, and finally by the people through a referendum
1979	Constitution only recognizes religions mentioned in the 1909 electoral law
1979–82	Minor modifications to the Civil Code
1979	Independent article ratified on the personal status of non-Muslims in 1312/1933 reaffirmed in civil code
1979–91	Application of the content of Article 881-Repeated of the civil code without any ratified law
1982	Ratification of first version of IPC by National Parliament
1982	Declaration of the employment regulations by Ayatollah Khomeini
1982	Ratification of a proviso of the employment regulations, indicating that all women must wear the veil
1984	Ratification of an article in the Code of Deeds and Properties Registration, indicating that the registration of religion in national identity documents is obligatory for all Iranians
1989	May: establishment of a council to amend the 1979 Constitution
1989	June: death of Ayatollah Khomeini
1989	June: election of new leader, Ayatollah Sayyid Ali Khamenei
1991	Ratification of Article 881-Repeated in the Civil Code against non-Muslims
1991	July: ratification of second version of the IPC
1995	May: ratification of third version of the IPC
1995–2012	Every five years the Parliament extended the validity of IPC to be tested for five more years
1998	August: ratification of regulations for special leaves on the ceremonial days of all non-Muslims
1998	October: ratification of final version of Article 881-Repeated
2001	29 December: ratification of monthly funds for the societies of religious minorities
2002	July: proviso to Article 297 of the IPC, determining the amount of *dīya* only for the recognized religious minorities, not for all non-Muslims
2008	May: according to a by-law, the amounts of blood monies for men and women and for Muslims and non-Muslims (not only the recognized religious minorities) were determined equal only in the cases of driving accidents.

2013	April: ratification of final version of IPC
2013	April: according to article 554 of IPC, the amounts of blood monies for men and women and for Muslims and only the recognized religious minorities were determined absolutely equal
2018	July: Expediency Council allows members of recognized religious minorities to stand as candidates in city council elections
2021	January: two articles (499-Repeated and 500-Reapeted) added to the IPC-v2013, advocating the rights of recognized religious minorities, and violating the rights of non-Muslims in general

Introduction

In the early twentieth century, when the 1906 Constitutional Revolution was introducing new ideas and institutions to Iranian society, it was widely assumed that *fiqhī* rules on the legal status of non-Muslims would be changed or ignored. Unexpectedly, at least for a while, they continued unabated, but under the Pahlavi regime their dominance began to wane and eventually only a few were retained in the body of law. Yet, after the 1979 Revolution, *fiqhī* opinions about religious minorities found their way back into most official laws and became a means of depriving minorities of their rights. Four questions require answering here. First, how do Islamic Shiite sources, including the Quran, hadiths and juristic works, deal with the legal status of non-Muslims, especially religious ones, in Muslim territories? Second, under what historical conditions have rulings on non-Muslims been formulated, developed, reinterpreted or changed? Third, why and how were they integrated into the state's laws from 1906 onwards? And fourth, is there any way, based on de facto jurist methods, to improve the legal status of non-Muslim Iranians under the Islamic government?

These questions are answered over the five chapters of this study. In Chapter 1, I evaluate the formation in Shiite jurisprudence of the original nineteenth-century viewpoints on the legal status of non-Muslims, which were allegedly based on *fiqhī* opinions that were deeply rooted in Islamic Shiite sources. Since, to my knowledge, such an evaluation from a Shiite perspective has no academic precedent, the chapter is longer than initially predicted. As we shall see, Islamic rulings, or *fiqhī* opinions, which gradually took on a divine hue, were developed from reports of the actions of the first caliphs and were imposed on non-Muslims in the initial hope of converting them to Islam. This is because Shiite jurists and theologians thought that conversion, whether voluntary or by force, not only brought socio-political benefits to the neophytes but also provided an avenue along which to find *truth* here and *salvation* hereafter. The assumption that salvation is restricted to those who accept Islam underlies all Islamic rulings on non-Muslims and plays an important part in their formulation. Muhammad b. Hassan Ṭūsī (d.460/1067) is considered the earliest source on Shiite jurist opinion about the legal status of non-Muslims. Throughout history, virtually all successive jurists have repeated verbatim the legal opinions of the pioneers, as if it were more important to keep alive the Shiite legal heritage founded by Ṭūsī than to develop and issue new legal opinions. Nonetheless, I will draw the reader's attention to any major differences that might have arisen among later jurists. New and old views can be

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recognized from the chronological list of jurists at the beginning of the chapter. I conclude that the jurists tended to focus more on the *duties* imposed on non-Muslims rather than on the *rights* granted to them.

The main topics of Chapter 2 are the social, cultural and economic contexts of the 1906 Revolution, as well as the position of religious minorities in the nineteenth century and their role in the revolution. According to one analysis, Iranian constitutionalism, within a nationalist paradigm, was a strategy planned by the intelligentsia and certain courtiers to reform the Qajar government and improve Iranian prestige in the region. The calls for reform and revolution, which brought a united response from practically everybody, including the religious leaders, were induced by defects in Muẓaffar al-Dīn Shah's character, the political situation in the region in the early twentieth century, popular protests against the dictatorship, tyranny, and corrupt local governors. In this scenario, in which the religious minorities were enthusiastic participants, the Islamic rulings that considered their status inferior were *ignored* or *forgotten*, which is a point I pick up later (in Chapter 5) as a solution for improving the legal status of non-Muslims under Islamic governance. In Chapter 2, I also evaluate the general status of religious minorities over the period in question. Notwithstanding the dearth of information when I was studying the sources, especially in the years between 2005 and 2007, I have derived the data from earlier inquiries, unpublished documents housed in the archives of the Iranian Ministry of Foreign Affairs (1862–1906), and a number of personal interviews with representatives of Iranian non-Muslims. I have also relied on the memoirs of eyewitnesses to the events of the revolution, the proceedings of representatives' conversations in the first Parliament, and various foreign documents on Iran, including *British Documents on Foreign Affairs* (1985). In addition, debates between the opponents and supporters of constitutionalism, namely the first conflicts between traditionalists and modernists, are discussed briefly.

In Chapter 3, I describe the 1906 Constitution and its 1907 Supplement as the great achievements of the revolution. By introducing its authors, sources, and methodology, I verify that the aristocracy and intelligentsia were the planners of the initial constitution and reform. Through their biographies, we see that the authors of the Constitution, although secular and enjoying elevated political positions, had to consider religious factors and obey the clerics in accepting the proposed Article 2 of the Supplement. The article indirectly justifies *fiqhī* inequalities against non-Muslims. In the main body of this chapter, which is based on the actual texts of the laws, I examine the relevant articles on the rights of non-Muslims and the meanings of new terms in the Constitution. As we shall see, various constitutional models such as those of France, Belgium and the Ottoman government, were made available to the authors, as well as

some Persian works containing the proposed constitution. The process of codifying laws and regulations in the Pahlavi period is also discussed in this chapter, as are the civil and penal codes, as requested by the 1906 revolutionaries, which were enacted under Reza Shah. After this enactment, the right of capitulation for foreigners living in Iran was cancelled, which indirectly influenced Iranian Jews and Christians. The secular attitude of the Pahlavi regime and the process of modernization in the period helped non-Muslims feel that they had attained a somewhat better legal status. The Pahlavi regime, however, with its emphasis on nationalism, favoured an Iranian identity over a religious one. Consequently, religious people gradually began to feel that they were losing their religious identity. Major factors causing the people to see the regime as incorrigible, like despotic rule, a preference for Iranian identity over religious interests, and foreign pressure to force Muhammad Reza Shah to implement certain international covenants, are briefly discussed in this chapter. To a greater or lesser extent, the religious minorities joined the protests against the regime with a view to changing the prevailing policies, gaining equal rights with the Iranian Muslims, and attaining more freedom within a democratic government.

Legal developments relating to non-Muslims in the Islamic republic is the pivotal theme of Chapter 4. In the revolutionary climate of 1978, no one, not even Ayatollah Khomeini, intended to change the Pahlavi regime, but he gradually began to suggest=establishing an Islamic government in which all demands would be met. After 1979, religious leaders started to Islamize the constitution and other laws and regulations, arguing that the corpus of the old regime must be altered. With its focus on the formation of rulings about non-Muslims, in this chapter I give an account of the preparations of the first drafts of the 1979 Constitution and then of the amendments leading to the codification of the final version. In addition, the new terms and relevant articles in the Constitution, the Civil Code, the Islamic Penal Code, and other regulations are discussed. As a result of these changes, recognized religious minorities found themselves in an inferior legal position, more or less like that of *dhimmī*s. But this did not mean that the government returned to imposing *jizya*, *kharāj*, and other *fiqhī* regulations. The Islamic republic encountered specific theoretical and practical problems a decade later. To overcome these, the government established a new institution, the Expediency Council, which is important to my study insofar as it has ratified a number of regulations in favour of the religious minorities.

A new strategy, a new *ijtihād* to improve the legal status of non-Muslims in Muslim societies, one based on a juristic interpretation, is suggested in Chapter 5. I propose this academically, not theologically, as a practical attempt

to convince the legislature that inequalities against non-Muslims are neither necessary nor the only inferences to draw from the sources. The strategy presupposes that some premises should be provided so that jurists and law-makers come to *ignore/forget*, not deny, the old rulings on non-Muslims, whether they are formed in the advent of Islam in Mecca or in Medina, and whether they are regarded as essential or accidental. To verify the effectiveness of the method, I draw attention to similar cases in the Shiite primary sources in which jurists had *ignored* or *forgotten* the Islamic rulings and their various mechanisms. The method, which may also serve as a basis for further discussion, relies on my particular view – only religious doctrines that are global, moral, and respectful to human rights should be adopted and obeyed. It is worth noting that an initial version of this chapter has already been published elsewhere.[1] However, since this chapter concludes the whole book, it is necessary to keep it here too.

The book has two Persian appendices, found in https://atharebartar.com/appendix. Appendix I contains the names of the deputies of religious minorities serving in the National Parliament between 1906 and 2019. In Appendix II, selected articles on the status of non-Muslims in Iranian laws during the time are cited chronologically in Persian to help the reader and provide a background for future discussions. Although some of these articles may have a less direct relationship to the issue, they are included to show the context.

1 *Menschenrechte und inter-religiöse Bildung*, eds Manfred L. Pirner, Johannes Lahnemann, Heiner Bielefeldt, Berlin: Eb Verlag, 2015, 105–16. It was also republished in *Human Rights and Religion in Educational Contexts*, eds Manfred L. Pirner, Johannes Lahnemann, Heiner Bielefeldt, Switzerland: Springer, 2016, 115–26.

CHAPTER 1

The Status of Non-Muslims in the Shiite Imāmī School

1 Introduction

On the sources and, to some extent on appropriate methods of obtaining legal opinions, there are differences between two main branches of Islam, namely *ahl al-Sunna* and *Twelver Shīʿīsm* or *Imāmī* (henceforth the Shiite school). However, apart from the issue of jihad, the legal opinions of these schools on the status of non-Muslims are, as we shall see, not very different. In addition to the Quran, the Sunna, about which each branch has its own definition, is the main source in Islamic law or *fiqh*. In the Shiite school, the main feature of the Sunna is that Shiites rely on the theological doctrine of the *imamate* and *wilāya* of the family of the Prophet (*ahl al-bayt*). They accept only those of the Prophet's sayings that they have received on the authority of the imams and rely only on the quotes and acts that are attributed to them.[1] The Sunna in this sense is authoritative for Shiite jurists and their followers. The jurists regard the imams as uniquely authentic interpreters of the Quran and, since they are infallible and have been inspired by the knowledge of the sacred book in legal subjects, accord them a legal status that is identical to that of the Prophet (Sharīf Murtaḍā 1409/1989: 150–233).[2] Theologically, the Shiite school does not regard the opinions of the Companions of the Prophet and the acts of the first three caliphs as authentic (Kohlberg 1984: 143–75), but in practice, and in the period of formation of Shiite law, especially in the middle of the fourth/tenth century and afterwards, many of those opinions about the status of non-Muslims entered the Shiite sources via different chains of transmission (*isnād*), which ultimately relied on the authority of one imam.

1 In the Shiite school, following the *Ahl al-Sunna*, four sources are normally cited to establish the inferences of legal opinions – these are the Quran, the *Sunna*, consensus (*ijmāʿ*), and reason. The last two, though, are not independent sources because *ijmāʿ* does not theoretically mean a consensus of local *ulama* in an absolute sense but refers to an agreement that expresses the opinion of the infallible imams. Thus, although Shiite jurists frequently use the term *ijmāʿ* in the sense of an 'absolute agreement of scholars', it refers to the Sunna. The fourth source, reason, is applied as a way of solving apparent inconsistencies between the Quran and Sunna or between the contents of different traditions. I found no ruling based on pure reason in Shiite *fiqh*.

2 Sharīf Murtaḍā, known as 'Alam al-Hudā (d.436/1044), defended the infallibility of all prophets and imams in those pages. About him, see s.v. 'Alam al-Hoda' by Wilferd Madelung in *EIr*.

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It is repeatedly claimed – and the claim is well documented – that Shiite *fiqh* is under the influence of and peripheral to Sunnite *fiqh*. To begin with, the critical opinions of Muhammad Amīn Astar-ābādī (d.1033/1623), the reviver of the *akhbārī* attitude, in *al-Fawā'id al-madanīyya*, against the contents of two works by two prominent Shiite jurists, Muhammad b. Hassan al-Ṭūsī, known as al-Sheikh al-Ṭā'ifa (d.460/1067), henceforth Ṭūsī, and Hassan b. Yūsuf known as 'Allāma al-Ḥillī (d.726/1325), henceforth Ḥillī, prove that the influence is a real one (see Astar-ābādī 1424/2002: esp. 76–9). Again, Sayyid Hussein Brūjirdī (d.1340/1961), the influential source of emulation (*marja' taqlīd*), believed in the influence and offered some pieces of evidence in his lectures (Modarressī 1984: 47–8).[3] Here, the meaning of *influence* is that Shiite jurisprudence and legal theory in the organization of subjects and arguments are similar to those of the Sunnites.

According to historical reports, in the first two centuries after the advent of Islam, the question of recognizing the legal status of non-Muslims lay within the remit of the caliphs. Some of their decisions were gradually institutionalized and later documented by ancient historians. While it is impossible to pigeonhole these historians as either Shiite or Sunnite, the narrators and jurists of both branches later acknowledged their contributions. While the caliphs attributed their decisions to various verses in the Quran, as well as to the sayings and acts of the Prophet and His Companions, the Sunnite and Shiite jurists engaged in theological disputes about the authenticity of the Companions' sayings and the caliphs' acts, and so justified their understandings in different ways. The oldest legal non-Shiite works containing rulings on the status of non-Muslims are *al-Muwaṭṭa'* by Mālik b. Anas (d.179/795); *Kitāb al-kharāj*[4] by Qāḍī Abū Yūsuf (d.182/798); *Kitāb al-kharāj* by Yaḥyā b. Ādam (d.203/818); and, *Kitāb al-sayr al-saghīr* and *Kitāb al-sayr al-kabīr* by Muhammad b. Hassan Shaybānī (d.189/804). In this chapter, we shall see how the Shiite school has been recording Sunnite sources on non-Muslims since the third/ninth century and how, in a number of ways, these data are very similar to those of their non-Shiite counterparts. Thus, it is reasonable to assume that both branches,

3 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 s.v. 'Takrīb' by W. Ende, in *EI2*, esp. 165–6). On how the Sunni school influenced the development of Shiite institutions since the *Ṣafavid* period, see Stewart 1998.

4 Here, the word *kharāj* is used in its literal and not technical sense ('the tax on land'), which refers to every tax, property, or income that the ruler is entitled to collect and distribute. In this literal sense, *kharāj* includes *khums*, *zakat*, and *jizya* (see Kulaynī 1388/1968: vol. 3, 567; vol. 5: 268).

in principle and theologically, agree on how to encounter non-Muslims but have different authorities and, consequently, different chains through which to transmit their own quotations and legal opinions.

The major difference between the Sunnite and Shiite schools goes back to the politico-religious issue of the Prophet's succession. While the would-be Shiite followers of Ali b. Abī Ṭālib (d.40/656), son-in-law of the Prophet, were arguing that he was the true caliph, based on some explicit texts from the Quran and the hadiths, other major Companions were referring the issue of the succession to the consensus and consultation of the chosen Companions (*ahl al-ḥall-i wa al-ʿaqd*). Politically, Sunnis accuse Shiites of violating the consensus and sometimes call them *rāfiḍī*, whereas Shiites believe all caliphs to be usurpers (*ghāṣib*), which inevitably leads them to reject any state's legitimacy. However, at various periods the political relationship between Shiites and caliphs (and later rulers) has been neither clear nor fixed and has been conceptualized in different ways.[5]

While I refrain from discussing all the various Shiite political positions on the legitimacy of rulers, on which theories have abounded throughout history, several questions still need addressing. Theologically, the Shiites were expected not to legitimize some of the actions of caliphs and rulers, such as engaging in an offensive jihad (*jihād ibtidāʾī* or *jihad al-fatḥ*) as opposed to a defensive one, owning slaves, and levying *jizya* and *kharāj* on non-Muslims. However, apart from the similarities between Shiite and Sunni rulings on the legal status of non-Muslims, the historical behaviour of Shiite imams, some of whom probably participated in the Arab conquests and all of whom had owned male and female slaves, suggests a different set of expectations. Since it is difficult to justify the illegality of cooperating with a ruler while at the same time benefiting from being aligned with his regime, we are faced with a dilemma: either we dispute the validity of the Islamic historiographical texts on the imams cooperating with the caliphs, or we must modify our view and accept that the Shiites

5 The details of the relationship call for thorough investigations. On the question of the different positions of Shiite jurists before the government, see Kadīwar 1378/1999: 58–186; and Lambton 1981. In some periods, such as the Buwayhid dynasty, certain jurists, including Sharīf Murtaḍā, justified their cooperation with the ruler as a religious duty; see Madelung (1980: 18–31) for a translation of his thesis (*Risālatun fī al-ʿamal maʿa al-sulṭān*). Sharīf Murtaḍā argued that, under an unjust ruler, it may not merely be lawful but also even a religious duty to accept public office if the holder is likely to be able to do good or prevent evil. In the nineteenth century, some jurists such as Narāqī (1408/1986: esp. 205–6), came to accept more authority for the jurist without interfering in the realm of the shah's power. Then it was Ayatollah Khomeini (1410/1989a: vol. 3, 125–38) who integrated the mystical and judicial meanings of the term *walī* and, for the first time, explicitly declared that jurists can and must have political power. More explanation on this position is presented in Chapter 4.

did not wholly agree with the caliphs' actions and sayings and that they considered them to be usurpers. Here again though, it is beyond the scope of this study either to examine the texts or modify extant opinions on them.

However, it is pertinent to say that no detailed study has yet been done on the connections between Sunni and Shiite jurisprudence, nor have the important questions of how and why Shiites adopted Sunni juridical concepts, especially on the legal status of non-Muslims, been adequately addressed. It has become a cliché to interpret the adoption of Sunni rulings and the connections with caliphs during the period of the twelve imams (11/632–260/873) as a way of keeping their own counsel (*taqīyya*).[6] During the Major Occultation (*al-ghayba al-kubrā*) of the twelfth imam, al-Imam al-Mahdi, since 329/940, and especially during the Buwayhid dynasty, the Shiites adopted the Sunni legal system to answer the accusation that they lacked an adequate legal one. Al-Najjāshī (d.450/1058) framed his bibliography of Shiite scholars as an answer to Sunni interlocutors, and Ṭūsī produced a series of juridical works that were similar to those of the Sunnis, especially of the Shāfiʿī school of law. Ṭūsī explicitly stated that he had compiled the hadith collection in response to Sunni critics who held that the Shiite legal tradition had been flawed because it contained too many conflicting traditions (Najjāshī 1416/1995: 3; Ṭūsī 1387/1986: 1–3; see also Stewart 1998: 125–6, 129).

2 Sources and Method

In both branches of Islam, it is repeatedly said that the Quran and the Sunna are the main sources from which to derive the rulings on every subject. Nonetheless, when one refers to the oldest legal books, especially those compiled by the early non-Shiites, one finds that, in most discussions, the jurists did not rely on the Quran to present their opinions.[7] However, why the Quran was not used as the source in the early centuries is inadequately discussed, especially among Muslim scholars. Several suggestions for this have been put forward. These include the Quran at the time had not yet been collected and canonized as an available book (*muṣḥaf*), it had been collected but not applied as a handbook for jurists, or that, in principle, the *fiqh* was not based on the

6 For a description of this term in the Shiite school, see Enayat 1982: 175–81.

7 See, for example, Mālik b. Anas (d.179/795). When he discussed prayer times (*al-Muwaṭṭa', kitāb wuqūṭ al-ṣalāt*), he did not refer to the verses of the Quran (2:238; 4:103; 17:78) that set out the criteria for defining the specific times. While the prayer is a devoted act that every Muslim says five times a day and, in this respect, we do not see the role of the Quran in the early legal works, we cannot expect to see its role in other actions that rarely happen.

Quran but on a complex assortment of local traditions and foreign elements that had been around at the time. Consequently, we do not expect the early jurists to quote a verse from the Quran for every ruling on non-Muslims. To deal with this, I shall start with the Quran's general perspective on the relationship between Muslims and non-Muslims and then, examine in detail, those cases in which a Shiite jurist has referred to it to derive his legal opinion.

In the Shiite school, the formation of a body of knowledge known as *fiqh* (Islamic law) began historically through quoting legal hadiths. These are attributed to the Prophet and imams, especially al-Imam Muhammad b. Ali al-Bāqir (d. ca.114/733) and al-Imam Ja'far b. Muhammad al-Ṣādiq (d.148/765). There are at least two contradictory views on their authenticity. While some non-Muslim scholars, like Joseph Schacht (1967: 262–8), doubt their authenticity on the same grounds as he doubted the Sunnite ones for not belonging to the times claimed by their compilers, some Shiite scholars believe that since the Shiite hadiths were communicated via non-oral means, Schacht's objections are fundamentally irrelevant. Shiite scholars claim that because the Shiites were politically marginalized, they were unlikely to have met in the same way as their counterparts. They claim that during the second/eighth century the early Shiite relaters used notebooks (*aṣl*, singular; *uṣūl*, plural), which they bequeathed to subsequent generations. Apparently, the transmitters left 400 such notebooks of imams' quotes, or perhaps only those of the sixth imam (see Kohlberg 1987: 128–66; Modarressī 2003: vol. 1: xiv). Today, however, only sixteen of these *uṣūl*, which were separately taken from later sources, are available and have been printed without notable critical editing.[8]

At the end of the fourth/tenth and during the fifth/eleventh centuries, the quotations were gradually compiled into hadith books. The hadith narrators were very literal in that they merely repeated verbatim the words of the collected and classified hadiths and verses of the Quran without any critical analysis, interpretation or regard for the consistency of the contents, let alone question the *isnād* or *sanad* of the hadiths in their collection. Some, like Muhammad Bāqir Majlisī in *mirāt al-'uqūl*, undertook critical studies of the hadiths, but presented their findings in separate works. To make my method clear to a non-specialist reader, it seems necessary to mention the names of the hadith compilers here chronologically, at least insofar as the legal status of non-Muslims is concerned:[9]

8 See Hussein Muṣṭafawī (ed.) *al-uṣūl al-settata 'ashar* (Qum: Dār al-Shabistarī, 1405/1984).

9 In the text and reference section, the article *al-* preceding the names will be intentionally ignored, whether the persons are originally Arab or non-Arab.

Hussein b. Saʿīd Ahwāzī (lived in 220/835).
Ahmad b. Muhammad b. ʿīsā Ashʿarī (d.260/873).
Ahmad b. Muhammad Khālid Barqī (d.274 or 280/887 or 893).
Muhammad Hassan Ṣaffār Qummī (d.290/903).
ʿAbd Allah b. Jaʿfar Ḥimyarī (d.*c.*310/922).
Muhammad b. Yaʿqūb Kulaynī (d.329/941).
Muhammad b. Ali b. Bābawayh al-Qummī, known as Sheikh Ṣadūq (d.381/991–992).
Muhammad b. Hassan Ṭūsī, known as al-Sheikh al-Ṭā'ifa (d.460/1067).
Muhammad b. Murtaḍā, known as Muḥsin Fayḍ Kāshānī (d.1091/1680).
Muhammad b. Hassan Ḥurr ʿĀmilī (d.1104/1692).
Muhammad Bāqir Majlisī (d.1110/1698).
Hussein Nūrī (d.1320/1908).

I shall briefly summarize the contents of the hadiths under the section heading 'Legal Shiite Hadiths on non-Muslims', but then will discuss them in more detail in the section on 'Legal *Fiqh* and non-Muslims'.

A *fiqhī* book, which is a work in which the author presents his legal opinions on a subject, is based less on the appropriate verse in the Quran and more on the passages of the hadith, on consensus (*ijmāʿ*), and on what is best-known among jurists. The first legal works on the subject are by Muhammad b. Muhammad b. Nuʿmān, known as Sheikh Mufīd (d.413/1022) – *al-Muqniʿa* and *Taḥrīm dhabā'iḥ ahl al-kitāb*. The former contains several legal opinions on the status of the people in the book and the latter is confined to clarifying lawful and unlawful methods of slaughtering animals.

Ṭūsī was then the first to play an intermediary role in that he wrote both kinds of works, the book of hadith and the book of *fiqh*. Shiite *fiqh* did not appear in book form until the fifth/eleventh century but remained in the format of hadith collections.[10] Ṭūsī wrote several *fiqh*-oriented judicial books, such as *Al-Nihāya fī mujarrad al-fiqh wa al-fatwā*, *Al-Khilāf*, and *Al-Mabsūṭ fī fiqh al-imāmīyya*, in addition to a hadith-based text, which will be presented below.[11] Although Ṭūsī (1351/1973: 104, 105, 172, 231, 278, 288, 295, 303, 344) and Ahmad b. Ali Najjāshī[12] (1416/1995: 140, 231, 251) claimed that Hussein b. Saʿīd

10 See Kohlberg 1983: 299–307 on the role of hadith in the Shiite school.
11 See References at the end of this chapter.
12 Al-Najjāshī (d.450/1058) is one of the first and greatest of Shiite biographers in that the Shiite school usually regards his quotations on hadith narrators as authoritative and reliable.

Ahwāzī (ca.220/835) and some hadith disseminators before and after him had written about thirty *fiqhī* books, they were actually hadith books. Again, it is true that after Mufīd and before Ṭūsī, Sharīf Murtaḍā (d.436/1044) and Ḥamza b. ʿAbd al-ʿAzīz Daylamī, known as Sallār (d.448/1056), wrote several brief treatises on non-Muslims, but my discussion begins with Ṭūsī's works.

Since *fiqhī* books in the Shiite school were, at least to some extent, in both content and method, influenced by Sunnite *fiqh* from Ṭūsī's period onwards, especially Jaʿfar b. Hassan, known as Muḥaqiq Ḥillī (d.676/1277), and Hassan b. Yūsuf, known as ʿAllma Ḥillī (d.726/1325),[13] it is sensible to consider Ṭūsī's views as the most reliable pointer to Shiite jurist views on the legal status of non-Muslims. Nonetheless, I will draw the reader's attention to any major differences among later jurists that deserve mention. Over the course of history, almost all successive jurists have continued to repeat verbatim the same legal opinions of the pioneers as if to keep alive the Shiite legal heritage, which Ṭūsī founded, is more important to them than developing and issuing new legal opinions. The following jurists, which are listed in chronological order, appear in various discussions in this chapter:

Sheikh Mufīd (d.413/1022).
Muhammad b. Hassan Ṭūsī (d.460/1067).
Jaʿfar b. Hassan, known as Muḥaqiq Ḥillī (d.676/1277).
Hassan b. Yūsuf, known as ʿAllāma al-Ḥillī (d.726/1325).
Muhammad b. Makkī ʿĀmilī, known as Shahīd Awwal (d.786/1384).
Zayn al-Dīn b. Ali ʿĀmilī, known as Shahīd Thānī (d.966/1559).
Ahmad b. Muhammad Mahdi Narāqī (d.1245/1829).
Muhammad b. Hassan Najafī known as *ṣāhib al-jawāhir* (d.1266/1850).
Murtaḍā b. Muhammad Amīn Anṣārī (d.1281/1864).
Muhammad Kāẓim b. Hussein Khurāsānī (d.1329/1911).
Muhammad Hussein Nāʾīnī (d.1355/1936).
Muḥsin b. Mahdi Ḥakīm (d.1390/1971).
Muhammad Bāqir Ṣadr (d.1361/1981).
Ruḥ Allah Khomeini (d.1368/1989).
Abū al-Qāsim Khūʾī (d.1371/1992).

13 See the biography of these Ḥillīs: s.v. 'Hellī, Najm al-Dīn' by E. Kohlberg in *EI2*; 'Ḥellī, Ḥasan b. Yūsof' by Sabine Schmidtke in *EI2*.

3 The Quran and Non-Muslims

In the Quran, Jews, Christians (*nasārā*, as the Quran calls them), Zoroastrians (*majūs*), and Mandaeans (*Ṣābiʾīn*)[14] are mentioned (see Q, 2:62; 5:69; 22:17) and the books revealed to the Prophets preceding Muhammad are confirmed (Q, 35:31; 5:48; 6:92) explicitly (Q, 3:3; 5:46; 46:12, 30) or implicitly (Q, 5:48; 6:92; 35:31). The followers of other religions, such as Hinduism and Buddhism, were either unknown so not recognized or, like Manichaeism, simply not recognized. The generations after Jacob and the followers of Moses are also regarded or addressed as the Children of Israel, *Banū Isrāʾīl*. While the term People of the Book is applied to Muhammad's Jewish and Christian contemporaries, the term Children of Israel is applied to earlier generations.[15] First, the People of the Book were considered literate compared with the Bedouin Arabs, the majority of whom were illiterate.[16] Second, because most of those who were literate were Jews and Christians who could read their Scriptures, they were called the People of the Book. The Quran referred to Arabs who were neither Jews nor Christians, but who were insufficiently literate to read the Holy Book, as *ummīyyūn* (Q, 62:2). The Prophet himself is said to be *ummī* (Q, 7:157–158),[17] but it could be "rendered as 'native,' that is, belonging to the Arab community" (Bell and Watt 1970: 33–4). The term the People of the Book gradually acquired a religious meaning and was applied to the followers of religions that possessed sacred divine books (Q, 5:68; 40:53). The Jews are reproached for not following their own Torah (Q, 62:5), which provides guidance and light for the judgments of the Prophets (Q, 5:44). Christians are also reproached for similar things (Q, 5:68). The People of the Book, however, both Jews and Christians, are

14 *Ṣābiʾīn* are mentioned three times in the Quran alongside the other believers. There is no consensus on their definition among scholars, and also on their relations to Mandaeans or Ḥarrānīān. In this study, the synonymy between *Ṣābiʾīn* and Mandaeans is assumed. For supporting evidence on this point, see Gündüz 1994: Chs 1 and 2, esp. 1–21, 27–8, 235; see also s.v. 'Alchasai' by J.P. Asmussen, in *EIr*.

15 Cf. s.v. 'Children of Israel' in *EQ* and *EI3* by Uri Rubin. He extended the meaning of 'Children of Israel' to Christians, resorting to some verses like Q, 43:59; 61:6, 14, but none of these explicitly supports his claim. Despite Jewish theological teachings, the Quran regards Jesus Christ as a prophet of *Banū Israʾīl* (Q, 5: 72, 78; 61:6). Then, accordingly, some Children of Israel believed in Christ and became the Helper of God, *anṣārullāh* or *naṣarā* or Christians, and the rest, who did not, remained Children of Israel (see Q, 61:14). In addition, Rubin (*EQ*: vol. 1, 303) does not give Quranic evidence for this statement of his: sometimes, the label 'Children of Israel' is interchangeable with that of 'People of the Book'.

16 Cf. s.v. 'Ummī' by Sebastian Guenther in *EQ*, esp. vol. 5, 400.

17 Some scholars believe that the Prophet's illiteracy had already become a dogma by the end of the third/ninth century. See s.v. 'Illiteracy' by Sebastian Guenther in *EQ*, esp. 492–3.

given the opportunity to be forgiven through fulfilling their commitments to the Torah and Gospel (Q, 5:65–66), which the Quran acknowledges as revelations from God. The Children of Israel are often regarded as a chosen community (Q, 44:32–33), who have received God's blessing (*niʿma*, 2:47, 122). However, the Quran intends to say that believers who follow the Prophet Muhammad will replace the Children of Israel as God's renewed chosen community (Rubin 1999: 60–1, 70). It is notable that, from the standpoint of Jews and Christians, the Book, the prophecy, and the report on how they have found their sacred books are quite distinct in meaning from the viewpoint of the Quran and, consequently, from that of Muslims. The term *ahl al-dhimma*, which appeared after Prophet Muhammad's death, or more probably in his later life, is not mentioned in the Quran and is found only in hadith and *fiqhī* sources. I will define it in the section of this chapter headed 'Legal Shiite Hadiths on Non-Muslims'.

Because it is difficult to categorize or present an authoritative view on all the verses in the Quran that pertain to non-Muslims, it is probably advisable to focus on their contexts and on what situations occasioned their revelations (*asbāb al-nuzūl*). Nonetheless, by highlighting those that express tolerance and good treatment of non-Muslims, some Islamic scholars have ignored others that contradict that position. Alternatively, which is my preference, one could perhaps arrive at a relatively consistent and more precise position by weighting the Quran's tolerant verses against its intolerant ones. The word *kāfir* (infidel) is derived from the verbal root *kafara*, which, as Zabīdī (2000: vol. 3, 524–5) puts it, means "whoever hides and/or covers something out of sight", which for example could be referring to a farmer who buries his seed in the earth (Q, 27:40; 57:20). Although anyone who denies and hides the truth is considered an infidel, when it comes to the actual nature of the truth, the Quran deals with the word *kāfir* in a number of different ways. Sometimes *an infidel* is someone who denies the unity of God, the Prophecy, and the Day of Judgment (Q, 4:15; 2:28; 18:105); at others it is someone who denies the Islamic interpretation of the unity of God (Q, 5:2, 73); at yet others it is someone who denies that Muhammad is a Prophet (Q, 13:43; 2:105); and, finally, at yet others still it is someone who fails to acknowledge God's grace, hence does not appreciate Him and does not fulfil his/her duty towards Him (Q, 14:7).

There is some evidence to suggest that the good treatment in the Quran of non-Muslims in general, and of the People of the Book in particular, is conditional. Sometimes it calls them "the people of the faith", praises them, and invites them to participate in dialogue (Q, 2:62; 3:113–14, 199; 5:5, 44, 69, 82). At others, especially in the Medinan suras when Muhammad is disappointed at the refusal of Jews and Christians to accept him as the true prophet, they are thought of as infidels (Q, 9:31; 19:88, 94; 4:171; 5:64, 73–5; 7:138–40, 194) or even

polytheists (Q, 98:1, 6). According to the jurists' current interpretation of verse 9:29 – which assumes that the term "book" in the verse means Holy Bible – Muslims are instructed to force them to convert or pay the special tax (*jizya*, Q, 9:29, 5). Another suggested meaning for the term "book" is "covenant", in which case the *jizya* would not be obligatory for Jews and Christians but only tribes that had a covenant with the Prophet to remain non-Muslim, but to keep the peace with him.[18] Some verses (Q, 3:19–20, 85) advocate an exclusivist attitude that considers other religions illegal and ways of darkness, with only Islam following the Straight Path. At the same time, some verses (Q, 11:118–19) adopt a more pluralist approach and one in particular (5:48) suggests postponing any attempt to ease the conflict with the followers of different religions to the Hereafter and that, in the meanwhile, they should follow their own way of life (*minhāj*) in this world. Sometimes, the Quran (22:40; 5:44) praises the Jewish rabbis and Christian priests, and views synagogues and churches on a par with mosques as places in which to remember and worship God. At other times, most rabbis and priests are seen as illegal usurpers of other people's property and the Quran (9:34–5) warns them of the gravity of the divine punishment. Thus, if one looks at the verses ahistorically, it is possible to select ones that affirm whatever position one wants on the People of the Book. Given that the literal meanings of the verses do not allow one to come to any clear decision, we should see on which part of the verses the Shiite jurists relied and how they interpreted them.

4 Legal Shiite Hadiths on Non-Muslims

The second source for the Shiites in substantiating legal opinions is hadith. In hadith and *fiqhī* works, two expressions – *ahl al-kitāb* or *kitābī*, and *ahl al-dhimma* or *dhimmī* – point to material on non-Muslims. The former has already been explained in the section above on 'The Quran and Non-Muslims' and the latter will be clarified under the subheading 'Terminology' in the section below called 'Shiite *Fiqh* and Non-Muslims'.

The three oldest Shiite sources, which contain few hadiths on non-Muslims, are all in a question-and-answer format.[19] The first is *Kitābu al-nawādir*,

18 See s.v. 'Poll Tax' by Paul L. Heck in *EQ*; also see J.B. Simonsen 1988: 47–61.

19 For characters of the formative period of Shiite hadiths in general, see Newman (2000), who confined his discussion to three antique books – *al-maḥāsin*; *baṣa'ir al-darajāt al-kubrā fī faḍa'il āl-i Muhammad*; and *al-kāfī*. The first two works were compiled by Muhammad b. Hassan Ṣaffār Qummī and the third by Muhammad b. Yaʿqūb Kulaynī.

attributed, though not with certainty, to either Ahmad b. Muhammad b. ʿĪsā Ashʿarī (1408/1987: 51) or Hussein b. Saʿīd Ahwāzī.[20] Here I refer to two questions in that book. At the time, the sixth imam, Jaʿfar b. Muhammad al-Ṣādiq, was asked about the manner in which the People of the Book should take an oath. "Only by God", replied the imam. On another occasion, the imam was asked about the legality of benefiting from *kharāj* (an annual tax on land) paid by a *dhimmī* from the income from land of unknown occupational status – with the possible statuses being inheritance, purchase, theft, or forced occupation – to which the imam replied, "that annual tax is legal" (Ashʿarī 1408/1987: 168). The second source is *Al-maḥāsin* by Ahmad b. Muhammad b. Khālid Barqī.[21] The book contains two hadiths on non-Muslims, one exempting children, women, the elderly, the blind, and the disabled from *jizya* (Barqī n.d.: vol. 2, 328) and the other (Barqī n.d.: vol. 2, 452, 569, 584) authorizing the use of the Jews' and Zoroastrians' *ahl al-dhimmas*, especially with respect to their dishes, eating their foodstuffs, and their slaughtering methods. On their dishes, the imam stated that "it is better to wash them and then use them", but recommended avoiding their meals, although with the following caveat: "I would not accept their invitation, but if it is customary in your territory, I would like not to make it unlawful for you." The imam restricted the lawful use of their foodstuffs (Q, 5:5) to cereals and groceries, saying "and the foodstuffs of those who were given the Scripture are lawful for you and your foodstuffs are lawful for them". The third early source is *Qurbu al-isnād* by ʿAbd Allah b. Jaʿfar Ḥimyarī, which includes two hadiths on *ahl al-dhimma*, one authorizing Muslims undertaking trips to spend no more than three days in their houses, and the other indicating whether it is permissible to look at the hair of their women (Ḥimyarī 1413/1992: 80, no. 260; 131, no. 459). This is all that there is to find in those three early books.

The first Shiite source in which oral and written hadiths were collected, compiled, and categorized is *Al-Kāfī fī ʿilm al-dīn*, by Muhammad b. Yaʿqūb Kulaynī Rāzī,[22] which was produced during the period that later became known as *al-ghayba al-ṣughrā*, namely "the Minor Occultation" (260–329/873–940). The work was soon accepted as one of the four canonical collections of Shiite hadiths, although Ibn Nadīm (writing in 377/987–8) did not even mention it. Kulaynī quoted those hadiths on *ahl al-dhimma*, cited previously by Ashʿarī,

20 On this attribution, see M.J. Shubayrī Zanjānī 1376/1997: 23–6.

21 On Khālid Barqī and his book, See Newman 2000: 50–66.

22 On the biography of Kulaynī, in addition to the work of Newman (2000), see Hussein Ali Maḥfūẓ's 'Muqaddama [Introduction]' to Kulaynī 1388/1968; see also s.v. 'al-Kulaynī' by Wilferd Madelung in *EI2*.

Barqī, and Ḥimyarī. He also related more hadiths, possibly oral ones with no documents apart from *al-Kāfī*, which are attributed to the Prophet, Imam Ali (the first imam), Ali b. Musa al-Riḍā (d.203/818; the eighth imam), and, specifically, the fifth and sixth imams. At the same time, these hadiths occasionally seem to be contradictory but some Shiites regard them as sound (*ṣaḥīḥ*)[23] and they are often quoted without commentary. According to Kulaynī (1388/1968: vol. 1, 8–9), the imam's aim was to compile a comprehensive compendium of hadiths that would benefit every Shiite, but he never intended to solve their discrepancies. He then recommended that, in the event of a discrepancy, the reader should refer to the Quran and the consensus of the Imāmī scholars and, finally, accept opinions that are contrary to those of *ahl al*-Sunna, a criterion that consolidates the social identity of the followers of the Imāmī School.[24]

The content of the hadiths on non-Muslims, and the terminology included in *al-Kāfī*, will be discussed in detail in the section headed 'Shiite *Fiqh* and Non-Muslims'. However, it would suffice here to consider briefly the general subjects on *ahl al-dhimma*. It is worth noting that hadiths have been regarded as legal opinions by those who were passionately interested in them in the early centuries,[25] as well as by the jurists who, since the time of Astar-ābādī, have been known as *akhbārī*. Under the materialist as opposed to the formalist system,[26] their chroniclers accept the literal meanings of the hadiths and do not try to offer extra interpretations. The list of their contents set out below

23 Among some biographers (for example Khʷānsārī 1390/1970: 553), there is a well-known mythical quotation attributed to Imam Mahdi [the Hidden Imam], which reads "*al-Kāfī* is enough for our followers" (*al-Kāfī kāfin li Shīʿatinā*) and is based on the literal meaning of the title of the book *al-Kāfī*. Majlisī (1379/2000: vol. 1, 3, 21–2), in his voluminous critical studies on hadith, *Mirāt al-ʿuqūl*, which is in fact a commentary on *al-Kāfī*, argues that *al-Kāfī* is the greatest and most precise work of the Shiite school and, at the same time, he enfeebles many hadiths quoted in *al-Kāfī* and in his own hadith collection, *Biḥār al-anwār*. Nonetheless, due to his enthusiastic tendency to hadith, Majlisī believes that in his acts a Muslim can rely on all hadiths even though they do not have equally reliable documentation.

24 For an analysis on the justification of this criterion, see Freidenreich 2011: 81–4.

25 We cannot call these hadith narrators *akhbārī*, for that technical term has only come into use since the eleventh/seventeenth century, after the appearance of Astar-ābādī.

26 Aron Zysow in his book, *The Economy of Certainty*, distinguishes between two major types of Islamic legal systems – the materialist one, which requires certainty on all legal issues, and the formalist one, which admits to probability. He then chooses Abū Ḥanīfa as the main representative of the formalist system. This demarcation helps me to separate a hadith narrator (*muḥaddith*) from a jurist (*faqīh*) in the Imāmī Shiite school. "Zysow believes that the early *Twelver* jurists were materialists who accepted the isolated hadith, since they required certainty in all areas of legal interpretation. Beginning with the jurists of the Buwayhid period, particularly with Ṭūsī, formalism was incorporated into the *Twelver* legal system, and culminated in the works of ʿAllāma Ḥillī, who recognized

cannot be found in *al-kāfī*, but was prepared after evaluating all the volumes. These are:

- *Jihad*, including its sub-topics, like how to deal with infidels, captives, and others in wartime (Kulaynī 1388/1968: vol. 5, 2–30, 35).
  - When is it our duty to fight against infidels in wartime and/or to give them pardon (*amān*)? (*idem*: vol. 5, 30–5).
  - The system of distributing war booty (*idem*: vol. 5, 43–7).
  - Whether it is permissible or forbidden for a Muslim to reside in *dār al-ḥarb* and to consider it her/his homeland (*idem*: vol. 5, 43).
  - Who is meant by *ahl al-dhimma*? (*idem*: vol. 3, 567–9; vol. 5, 10–11).
  - Buying and selling slaves of *ahl al-dhimma* (*idem*: vol. 5, 210–11).
  - How to correspond by letter with *ahl al-dhimma*? (*idem*: vol. 2, 651).
  - Why *ahl al-dhimma* should pay *jizya* and/or *kharāj* and what is the proper way to collect these taxes? (*idem*: vol. 3, 567–9, 270, 282).
  - To marry and divorce *ahl al-dhimma* (*idem*: vol. 5, 436–7).
  - The length of the waiting period (*'idda*) for the female *dhimmī* after divorce (*idem*: vol. 6, 174–5).
  - The purity and impurity of their dishes and foodstuffs (*idem*: vol. 6, 263–5).
  - 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? (*idem*: vol. 7, 238–9).
  - How to treat a Muslim who is charged with the malicious accusation (*qadhf*) of illicit sexual relations against *ahl al-dhimma*, and vice versa? (*idem*: vol. 7, 239–40).
  - Retaliation and blood money for the People of the Book (*idem*: vol. 7, 309–12, 364).
  - The validity of *ahl al-dhimma*'s witness for or against a Muslim (*idem*: vol. 7, 398).

These hadiths, as well as those that supplement them, are reproduced in the later Shiite hadith collections. Following *Kulaynī*, the hadiths are found in the works of Muhammad b. Ali b. Bābawayh Qummī, known as Sheikh Ṣadūq, particularly in his *Man lāyaḥḍuruhū al-faqīh*. The title of this work suggests that he intended to collect the hadiths as a kind of legal instruction for every Shiite without access to a jurist. About seventy years later, the hadiths were again

ijtihād and its extensive usefulness in a system of legal interpretation that was based on probability" (Stewart 1998: 19).

repeated with some addenda and comments in two works by Ṭūsī – *Tahdhīb al-aḥkām* [*Rectification of Rulings*] and *al-Istibṣār*,[27] in which he explained why he chose some of the disputed hadiths. Ṭūsī's two works, along with Kulaynī's *al-Kāfī* and Ṣadūq's hadith work, constitute the canonical texts (*al-kutub al-arbaʿa*) in the Shiite school at the end of the fifth/eleventh century.

The collected Shiite hadiths, including those on non-Muslims, were limited to cases arising between the fifth/eleventh and eleventh/seventeenth centuries. When collecting, developing, and categorizing the Shiite hadiths, two eleventh/seventeenth-century hadith chroniclers decided to do what Kulaynī had done in the fourth/tenth century by adding what had been found since his time. While in *Wasāʾil al-shīʿa*,[28] Ḥurr ʿĀmilī merely collected and categorized the legal hadiths without providing any detailed explanation of their context, in his voluminous work *Biḥār al-anwār* (110 vols.), Muhammad Bāqir Majlisī compiled hadiths that included his own interpretations as well as previously-noted hadiths and historical events. Since the twelfth/eighteenth century, the work of ʿĀmilī has been the main source for legal opinions, along with the Quran; in fact, it has sometimes even been considered more important than the Quran. This work has been published several times and is now available in two editions, one in twenty volumes and the other, an annotated edition, in thirty volumes. Apart from some addenda, the contents of hadiths on non-Muslims in this work are similar to those of *Al-Kāfī* (see examples in Ḥurr ʿĀmilī 1372/1992: vol. 15, 26–36, 125–6, 154–9).

5 Shiite *Fiqh* and Non-Muslims

In reviewing the primary sources used to derive rulings in the Shiite school, I shall now examine how jurists have dealt with these resources. Having examined Ṭūsī's works and those of some prominent Shiite jurists after him, I classify the extant literature on non-Muslims under five sub-sections. The first defines the relevant terms, the second evaluates briefly the issue of jihad, the third explains the duties and rights of non-Muslims in Muslim territories, and the fourth and fifth clarify the social and legal relations of Muslims and non-Muslims in Muslim regions.

27 The full title of this work is *Al-Istibṣār fī mā ukhtulifa min al-akhbār* [The Knowledge on What Differed in Hadiths].

28 Its full name is *Tafṣīlu wasaʾil al-shīʿa ilā masaʾīl al-sharīʿa*.

5.1 *Terminology*

We have already seen who the Quran regards as the "People of the Book", and that the Shiite jurists apply the term exclusively to mean Jews, Christians, and Zoroastrians. Although the Quran includes the *Ṣābi'īn* or Mandaeians alongside the three other faiths and stresses their beliefs (Q, 2:62; 5:69; cf. 22:17), jurists have never recognized their inclusion in the category. There are also different opinions on whether Zoroastrians[29] should be included, a disagreement based primarily, as the jurists would like to have it, on doubts about the authenticity of the Prophetic hadith regarding Zoroastrians or *majūs*. Sometimes, the contents of hadiths, including this one, are based less on reality and more on polemical images for which one can find no historical evidence. According to this hadith, Zoroastrians are the People of the Book who assassinated their prophet and burned his revealed book, which was written on 12,000 sheets of parchment (Kulaynī 1388/1968: vol. 3, 567–8; cf. Ṭūsī 1387/1967: vol. 2, 37, attributed this hadith, albeit with different wording, to Imam Ali).

Some terms that the jurists frequently employ in their works are subject to different interpretations. For example, the term infidel (*kāfir*) has three meanings or applications in *fiqh*. The first simply refers to non-Muslims, whether or not they live in Muslim territories. According to this meaning, adherents of other faiths, regardless of whether they affiliate to the great historical religions or to new religious movements, as well as those who convert from Islam to other religions or who abandon religion altogether, are regarded as infidels. The second meaning is applied to the People of the Book who would like to keep their faith and, at the same time, live in Muslim territories under an Islamic authority and accept some stipulations,[30] irrespective of being Arab or non-Arab. The Muslim ruler must support and protect their lives and property in return for the taxes they pay. Jurists call these groups *dhimmī* or *ahl al-dhimma* or *kāfir dhimmī* as opposed to *kāfir ḥarbī* and consider them as a single community (*millatun wāḥida*), who are all equal before the rulings of *fiqh*. The term *dhimmī* and its synonyms do not exist in the Quran but the jurists base their use of it on an interpretation of just one verse (Q, 9:29). Since Ṭūsī till the present, *dhimmī*s are considered a single community, thus if some interpretations suggest that jurists have singled out a minority, specifically

29 On the history of the Zoroastrians in Iran, see Mary Boyce, *Zoroastrians: their Religious Beliefs and Practices* (London, New York: Routledge & Kegan Paul, 1991); see also s.v. 'Zoroastrians' in *ER* by G. Gnoli, translated from Italian by F. Lubin.

30 There are more explanations on the stipulations in the following pages.

Jews, for special treatment or a ruling, they would be wrong.[31] In his definition of *ahl al-dhimma*, Ṭūsī (1387/1967: vol. 2, 36) mentioned Jews, Christians, and Zoroastrians and regarded *Ṣābi'īn*, who in his opinion worship stars, as infidels and did not consider them *dhimmī* (see Ṭūsī n.d.: 292).[32]

The majority, if not all, Shiite jurists did and still do follow him in this regard, but came across two exceptions – Ibn Junaid (d.381/991) among the early ones and Khū'ī (1410/1989: vol. 1: 391) among the contemporary ones – who regarded *Ṣābi'īn* as *ahl al-dhimma*, even although they did not regard them as People of the Book. Likewise, ʿAllāma Ḥillī (1413/1992: vol. 4, 429–30) considered Zoroastrians as not belonging to the People of the Book but regarded them as *ahl al-dhimma* and gave them the same injunction. The distinction between People of the Book and *ahl al-dhimma* is of political and economic, rather than theological, significance. Thus, according to Ṭūsī (1387/1967: 37), if the Islamic army encounters certain people who claim that they are People of the Book and are ready to pay *jizya*, the Muslim rulers should not question their beliefs and must accept their claim and their *jizya*. One may infer that this legal opinion is not exclusively limited to the time of Ṭūsī – see, for example, Khū'ī (1410/1989: vol. 1, 392), who reiterated the idea as his legal opinion.

The third application of the term for non-Muslims who live in non-Muslim territories is *al-kāfir al-ḥarbī* (literally, 'hostile infidel'), irrespective of whether they have a good or bad relationship with Muslims. The literal meaning can potentially be misunderstood as implying that every non-Muslim is considered an enemy, but that is not the case at all. To the jurists, the term simply refers to non-Muslims who live in non-Muslim territories.[33] They become enemies only

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31 One can conclude from Tsadik (2003: 382, 386; Tsadik 2007: 17) that he singled out the Jews among other minorities. But he (Tsadik 2007: 3, 5, 185, esp. 262n1) himself asserts that there is no difference in legal opinions when they come to considering religious minorities as second-class and humiliated people.

32 The jurists do not generally have real images of the *Ṣābi'īn* or Mandaeans, who still mainly live in southwest Iran and southeast Iraq and are followers of John the Baptist. See Gündüz (1994); 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 11/1, pp. 46–61; Maḥmūd Rāmyār, "Ṣābi'īn"', *the Journal of Faculty of Theology in Mashhad* [in Persian], vol. 1, 1 (1347/1968), pp. 154–167; Salim Birinjī, *qawm-i az yād raft-i* [*The Forgotten Tribe*] (Tehran: Dunyāy Kitāb, 1367/1988); Christopher Buck, "The Identity of the Ṣābi'ūn: An Historical Quest", *Muslim World*, vol. 74, no. 3–4 (1984): 172–186; Khāmis, Sāhī, *ṣābi'īn Qawm-i hamīsh-i zand-i-ye tārīkh* [*ṣābi'īn a Living Tribe for Ever in the History*] (Tehran: Āyat, 1383/2003); Mihrdād ʿArabistānī, *ta'mīdīyān gharīb* [*Lonely Baptists*] (Tehran: Afkār Nuw, 1383/2003).

33 Cf. Yeroushalmi (2009: for example, 6, 8), who always translated the term *al-kāfir al-ḥarbī* into "enemies at war with Islam".

if they declare their hostility towards Muslims. The jurists similarly confine the application of certain verses of the Quran to those who declare their hostility, verses (such as 9:29, 123; 33:20; 3:167) that instruct believers to fight *kāfirs* (non-Muslims). The Quran does not, in principle, hold peace and justice through violence, but it orders Muslims to fight those who betray the peace contract whether or not they live in Muslim territories.

Following their Sunnite counterparts, the Shiite jurists then divided the territories into two parts. Those in which Muslims have been ruling and Islamic regulations have been practised, whether conquered by force[34] or acquired peaceably, are called *dār al-islām*.[35] This stands in opposition to *dār al-ḥarb*, which technically refers to territories where Islamic rule and the obligatory adherence to Islamic regulations are not applied. The term *al-kāfir al-ḥarbī* thus has two meanings – (1) the infidels who live in *dār al-islām* and who belong to neither the People of the Book nor *ahl al-dhimma* and, again, the *dhimmis* who violate their contract with the Muslim ruler; and (2) the infidels who live in *dār al-ḥarb*, whether or not they are People of the Book. From the jurists' viewpoint, the *al-kāfir al-ḥarbī* in the first meaning have no choice in *dār al-islām* other than to convert to Islam or accept death. Also, they have no ownership rights, which is why the ruler can confiscate their properties if they refuse to accept Islam. The Sunnite jurists based this legal opinion on an interpretation of two verses (Q, 9:29; 2:85) and on two famous hadiths attributed to the Prophet (see Bukhārī 1401/1981: vol. 8, 50, 140, 162), the first remarking "you must kill whosoever changes his/her religion", and, the second saying "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." In one of his *fiqhī* books, Ṭūsī (1387/1967: vol. 2, 36, 57; vol. 7, 281, 284; vol. 8, 282) cited these hadiths on the authority of Ibn ʿAbbās and then gave his opinion as "There is the consensus of *umma* on this injunction." This legal opinion and those hadiths can also be found in Shiite jurist works that postdate Ṭūsī (see Ḥurr ʿĀmilī 1992: vol. 15, 26). Nonetheless, in the Shiite *fiqh*, the final decision on the destiny of such an infidel is taken by the imam or his deputies. Therefore, in this regard, no ordinary Muslim is entitled to reach a decision.

34 The term *maftūḥ al-ʾnwa* refers to territories occupied by force.

35 The oldest book I could find on this division is *Sharḥ kitāb al-sayr al-kabīr*, which is attributed to Muhammad Hassan Shaybānī (d.189/804). See Shaybānī 1971: 804–5; see, also, s.v. 'Dār al-Islām' by S.J. Shaw in *EI2* and by Rudolph Peters in *OEMIW*.

5.2 *A Very Short Introduction to Jihad*

There is a plethora of primary works written on jihad and its related sub-topics from the viewpoint of non-Shiites. The earliest are attributed to Abū Ḥanifa in *Fiqh al-akbar*, ʿAbd Allah b. Mubārak (d.181/797) in *Kitāb al-jihād*, Qāḍī Abū Yūsuf (d.181/797) in *Kitāb al-kharāj*, and Shaybānī in his different works. Beginning with Kulaynī and later moving on to hadith narrators and jurists, the issue is also developed in the Shiite sources. Extensive secondary works have been produced on the issue, especially in recent decades.[36] Here, I present an introduction to jihad based on Shiite primary sources. The term has two major meanings – (1) the holy war in the path of God, and (2) the struggle against the devil's temptations and all acts regarded as sinful. The former applies to the legal works and the latter to the ethical cum mystical ones. The Quran (3:169–70; 9:21) encourages Muslims to participate in jihad with respect to both meanings of the term, and promises them the mercy of the Lord and enduring pleasure in paradise. Clinging to worldly affairs and to family connections are considered the two main obstacles towards participating in jihad (Q, 9:24). The result of jihad from the points of view of both meanings would be a purified man.

Early Shiite jurists, like their Sunnite counterparts, regarded jihad as a religious task to be carried out at least once a year (see ʿAllāma Ḥillī 1413/1992: vol. 1, 477; Ṭūsī 1387/1967: vol. 2, 10), but later ones link the task to the conditions of Muslims (Najafī 1367/1987: vol. 21, 49). The early works show no explicit division of jihad into offensive and defensive forms. The discussion, based on some verses of the Quran (esp., 8:60), is developed to ensure the adequate provision of facilities with which Muslims may terrify their enemies (see Kulaynī 1388/1968: vol. 5, 2–23; Najafī 1367/1987: vol. 21, 38–9, 117–20). The main difference between Shiites and Sunnites is that the early Shiites linked jihad to the permission of the infallible imam or his specific deputy (see Kulaynī, 1388/1968: vol. 5, 23; Ṭūsī 1387/1967: vol. 2, 8), but some contemporary Shiite jurists believe that the struggle against the oppression of unjust rulers, rationally speaking, is necessary and does not require any permission (Khūʾī 1410/1989: vol. 1, 364; Muntaẓirī 1368–1370/1988–1990: vol. 1, 115, 118). Since the early jurists focused their discussions on jihad on the duty of governments to expand Islamic borders, they failed to address the question of an individual's responsibility to combat the oppression of unjust rulers. Consequently, the practice of jihad, either collectively or individually, has usually been carried out under the supervision of Shiite scholars or *ulama* who carry legal authority among religious people. They are regarded as the general deputies of the

36 See Etan Kohlberg 1976: 64–86.

twelfth imam, who is believed to be in the Occultation. Thus, every study of any subject on the duties of Shiites, including jihad, is linked to the function of the hierarchical institution of religious scholars. This institution has controlled the actions committed in the name of jihad and has legitimized those considered to be in the interest of the Shiites.[37] Here, it is relevant to add that some Islamic groups, like Muʿtazila in the past and Qādiyānīyya and Aḥmadīyya in contemporary Pakistan and India, believe that the ruling of offensive jihad has been abrogated forever.

The main question concerning jihad in the works of early Shiite jurists is why did they discuss the issue, especially the acquisition of slaves, in such detail yet fail to legitimatize jihad against an unjust ruler? The question may be raised in relation to the presence (11–255 AH) or absence (255 AH onwards) of the imams. For the former period, these discussions can be justified on the grounds that, despite their opposition to the caliphs, the imams probably accepted the de facto legitimacy of jihad. For the latter, it may be said that in the early years of the Occultation, the anticipation of establishing the enduring government of Imam Mahdi, which seemed imminent, coloured the focus of the discussions on jihad (see Modarressī 1993: 86–91).[38] Afterwards, jurists explained and justified certain cases of defensive jihad without stipulating the presence of a just imam or the obligation of all Muslims to participate in it.[39] Nowadays, some chapters or *abwāb* in the Shiite judicial books are still confined to slaves and slavery and I have heard teachers in Shiite seminaries dismissing them as merely theoretical and justifying their inclusion with remarks such as, "in the process of *ijtihād* it does not matter which issue you are dealing with; what counts is to learn the process and the method."

It is perhaps therefore pertinent here to question the function of such discussions in Shiite legal works. The purpose of engaging in theoretical discussions about jihad and the treatment of religious minorities in those works may be more about keeping the Shiite heritage alive and providing jobs for jurists

37 See Khalid Sindawi, "Ḥawza Instruction and Its Role in Shaping Modern Shīʿite Identity: The Ḥawzas of al-Najaf and Qum as a Case Study", *Middle Eastern Studies*, vol. 43, no. 6 (November, 2007), pp. 831–56; Marvin Zonis, "The Rule of the Clerics in the Islamic Republic" in *The Annals of the American Academy of Political and Social Science*, vol. 482, *Changing Patterns of Power in the Middle East* (Nov. 1985), pp. 85–108.

38 See Kulaynī (1388/1968: vol. 1, 338), who quoted the period of anticipation as "six days, six months or six years" but in the later Shiite works the phrase is changed into "a period of time".

39 See, as an example, Shahīd Thānī 1410/1990: vol. 2, 380–2. The supreme religious leader of Iran, Ayatollah Sayyid Ali Khamenei (1415/1995: 331, Question no. 1074), issued the legal opinion that offensive jihad was also obligatory, even in the period of the Occultation. This is a decree of very rare precedent among Shiite jurists.

than about any real need to apply these legal opinions to a certain period. After all, legal rulings invariably take place within historical contexts. For example, that a jurist discusses *jizya* in certain of his legal works is insufficient reason to levy that tax during his lifetime. An example worth noting is the treatise of *ṣawāʿiq al-yahūd* (of lightning bolts against the Jews) attributed to Majlisī, which deals with how Muslims, particularly rulers, must treat non-Muslims.[40] The subject matter of the treatise, as we shall see, can readily be found in the works of many jurists before and after Majlisī[41] and right down to the present day; however, the mere existence of a treatise is no reason to implement its findings during a particular time frame. The relevant quote from Majlisī (1992: 191, 194) which reads "I do not have any reliable reference and legal basis for this treatment" serves to support the notion that Shiite jurists mainly dealt with such matters in a fiercely competitive environment. I do not wish to convey the impression that they did not believe in their own recommendations; rather, my aim is to distinguish between theoretical discussions and practical applications to avoid reaching a fallacious conclusion. I shall cover several concrete cases of these treatments in Chapter 2.

5.3 *The Duties and Rights of Non-Muslims*

From a juristic viewpoint on the different categories of non-Muslims, only *ahl al-dhimma* or *dhimmīs*, irrespective of whether or not they are People of the Book, can live in Muslim territories, and then only if they fulfil certain stipulations. Apart from various minor commitments, which I discuss here, the major requirement following the surrender agreement is to pay the *jizya* and *kharāj* taxes.

Jizya, by definition, is an annual tax imposed on *dhimmīs* through a determinate contract with the Islamic ruler who, in return, agrees to protect their lives and property in *dār al-islām*. *Kharāj* is an annual tax for *dhimmīs* who own or occupy land, and it is based on a percentage of the income derived from land conquered in wartime by Muslim soldiers (*maftūḥ al-ʿanwa*).[42]

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40 See this treatise in Vera Basch Moreen's article in English and its Persian original in *Die Welt des Islams* (Moreen 1992: 177–95).

41 See Yeroushalmi (2009: 3–10) for similar precepts by some jurists of the Safavid period; see also Sharifi 1387/2009: 63–86, 210–14. The point is that the reader should be cautious about the accuracy of Sharifi's reports. See also Tsadik (2007: 138) on the "1889 *dhimma* thirteen regulations" of Aqā Najafī (1846–1914), the prayer leader of the Shah Mosque, against the Jews of Isfahan; and Tsadik 2007: 161 on similar regulations by Mullā ʿAbdullāh against the Jews of Hamadan.

42 On this kind of land, see Modarresī (1362/1983), vol. 2, Ch. 5, esp. 199–207; on the general classification of lands, see A.N. Poliak, "Classification of Lands in the Islamic Law and Its

According to these definitions, which found consistency in the later period, *jizya* is a levy to protect the lives of *dhimmīs* while *kharāj* is related to their lands. *Dhimmīs* pay these taxes to the ruler in exchange for the right to live and the right to work their lands. However, early Shiite *fiqh* literature occasionally yields different definitions. In one case, Kulaynī (1388/1968: vol. 3, 567–8) cited six hadiths from Imam Jaʿfar al-Sādiq on the definitions of *jizya* and *kharāj*. According to the second, *kharāj* saves a *dhimmī*'s life and *jizya* saves his land. Elsewhere (Kulaynī 1388/1968: vol. 5, 10–11), Kulaynī quoted two other hadiths from the Prophet which indicated the opposite of this definition. Most likely, these two hadiths could not be attributed to the Prophet since there is some evidence from Islamic sources that *jizya* was established in the later years of the Prophet's life and *kharāj* was established in the period of the second caliph, ʿUmar b. Khaṭṭāb (see Mudarressī 1362/1983: vol. 2, 48–54).

The interchangeable usages of the terms *jizya* and *kharāj* in some early Sunnite *fiqhī* literature (that is *jizya* on life and *kharāj* on land and vice versa) have led some scholars to assume that the terms were unclear and they came up with various suggestions for resolving the ambiguity (see Wellhausen 1973: 276–7). Ṭūsī (1407/1986: vol. 2, 70; vol. 5, 535) attributed the synonymity of the two terms to Abū Ḥanīfa, but then argued that, at least in the Shiite hadiths, they had clear and definite meanings and were not at all synonymous.[43] However, we saw the inconsistency in Kulaynī's work. One difference that Ṭūsī mentioned is that if a *dhimmī* converts to Islam, he is freed from paying *jizya* but that the *kharāj* remains in place, without exception.[44] In addition, according to a hadith quoted by Kulaynī (1388/1968: vol. 3, 568), it is possible for a *dhimmī* to pay *jizya* with money earned from selling wine and pork, but *kharāj* is a determined percentage of the income from land conquered by force and it does not make sense to pay it by selling such things. *Jizya* and *kharāj*, however, do bear similarities: both are paid annually and are used to the same end. The end is to allocate them to soldiers in jihad and that is why some jurists look upon *jizya* as war booty (see Najafī 1367/1987: vol. 21, 262; Ṭūsī 1387/1967: vol. 2, 50). Nonetheless, jurists have argued that it is up to the imam or ruler to demand more taxes for the war in accordance with the interests and needs of the Muslim society in question (see Ṭūsī 1407/1986: vol. 5, 545–6). According to Shiite jurists, women, children, invalids, slaves, beggars, the elderly, and the mentally-ill are exempt from paying *jizya* (see Kulaynī 1388/1968: vol. 3, 567).

Technical Terms", *The American Journal of Semitic Languages and Literatures*, vol. 57, no. 1 (Jan. 1940): 50–62.

43 For his definition on *jizya*, see Ṭūsī n.d: 194–95; and Ṭūsī 1407/1986: vol. 2, 69–70.

44 See also Modarressī 1362/1983: vol. 2, 149–51.

What is the purpose of levying *jizya*? Is it equivalent to alms or *zakat* for Muslims, or is it paid to give them the right to life? On one hand, according to a hadith attributed to the Prophet, *jizya* is a tax for *dhimmīs* like the alms tax (*zakat*) is for Muslims; hence, they should pay nothing else as tax.[45] On the other hand, some are of the opinion that *jizya* is a levy to protect the lives of *dhimmī*s. Kulaynī (1388/1968: vol. 3, 567–8) mentioned that, according to the Quran (2:83), before levying *jizya*, the duty of Muslims in dealing with others, including People of the Book, is just to meted out good treatment and nothing else. Then, he added, "the verse (2:83) was abrogated by another verse (9:29) in Sura *at-tawba* which was apparently revealed in the later years of Muhammad's life."[46] Furthermore, the interpretation of one word in this verse (Q, 9:29), *ṣāghirūn* (and *ṣāghir*, the singular form, literally "those who feel humble or inferior"), raised various debates on the purpose of *jizya*. According to Ṭūsī (1387/1967: vol. 2, 43, 52), *ṣaghār* refers to the state and level of commitment of a *dhimmī* who accepts Islamic regulations because of the *jizya* contract, which protects his life.[47] Some Shiite jurists, following the Sunnite ones, equate *ṣaghār* with a state of anxiety. This is because *dhimmī*s should not be allowed to feel a sense of tranquillity after paying a fixed and reasonable amount of *jizya*. The ruler therefore fixes the amount at a level that most *dhimmī*s cannot easily pay, so must either convert to Islam or be in a constant state of anxiety. The same jurists then added some conditions for *dhimmī*s when they pay *jizya* with their own hands to emphasize their being humble or *ṣāghirūn* (Mufīd 1410/1989: 273; Najafī 1367/1987: vol. 21, 247–9).[48]

The practice of drawing up surrender agreements and then levying *jizya* and imposing humiliating stipulations was in operation during the Sasanian dynasty (AD 224–651) and in Byzantium[49] as well as in pre-Islamic Arab society

45 ʿAllāma Ḥillī (1413/1992: vol. 3, 251–2) gave the idea as his *fiqhī* opinion, not simply as a hadith quotation; Khūʾī, (1410/1989: vol. 1, 395) used the term *jizya* for both life and land cases and considered only one tax obligatory for *dhimmī*s. See also Kulaynī (1388/1968: vol. 3, 568).

46 Take a look at the end of the verse, which reads, "Fight those who do not believe in Allah or … until they give *jizya* with their own hand willingly while they are humble." The adjective *humble* implies a pejorative sense here.

47 Most Shiite jurists have accepted this interpretation. See ʿAllāma Ḥillī (1413/1992: vol. 4, 434) as an example. Ṭūsī adopted a different position from the one given here in *Al-khilāf* (Ṭūsī 1407/1986: vol. 5, 543–4). See Bravmann (1972: 205–12) on the meanings of *yad* (hand) and *ṣāghirūn*.

48 See Rubin 1993: 133–44.

49 See s.v. 'Djizya' by C.L. Cahen in *EI2*, esp. 563.

(Jawād Ali 1993: vol. 7, 76; Levy-Rubin 2011: 26–31, 45–50, 95, 97).[50] It is said that the word *jizya* has Persian-Pahlavi roots, derived from *ġazīdag*,[51] while some scholars (like Jeffery 1938: 101–2)[52] argue that the word is borrowed from Syriac[53] or Aramaic.

There are other stipulations regarded as necessary in the *dhimma* contract. For example, it is reported in the Shiite sources that "the Prophet usually stipulated in his contract with *dhimmī*s that they avoid taking usury, doing incest,[54] eating pork, and drinking alcohol in public" (see, as an example, Ḥurr ʿĀmilī 1372/1992: vol. 15, 125). Ṭūsī (1387/1967: vol. 2, 43–4) generally divided the stipulations into two categories – positive and negative. The first should be precisely stipulated in the surrender agreement, but the second are mandatory, but should not be performed in Muslim territories; Ṭūsī divided them into three general types:

(a) Transgressions that cancel the *dhimmī*'s entitlement to protection, such as murdering a Muslim or waging war against Muslims. If *dhimmī*s fall into this category, their contract is annulled and they become *kāfir-i ḥarbī*s. The decision to identify *ḥarbī*s and invalidate their contracts is

50 See Bravmann 1972: 199–205; see Levy-Rubin (2011: Ch. 2) for details on the similarities between the surrender and vassal agreements of the Muslim rulers and the Roman and Iranian ones.

51 See Mackenzie 1971: 36.

52 See also s.v. 'djizya' by C.L. Cahen in *EI2*, esp. 559–60.

53 An ancient Aramaic language spoken in Syria from the third to the thirteenth centuries survives as the liturgical language of several Eastern Christian churches (*The American Heritage Dictionary*).

54 Islamic sources attribute the practice of incest to Zoroastrians. The Zoroastrian text that explicitly mentions the legality of incest is translated from Pahlavi by F. Faḍīlat and contains 420 reports on the Mazdian religion (*Dīnkird* III, *Dādistān Dīnī*, 1381/2002: Ch. 80 and Question 64). In Chapter (*kard-i*) 80, the author explains the legality of incest in reply to a Jew asking about its justification. In *Magika*, incest, or 'Xvaet.Vadaəa' in the Pahlavi Zoroastrian literature, is attributed to a writer whose name is Xantus Lidia (b.465 BCE); see quotation on *Vandīdād*, no. 105, in Raḍī (1382/2003). See Anklesaria (1913) on the Zoroastrians' ancient religious text. When the author enumerates sins in paragraph 7 of question 35, he regards the fourth great sin as that committed "when one cancels his marriage with his intimate". See also Tafazzolī (1376/1997: 131, 152, 155), who reported that the author of *Pahlavi Narrators* justified marrying intimates on the grounds that a Zoroastrian priest feared that marrying outsiders would lead to a decrease in people's faith; see also Anklesaria (1964: esp. 93). However, later Zoroastrians believe that 'Xvaet. Vadaəa' was a teaching of Magi and must not be translated as 'incest', because in their opinion they had never had such a custom. According to this interpretation of 'Xvaet. Vadaəa', it means that the marriage of a Zoroastrian with a non-Zoroastrian is unlawful. See Shahzādī 1380/2001: 248. I came upon this information through research and by interviewing the late Dr Shahrām Hidāyat (d.2015), who was an expert in Zoroastrian studies.

entrusted to the imam or his nominee, not to individuals (Ṭūsī n.d.: 749; Ṭūsī 1407/1986: vol. 5, 342, 457).

(b) Behaviour that harms the reputation of Muslims, such as adultery with Muslim women, reporting the secrets of Muslims to their enemies, or seeking to convert Muslims to another religion.

(c) Things that the *dhimmī*'s religion permits but that are prohibited in *dār al-islām*, such as usury, incest, eating pork, drinking alcohol in public, and ringing church bells are all examples mentioned by Ṭūsī.

On the latter two cases, Ṭūsī (1387/1967: vol. 2, 43–4: vol. 8, 37) argues that although the *dhimmī*'s contract remains valid, the individual offender will be punished. He then adds another option, namely

(d) activities that both Islam and the *dhimmī*'s religion consider illegal, such as adultery and theft. He argues that such lawbreakers must be punished in accordance with Islamic penal regulations as if they were Muslims (see Ṭūsī 1407/1986: vol. 5, 552–3). In this case, all people are equal as to the application[55] of the law and it makes no difference whether the subject is a Muslim or not. As we shall see in Chapter 4, under the sway of Ṭūsī's legal opinion, legislators in the Islamic Republic charged non-Muslim criminals under the Islamic Penal Code.

Finally, Ṭūsī drew up a list of requirements relating to the positive mandatory category; these consisted of the ruler's conditions mentioned in the contract to which *dhimmī*s needed to comply if they were to fulfil its terms. Ṭūsī wanted *dhimmī*s to get closer to Islam and eventually accept it, though he mentioned that since there are no hadiths or valid sources attributed to the Prophet or to the imams to uphold these suggestions, they are left to the discretion of the ruler (Ṭūsī 1387/1967: vol. 2, 44–5). Amazingly, these stipulations are the same as those found in the Pact attributed to ʿUmar b. al-Khaṭṭāb or most probably ʿUmar b. ʿAbd ulʿazīz[56] and are known in the Sunnite fiqh as *al-ʿūhūd* or

55 This does not mean that the punishment is also equal, which is why I said "equal as to the application of the law", not simply equal before the law.

56 Levy-Rubin (2011: 60) lists the various versions of the Pact and, in her third chapter, explains the development of its contents. From her textual analysis of it, she claims that some scholars, such as A.S. Tritton and Antoine Fattal, dated the Pact to a period of political stability for Islam and not to that of the conquerors. Thus, it is likely that its initial version belonged to ʿUmar ibn ʿAbd ulʿazīz, or more probably to the second half of the second Islamic century, and then was gradually developed and canonized until the seventh or eighth century of Islam. Albrecht Noth argues that the text is a collection of early understandings based on treaty traditions, on the praxis between the Muslim conquerors and the non-Muslim conquered population, and that it is made up of three basic layers. Levy-Rubin believes that it belongs to the period of ʿUmar ibn ʿAbd ulʿazīz, thus culminating around the turn of the second century, and that prior to its canonization there was no

al-shurūṭ al-ʿumarīyya.[57] Neither Ṭūsī nor any other later Shiite jurist refers to the source of these suggestions. Ṭūsī argues that it is appropriate for the ruler to force a *dhimmī* to wear a distinct type of dress,[58] such as a *zunnār* belt,[59] a particular turban (*ṭaylasān*), clothing, or shoes, to avoid being confused with Muslims. Ṭūsī suggests that *dhimmī* women wear different shoes from Muslims; for instance, one shoe could be white and the other red.[60] They must not go to public baths, but if they have no alternative they must wear an iron or leather necklace to ensure that they are easily recognized as *dhimmī*.[61] Subsequently, most Shiite jurists have quoted Ṭūsī's suggestions and then added a few more statements, such as a *dhimmī* must not ride a thoroughbred or saddle horse, or should not ride any horse at all; also, they must not themselves carry any weapons or keep any in their houses. They must not use the titles of Muslims, and they must not dress and cut their hair (uncut forelocks) in any way to resemble Muslims. In some *fiqhī* opinions, if the Muslim ruler deems it advisable to impose other conditions or stipulations to promote the public interests of Muslims, he may do so. To justify the suggestions, some Shiite jurists added that "the stipulation causes them to accept Islam whether out of fear

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single agreed-upon formal legal document on Muslim – *dhimmī* relations. Rather, there were alternative versions that disagreed on several major issues (Levy-Rubin 2011: 60–2, 79, 92). See Yarbrough (2016: 173–206) for a critique of Levy-Rubin's maximal reading of the evidence on the historicity of the Pact.

57 The chronological bibliography of the expanded texts of the Pact and some comments on them is as follows: Ibn ʿAsākir (d.571/1175), *Tārīkh madīna damishq*, Beirut 1415/1995: vol. 2, 174–180; *Sharḥ al-shurūṭ al-ʿumarīyya*, edited by Muhammad b. Abī Bakr Saʿdī Miṣrī, known as al-Akhanaʾī (d.750/1349), the Egyptian judge; Ibn Qayyim Jawziyyah (d.751/1349), *Sharḥ al-shurūṭ al-ʿumarīyya*, edited by Ṣubḥī Ṣāliḥ (Damascus: Jāmiʿa al-Damishq, 1961); 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, "I explained the whole *al-shurūṭ al-ʿumarīyya* concerning Jews and Christians in my work *al-aḥkām*," then he briefly reported them in vol. 14, 287–8, which may be compared with what Ṭūsī suggested; see also, *Al-ʿuhūd al-ʿumarīyya fī al-Yahud wa al-Naṣārā*, edited by Ahmad b. ʿAṭṭār al-Danīsirī (d.794/1391), in Hājī Khalīfa, *Kashf al-ẓunūn* (Beirut: Dār al-Iḥyaʾ al-Turāth al-ʿArabī, n.d.): vol. 2, column 1180. For a discussion on the origins of the Pact in other pre-Islamic cultures, see Levy-Rubin 2011: Ch. 5.

58 By "wearing a distinct type of dress or sign in Muslim regions", Sunnite and Shiite jurists intended to attach a dress code or sign to non-Muslims that is sometimes called *al-ghiyār*. On this term, see Levy-Rubin (2016: 157–72), who argues (in Levy-Rubin 2011: 97–8, 143–4) that the term is of Pahlavi origin.

59 See s.v. 'zunnār', by A.S. Tritton in *EI2*; Levy-Rubin 2011: 153–7.

60 These colours are cited by Ṭūsī, but Ibn Kathīr (1408/1987: vol. 14, 288) says that one shoe must be black and the other white.

61 Since the examples were gradually developed into somewhat *fiqhī* opinions rather than mere suggestions, I preserved the very examples and their details here, all quoted from Ṭūsī.

or enthusiasm" (see Khomeini 1390/1970: vol. 2, 503–4; Khū'ī 1410/1989: vol. 1, 398;[62] Najafī 1367/1987: vol. 21, 271–3). However, some of the stipulations in the fourth category seem to date from the politically stable period of Muslim rule rather than from the surrender agreements that the commander of conquerors drafted after the Muslim conquest.

As to stipulations on synagogues, churches and temples, Ṭūsī distinguished between territories that originally belonged to Muslims or that were conquered by force, and territories acquired through a peace agreement following which the ruler would levy *jizya* on the people living there. In the first case, they must not erect any new church, temple, or place of fire worship and, in addition, must not repair them because, in his view, they are signs of evil (*munkar*) (see Ṭūsī 1387/1967: vol. 2, 44–5).[63] In the second case, though, they can repair them provided they observe the conditions set by the ruler, such as a prohibition on erecting buildings higher than the Muslims' houses and mosques and the prohibition against ringing church bells (Ṭūsī 1387/1967: vol. 2, 46).

5.4 *Social Relations*

Most kinds of social relations with non-Muslims are completely legal in Muslim territories. For example, trading with non-Muslims is permissible; a Muslim can appoint a solicitor (*wakīl*) from among the infidels, including People of the Book; and a Muslim male or female can become a solicitor to non-Muslims and carry out their legal or business affairs (see Ṭūsī n.d.: 317). In the everyday conduct of socio-economic relationships, such as buying, selling, renting or borrowing goods and services, the jurists believe that, theoretically, there are no restrictions apart from those, such as drinking wine or eating pork, that are in principle forbidden for Muslims. However, this legality is confined to non-Muslims who are not, according to its first meaning, *al-kāfir al-ḥarbī*.[64] Economic relations with *al-kāfir al-ḥarbī* are considered illegal because, from a jurist's viewpoint, they do not enjoy ownership. On the question of economic relations between Islamic and non-Islamic governments, however, it is

62 Khū'ī, on the authority of a hadith quoted by Ḥurr ʿĀmilī (372/1992: vol. 15, 126), added that *dhimmīs* must not educate and train their children in accordance with their own beliefs, but Muslims do permit them to attend their meetings and schools with a view to finding the right path, the religion of Islam, a cause that would be *fiṭrī* or instinctive.

63 Kulaynī (1388/1968: vol. 3, 368) quoted a hadith by Imam Jaʿfar Ṣādiq in favour of converting churches and temples into mosques.

64 The term, as already mentioned in the section headed 'Terminology', has two meanings. The first refers to infidels living in Muslim territories who are classified as neither People of the Book nor *dhimmī*.

generally up to the Muslim ruler to grant such permission under certain conditions. Relations of this kind need independent discussions.

In terms of social relations, two factors – which are sometimes connected to each other and are highlighted in both Shiite sources and in the Shiite mentality – influence how Muslims encounter non-Muslims in their territories. The first concerns the purity or impurity of People of the Book and *dhimmīs*, and the second the lawfulness or unlawfulness of Muslims eating their foodstuffs. In my opinion, both are highlighted as factors that help to form and develop the identity and community of Muslims in general and of Shiite Muslims in particular. They are thus, and always have been since premodern times, of more sociological than legal significance.

Before discussing jurists' different legal opinions, it is helpful to look into the Quran and Sunna to ascertain the main root of the disputes. There are two relevant verses on these issues in the Quran. In one the believers are told that "the polytheists are impure (*najas*)" (Q, 9:28) and in the other that "the foodstuffs of the People of the Book are permissible for you" (Q, 5:5). The various extant *fiqhī* opinions depend largely on the interpretation of the terms (polytheist, impure, and food) in those verses. The Shiite hadiths contain no explicit words to describe the purity or impurity of the bodies of the People of the Book or of *dhimmī*s, though some hadiths refer to the purity or impurity of their dishes and foodstuffs. Kulaynī (1388/1968: vol. 6, 263–5) quoted ten hadiths, in three of which the imam granted Muslims legal permission to consume the foodstuffs of the People of the Book, but then only in the form of grains (*ḥubūb*), vegetables, and herbs (*buqūl*). In two other hadiths, the imam simply answered the questioner in the negative, which jurists have interpreted in various ways. In one of these, the imam is reported to have added, "I myself do not eat food with them but I am reluctant to forbid for you what is regular in your region." In a fifth hadith, the imam limited the scope of the impurity concerned by making it conditional upon knowing for sure whether an impure substance, such as wine or pork, had been used in preparing the food in question. The ninth hadith, for which there is a weak chain of authority, absolutely forbids their foods on the grounds that they routinely use wine and pork in their dishes. In the tenth hadith, the imam explicitly permits coexistence with the People of the Book and the use of all their dishes and foodstuffs with the single exception of pork. After the Kulaynī period, another hadith related by ʿAmmār Sābāṭī from the sixth imam Jaʿfar al-Ṣādiq, which is considered reliable[65] (*muwaththaq*),

65 Each of these schools of thought, Shiite and Sunnite, has its own criteria for dividing hadiths into at least three categories – *ṣaḥīḥ* (sound), *muwaththaq* (reliable), and *ḍaʿīf* (weak). Depending on their analyses and views on theological doctrines and historical narrations,

reaches the opposite conclusion. Jurists who believe in the purity of the People of the Book's dishes and foodstuffs usually cite this hadith. When a Jew drank water from a jug, the imam was asked, "can I drink water or make ablutions from the same jug?" "You can," replied the imam. Surprised, the hadith-relater enquired again, saying, "the drinker is a Jew!" and received the same answer again (Ḥurr ʿĀmilī 1372/1992: vol. 1, 229–30; see also some opposite hadiths in vol. 3, 419–22). While there is no information with which to analyse and clarify the context of this hadith, the narrator's surprise suggests that the imam's belief in the purity of non-Muslim foods was unusual. It is a hadith that Shiite jurists have challenged and it is cited here in detail to illustrate the basis for such a variety of *fiqhī* opinions. Other hadiths that use minute verbal changes to prove the legality or otherwise of their contents are ready for further scrutiny.

5.4.1 Purity and Impurity

According to the present modus operandi, Shiite jurists have issued different legal opinions. Ṭūsī's viewpoint, in accordance with our favourite method, must first be attended to. He interpreted *mushrikūn* in the verse as polytheists and infidels and then included the People of the Book and *dhimmīs*. Accordingly, he regards non-Muslim bodies as contagiously impure (*najas*) and argues that Muslims must avoid using their dishes and foodstuffs and the wet things they have touched. He interprets the term *najas* as substantial impurity (*najāsat ʿaynī*), which must be avoided, in contrast to the intrinsic impurity (*najāsat bātinī*), upon which some further views, including Sunni ones, will be taken into account (see Ṭūsī 1407/1986: vol. 1, 70; vol. 4, 406). As we shall see, Ṭūsī offered his interpretation of the terms *mushrikūn* and *najas* without any semantic consideration and consequently extended the meaning of polytheist and infidel to *ahl al-kitāb* and the literal meaning of *najas* to a technical one.

After Ṭūsī, the issue of the purity and impurity of the People of the Book and *dhimmīs* received various legal opinions in the history of the Shiite *fiqh*.[66] I divide the jurists' legal opinions since Ṭūsī into three historical categories:

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different jurists may have different criteria for considering transmitters as reliable or unreliable. In this regard, Ṭūsī is also a pioneer in the Shiite tradition. Further information may be found in the Shiite books of *rijāl* (hadith transmitters), like Ṭūsī (1351/1973), *Al-fihrist*, and Khūʾī (1413/1992), *Muʿjamu rijāli al-hadith wa tafṣīlu ṭabaqāt al-ruwāt*, in 24 vols.

66 The pro-Shiites' views before Ṭūsī differentiate between non-Muslims and Jews and Christians with respect to their purity status; see Freidenreich 2011: 70–6. The opinion of this group is like the second group in my division.

(a) The majority of Shiite jurists (see, as an example, Muḥaqiq Ḥillī 1409/1989: vol. 4, 755) accepted Ṭūsī's view absolutely. They followed him in interpreting the keywords of the verse, *najas* and *mushrikūn*, and in preferring hadiths that emphasized impurity over those indicating purity. This group argued that the hadiths indicating purity were uttered by the imam or quoted by their narrators in a dissimulated way (*taqīyya*).[67] It is worth mentioning that, among *ahl al*-Sunna, some jurists like Muhammad b. Hasan Shaybānī (d.189/804), Ahmad b. Ḥanbal (d.241/855), and his teacher, Abū Isḥāq Ibrāhīm b. Muhammad[68] (d.238/852), interpreted the two words of the verse in a similar way. Thus, first, the idea of impurity is not a distinctive characteristic of the Shiite School,[69] whereas the idea of communicable impurity has been in existence since the fourth/tenth century; second, the idea of communicable impurity stems from a certain interpretation of the verse and from accepting those hadiths; and, third, it is false to claim that Shiite jurists received or borrowed this idea from Zoroastrians and ancient Iranians (cf. Sanasarian 2000: 23–4).[70]

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67 The term 'dissimulation' is repeated many times in the Shiite sources, especially where there are similarities between Sunnite and Shiite views. But here, concerning the idea of purity, the application of the term is inappropriate, for it fits only when the opposite opinion among *ahl al-Sunna* becomes famous and receives government support in a way that prevents Shiites from expressing their disagreements.

68 On Abū Isḥāq, see Ibn Ḥajar al-'Asqalānī, *tahdhību al-tahdhīb* (Beirut: Dār al-Fikr, 1404/1984: vol. 1, 134, no. 276).

69 Shaybānī (1971: vol. 1, 145–7) in his argument on the legality of using the dishes asserts that the real impurity of an infidel is not communicable to his or her dishes. He took the impurity of infidels for granted and only questioned the possibility of its transfer. See also Muḥyī al-Dīn Nawawī (n.d.: vol. 1, 264–5), in which he reported how Aḥmad b. Ḥanbal and Abū Isḥāq Ibrāhīm b. Muhammad had interpreted the two words *najas* and *mushrikūn*. Their interpretation is similar to that of Ṭūsī. Tsadik (2003: 383) concluded from Abū al-Qāsim Qummī's opinion (d.1231/1816) that "one cleric argued that this point [impurity] is one of the distinctive characteristics of the Imāmī Shī'īsm". But, it is unclear who he meant by "one cleric". It would not be Qummī (1371/1992: vol. 1, 45), for he was in sympathy with the idea and, in his book, only mentioned that "the impurity is common knowledge among our companions of our community and … some *ulama* had claimed consensus on the issue" and did not say this was the distinctive characteristic. However, Tsadik in his claim is right if by "the impurity" he means "the contagious impurity".

70 Sanasarian quoted the idea of 'borrowing' from Bernard Lewis, following Goldziher in *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. For a criticism of the idea of 'borrowing', see Freidenreich 2011: 80–1, especially where he says, "although there are similarities between Zoroastrians and Shī'ī ideas on

(b) Some jurists limited the scope of the impurity to cases in which a substantial impurity (*najāsat ʿaynī*), such as pork or wine, could be found in their foods and dishes. According to their interpretation of the verse, the Quran gives no clear idea of the impurity of the People of the Book. These jurists do not say that their food is invariably impure because they themselves are impure. According to this group, since the word *najas* in the Quran may connote an attribute of one who carries out a corrupt action and/or has a false idea, the word does not explicitly convey the substantial impurity of *mushrikūn*, including the People of the Book. Hence, the word *najas* in this sense is not definite (*naṣṣ*) in the Quran. As a result, *najas* is perhaps used in the verse to convey a political and theological rather than a legal connotation, which was later formed gradually during the first centuries. This position was held by the famous Shiite jurist Muhammad b. Makkī ʿĀmilī (d.786/1384), known as Shahīd Awwal, and also by Zayd b. Ali ʿĀmilī (d.966/1559), known as Shahīd Thānī (see, as an example, Shahīd Thānī 1413/1992: vol. 12, 65–7).[71] It is worth mentioning that most jurists among the *ahl al-Sunna*, be they Ḥanafī or Mālikī, also fall into this category.[72]

(c) Since the middle of the twentieth century, some Shiite jurists have come to reject the majority idea. They refuse to accept the hadiths that indicate impurity and believe that the People of the Book, whether *ahl al-dhimma* or not, are pure. They argue that if one finds any real impurity in their dishes or foodstuffs, one must avoid that dish, but that is no reason to assume the contagious impurity of their bodies and dishes in general. Among these jurists, to the best of my knowledge, Sayyid Muḥsin Ḥakīm was perhaps the pioneer of this idea. He partially presented the argument and it was then developed further by a number of jurists like Abū al-Qāsim Khūʾī, Muhammad Bāqir Ṣadr, and even Khomeini. Ṣadr scrutinized all the arguments for or against purity and then explicitly opted for

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the subject, the argument that Shiite authorities 'borrowed' from them carries no explanatory force."

71 On both of these jurists, see s.v. 'Muhammad B. Makkī' by B. Scarcia Amoretti in *EI2*; s.v. 'Shahīd Thānī' by Etan Kohlberg in *EI2*.

72 See quotations from other schools that confirm this position in Dārimī (d.255/868), (n.d: vol. 2, 233–4); Ibn Ḥajar al-ʿAsqalānī (d.852/1448), (n.d: vol. 9, 511–12); Khaṭīb Shirbīnī (d.977/1569), (1377/1958: vol. 1, 31); Muhammad b. Ahmad Zakarīyyā Anṣārī (d. 926/1519), (1997: vol. 1, 37); Muhammad b. Ali Shawkānī (d.1255/1839), (1973: vol. 1, 25–6); Nawawī (n.d.: vol. 1, 264: vol. 2, 562–3). Concerning the position of *ahl al-Sunna*, see Holmes Katz (2002: 164–71), especially on al-Shāfiʿī's position regarding the purity of all human beings. See also Richard Gauvain, "Ritual Rewards: A Consideration of Three Recent Approaches to Sunni Purity Law," *Islamic Law and Society* 12 (2005: 333–93).

purity (Ṣadr 1391/1966: vol. 3, 260–70: vol. 4, 282; see also Ḥakīm 1391/1966: vol. 3, 361–2). He argues that early Shiite jurists had received and were aware of hadiths favouring the purity argument, such as that of ʿAmmār Sābāṭī, but adds that as they were being swayed by the opinions of *ahl al-Sunna*, they failed to pay proper attention to them. Therefore, they assumed that impurity was an undisputed idea in *fiqh*.[73] In addition, the proponents of purity presented more evidence for their interpretation of *najas* and *mushrikūn* in the verse by referring to the semantic changes of the words in the Islamic sources. Their main reasoning is that the meaning of *najas* in the Quran is neither *fiqhī* nor technical, for when the verse was revealed in Mecca, its technical meaning had not yet appeared; rather, it had only a lexicographic significance, suggesting inner impurity of thought (*najāsat* or *khubth bāṭinī*), which everybody attributed to his opponents trying to create an identity for themselves. This group of jurists, who are gradually increasing in number, restrict the meaning of *mushrikūn* to those who practise idolatry but, in their opinions, all infidels, including atheists and the People of the Book, are considered pure (see Ḥakīm 1391/1966: vol. 1, 367–8).[74] Reviewing the hadith the jurists used as evidence to prove the impurity of infidels, Khūʾī (1413/1992: vol. 2, 45–50) held that far from proving impurity, the hadith provided the best evidence in favour of purity. In the same text, the imam said that since the receptacles the *ahl al-dhimma* used for drinking wine were impure, the imam's stipulation would have been meaningless if they had been contagiously impure.

Thus far we have looked at three standpoints held by Shiite jurists regarding purity vs impurity. One point remains to be mentioned here. Some Shiite jurists such as Ibn ʿAqīl (d. *ca.*fourth/eleventh century), Ṣadūq (d.381/991), and Muhammad Bāqir Sabziwārī (d.1090/1679) have been quoted as having argued that the very act of drinking alcohol is forbidden but alcohol itself is not impure (see Sabziwārī n.d.: vol. 1, 153). Accordingly, the jurists of this opinion are classified in group (b) and, subsequently, only pork remains impure,

73 This attribution to the *ahl al-Sunna* is untrue, for most Sunnite jurists, as we have seen, rejected absolute impurity, and interpret the term *najas* as an 'inner impurity of thought'.

74 For more explanation, see Khūʾī, 1413/1992: vol. 2, 43–5. Khomeini (1410/1989b: vol. 3, 306) believed that "even an atheist (*mulḥid*) is not impure." However, in his popular Persian judicial book, known as *Tawḍīḥ al-masaʾil* (which, as is customary concerning all books of its kind, was compiled by the disciples and then endorsed by the jurist), he mentions the impurity of *kāfir* and explains the word in a way that includes the People of the Book. Many ordinary Muslims in Iran who cannot read his Arabic works assume that the People of the Book in his view are impure.

which could be a reason to avoid using the dishes and eating the foodstuffs of the People of the Book.

Because most Shiite jurists in the past, and some in the present, belong to group (a), which considers infidels to be impure, a belief that is widespread among ordinary Muslims in Shiite Iran and one that sometimes leads to prejudice, albeit a prejudice that has roots in the legal and historical sources. Ṭūsī's view, for example, on who should partake in the *ṣalātu al-istisqā'* (the ritual prayer for rainfall) is notable evidence of my claim. In an attempt to attract God's grace, he encouraged the attendance of children, the elderly, and any pious person in such a prayer. He added that it was preferable to discourage the attendance of People of the Book because, as *maghḍūbun ʿalayhim*, they would not receive God's grace (see Ṭūsī 1387/1967: vol. 1, 135: vol. 7, 276). Ṭūsī's view has no relevance to or attribution from the imam or Prophet. Nonetheless, many later Shiite jurists reiterated his words without reflecting on his opinion. In the last century, these stereotypes and prejudices have been in decline. In Chapters 3 and 4, we shall see that the idea of purity and impurity has failed to attract any attention in Iranian laws and regulations and has already sunk into oblivion.

5.4.2 The Lawfulness or Unlawfulness of their Foodstuffs

The foodstuffs of the People of the Book are viewed from two angles. The first relates to the question of purity vs impurity and the second concerns a stipulation in Muslim dietary laws. This stipulation has its basis in the Quran (6:118–121): "If you are [a] 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*)." Conversely, another verse (Q, 5:5) reads, "The foodstuffs of the People of the Book are authorized for you." The question raised here is whether the butcher who slaughters the animal must be Muslim to authorize the meat fit for consumption (*ḥalāl*) or whether slaughtering by a non-Muslim butcher is also permitted provided he pronounces God's name. Then, there remains a significant further question: if a non-Muslim butcher slaughters the animal and pronounces God's name, given that the notion of God in another religion differs from that in Islam, what does he mean when he utters God's name? Therefore, the questions have both legal and theological implications. Before considering Ṭūsī's viewpoint, it would be worthwhile looking at the hadiths quoted in the Shiite sources.

Kulaynī and Ṣadūq in the fourth/tenth century quoted about thirty hadiths in their works and then in the eleventh/seventeenth century Ḥurr ʿĀmilī added more hadiths, thus bringing the total to 46 (Ḥurr ʿĀmilī 1372/1992: vol. 24,

52–66). What follows is an overview of their main contents to clarify on what bases the various viewpoints of the Shiite jurists stand:

(a) Hadiths in which the imam prohibits the eating of meats attributed to non-Muslims because the non-Muslim slaughterer may not pronounce God's name just before slaughtering. That a non-Muslim slaughterer utters God's name is not adequate, for what is meant may be Jesus Christ or a concept of God that does not correspond to the Islamic one (these words are quoted exactly from the hadith). In this category, one more hadith prohibits the consumption of animals slaughtered by the People of the Book, whether or not God's name is uttered (see Kulaynī 1388/1968: vol. 6, 238–41). Another reason for the prohibition is retaliatory, "since *dhimmī* avoids eating what a Muslim slaughters, the Muslim must not eat his" (Ḥurr ʿĀmilī 1372/1992: vol. 24, 55–66, no. 4, 46).

(b) Hadiths that permit the consumption of animals slaughtered by the People of the Book provided they mention God's name (Ḥurr ʿĀmilī 1372/1992: vol. 24, 55–66, no. 14, 38–40, 43–5).

(c) Hadiths with the same content as (b) but with the addition that if a non-Muslim butcher mentions the name of Christ, it is to be taken as God's name; therefore, it is lawful for Muslims to eat the slaughtered animal (Ḥurr ʿĀmilī 1372/1992: vol. 24, 55–66, no. 25, 34–6).

(d) One hadith attributed to the eighth imam, Ali b. Mūsā al-Riḍā (d.203/818), authorizes the consumption of all animals slaughtered by the People of the Book (not only *ahl al-dhimma*) without stipulation (Ḥurr ʿĀmilī 1372/1992: vol. 24, 66, no. 41).

(e) Hadiths closely stipulating the prohibition and authorization of the act of mentioning God's name. Therefore, if a Muslim butcher fails to mention God's name, the meat is forbidden and if a non-Muslim butcher mentions the name the meat is lawful (Ḥurr ʿĀmilī 1372/1992: vol. 24, 55–66, no. 31, 37).

(f) One hadith connecting the lawfulness of the slaughtered meat with the presence or absence of a Muslim. If a Muslim is absent while the butcher slaughters the animal and, accordingly, the details of what happened unknown, that is whether or not the butcher mentioned God's name, then eating the meat is permitted (Ḥurr ʿĀmilī 1372/1992: vol. 24, 55–66, no. 33).[75]

75 There is a hadith that cannot be fitted into any of these categories. It claims that the consumption of animals slaughtered by Jews and Christians is lawful, although not those slaughtered by Zoroastrians (see Ḥurr ʿĀmilī, 1372/1992: vol. 24, 55–66, no. 17).

Now, let us examine how jurists have dealt with this puzzle. Perhaps the first Shiite work on the subject is an independent monograph by Mufīd (d.413/1022) entitled *taḥrīm dhabā'iḥ ahl al-kitāb* [*The Unlawfulness of Eating the Slaughtered by the People of the Book*]. While he neither interpreted the two verses on the subject nor resolved the contradictions between hadiths, he mostly relied on those in group (a) and regarded the question of lawfulness as a kind of dissimulation (*taqīyya*). The theological position on which he insisted was that the People of the Book have an ambiguous view of the meaning of God and that non-Muslims, especially Jews, do not believe in Him; had they believed, they would have accepted the prophecy of Muhammad (see Mufīd 1413/1992: 22–4, 31–2). Like Mufīd, Sharīf al-Murtada (d.436/1044) and Ṭūsī concentrated on the hadiths in group (a) and argued that the flesh of animals slaughtered by all kinds of infidels, including atheists and People of the Book was absolutely prohibited (Ṭūsī n.d.: 582; Ṭūsī 1387/1967: vol. 7, 289). Many later Shiite jurists accepted and reiterated his legal opinion in their works.[76] While the majority of *ahl al-Sunna* preferred the verse in the Quran claiming that all the People of the Book's foodstuffs were lawful, the Shiites limited them to grains (*ḥubūb*), vegetables, and herbs (*buqūl*).

Some noteworthy exceptions require attention. Shahīd Thānī (1413/1992: vol. 11, 452) mentioned that Ibn 'Aqīl, Ibn Junayd, Ṣadūq, and his father Bābawayh Qummī (d.329/940), with some minute differences, accepted the lawfulness of meat slaughtered by the People of the Book. Then, referring to hadiths in groups (c), (d), and (e), Shahīd Thānī argued in favour of the lawfulness of their slaughtered animals. Such a view is highly unusual among Shiite jurists. In *Masālik al-afhām*, Shahīd Thānī (1413/1992: vol. 11, 452–65) assessed all the hadiths and arguments for and against the issue that earlier Shiite jurists had offered. Some nineteenth-century Shiite jurists, notably Sayyid Ali Ṭabāṭabā'ī (d.1231/1815), were inclined to the ruling that if a non-Muslim butcher mentions God's name, the slaughtered meat is lawful. They were relying on hadiths in groups (e) and (c). However, his contemporary jurist Muhammad Hassan Najafī (d.1266/1850) regarded the prohibition as a necessary ruling of Islam and seriously criticized him (Najafī 1367/1987: vol. 36, 86–9).

76 'Allāmah Ḥillī (1413/1992: vol. 8, 299) said that the hadiths in group (d) applied in an emergency and those in groups (b) and (c) were for when an imam was being duplicitious. Najafī regarded the prohibition as an obligatory ruling in Islam and agreed with 'Allāmah Ḥillī on (b) and (c) hadiths (Najafī 1367/1987: vol. 36, 89). Most contemporary Shiite jurists like Khū'ī (1410/1989: vol. 2, 335) and Ali Sīstānī (1416/1995: vol. 3, 276) have also followed Ṭūsī.

5.5 *Legal Relationships with Muslims*

According to Shiite jurists, Islamic law does not cover the ritual affairs or personal statuses of non-Muslims, which would include such things as marriage, divorce, inheritance, giving evidence, or acting as a witness in a trial. Non-Muslims are entitled to engage in these practices in accordance with their own regulations and there are no stipulations about them. This *fiqhī* opinion is based on a legal maxim known as *qāʿida ilzām*,[77] attributed to Imam Ṣādiq, which specifies that every believer is entitled to obey the legal prescriptions endorsed by his or her religion. With respect to their legal relations with Muslims, however, jurists have articulated several *fiqhī* regulations, which I shall now discuss.

5.5.1 Testimony

Generally, jurists lay down legal stipulations to cover situations in which legal matters involving Muslims and non-Muslims impinge on an Islamic theological doctrine. For instance, Muslims cannot use non-Muslims as witnesses, either to draw up a will (testament) or to prove a claim or debt in a court of law. This is because of a stipulation that a person who gives testimony in the court must have *ʿadāla* or reputed integrity (Kulaynī 1388/1968: vol. 7, 398; Q, 5:106). Reputed integrity in the legal context of Shiite *fiqh* is granted to believers with real faith, who are also known for their good conduct, for their avoidance of committing sin or doing wrong, and for not behaving in a manner normally regarded as base or mean. For example, in Shiite *fiqh*, unlike the Sunnite equivalent, only somebody known for possessing faith and integrity can become an imam prayer. The presence of faith in this definition is a theological factor because it is not enough for someone who gives testimony to have strict moral or ethical standards; they must also demonstrate their faith or belief in Islam (Shahīd Thānī 1413/1992: vol. 14, 161; Ṭūsī 1407/1986: vol. 5, 344). From a jurist's viewpoint, because non-Muslims do not belong to the Islamic faith, they cannot be witnesses of reputed integrity even although they may be known for their good moral behaviour among their co-religionists (Ṭūsī 1387/1967: vol. 8, 187; Ṭūsī 1407/1986: vol. 6, 272) and other Shiite jurists in this discussion have regarded and categorized the People of the Book as infidels. Consequently, they have concluded that the testimony of a non-Muslim is not accepted.[78] However, if non-Muslims convert to Islam and bear witness, repeating the same statements and claims that they had already uttered, their testimony

77 The original text is *tajūzu ʿalā ahl-i kull-i dhawī dīnin mā yastaḥillūn* (Ḥurr Āmilī 1372/1992: vol. 26, 158, no. 4).

78 Shahīd Thānī (1413/1992: vol. 14, 164) adduced that Ibn Junayd, the Shiite jurist who died in the fourth/tenth century, accepted a *dhimmī*'s testament for Muslim and non-Muslim.

is acceptable before the court (Kulaynī, 1388/1968: vol. 7, 398; Ṭūsī, 1407/1986: vol. 6, 272). Although this ruling has remained unchanged among Shiite jurists since Ṭūsī's time, there is one exception: this is that if a Muslim cannot locate another Muslim for the task in hand, it is lawful to choose a non-Muslim as a witness (see Q, 5:106).

5.5.2 Inheritance

As the legal maxim mentioned above implies, non-Muslims can inherit from each other in Muslim territories in accordance with their own regulations (see also Najafī 1367/1987: vol. 39, 32; Ṭūsī 1407/1986: vol. 4, 125). On their relations with Muslims, however, some points must be taken into consideration. According to Sunnite jurists, an infidel cannot inherit from a Muslim and a Muslim cannot inherit from an infidel, but Shiite jurists argue that non-Muslims cannot inherit from Muslims but a Muslim can inherit from a non-Muslim. Furthermore, according to a relatively undisputed legal opinion in Shiite *fiqh*, if non-Muslims convert to Islam their relatives, even if they have an equal entitlement to the inheritance, are prevented from receiving it (*ḥajb*). Kulaynī (1388/1968: vol. 7, 146) quotes the hadith claiming that if a father with a wife and children dies and one of his children converted to Islam prior to his death, the conversion negates the rights of all the other beneficiaries to inherit.[79] This ruling on Muslim – non-Muslim relations is one of the most hotly debated and most manipulated laws affecting non-Muslims in Iran for the last three hundred years, mainly because of its profound impact on religious minorities, especially Jews and Zoroastrians. There are documented cases of people faking a conversion to Islam to prevent relatives receiving their share of an inheritance. I examine some such cases in Chapter 2. Kulaynī (1388/1968: vol. 7, 146) quoted one hadith that proposed the opposite, namely that conversion was irrelevant to the distribution of an inheritance and, therefore, all inheritors receive their rightful share and no one can prevent another person from receiving theirs. However, Shiite jurists have failed to pay due attention to this hadith in the history of *fiqh*.

One of the main reasons for the general ruling that an infidel cannot inherit from a Muslim, while the reverse is lawful, is a famous hadith, sometime regarded as a legal maxim, attributed to the Prophet and almost exclusively cited in inheritance manuals under the title of impediments to inheritance: "Islam is high and nothing is higher" (Ḥurr ʿĀmilī 1372/1992: vol. 26, 14, no. 11).[80]

79 Shahīd Thānī (1413/1993: vol. 13, 21–2) argued in favour of a consensus on this ruling in Shiite *fiqh*.

80 The Arabic text of this hadith reads *al-Islam yaʿlū wa lā yuʿlā ʿalayh*. The point is that none of the Shiite jurists, as far as I have researched, has documented this opinion in the field

Accordingly, when Muslims inherit from non-Muslims, jurists say that their "high position" remains intact, and they then add some examples (Ṭūsī 1387/1967: vol. 4, 51; vol. 2, 46) like the one stating that an infidel can be a legator or testator (*mūṣī*) for a Muslim but a Muslim cannot be taken as an infidel's legatee (*mūṣā lahū*).

There is insufficient information on the context of this hadith to decipher what "high" means and why it has been cited in a legal capacity, especially one that pertains to inheritance. Furthermore, apart from the point that this hadith is *mursal* (deriving from interrupted chains of transmission) and is regarded as weak, even unreliable, one can lessen its implications by raising a serious question. This is that if the hadith implies that Muslims must retain their superiority in all legal relations, can a jurist then say that a contract in which a Muslim is not in a "high" position is illegal? As an illustration, one could argue that in a contract between a property owner and a tenant, a Muslim should never agree to being the tenant for fear of losing his or her "high position". Consequently, the ambiguity surrounding this hadith or legal maxim definitely discourages jurists from relying on its opinion.

5.5.3 Marriage and Divorce

Generally, Islam, like Judaism, Zoroastrianism, and Mandaeism, forbids its adherents to marry followers of other religions. In these religions, regulations on marriage and divorce are seen as devices instituted to maintain the distinctive social identity of the believers and should not be regarded as pure legal injunctions.[81] In some hadiths, Shiite jurists have detected subtle differences on the legality or illegality of marriage with non-Muslims.[82] In some verses of the Quran (2:221; 60:10), and in the hadith or legal maxim attributed to the Prophet Muhammad discussed above – "Islam is high, and nothing is higher" – the jurists believe that under no circumstances can a Muslim female marry an infidel, and this includes People of the Book and *dhimmīs*. This legal opinion is undisputed among Shiite jurists (see, as an example, Anṣārī 1415/1994: 392).[83] Since in Islamic culture, the relationship between male and female is largely based on male superiority[84] and a female in her marriage accepts the superiority

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of inheritance by the verse of the Quran (4:141), which is known in *fiqh* as the maxim of *nafy-i sabīl*.

81 In Zoroastrianism, Judaism, Mandaeian, Christianity, and Islam, the body of regulations surrounding the burial of a deceased person is also another means of maintaining social identity.

82 See Ḥurr ʿĀmilī 1372/1992: vol. 20, 538–42; Kulaynī 1388/1968: vol. 5, 358.

83 Anṣārī also holds that a Muslim man cannot permanently marry an infidel woman, even if he expects her to convert; cf. this legal opinion with Q, 5:5.

84 See, as an example, Q, 4:34.

of the male, she cannot accept the superiority of a non-Muslim. However, according to most Shiite jurists, a Muslim man can marry a non-Muslim woman provided he intends to make her a Muslim.[85] Permanent marriage with a non-Muslim is unlawful without the initial expectation of conversion. However, temporary marriage (*mut'a*), which is a distinctive characteristic of the Shiite school, is lawful only with Jews and Christians; with Zoroastrians, it is still controversial (see, as an example, Anṣārī 1415/1994: 392–7).[86] Shahīd Thānī (1413/1992: vol. 7, 367) believes that a Muslim man can marry a woman from among the People of the Book either with or without hoping for her conversion and again it is lawful for a converted man from among the People of the Book to keep his wife permanently without any expectation of her conversion. The legal status of children from a marriage between a Muslim and non-Muslim is determined by which parent is considered superior: in the jurist's view, being Muslim, male, and free ranks over being non-Muslim, female, and a slave. Therefore, when a Muslim marries a non-Muslim, the children legally follow the Muslim. This rule derives from both jurists' legal opinions and Shiite hadiths.[87]

The conversion of a spouse to Islam has certain legal consequences. On conversion, the couple's marriage contract is not cancelled but they must refrain from sexual intercourse until the other partner decides to convert. If the husband retains his religion and the wife converts to Islam, the marriage contract is cancelled, and this ruling is undisputed among Shiite jurists. However, if a man converts to Islam and the woman keeps her religion (which must be one of the three cited above), but they are determined to remain married, according to one legal opinion they can do so permanently, but according to another they have to draw up a new temporary marriage contract (Ṭūsī 1387/1967: vol. 4, 212–14; see also Anṣārī 1415/1994: 398–9; Shahīd Thānī 1413/1992: vol. 7, 365–6). Moreover, some Shiite jurists, on the basis of the Quran (3:85) and some hadiths,[88] assert that when a spouse converts from Islam to another religion, or rejects all religions, their marriage is annulled; if such a conversion is verified in

85 Cf. Sharīf Murtaḍā (1415/1994: 279–80). He did not accept this exception and believed that marriage with non-Muslims is absolutely forbidden.

86 On the subject of marriage, most, if not all, Shiite jurists regarded Mandaean as infidels, thus marriage with them is illegal for Muslims. Shahīd Thānī (1413/1992: vol. 7, 361–2) quoted some jurists' doubts about marriage with Zoroastrians.

87 See, for example, Khū'ī 1407/1986: vol. 1, 275; Kulaynī 1388/1968: vol. 5, 492–3; and Najafī 1367/1987: vol. 30, 213.

88 See for example Ṭūsī 1387/1967: vol. 2, 36, 57; vol. 7, 281, 284.

court, the spouse is deemed an apostate and, consequently, sentenced to death or permanent imprisonment (Shahīd Thānī 1413/1992: vol. 7, 368–9).

On the legality of sexual relations between Muslim men and non-Muslim women, the following discussion seems pertinent. In the Shiite tradition, there is evidence that the legal status of *dhimmī* women is the equivalent to that of an imam's slaves. The evidence to consider in this respect concerns permission to enter a temporary marriage with a Jewish or Christian woman; authorization to look at their hair and bodies; and, in certain hadiths, recognizing these people as potential slaves for imams or other rulers – in other words as their possessions (see Ḥurr ʿĀmilī 1372/1992: vol. 15, 477–8). When taking this evidence into account, some scholars first explain the legal aspects of the issue and then express their doubts over whether such precepts are really legal opinions or metaphorical descriptions (see Tsadik 2003: 388, note 46, 403–5). Khūʾī (1404/1983: vol. 1, 35) also approached the question in some of his works and argued that if the relationship between the imam and *dhimmī* women was real rather than metaphorical slavery, then there would be legal consequences. For example, in the event of a slave being killed, the blood money would be paid to the imam if they were his slaves, but to the slavemaster if not. In Shiite *fiqh*, he added, since there are no such legal opinions on the People of the Book and *dhimmīs*, the blood money goes to the slave's family. Khūʾī therefore concluded that the analogies in those hadiths were purely metaphorical. In my opinion, however, there are enough similarities to raise doubts. For example, according to a hadith attributed to Imam Jaʿfar Ṣādiq (see Kulaynī 1388/1968: vol. 6, 174–5), when a woman of the People of the Book is divorced, she, unlike a Muslim woman, is not subjected to the same waiting period (*ʿidda*): "for she is viewed as a slave of the imam". The hadith narrator then raised another question to the imam. "If a Muslim is going to marry a divorced Christian woman, how many days should her waiting period be?" "Two periods, or 45 days, if she has not yet converted to Islam," answered the imam. In both Shiite and Sunnite *fiqh*, the length of the waiting period for slaves is predetermined. The same hadith also indicates that if a Christian woman who has converted to Islam later marries a Muslim man, her waiting period is the same as that for a Muslim woman. Anyway, the issue should be treated with great caution.

5.5.4 Penalties

In *dār al-Islām*, the People of the Book have the right to appeal to a judge or court on legal matters. Islamic historiographies contain cases of non-Muslims turning to the Prophet, caliph, or imam as a judge. However, depending on the terms of the protection contract (*dhimma*), non-Muslims can be referred to

Muslim judges and have to accept their verdict in cases where legal and criminal claims affect a Muslim individual or Islamic society, such as illicit sexual relations, drinking alcohol in public, and theft. In such cases, non-Muslims are treated like Muslims and receive penalties in accordance with Islamic criminal law and regulations. Shiite jurists stipulate two kinds of penalties – *ḥudūd* (sing. *ḥadd*) and *taʿzīrāt* (sing. *taʿzīr*). The nature and amount of the former have been explicitly prescribed in the Quran or hadith and are subject to cancellation in the event of a given doubt, whereas the nature and amount of the latter have not been prescribed in the *fiqhī* sources and are left to the discretion of the judge (see Shahīd Thānī 1413/1992: vol. 14, 345–6).[89] In Islamic criminal law, lashing is one way of punishing someone who commits a sin or crime. According to various legal opinions, the minimum number of lashes in *ḥadd* is either 74 or 79,[90] but in *taʿzīr* there should be fewer than in *ḥadd*. The practice of *ḥudūd*, in principle, is left to the discretion of the imam or the Muslim ruler. In this regard, there is a legal maxim encouraging jurists to avoid implementing *ḥudūd* as much as they can in cases of doubt about the occurrence of a sin or, legally speaking, crime (*tudraʾu al-ḥudūd bi al-shubahāt*). This is evidence that the punishments determined in Islamic criminal law are mostly of an admonishing, threatening nature.[91]

In applying penalties, *fiqhī* regulations consider all subjects as Muslim. This is ensure that People of the Book and *dhimmīs* in Muslim territories cannot reject a verdict on the grounds they are not Muslims (see Ḥurr ʿĀmilī 1372/1992: vol. 28, 50; Najafī 1367/1987: vol. 41, 313, 400, 460; Ṭūsī 1387/1967: vol. 8, 37; Ṭūsī 1407/1986: vol. 5, 553). It is worth noting that the severity of the penalty is not equal in every case with respect to being or not being a Muslim. In certain important crimes, such as murder and illegal sexual relations, the rulings show definite inequalities, some of which I shall now briefly explain.[92]

In Islamic criminal law, Muslims and non-Muslims receive unequal penalties for illegal sexual relations and same-sex intercourse. It is interesting to

89 These definitions are common in Shiite *fiqh* but, literally, *ḥadd* and *taʿzīr* are sometimes used interchangeably and even as synonyms. That is why some authors occasionally confuse the meanings of these two terms, see s.v. 'Taʿzīr', esp. 406, by ʿIzzu al-Dīn in *EI2*.

90 Compared with the Jewish penal code, the Islamic criminal law is milder but there are many similarities. Cf. s.v. 'Penal law' and 'Divine punishment', by Haim Herman Cohn in *EJ2*.

91 See, concerning this legal maxim, Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015).

92 It is worth noting that Abdul-Hadi Hairi (1977: 221–4), and Danil Tsadik (2003 and 2007) are pioneers in explaining these inequalities.

note that the more difficult it is to prove that a crime has been committed the more severe the punishment is likely to be. For example, it seems nonsensical that proving lesbianism requires the testament of four men of reputed integrity or the confession of the subjects. Therefore, it can be suggested that the philosophy behind meting out such punishments is that they must lead only to admonishing, threatening outcomes. One inequality applies to fornication. If a non-married Muslim man fornicates with a Muslim woman, he receives one hundred lashes as a penalty, as does a *dhimmī* man who fornicates with a *dhimmī* woman. However, if a *dhimmī* man, whether married or not, fornicates with a Muslim woman, or is found to have engaged in homosexual intercourse with a Muslim, he receives the death penalty. The justification behind this ruling is that, by this act, the *dhimmī* has violated the contract of protection and is not entitled to live.[93] Even if a *dhimmī* converts to Islam after his illegal sexual act, the punishment will never be abrogated. Another example is the penalty for a false accusation (*qadhf*) of adultery or sodomy: if the accused is a Muslim, the penalty will be eighty lashes, but if the accused is a *dhimmī*, the penalty will at most be seventy-four lashes (*taʿzīr*) (Mufīd 1410/1989: 792).

Despite inequalities of this kind, Shiite jurists insist on several cases in which Muslims must respect the rights of the People of the Book. For instance, if a Muslim insults a *dhimmī* by falsely accusing him or her of adultery or sodomy, the Muslim offender must be punished, but if the insult is a word that implies *kufr* (infidelity) or *ḍalāl* (darkness), he must only be punished if the insult is likely to cause unrest or lead to the corruption (*mafsada*) of Islamic society (Kulaynī 1388/1968: vol. 7, 234; Mufīd 1410/1989: 792). Furthermore, if a Muslim harms another's pigs or other livestock, or damages any of their musical instruments that are of monetary value, the culprit must pay compensation, with the amount calculated by comparing the price of an intact musical instrument with that of the defective one (Mufīd 1410/1989: 770).

5.5.5 Retaliation (*qiṣāṣ*)

Here again there are inequalities in that a Muslim does not suffer retaliation for killing a non-Muslim. If a Muslim murders a *dhimmī*, whether intentionally (*ʿamdī*) or unintentionally (*khaṭāʾī*), the heir, or family of the victim, is not entitled to demand retaliation and can only receive blood money (Kulaynī 1388/1968: vol. 7, 310). However, there is an exception: if a Muslim is a murderer who has repeatedly killed non-Muslims or, in other words, is a professional or

93 Ṭūsī (n.d.: 692). This idea has been well entrenched throughout the history of Shiite *fiqh*. For example, see Khomeini (1390/1970: vol. 2, 463); and Najafī (1367/1987: vol. 41, 313).

habitual killer, the heirs of the victim are entitled to take revenge on him, but since another ruling indicates that the amounts of blood money for Muslims and non-Muslims are unequal, the imam, ruler, or heirs of the victim will pay the difference to the heirs of the murderer and he will then suffer retaliation (ʿAllāma Ḥillī 1413/1992: vol. 9, 323; Mufīd 1410/1989: 739–40; Ṭūsī n.d., 749). However, some jurists (Ḥalabī 1403/1982: 384) argue that it is unnecessary to pay money to the heirs of such a murderer and the ruler can punish him as a malicious man (*mufsid fī al-arḍ*). In some hadiths 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 (Kulaynī 1388/1968: vol. 7, 310–11, no. 2, 8). These hadiths, however, have never received attention from Shiite jurists. On the other hand, in the case of a *dhimmī* deliberately murdering a Muslim, besides retaliation, the *dhimmī* must cede all his or her property to the heirs of the Muslim victim, even if the value of the property exceeds the amount of the blood money (Khomeini 1390/1970: vol. 2, 520; Ṭūsī n.d.: 748). In this case, some hadiths indicate that the family of the deceased Muslim can, in turn, choose either to enslave or kill the *dhimmī* (Kulaynī 1388/1968: vol. 7, 310, no. 7, 8).

Non-Muslims are also retaliated for killing non-Muslims. In accordance with most jurists' legal opinions, in cases where both sides, the murderer and the victim, are non-Muslims, whether of the same or of different faiths, the law of retaliation is applied. Therefore, if the heir of the victim seeks retaliation in the case of an intentional murder (*qatl-i ʿamdī*), the murderer is sentenced to death (Kulaynī 1388/1968: vol. 7, 309–10). Shiite hadiths differ on cases of a murderer converting to Islam for the purpose of escaping the punishment after committing a crime. Some indicate that the conversion saves a murderer's life who then only needs to pay the blood money; others indicate that the murderer must be killed and that their conversion is irrelevant (Ḥurr ʿĀmilī 1372/1992: vol. 29, 110–11; Kulaynī 1388/1968: vol. 7, 310). The legal opinions of most Shiite jurists rely on hadiths that confirm the first view (Najafī 1367/1987: vol. 42, 156; Shahīd Thānī 1413/1992: vol. 15, 144).[94]

Shiite jurists demand the payment of blood money for all murder cases, even if unintentional, irrespective of whether the killer and victim are Muslim or non-Muslim (Najafī 1367/1987: vol. 42, 156). However, as evidenced in the pre-2010 policies of Iranian insurance companies for driving accidents that lead to death, the amount of blood money differs for Muslims and non-Muslims. If *dhimmī*s unintentionally kill somebody, whether or not the victim is Muslim,

94 On this legal opinion, Najafī claimed the consensus of the Shiite jurists, and Shahīd Thānī argued that there was no opposite hadith in Shiite sources.

they must pay blood money; if they are unable to do so, then the imam or ruler will not pay the murderer's heirs or *ʿāqila*.[95] The punishment meted out in this ruling is milder for People of the Book and *dhimmīs* than it is for Muslims. This has been justified in certain hadiths on the grounds that *jizya* is the equivalent of blood money for People of the Book and *dhimmīs* because they have less protection than Muslims in this respect.

5.5.6 Legal Compensation (*dīya*)

There is no difference between the Shiite school and most Sunnite schools in how the unequal amounts are determinined for legal compensations. However, Abū Ḥanīfa and the school attributed to him do not recognize any differences between Muslims and non-Muslims in Muslim territories in the amount of *dīya* paid. According to the pre-Islamic Arab tradition, the compensation would be paid in the form of money, camels, or goods. The blood money of the People of the Book, the *dhimmī*s, and the *musta'min*s (non-Muslim foreigners temporarily admitted to Muslim territories) according to the majority of Shiite jurists is 800 *dirham*s for a free male and 400 *dirham*s for a free female (one-twelfth of a Muslim's *dīya*), while the blood money for a Muslim male is 10,000 *dirham*s or 1000 *dīnār*s and for a Muslim female it is 5000 *dirham*s or 500 *dīnār*s (Ṭūsī 1387/1967: vol. 7, 156; Khomeini 1390/1970: vol. 2, 559). According to some historical reports, one gold coin (*dīnār*) was equal to approximately ten silver coins (*dirham*s), depending on the various prices at the time, between 4.55 and 4.25 grams,[96] but today these monetary units are vague and the differences cannot be figured out exactly. Despite this vagueness, these monetary units are still mentioned in the works of contemporary Shiite jurists.

Discrimination between Muslims and non-Muslims and between males and females in the amount of blood money paid is another example of inequality. From the data overviewed in our discussion on legal relationships (in the section headed 'Penalties'), we can conclude that the ideas of Shiite jurists on penalties, retaliation, and blood money have not changed since Ṭūsī. His very words are at times quoted verbatim in the works of Shiite jurists. To prove this claim, I tried in the section headed 'Legal Relationships with Muslims' to cite some references from the early, medieval, and contemporary jurists to show their continuous and stable legal opinions towards legal relationships with non-Muslims.

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95 On this institution, regarded as insurance in the pre-Islamic Arab tradition and later in Islamic law, see s.v. "ʿāḳila', by Robert Brunschvig in *EI2*.

96 See also s.v. 'Diya', by E. Tyan; and 'Dīnār', 'Dirham', by G.C. Miles in *EI2*.

6 Conclusion

In this chapter, we have seen the approaches of jurists towards non-Muslims being derived more from hadiths and living traditions than from the Quran. The process of forming the Shiite *fiqh* still needs more research. It seems that, by regarding *fiqh* as a priori knowledge, jurists have at times outlined the process of reasoning without reference to particular facts or experiences. It is sometimes said that God gathered the entirety of the laws and regulations needed for society in the Quran and hadiths. Such an interpretation of *fiqh* envisages the legal corpus as independent of historical events and reality.[97] With 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 through taking the context into consideration and even, as we have seen, not through respecting the verses of the Quran implying tolerance and ordering Muslims to treat others fairly. They also try to preserve their sources, their consensus, and their well-known *fiqhī* opinions as a permanent heritage and transfer them to succeeding generations. However, the essence of law and legislature is intermingled with social and historical events and legislators cannot ignore this point in the process of codification. The history of *fiqh* shows that when the early Muslim legislators were forming their legal opinions they also paid attention to social facts. The best evidence is that one can find certain discussions and methods in jurisprudence that may justify the historical evolution of rulings, such as the division of rulings into established (*aḥkām ta'sīsī*) and confirmed (*aḥkām imḍā'ī*) categories. This division itself, regardless of the instances, shows that the context had been taken into consideration. Nowadays, Muslim legislators and jurists may admit this division as a basis for their current legislation. If there is a fair and reasonable law in any legal system of the world, why not admit it as a confirmed ruling? This would ensure that the door of *ijtihād* (juristic inference) remained open and would make it possible to change some *fiqhī* opinions by considering *maṣlaḥa* (public interest) and *mafsada* (the corruption of affairs).

The legal status of non-Muslims, as we have seen, is inferior in Islamic law and society. It is reasonable to conclude that the legal opinions on non-Muslims are more of the nature of mere *duties* imposed upon them rather than

97 The origin of this view and interpretation dates back to a hadith attributed to the sixth Imam Ja'far Ṣādiq, who remarked that "the lawful of the Prophet Muhammad remains lawful until the Day of Resurrection and his unlawful remains unlawful until the Day of Resurrection" (*Ḥalālu Muhammadin ḥalālun ilā yawm-i al-qiyāma wa ḥarāmuhū ḥarāmun ilā yawm-i al-qiyāma*). See Kulaynī (1388/1968: vol. 1, 58, no. 19); repeated in Majlisī, *biḥār al-anwār* (Beirut: al-Wafā'), 1403/1983: vol. 86, 148.

actual *rights* recognized for them. According to the method of this study, this status has its roots in the historical events and views formed gradually in the first centuries of the advent of Islam. The *duties* were developed and canonized and imposed historically in a context of war and violence and were later written especially from the viewpoint of conquerors and winners to establish their superiority. It is to some extent true that the Muslim winners had certain rules and regulations for their policies of encountering others and did not act as anarchists. This point should be taken into consideration in discussing the philosophy of war in Islamic teachings; nonetheless, the spirit of the regulations is far from the instructions generally existing in teachings on dealing with others. However, according to a method of a group of scholars, whose contribution to our understanding of Islamic history is through non-Muslim sources contemporary to the period of the conquests, the inferior status of the conquered people did not emerge *deus ex machina*. The origins of this status are not only the Arabian and Muslim world but also the ancient cultures and civilizations of the conquered lands and peoples, including the Byzantine and Sasanian societies.[98]

In modern times, we are entitled to ask whether the historical *duties* imposed on non-Muslims belong to a particular context or, as we shall see in Chapters 3 and 4, are sacrosanct, stagnant rules that must be enshrined in official laws and regulations and must be enforced. The answer today mostly depends on our views of the roles and functions of religions. The religions should not be rivals, and to reach more convenient relationships and a more comfortable world, they need to replace the rivalry with dialogue. Again, if Muslim jurists want a more peaceful world, they should *forget* the idea of conversion, whether willingly or by coercion, which, they imagined, not only brought socio-political benefits for the neophytes but also became a way of finding out the *truth* here and attaining *salvation* in the hereafter. Rather, they are expected to obey the verse of the Quran (5:48) telling us that finding a solution to resolve the conflict among the followers of different religions should be *postponed* to the hereafter and people here should follow their own ways of life (*minhāj*) and respect the rights of others. Is dialogue possible by insisting on the general stipulations determined in the legal historical works on non-Muslims who live in Muslim territories? Obviously not. What is to be done? This is the question I shall answer in Chapter 5.

98 For a report of this method, concerning the origins of the inferior status of non-Muslims in Muslim lands, see Levy-Rubin 2011: Ch. 5.

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CHAPTER 2

The Context of Iranian Constitutionalism

The Constitutional Revolution of Iran (1905–11) was Shiite Islam's first direct encounter with certain elements of modernity. Modernity, as opposed to modernization, is generally thought to describe the particular approaches, ideas, terms, and institutions that, since the end of the nineteenth century, came to characterize the West's socio-political discourses. These include the idea of constitutionalism, a new approach to law that recognizes the limits of and divisions within various powers, the quest for freedom, the notion of equality of all before the law, the concept of nation and nationality, and the institution of the state. All earlier attempts to modernize Iran, while introducing important changes to its legal, educational, and administrative systems, were conducted in areas with only marginal links to underlying traditional values. The codification of the law, however, brought new challenges to basic current norms and to the traditional institutions of jurists and jurisprudence.

In this chapter, I examine the context of the period between 1848 and 1911, which is from the start of Nāṣir al-Dīn Shah's reign to the end of the developments, with a special focus on the 1906 Revolution and its background, especially those events that to a greater or lesser extent affected the status of non-Muslim Iranians. The study is not merely intended to relate the history and repeat the historical analyses; rather, the ensuing discussion will clarify the elements that can help us visualize and understand the situation that has influenced the codification of the Constitution and other laws and regulations as new phenomena.

1 The Political Context

A positive and noteworthy aspect of the Safavid dynasty (1501–1722) was that it united Iran's lands and gave the community a new identity for the first time since the Arab invasion.[1] Two effective elements, the Persian language and *Imāmī Shiite* beliefs, helped the earlier shahs of the Safavid dynasty to achieve their aims. An early Safavid shah regarded himself as a *walī*, an exceedingly

1 On the Safavid dynasty in Iran, see R.M. Savory, *Studies in the History of Safavid Iran*, London: Variorum. (1987: chapter on 'The Emergence of the Modern Persian State under the Safavid'); Ṭabāṭabā'ī (1380/2001: esp. 29–72, 121–6).

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pious man with a very close relationship to the Hidden Imam and God, much like a saint in Christendom. Many followers of Shah Ismāʿīl, the founder of the dynasty, obeyed him not merely politically but also basically to attain God's reward (see Qazwīnī 1367/1988: 90–5).[2] However, the Iranian Sunnis and religious minorities were oppressed and, because of their fanatical attitude, suffering from the tyranny of the Safavid (Ṭabāṭabāʾī 1380/2001: 50–83).[3] After their fall, the thought of an independent Iran also disappeared. All the ethnic groups, including the Turks, Bakhtiyārīs, Persians, and Balūchis, sought their own interests and none cared about the unity of the country. Political instability, ethnic disputes, and religious conflicts continued in all the regions during the reigns of Nādir Shah and Karīm Khan and this lasted until Āqā Muhammad Khan from the the Qajar dynasty, a Turkish tribe from northeastern Iran, managed, albeit only by inflicting massacres and bloodshed, to overcome the resistance and settle their disputes. He established a new dynasty in 1796, but was assassinated after only one year.

1.1 *The Qajar Dynasty*

The crown then passed to Fatḥ ʿAlī Shah (d.1834), his nephew.[4] There were two wars between Iran and Russia (1805–13 and 1826–28) during his reign, with both ending in an Iranian defeat. With the treaties of Gulistān (October 1813) and Turkamanchāy (February 1828), the Qajar government gave up large territories in the north and, with Russia controlling its internal affairs, it sank into one of its worst periods in terms of international relations. Based on Articles 7 and 8 of the Supplementary Commercial Treaty, Russia and some other countries could achieve unilateral capitulation for their residents with respect to civil and criminal claims and, therefore, the treaty threatened and abrogated Iran's juridical independence (Said Wazīrī 1355/1976: 16–20).[5] Historians regard the Turkamanchāy treaty as humiliating and blamed it for the resulting political

2 See, Andrew J. Newman, *Safavid Iran: Rebirth of a Persian Empire*, New York: I.B.Tauris, 2006 on the role of the shahs in the Safavid dynasty.

3 Further information can be found in Varatan Gregorian, 'Minorities of Isfahan: The Armenian Community of Isfahan 1587–1722', *Iranian Studies*, 7 (3–4), 1974: 652–80; and Vera B.Moreen, 'The Status of Religious Minorities in Safavid Iran 1617–1661', *Journal of Near Eastern Studies*, 40 (April), 1981: 119–34.

4 He presented himself as a pious man. He made a pilgrimage to Qum every year and ordered the construction of the *Madrasa Feyḍīyya*, which is still the main theological seminary, close to the shrine. On his death, he left behind 5,000 descendants from 700 wives. See Ghani (1998: 2, 19) quoting from Curzon's, *Persia and the Persian Question*, vol. 1, 410–11.

5 See the text of the treaty, including sixteen articles and its Supplement in Nafīsī (1383/2003: 670–87). See also s.v. 'Imtiyāzāt, iii-Persia', esp. 1189–91 in *EI2* by A.K.S. Lambton.

deterioration. The crown prince (*walīʿahd*) Abbās Mīrzā (d.1833),[6] son of Fatḥ Ali Shah, was very active during his life and made various meritorious attempts to rebuild his army along European lines with a view to restoring the regions lost during the wars, but he died shortly before his father did and the crown passed to Abbās Mīrza's eldest son, Muhammad Shah (r.1834–48). Muhammad Shah chose Mīrzā Abū al-Qāsim (1779–1835), known as Qā'im Maqām, as his *ṣadr-i aʿẓam*[7] and he was quite effective in political and social affairs, but was killed after just one year because the king could not tolerate him (see Bāmdād 1357/1978: vol. 4, 234–9). The next *ṣadr-i aʿẓam* was Mīrzā Āghāsī (d.1849),[8] who had studied mysticism and theology at the seminary and had been the shah's teacher. During Āghāsī's thirteen years in office, his government was having to deal with the political problems associated with regaining Herat (northeastern Iran). Hoping to get support from Russia, Iran and the Afghans engaged in a war against Britain's interests in Herat, but, finally, despite its efforts, Iran was forced to give up the region (see Bīnā 1342/1963: vol. 2, 128–34).

Nāṣir al-Dīn, son of Muhammad Shah, was the fourth shah of the Qajar dynasty, and he came to the throne in 1848 when he was only seventeen years old. He, too, had a very efficient and capable *ṣadr-i aʿẓam* Mīrzā Taqī Khan, known as Amīr Kabīr (d.1852).[9] Amīr Kabīr followed the ideas of reform started by the two previous reformers, Abbās Mīrzā and Qā'im Maqām. After only three years in office, Amīr Kabīr experienced the same fate as Qā'im Maqām and was the second grand vizier to be killed by a Qajar shah. Some of his reforms will be explained below. Mīrzā Hussein Khan Sipahsālār (r.1871–1882) was another of Nāṣir al-Dīn Shah's eminent *ṣadr-i aʿẓam*, who pursued a course of reforms. The call for justice to underlie the Constitutional Revolution began among the people and governors when Sipahsālār was in office. According to reports from the Pahlavi period, his powerful state was overthrown by the activities of certain radical clerics such as Mullā Ali Kanī and Sayyid Ṣāliḥ ʿArab, and by the support of the British Embassy (see Ādamīyyat 1356/1978: 265–8).[10] Nāṣir al-Dīn Shah took three trips[11] to Europe during his reign but they had

6 With regard to his biography, see s.v. 'Abbās Mīrza', in *EIr* by H. Busse; Abrahamian (1982), 53.

7 The grand vizier.

8 See Hussein Saʿādat Nūrī, *Zindigī* [*the Life of*] *Mīrzā Āghāsī*, Tehran: Waḥīd. n.d.; cf. Humā Nāṭiq, *Iran dar rāhyābī farhangī* 1834–1848 [*Iran in the Cultural Route*], London: Payām 1988: esp. Ch. 1.

9 On Amīr Kabīr, see Ādamīyyat 1348/1970; about his murder at the behest of the Shah, see Amanat 1997: 157–68.

10 On Sipahsālār, see E.G. Browne 1910:130–3, 420.

11 See chronology at the beginning of this book.

no positive impact on his mind. He often advised his courtiers to keep it quiet that the Europeans were more advanced than Iran by at least a hundred years. In general, historical works mostly written during the Pahlavi period see the position of Iran in the fifty years of his reign as a period of relative stability and inactivity, yet, falling short of implementing reforms and achieving equality with the West (see Amanat 1997: 445; Ghanī 1998: 4). In 1896, he was executed by Mīrzā Reza Kirmānī[12] who was a disciple, and hence under the influence of Sayyid Jamāl al-Dīn Asad-ābādī, known as Afghānī (1839–97).

Muẓaffar al-Dīn (r.1896–30 December 1906) was the fifth shah of the Qajar dynasty. His lenient character[13] helped the Constitutional Revolution accomplish victory and, particularly, facilitated the establishment of the first *Majlis* or Parliament. Some of his associates who played effective roles in the 1906 revolution are introduced in Chapter 3. Muẓaffar al-Dīn Shah died only five days after his endorsement of the Constitution, and Muhammad Ali Mīrzā (r.1907–9) became the sixth Shah of the dynasty. He did not support constitutionalism and, backed by Russian troops, bombarded and closed Parliament. Shortly thereafter, the armed revolutionaries took over Tehran (July 1909), thus forcing him to take refuge in the Russian Embassy and then, with Russian support, leaving Iran, abdicating his position to his twelve-year-old son, Ahmad Mīrzā, the seventh and last shah of the Qajar dynasty (r.1909–25).[14]

1.2 *Foreign Powers*

Two mighty powers, Britain and Russia, were in constant competition over their interests in Iran, especially in the Persian Gulf. Before the end of the nineteenth century, the global political discourse was such that powers felt entitled to colonize other countries or interfere in their internal affairs, even through war. They saw war as a policy to be chosen by politicians.[15] In this discourse, Russia was interfering in the country's socio-political affairs to acquire the northern provinces of Iran, to find a route to the waters of the Persian Gulf, and to enhance its position in the international balance of power. Britain, on the other hand, was pursuing its own interests in India, including an attempt

12 See his motive to assassinate the Shadow of God, Nāṣir al-Dīn Shah, in his answers to the interrogator in prison. He said that it was neither a revenge nor a personal matter, calling the Shah the root of corruption and tyranny (see Kirmānī 1362/1983: vol. 1, 106–16).

13 On his character, see Browne (1910: 163–9, 415–17).

14 On this sad and sorrowful period of his reign, see Ghanī (1998).

15 On political and philosophical justifications for war and peace, see Carl von Clausewitz, *On War*, tr. by J.J. Graham (Ware, Engl.: Wordsworth Press, 1997); Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals*, tr. Ted Humphrey (Indianapolis: Hackett, 1983).

to gain easy access to its territories and, in this competition, Iran was frequently subjected to British threats. Many historians of contemporary Iran or of the Constitutional Revolution relied on Foreign Office Archives (FO), or on Russian and American documents, to show the extent to which the two powers were interfering.[16] In this study, however, I shall concentrate on the *British Documents on Foreign Affairs* (henceforth *BDF* 1985).[17] Now that FO, BDF, and Russian documents are available, it is clear that claims of rampant political and economic competition were not groundless. One report by G.N. Curzon of 12 April 1896 (BDF 1985: vol. 13, 153) among many others can 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][18] Gulf, and they will rashly take any step that would effectually, and at a blow, prevent the realization of that dream.[19]

Some documents also show Russia and Britain engaged in rivalrous struggles to establish railways, even although neither succeeded and their ambition remained rhetorical (Browne 1910: 429–30; Kazemzadeh 1968, 218–19, 233, 238–9). This bilateral competition, or "jealousy" as some documents call it (BDF 1985: vol. 13, 147), was not limited to economic and political affairs, but extended into judicial and cultural ones as well.[20]

By the time the idea of Qajar forging a relationship with a third country to tilt the balance of power between Britain and Russia was broached, all diplomatic routes had been exhausted. Following Napoleon's victory over Russia (1807) and the signing of the Tilsit treaty, Iran went to great lengths to bring France into its political and economic affairs, but to no avail (Bīnā 1342/1963: vol. 1, 118–21). Eventually, after 1850, Iran succeeded in forging weak political relationships

16 For example, see Abbas (1997); Kazemzadeh (1968); and Martin Vanessa in s.v. "Constitutional Revolution-II: Events", in *EIr*.

17 See in References.

18 The word Persian, added by me, is not in the document, although it has been used elsewhere in *BDF* 1985. See, as examples, vol. 13, 271, 274, 294, 310; regarding the three Iranian islands, see also vol. 13, 421, 425, 494; vol. 14, 7–8.

19 See also Spring Rice's report in *BDF* (1985: vol. 13, 412–13).

20 One example is Arthur Herbert's report (7 December 1886) on his concern about Zukovski's purchase of 500 photographs of Bam, a professor of Oriental Studies at the University of Moscow (see BDF 1985: vol. 13, 21).

with France, Austria, Germany, and America (Ādamīyyat 1348/1970: 458–62, 566–75),[21] but failed to secure loans from French, Dutch, and Belgian banks until the late nineteenth century (Ādamīyyat 1355/1976: 110–11). This failure to secure loans was mainly because of British and Russian interference (*BDF* 1985: vol. 13, 294–5), as a report sent to the Ministry of Foreign Affairs during the reign of Muẓaffar al-Dīn Shah (*BDF* 1985: vol. 13, 477) illustrates:

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

When the first German ambassador arrived in 1885 and started to initiate various economic and cultural reforms, such as obtaining concessions to establish German banks, schools, and hospitals, Iran was able to achieve some success. A British Embassy report regarded the ambassador's activities "as poisonous for relations between the English, the Persians, and the Russians" (BDF 1985: vol. 13, 424) and there is evidence of other such competitive behaviour at the time.[22] However, in the Qajar period France exercised the most cultural influence, particularly in training the first generation of intelligentsia and in expanding the education of Iranian Muslims and Jews.

Aware of this competitive atmosphere, Nāṣir al-Dīn Shah tried to give political and economic concessions to Britain and Russia, but whenever the government gave a concession to one, the other would raise objections and try to cancel it. For example, the first objections to the Tobacco Regie Concession granted to the British company came from Russia (BDF 1985: vol. 13, 80, 83–6), and these gradually escalated into popular protests (between 1891 and 1892) led by clerics like Mīrzā Hassan Āshtīyānī in Tehran and, according to one opinion, Mīrzā Hassan Shīrāzī in Iraq, who prohibited the use of any tobacco at all.[23] While the intelligentsia supported the protest, influential courtiers, royal princes, statesmen, and even the shah's friends were divided over whether to

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21 See also Kamyar Ghaneabassiri, 'US Foreign Policy and Persia, 1856–1921', *Iranian Studies*, 35 (1–3), 2002 (145–77).

22 For examples, see Ādamīyyat 1348/1970: 412–14, 455–546; and Kazemzadeh 1968: 238–9.

23 See details of this protest in Abrahamian (1982: 73); and Browne (1910: 51–4). After stating the effects of the *fatwā* issued to prohibit the use of tobacco, Browne (1910: 52) 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. s.v. 'Dustūre, IV-Iran', by A.K.S. Lambton in *EI2*, who ignored the role of clerical leaders in the protest;

support Russia or Britain. The shah liked this divisive atmosphere because it enabled him to play the powers off against each other, though he lacked the proficiency he needed to manage the game. In any case, Britain got economic concessions in the south and Russia secured its own in the north; the two powers also gave loans to the Iranian government, although under very humiliating conditions (IDF 1370/1950:[24] 52, 89–91, 133; see the conditions in BDF 1985: vol. 13, 279–82, 292–3, 418; see list of concessions in Abrahamian 1982: 55–6).

Direct interventions by the two powers increased during the period of Muẓaffar al-Dīn Shah, with the British and Russian embassies dictating who the shah should put in charge of the country's ministries and local governorships.[25] For our present purpose of learning more about one hundred years of British intervention it will suffice to review part of Curzon's report on the death of Nāṣir al-Dīn Shah in 1896, which says "We don't want the *walīʿahd* [Muẓaffar al-Dīn, who resided in Tabriz] to ride down from Tabriz with an escort of Russian soldiers in the same way as we ourselves brought down Muhammad Shah in 1835 to be installed as shah under Russian auspices" (BDF 1985: vol. 13, 152).[26]

When the balance of power changed in favour of Russia in 1896, and signs of the Constitutional Revolution were on the horizon, Britain, having failed to get concessions such as Reuter's and thus having fallen behind, supported the protests in an attempt to redress the imbalance.[27] Their support had a logical justification, for the revolution could weaken the position of the royal government as well as Russian interests, which both worked in Britain's favour. In addition, Russia was engaged in a war with Japan (February 1904–September 1905) and could not effectively attend to the political situation in Iran at the same time.

British support for the revolution lasted for a short while until Muẓaffar al-Dīn Shah accepted the constitutional system.[28] The atmosphere changed, however, after the Anglo-Russian Entente (31 August 1907), when Russia and Britain agreed to carve Iran into three regions of interest – the north, south, and neutral region.[29] While the foreign powers saw the agreement as a move

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Ādamīyyat (1360/1981: esp. 74–5, 78, 83, 100) clarified some doubts on the genuineness of the *fatwā* published on behalf of Mīrzā Hassan Shīrāzī.

24 See References at end of chapter.

25 For some instances, see Dawlat-ābādī 1371/1992: vol. 1, 206–7; IDF 1370/1870: 94–5; Kirmānī 1362/1983: vol. 2, 420–4.

26 More instances are available in Curzon 1892.

27 See details in Browne 1909: 6–27; IDF 1370/1870: 160, 167; Kasrawī 1357/1979: 110–19; Kirmānī 1362/1983: vol. 1, 501–11.

28 Kirmānī 1362/1983: vol. 2, 202–3.

29 See Ādamīyyat 1355/1976: 183–5; IDF 1370/1870: 167; Kirmānī 1362/1983: vol. 2, 513.

towards Iranian independence and a commitment to end the destructive competition, the Iranians saw it as highly detrimental to their interests (BDF 1985: vol. 14, 24–25; Browne 1910: 171–4; Kazemzadeh 1968: 510–19).[30] They maintained that the British supported the Constitutional Revolution only for as long as they saw it as a means of combatting Russian influence. One effect of the Entente was that it enabled Russian and British troops to occupy the Gīlān and Azerbaijan provinces in the north, and then a few years later in 1911, some other regions in the south. Some historians believe that the 1907 Entente would have destroyed Iran had the First World War not broken out in Europe in 1914 (see Kasrawī 1357/1979: 460–1).

Another point worth mentioning about Russia's position on the Constitutional Revolution is that during the Qajar period, especially from 1896 onwards, Russia supported the shah and those of his courtiers who were backing him – the others were usually consolidating their position by menacing the shah, *ulama* and others with a threat to occupy northern Iran.[31] After the victory of the revolution, this support continued with Russia agreeing to give refuge to Muhammad Ali Shah and some princes (Browne 1910: 445). Ivan Alexwich, a Russian diplomat in Tehran, expressed his ideas on constitutionalism (see Browne 1910: 429) as follows:

> 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.

An examination of the secret reports of Russian military representatives clarifies that Russian military forces advocated and planned the military operation against Parliament and the assassination by Mohammad Ali Shah in 1908 of some revolutionaries (Kasrawī 1357/1979: 590–5; Kazemzadeh 1968: 523–4). In fact, the commander of operations, Colonel Liakhoff, became governor of

30 Some clerics wrote to the British Embassy to complain about the contents of the 1907 Entente and stating that they had not expected such behaviour (*Irān-i nuw* 1328/1910: vol. 2, 44); I have not seen the original document, but it is quoted in *Iṭilāʿāt-i sīyāsī iqtiṣādī* (1385/2006: 21 (227–30) 87).

31 Ādamīyyat (1355/1976: 48) argues that this illusion has existed in the Iranian mentality in various periods. But it may be added that the illusion also existed in the British mentality; see, for example, BDF 1985: vol. 13, 153.

Tehran for a short while.[32] At the time, however, Britain kept quiet about these events and even Liakhoff, with the ambassador's permission, protected the British legation to prevent Persians from entering it (Kazemzadeh 1968: 524).

The Anglo–Russian rivalry continued until October 1917, when the Bolshevik Revolution took place and Russian forces left Iran. Britain then remained the only active player with influence and its political and economic role was further strengthened by the presence of almost all parts of its army.[33] The humiliation of the Iranian government came to a head when the 1919 Entente – despite its name 'Friendship and Assistance' – placed Iran entirely under the influence of Britain. In appearance, Iran was independent, but in reality it was a British colony.[34] The sad tale of the political situation under Ahmad Shah is beyond the scope of this study.

2 The Socio-Cultural Context

2.1 *The Social Situation*

The socio-economic and administrative structure of the society remained antiquated under Nāṣir al-Dīn Shah (1848–96). The main obstacles to progress were the dictatorial manners of the shah and local governors and the lack of adequate education of the people. Two prime ministers, Amīr Kabīr and Sipahsālār, had carried out some social reforms during this period, but their successors abandoned any attempts to continue them. The dearth of big cities, learned men, transport and easy channels of communication, combined with exceedingly low level of literacy, and very few educational facilities were the main reasons for Iranians remaining ignorant of the realities of the time.

During this period, the society witnessed an increase in the level of poverty, a rise in the occurrence of natural and sometimes artificial famines (as in 1871–2 when the shah took a pilgrimage to religious Iraqi cities such as Najaf and Karbala), and the spread of cholera (1892). As a policy, the shah leased out various regions of the country to local governors under specific contracts to manage their security and public affairs. The social outcome of this was that

32 On his role in the operation, see Browne 1910: 207–8, 213–15, 223–6.

33 Ghani 1998: Ch. 1, esp. 22 ff.

34 On the 1919 Entente, see Ghani 1998: 23. A blacklist had been prepared under British pressure of Germans, Turks, and other undesirable foreigners who were expelled and not allowed to re-enter Iran. The list included German technicians and even orientalists and archeologists (quoted by Ghani from Yair P. Hirschfeld's PhD thesis on 'German-Iranian relations, 1921–1941'). On the Iranian supporters of the 1919 agreement and their conditions, see Ghani 1998: 30–4.

these positions went to those of his relatives who paid the most money to central government and, consequently, increased its capacity to put pressure on the people. In addition, accepting bribes, which even the shah himself did, became common practice. The shah took a personal interest in any modern equipment or structures that would either consolidate or at least not harm his government. Consequently, media such as telecommunications, photography, pro-government newspapers, new administrative structures, and any innovative ways of levying taxes or modernizing the army that might effectively enhance the shah's power were all welcomed, but no systems were put in place to promote modern ideas about such things as democracy, rights, and freedoms (see Amanat 1997: 414–16; Kazemzadeh 1968: 100–1, 290; Kirmānī 1362/1983: vol. 1, 106–28, 250, 275, 299–306).[35]

The *ulama*, many of whom were jurists, represented the religious power and had tremendous influence in the society. While the shah needed their support to legitimize his own power, he also needed to prevent them from interfering in political affairs. The balance of power between these two groups, the religious and the political, was one of the main issues during the Qajar dynasty.[36] In one letter to his courtiers (quoted by Ādamīyyat 1355/1976: 42), the shah warned against the influence of clerics in politics, expressly stating that

> We haven't forgotten the *fatwās* of jihad issued by those who came from Najaf and Karbala[37] to Tehran and forced poor Fatḥ Ali Shah to fight against the Russians. Whatever we have been suffering from has been the result of *ulama*'s injunctions and surely there is no need to repeat them.[38]

In an attempt to limit the scope of the clerics' power and introduce a better balance, he separated the customary courts (*maḥākim ʿurfī*) from the religious ones (*maḥākim sharʿī*). However, because the judges in the religious courts

35 On this period, see Ibrahim Taymūrī's, *ʿaṣr-i bīkhabarī yā panjāh sāl istibdād dar Iran: tārīkh-i imtīyāzāt* [*The Period of Ignorance or Fifty Years of Dictatorship: the History of Concessions*] (Tehran: Iqbāl, 1357/1979).

36 The point here is that the number of religious students (*ṭullāb*) had increased since the period of Fatḥ Ali Shah. They got allowances from *ulama* and sometimes, especially during the Constitutional Revolution, acted as their militants. See Amanat (1997: 413–15) on the power of *ulama* in the period of Nasir al-Din.

37 Here he is referring to Jaʿfar Kāshif al-Ghiṭaʾ (d.1228/1812), Sayyid Muhammad Mujāhid (d.1242/1826), and Ahmad Narāqī (d.1245/1829), who issued *fatwās* on defensive jihad against Russia to encourage the people to participate in the war.

38 Ādamīyyat quoted the letter from the archives of Nāyib al-Salṭana, the son of Nāṣir al-Dīn Shah.

based their decisions on the Quran, Sunna, and *fiqhī* opinions, their rulings were at times inconsistent. In addition, because religious judgments were regarded as sacred, it was impossible to dispute a judge's final decision. The religious courts took care of civil cases and left the criminal ones to the customary courts, in which the procedures were based on oral law, including commonsense and precedents. However, Judges in customary courts were careful not to issue any sentence that would oppose the religious courts, and it was common to allow a case that presented some special difficulty to be sent to a religious court for appeal.[39]

Nāṣir al-Dīn Shah and Sipahsālār tried to centralize the administration of justice through *dīwān-khānih* (the house of administration) and to expand the field of customary jurisdiction by establishing the Ministry of Justice.[40] Sometimes, on appeal, a criminal case would be sent directly to the governor of the province, or to the shah himself, especially if one party was in any way connected to the government. In such an event, the law would be of little concern to the shah or governor who would quickly come to a decision and, with a word or gesture, decree a retribution or reward (Benjamin 1887: 440).

In any event, the religious courts retained their legal authority while customary courts kept their prominent place in the administration of justice. What is important to our discussion is that a court was established at the Ministry of Foreign Affairs to look after the affairs of foreigners and, sometimes, of Iranian religious minorities. This court, called *dīwān-i muḥākamāt-i khārijih* (or the supreme court for foreigners), was independent, yet, in accordance with the law of capitulation, the consulates in various cities had the right of judgment and their decisions sometimes interfered with the injunctions issued by the Supreme Court (Said Wazīrī 1355/1976: 16–17).

2.2 *The Cultural Situation*

The levels of public education, the publication of books and newspapers, and the eminent personalities who played roles in implementing social change all had a direct influence on the society. Public education, which was exclusively for boys, was only available in traditional schools (*maktab-khānih-hā*), which were directed mostly by clerics. The students in these schools first learnt to recite the Quran by heart before moving on to elementary reading and writing,

39 See more information about these courts in Benjamin 1887: Ch. 15, esp. 438–43; on the dual system of religious and customary courts, both of which were, theoretically, under the power of the shah; see also Floor 1983: 113–47. Since most injunctions by both courts were issued orally and rarely written, the archives contain very few reliable documents.

40 See s.v. 'Maḥkama 3. Iran' by A.K.S. Lambton in *EI2*.

Persian and Arabic grammar, elementary mathematics, and reading Persian classical literary and historical texts. If they continued their education into religious schools, they learnt hadith, jurisprudence, Aristotelian logic, interpretation of the Quran, philosophy mixed with mysticism, a more polemical form of theology, and, in some cases, elements of astronomy with a view to finding the direction of Mecca for the purposes of praying, or calculating the first days of the lunar months for enabling the practice of certain rituals. At the same time, methods of instruction and of producing textbooks were inappropriate for educational purposes. A few students used to go to Najaf, Karbala, and Samarra in Iraq to continue their education at higher levels, for example to the grade of *mujtahid* or perhaps *source of emulation*.[41] The clerics who graduated from these cities were highly respected by the people and they had a great influence on Iranian society. As we shall see, all the clerical leaders of the Constitutional Revolution, whether for or against it, had been educated there.

In developing public education, Amīr Kabīr followed the process of reform started by ʿAbbās Mīrzā.[42] During his period in office, some of the students whom Mīrzā had already sent to Britain and France to learn technology, science, and foreign languages for the first time, returned in 1849 (Ādamīyyat 1348/1970: 163–4).[43] In addition to dispatching more students, Amīr also decided to train some students in the modern fields of knowledge within the country. Although he established a centre – *Dār al-Funūn* (Abode of Learning)[44] – in which to teach new techniques and modern sciences, he never saw the results of his work because the shah had him assassinated in 1852. The students of *Dār al-Funūn*, who later played their own roles in the Constitutional Revolution, were mostly the sons of aristocrats and rarely of religious minorities. These reforms coincided with the revolt of Sayyid Ali Muhammad Bāb (d.1850), which created political instability and ended in the execution of Bāb and many of his followers.[45]

41 See s.v. 'Marjaʿ al-Taqlīd' by Norman Calder in *EIMIW*.

42 On these efforts, see Ringer 2001: 15–44.

43 On the process of dispatching Iranian students, see Hussein Maḥbūbī Ardakānī 1354/1976.

44 About *Dār al-Funūn*, see Ādamīyyat 1348/1970: 347–62. See also Ringer 2001: Ch. 3.

45 On Bāb and his successors, Bahaʾu Allah and Ṣubḥ-i Azal, see Benjamin 1887: 353–5; Browne, E.G. *Materials for the Study of the Bābī Religion* (London: Cambridge, 1918); Iʿtiẓād al-Salṭana Ali Qulī, *Fitnih-yi Bāb* [*The Sedition of Bāb*], edited by Aʿbd al-Hussein Nawaʾī, (Tehran: Masʿūd Saʿd 1333/1954); Ahmad Kasrawī, *Bahaʾīgarī* [Bahaʾīsm], (Tehran: Farrukhī 1322/1943); cf. s.v. 'Bāb', by Denis, MacEoin and s.v. 'Bahaʾī', by Todd Lawson, both in *EIMIW*. The revolt was considered a great obstacle to the modernization of Iran. According to Ādamīyyat (1357/1978: 24, 146, esp. fn. 147), the revolt of Bāb was a significant protest against the fanaticism of the Shiite clerics but it then added more superstitions

After Amīr Kabīr, the shah assumed control of the process of modernization and reform, but mainly focused on modern ways of consolidating his own government. He stopped the expansion of *Dār al-Funūn*, forbade the opening of new schools, declared some newspapers illegal, prevented the government from sending students abroad, made travelling to Europe unlawful for the rich and for his relatives, and adopted policies to keep the people ignorant of events in other countries. These policies are even recorded by authors who were not being influenced by the Pahlavi documents.[46] Another example of his policy in the realm of public education was to restrict the selection of students for *Dār al-Funūn* to a certain social class. Following his first trip to Europe in 1873, the shah had come to realize that modern education would threaten his monarchy. In 1886, however, the first schools offering a new educational system were established by Mīrzā Hassan Khan Rushdīyya,[47] an open-minded figure who, despite receiving harsh opposition, handled these schools successfully.

During his period in office, Muẓaffar al-Dīn Shah (r.1896–1906) ordered the establishment of a new school system and, with the support of certain European countries, especially France, some colleges. It is noteworthy that one of these new colleges, which was started in 1899, was dedicated to training diplomats in political and legal sciences (see IDF 1370/1950: 19–20). This college was managed by Naṣr Allah Mushīr al-Dawla, the foreign minister, and by his son, Hassan Pīrnīyā,[48] one of the authors of the draft Constitution and its Supplement. Graduates from the college were important contributors to the development of the modern structure of the state. The admission of students was determined by the nobility of their families, their success in the entrance examinations, and the agreement of the foreign minister. World history, international and political law, and the French language were included in the college curriculum. The college employed some foreign professors, as well as some Iranian ones like Muhammad Ali Furūghī (d.1942), who had been educated at *Dār al-Funūn* and had played an important role in saving Iran from the invasion of foreign military forces during the First World War.[49]

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to the previous fanaticism. See also his analysis on the Bābī movement in Ādamīyyat 1348/1970: 436–51.

46 See, as an example, Abrahamian 1982: 73–5.

47 See his biography in Fakhr al-Dīn Rushdīyya, *zindigīnāmih-yi pīr-i ma'ārif Rushdīyya, bunyāngudhār-i farhang-i nuwīn-i Iran* [*The Biography of the Master of Knowledge, the Founder of the Iranian Modern Culture*] (Tehran: Hīrmand, 1370/1991). See also Ringer 2001: 155–9.

48 See short biography of Hasan Pīrnīyā and his brother Hussein in Chapter 3.

49 He was a learned man who later became principal of the school and twice became the prime minister in the period of Reza Shah. Expanding the process of modernization and advancing modern thought, he wrote for the first time a book on the principles of

It is time to take a look at newspapers as an element of the culture of the time. Mīrzā Ṣālih Shīrāzī, one of the eight students sent to Europe who returned in 1819 (Ādamīyyat 1348/1970: 363), brought out the first edition of the pro-government newspaper *Kāghadh-i akhbār* in 1837. It reported on the shah's orders and news from the royal court in flattering tones and in language not easily understood by the people. For a long time, this and similar newspapers, carrying virtually identical information, were published in a simple format and educated people showed no interest in them. The first newspapers to exert an influence on awakening Iranians were published abroad and then brought to Iran after delays, sometimes even smuggled. These included *Akhtar* [*The Star*],[50] published in Istanbul (1875); *Qānūn* [*The Law*], in London (1880–9); and the weekly *Ḥabl al-Matīn* [*The Firm Cord*],[51] published first in Calcutta (1893) and then in Tehran and Rasht. The number of newspapers increased during the period of the revolution.[52] Religious minorities were also publishing their own newspapers, which will be introduced later.

A few books also awakened and influenced the literate classes of the society in the late nineteenth century by introducing them to modern ideas like equality of all before the law. While these books only later entered the political arena, Abbās Mīrzā initiated the process of translating them on the grounds that the government might benefit from the valuable experiences of Western development. Voltaire's *Portayal of Peter the Great in Histoire de Charles XII*, and Edward Gibbon's (1737–94) *The History of the Decline and Fall of the Roman Empire* were two of these books (Ādamīyyat 1355/1976: 52–3). At this time, scholars were writing noteworthy books – one example being Fataḥ Ali Ākhūndzādih (1812–78) who espoused secular, anti-clerical views – and, occasionally, creative plays, but these never became popular. Late during the rule of Nāṣir al-Dīn Shah, however, a free translation by Mīrzā Ḥabīb Iṣfahānī of

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the constitutional state (Tehran, 1326/1908, edited and reprinted in 1382/2003, Tehran: Kawīr) and translated a book on economics under the title *Usūl-i ʿilm-i tharwat-i milal* in 1323/1905. The last edition of this translation was printed in Tehran (Tehran: Farzān-i Rūz, 1377/1998). The original version was written in French by Paul Beauregard (Cf. Abbas Amanat s.v. 'Constitutional Revolution', 166a, in *EIr*, who mistakenly attributed the original version to Adam Smith). 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? BC) to the great philosophers of the nineteenth century. For more information about him, see Ādamīyyat 1355/1976: 282–3.

50 See s.v. 'Aktar newspaper' by L.P. Elwell-Sutton in *EIr*.

51 See s.v. 'Habl al-matin' by Nassereddin Parvin in *EIr*.

52 For more information on newspapers before and after the 1906 Revolution, see s.v. 'Constitutional Revolution v. the press' by Mansore Ettehadieh in *EIr*; Ājudānī 1382/2003: 239–47; see also Jabbārlūy 1385/2006: 330–44.

the novel *Ḥājī bābā iṣfahānī*[53] by James Morier (1780–1849) achieved enduring popularity. Although its portrayal of the Persian character was hostile and disdainful, through its simple and funny language the work prompted Iranians to acknowledge their backwardness and defects. Iṣfahānī also translated the Egyptian author Rufā'a Bik Ṭahṭāwī's Arabic work *Ghara'ibu 'aqa'id-i milal* [*The Strange Beliefs of Nations*], published in Istanbul in 1885, into Persian. This anthropological story describes and depicts the illogical and irrational convictions of various characters among nations. One such irrationality, according to the story, is to insult the People of the Book and to ridicule the followers of other religions. It was innovative to present this theme in fiction in a society that regarded other faiths with contempt; the superstitions prevailing among Iranians were included among other irrational convictions.[54] Another critical book is Zayn al-'Ābidīn Marāghi'ī's *Siyāḥat nāmi-yi Ibrāhīm Beyg* [*The Travelogue of Ibrahim Beyg*], which in fictional form describes the wishes of a Persian who enthusiastically returns to his homeland to find nothing but tyranny, ignorance, and corruption. The first volume was published in 1896, a second in 1905, and a third in 1909 (Ādamīyyat 1355/1976: 85–100). The book greatly influenced the revolutionaries who, according to Nāẓim al-Islām Kirmānī[55] (1362/1983: vol. 1, 248–52), before the 1906 Revolution, used to meet in secret circles to read the first volume. This was the first time that a book written in very simple language, but introducing words like constitutionalism and *Majlis* (Parliament), contained ideas about codes of law, egalitarianism, and the need for an administration capable of codifying laws (Ādamīyyat 1355/1976: 98).

Two more fictional works are worth mentioning here. The first is a historical, political, and philosophical story of a young man called Telemak[56] in which the government and dictatorship of Louis XIV, as well as the policies of the Church in the West, are subjected to harsh criticism. The author, who believes that the state should align itself with reason and civility, explicitly raises concepts that were previously unfamiliar to educated Iranians. These include questions on natural rights, individual merits, inequalities in

53 The main title is *The Adventures of Hajji Baba of Ispahan*. The best Persian edition of the book is published in 1379/1999 with an introduction and valuable notes by Ja'far Muddarris Ṣādiqī (Tehran: Nashr-i Markaz).

54 I quote the content of the book from Ādamīyyat (1355/1976: 83–5). The book has another title: *Ghara'ibu 'awa'id-i milal* [*The Strange Customs of Nations*], see Āghā Buzurg Ṭihrānī 1403/1983: vol. 16, 31–2.

55 Some information on him will be presented below.

56 *Les aventures de Telemaque* written by Fenelon and translated by Ali Khan Nāzim al-'Ulūm in 1886.

the distribution of wealth, inherited privileges, and opposition to war (see Ādamīyyat 1355/1976: 55–5).

The second work, *Manṭiq al-waḥsh* [*The Language of the Beasts*], written in French through the memoirs of a donkey by Comtesse de Segure, introduces the attributes of a natural system and the concept of human rights. Ali Aṣghar Khan Amīn al-Dawla, the learned *ṣadr-i aʿẓam* of Muẓaffar al-Dīn, translated its Arabic version, which was published in 1300/1882. The story unfolds as a donkey, complaining about his oppressive owner, little by little comes to an understanding of his rights. In the Persian version, the translator intentionally inserted information that was relevant to Iranian society by criticizing the morality of provincial aristocrats and explaining the concepts of natural rights and equality (see Ādamīyyat 1355/1976: 65–76). These works provided the appropriate background in which to implant certain modern terms and concepts in the minds of the learned.[57]

Clerics and eminent members of the intelligentsia, especially among the elite, also played effective roles in awakening Iranian consciousness and introducing the changes leading up to constitutionalism. Eight figures in particular deserve special mention. They are

Sayyid Jamāl al-Dīn Asad-ābādī (1839–97);
Sayyid Muhammad Ṭabāṭabāʾī (1843–1913);
Sayyid ʿAbd Allah Bihbahānī (1840?–1910);
Fataḥ Ali Ākhūndzādih (1812–78);
Mīrzā Malkam Khan (1834–1908);
Mīrzā Āqā Khan Kirmānī (1854–96);
ʿAbd al-Raḥīm Ṭālbov (1834–1911); and
Mīrzā Yūsuf Khan Mustashār al-Dawla (1808?–95).

57 Another less important book was *The Virgin's Kiss* (*Būsiy-i ʿadhra'*) by G. Reynolds, translated by Sayyid Hussein Khan Shīrāzī in 1307/1889, published in 1326/1908 (see Ādamīyyat 1355/1976: 76–82). Cf. Abbas Amanat, s.v. 'Constitutional Revolution-Intellectual Background', 164–5 in *EIr*, where the author mentioned among the effective books only *Ḥājī bābā* and *Sīyāḥat nāmih* and then added an unknown book *Risāli-yi madanīyya* [*A Treatise on Civil Society*], attributed to Mīrzā Abbās Nūrī, the son of Abd al-Baha', in which he proposed creating representative institution. Some scholars criticize the attribution of this book to Nūrī on the grounds that the theme, civil society, is inconsistent with the general principles in Baha'īsm, which is not to involve itself in the political discussions, and in that the authenticity of the book is still dubious since it was only once published abroad after the 1979 Islamic Revolution (see Hussein Ābādīyān, 'Some Critical Points on the Translation of Articles on Constitutionalism in *EIr*', vol. 1/256 *Sharq newspaper*, 14 Murdād 1383/4 August 2004, 8).

Many Persian and English works have been written about them, so there is little more to add apart from a few relevant points. The first on the list, Sayyid Jamāl al-Dīn Asad-ābādī, known as Afghānī, was a pan-Islamist cleric who propagated Islamic nationalism and a doctrine of freedom, brotherhood, and equality in the nineteenth century when nationalism was fashionable. His ideas, broadly speaking, were neither systematic nor profound and were not published in Iran. In fact, he was better known in Afghanistan, Egypt, and India than in Iran.[58] Ṭabāṭabā'ī and Bihbahānī were challenging Sheikh Faḍl Allah Nūrī, a famous ayatollah who disagreed with constitutionalism. Firiydūn Ādamīyyat (d.2008) has written independent treatises on the ideas of the next three on the list – Ākhundzādih,[59] Mīrzā Āqā Khan Kirmānī,[60] and Ṭālbov[61] – who tried to introduce certain aspects of modern thought into Iran and, although valuable accounts, since 1979 it has been impossible to publish them in Iran because of their secular content. Ādamīyyat provides sympathetic but occasionally exaggerated accounts of their ideas and biographies. Among the eight on the list, Mīrzā Malkam Khan and Mīrzā Yūsuf Khan Mustashār al-Dawla are the most pertinent to my enquiry, for they contributed most towards furthering our understanding of constitutionalism, codifying modern law, and changing attitudes towards non-Muslim Iranians.

While apparently a Muslim by birth, Mīrzā Malkam Khan[62] belonged to an Armenian family and his father had converted to Islam.[63] However, from his early works, eight of which are on the essence of law, it is apparent that he was a secular intellectual. As a young man, he wrote five treatises between 1858 and 1862, which he showed only to the shah, his friends, and some of the courtiers. These were *Daftar-i tanẓīmāt*[64] [*Notebook of Reforms*] (1858), *Majlis-i*

58 On Sayyid Jamāl al-Dīn, see Browne 1910: 1–30, 401; s.v. 'Afghānī' by A. Ḥabībī in *EIr*, and s.v. 'Afghānī' by Nikki R. Keddie in *OEMIW*.

59 See s.v. 'Ākhundzāde' by Hamed Algar in *EIr*. See also Iraj Parsinejad, *rushangarān-i Irānī wa naqd-i adabī* [The Iranian Enlightened Thinkers and Literary Criticism], (Tehran: Sukhan, 1380/2001). The author also evaluated the works of some Iranians, including Ākhundzādih, Mīrzā Āqā Khan Kirmānī, Ṭālbov, and Malkam Khan.

60 See Bayat Philipp Mangol, 'Mīrzā Āqā Khan Kirmānī: A Nineteenth Century Persian Nationalist', *Middle Eastern Studies*, 10 (1) 1974: 36–59.

61 See Mehrdad Kia, 'Nationalism, Modernization and Islam in the Writings of Talibov-i Tabrīzī', *Middle Eastern Studies*, 30 (2) 1994: 201–23.

62 He was educated in France and became a teacher in the *Dār al-Funūn* and then secured a political position as the ambassador to Egypt and Britain. About him, see Abrahamian 1982: 65–9; Kazemzadeh 1968: 242–7.

63 Cf. Abrahamian 1982: 65; Afary 1996: 26. These authors attributed the conversion to Malkam as well as his father.

64 The second title of this treatise is *Kitābchi-yi ghaibī* [*Unseen Notebook*].

tanẓīmāt [*Committee of Reforms*] (1859–60), *Dastgāh-i dīwān* [*The System of Tribunal*] (1860–61), *Daftar-i qānūn* [*Notebook on the Law*] (1860), and *Rafīq wa vazīr* [*Friend and Minister*] (1861). They all, with the exception of *Notebook on the Law*, are about how the government should handle its affairs. The main proposal in his recommendations was to delegate governmental affairs to a legislative council and executive cabinet, both of which were to be appointed by the shah. *Notebook on the Law* (1860) was a kind of adaptation of the French penal code to Iran. Although his books on the role of law in reforming the country were never published or distributed for educational purposes, he hoped that the shah, influential courtiers, local governors, and the intelligentsia would study them carefully.[65] 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. Once relieved of all governmental responsibilities, he began to publish the newspaper *Qānūn* [*Law*] (1890–9), of which there were only forty-one issues, which adopted a liberal Islamic tone to attract the attention of the clerics. In revenge for removing him from office, he explicitly criticized the shah and *ṣadr-i aʿẓam* in his newspaper while introducing modern ideas in Islamic terms – a trend that had no precedent in his works before 1890. Had he remained in office, Malkam would never have thought of publishing the newspaper. Thirty five years after composing his treatises, he revised his ideas 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 introduced Malkam Khan as the father of modern concepts and law in Iran, Firuz Kazemzadeh (1968: 242–5) and Hamed Algar (1973) regarded him as a politically hypocritical man and dismissed his attempts in to offer modern concepts to Iranians. In his judgement on Malkam, Ājudānī has shown balance by introducing both aspects of his character (Ājudānī 1382/2003: 281–362).

Counsellor of State Mīrzā Yūsuf Khan Mustashār al-Dawla was a brilliant, open-minded thinker with a religious mindset, who devoted his life to the dignity and service of his government and people. When Mustashār al-Dawla was about eighty years old, Nāṣir al-Dīn heard about his work *Yik Kalamih* [*One Word*], in which on several occasions he raised the question of the equality of a king and beggar before the law. However, because it introduced republican ideas, which were regarded as damaging to a monarchy, the shah had

65 The eighth work is an English lecture on the process of civilization in Iran. His treatises were published for the first time in 1325/1907, edited by Hāshim Rabīʿzādih, for the second time in 1948, edited by Muḥīṭ Ṭabāṭabāʾī, and for the third time in 1383/2003, edited by Ḥujjat Allah Aṣīl (Tehran: Niy, 1383/2003). I rely on the most recent edition.

him imprisoned and tortured; his property was confiscated and he died in 1895. *One Word*, along with the biography he authorized in Tehran in 1895, was subsequently published several times – in Tabriz in 1906, in Tehran in 2002, and a Persian – English version in Amsterdam in 2008 (Mustashār al-Dawla 2008: xvi–xvii). Under Malkam's influence, Mustashār al-Dawla (2008: 6–7, 9) believed that the key to progress in Western countries lay in one thing – enjoying a new system of law. He followed Malkam's idea of separating legislative and executive powers in government and believed that new terms in modern law, such as justice (*ʿadālat*), could be found in the Islamic literature. Thus, to demonstrate the similarities between the Islamic teachings and the French codes, he compiled a book of nineteen selected articles from the French Constitution along with some Quranic verses and hadiths (Mustashār al-Dawla 2008: 13, 15, 27–9, 37, 39, 53, 75, and *passim*). Instead of changing *fiqhī* opinions, he argued, he would prefer to formulate them in such a way as they could be written into law books in non-technical language and made universally available (Mustashār al-Dawla 2008: 11). As we shall see, Malkam's later works and *One Word* inspired the authors of the 1906 Iranian Constitution and its 1907 Supplement. The nineteen articles were carefully prepared to avoid offending either the shah or the *ulama*, which explains why the Constitution was constructed from a mix of Islamic, Western, and Iranian sources. A critique of the Constitution and of Malkam's eclectic approach is the main subject of Ājudānī's *Mashrūṭi-yi irānī* [*Iranian Constitutionalism*]. He criticized Malkam's work for betraying the country with a failed revolution and defective constitution, or, as he would have it, an Iranian style of constitutionalism (Ājudānī 1382/2003: 204–6, and no. 335 of the endnotes).[66] He called it a lion without mane, tail, and belly.[67]

Intellectuals like Malkam and Mustashār al-Dawla had no option but to take Iran's religious context into account, although a hundred years after the Constitutional Revolution, we still see ordinary people more readily accepting new ideas if they carry a religious overtone. To understand what the real context was, it would suffice to remember that Ājudānī himself described how Iranian communist groups, especially *Ijtimāʿīyyūn ʿāmmīyyūn* (the Social Democrats) and later the *Tūdih* Party, would use verses from the Quran and religious

66 See Ājudānī's critique of Malkam Khan in endnote 531; also 312, 317–19, esp. 327, 330–1. Despite claiming to support modern thoughts in his early works, in the *Qānūn* newspaper Malkam believed that the government should be in the hands of *ulama*. This is why he then fabricated a decree on behalf of the jurists to prohibit the paying of tax to the government.

67 This is a reference to a poem by the great Iranian mystic poet Jalāl al-Dīn Rūmī (d.672/1273) in *Mathnawī maʿnawī*.

references to make their announcements and internal regulations more palatable to their audiences (see Mustashār al-Dawla 2008: 414–15). Another piece of evidence may further clarify the context. Some preachers and clerics interpreted constitutionalism as a sign of the coming of Imam Mahdi, the Hidden Imam, and then predicted that, according to the Quran and hadith, the 1906 Revolution would surely be victorious (Zargarīnizhād (ed.) 1374/1995: 273).

3 The Constitutional Revolution

3.1 *Sources*

Casting a cursory look at the main primary and secondary sources on the Constitutional Revolution should help us reach an almost accurate analysis, especially if we give higher priority to the works of historians written closer to the event. In fact, five – Nāẓim al-Islām Kirmānī (1863–1918), Ahmad Kasrawī (1890–1945), Yaḥyā Dawlat-ābādī (1862–1940), E.G. Browne (1862–1926), and Mahdi Malikzādih (1884–1955) – were practically eyewitnesses.

Since Kirmānī was a cleric, close to the religious leaders, middle class, and unaligned to any particular group, his *Tārīkh-i bīdārī-yi irānīyān* (*The History of Iranians' Awakening*) is the main source for most researchers, even for Browne, who was living in Iran at the time. To the accusation of some historians (Malikzādih 1363/1983: vol. 1, 8–10) that he was close to dictators and prone to exaggeration, my response would be that any historian might overstate something, but that it is unacceptable that a man involved in revolutionary events should sustain a relationship with dictators. Nonetheless, although Kirmānī did not follow a standard style in recording his daily memoirs of the events, his work is of scholarly value.

Kasrawī was born into a religious family and early in his life he became a devout Muslim, preacher and imam prayer. He believed that Western ideas on humanity and culture were inappropriate for Iranians and that they should only import Western technology. At the time, he harshly criticized and belittled the Orientalists' research on Iranian and Islamic culture, but gradually changed his mind and eventually became critical of Islamic teachings and developed a secular, iconoclastic, even anti-religious attitude. He felt it his mission to invite people to join a new faith, which he called *Pākdīnī*, and he wrote treatises against *Shī'īsm* and *Baha'ism*. Consequently, most followers of those religious factions dislike his narrations, judgements, and analyses (see Malikzādih 1363/1983: vol. 1, 8, vol. 3, 258–9). He was eventually assassinated by a radical Islamic group called *Fada'īyān-i Islām* (the Devotees of Islam), led

by Sayyid Mujtabā Nawwāb Ṣafawī.[68] Kasrawī regarded himself as a reformer more than merely a historian evaluating the players and events of Tehran, though rarely other cities. The academic way in which he recorded his findings and his rather peculiar use of language, which is new to Persians, diminished the popularity of his *Tārīkh-i mashrūṭi-yi Iran* [*The History of Constitutionalism in Iran*]. Also, his harsh criticism of all the famous figures in the revolution have led some scholars to regard his work as a form of revenge.[69]

While Dawlat-ābādī's autobiography contains much valuable information on the background of the revolution, it is written in such an unorthodox style that it is sometimes difficult to decipher which of it is appropriate for research. Having been born into a clerical family and grown up in a religious milieu, he was clearly familiar with the customs and inner relationships of his class, but since a definite anti-clerical bias is detectable in his book, some have assumed that he must have been an Azalī.[70] However, it is important to realize that during that period the government and some clerics would accuse any opponent or open-minded person whose views they wished to suppress of being Bābī or Azalī. On their part, however, the Azalīs were keen to recruit all activists, irrespective of whether they belonged to the intelligentsia or clerical class.

Browne's work on Iran is still regarded as unique and, even though in his introduction to *The Persian Revolution of 1905–1909* he mentioned that he did not intend to write a historiographical work, he clearly did. Without Browne's work, that is without the eyes of a foreign observer, it would have been much more difficult to look at the revolution as it was and to understand the facts and events surrounding it (cf. Malikzādih 1363/1983: vol. 1, 11, who considers some of Browne's data quite wrong).

Malikzādih was son of Malik al-Mutakallimīn (1864–1908). His father was an open-minded cleric who, according to Browne (1918: 221–2),[71] became Azalī and because of his harshly critical sermons and stance against the regime was

68 See s.v. 'Feda'ian Eslam' by Farhad Kazemi in *EIr*.

69 On evaluating his work see Muhammad Ali Muwaḥḥid, 'Kasrawī wa tārīkh-i mashrūṭi-yi ūw' [Kasrawī and his History of Constitutionalism], *Nigāh-i Naw*, 1385/1965: 54–61; and Suhrāb Yazdānī, *Kasrawī wa tārīkh-i mashrūṭi-yi Iran* [*Kasrawī and the History of the Iranian Constitution*] (Tehran: Niy, 1376/1997); and on his attitude, see M.A. Jazāyery, 'Kasrawī, Iconoclastic Thinker of Twentieth Century Iran', in Ahmad Kasrawī (ed.) *On Islam and Shī'īsm*, California: Mazda Publishers, 1990.

70 Azalī is an honorific attributed to Mīrzā Yaḥyā Ṣubḥ-i Azal, the main successor to Sayyid Ali Muhammad Bāb until 1280/1863. Between 1863 and 1866 his brother Mīrzā Hussein Ali claimed that he was the real successor and then the followers of Bāb were divided into two branches, Azalī and Baha'i. On their conflicts, see Ādamīyyat 1348/1970: 448–51.

71 See his biography in Malikzādih 1325/1946. There is no designation in this work to indicate that his father was Azalī.

assassinated by Muhammad Ali Shah in 1908. Although it was about forty years after the revolution that Malikzādih wrote *Tārīkh-i inqilāb-i mashrūṭyyat Iran* [*The History of the Constitutional Revolution of Iran*], in which he recorded his memories and analyses of the events, he claimed to have drawn attention to the roles of clerics and members of the intelligentsia that other historians had neglected.

In addition to these primary historical sources, the clerics' positions for or against constitutionalism described in the monographs (see Zargarīnizhād (ed.) 1374/1995) cast light on the roots of discrimination against non-Muslims in current *fiqhī* opinions, which indirectly found their way into the 1907 Supplement and then into the 1979 Constitution. Ādamīyyat is the only historian to have used these monographs to elucidate the clerics' impressions of modern concepts, terms, and institutions.

It would be pertinent here to add a brief comment on secondary sources on the Constitutional Revolution, which fall into two main categories. The first contains works that describe and analyse factors that contributed to the revolution and the theories on which they were based. Three works are important here – Firiydūn Ādamīyyat's *Idi'uluzhī-yi nahḍat-i mashrūṭīyyat-i irān* [*The Ideology of the Iranian Constitutional Movement*] (1355/1976); Ervand Abrahamian's *Iran between Two Revolutions* (1982); and Māshā' Allah Ājudānī's *Mashrūṭi-yi irānī* [*Iranian Constitutionalism*] (1382/2003). The other category consists of adaptations and incorporations of previous works, although these can hardly be regarded as authoritative, but it also contains the works of authors who want to alter the direction of reality and impose their own ideas on the reader. Some tried to highlight the roles of personalities and groups in favour of social democracy; others tended to offset clerics against the intelligentsia or vice versa; and yet others made futile attempts to pin the revolution on Azalī ideas.[72] For such authors, any open-minded high-ranking cleric might be

72 Nikki Keddie, Janet Afary, and authors of the 'constitution' entry in *EIr* such as Abbas Amanat tried to highlight the role of Bahā'ī and Azalī groups in the revolution. See, for example, Afary 1996: 4, 28–2; cf. Malikzādih (1363/1983: vol. 3, 610), who denied that Bahā'ī and Azalī groups played a part in the revolution and attributed the accusation of being Bābī to the revolutionaries and clerics opposing constitutionalism, like Sheikh Faḍlu Allah Nūrī. In the last decade, Sayyid Miqdād Raḍawī, with support from conservative Iranian governmental institutions, enthusiastically published some works and documents in an attempt to prove that Bābī – Azalī people had managed the revolution. He argued that the majority of actors, including Ayatollah Hādī Najm Ābādī, were Bābī-Azalī. See, as an example, Raḍawī (1391/2012: 119–221). The evaluation of these claims to verify that they are 'futile attempts' needs independent research.

regarded as Azalī, even the famous Tehran jurist Ayatollah Hādī Najm-ābādī (see Afary 1996: 48).[73]

3.2 *Events*

While all the facts are comprehensively covered in existing historical works, I would like to revisit two events of historical relevance. The first concerns asylum seeking (*bast*),[74] first in the Shah ʿAbd al-ʿAẓīm shrine in Rey and then in the British Embassy, and in both events, non-Muslim Iranians, especially Zoroastrians, were active and at times provided financial support.

On the first occasion, various people, mostly religious students under the auspices of two high-ranking clerical leaders, Sayyid ʿAbd Allah Bihbahānī[75] and Sayyid Muhammad Ṭabāṭabāʾī[76] sought refuge at the shrine in protest against the government's reluctance to meet certain minor demands. The second occasion involved the representatives of merchants and bankers, later joined by others, especially Zoroastrians, seeking refuge in the British Embassy. Coincidentally, the clerical leaders, including Sheikh Faḍlu Allah Nūrī,[77] decided to leave Tehran and take refuge in Qum (15 July 1906). At this time, the refugee demands were being widened to include the establishment of a house of justice, a national assembly, and a constitution.[78] Telegraphy, the then modern means of communication provided by a British company, played an effective role in extending the protests to other cities.

After lengthy negotiations, Muẓaffar al-Dīn Shah eventually agreed, on 5 August 1906, which was also his birthday, to announce his intention to implement a constitutional system. When the occupations of the sanctuaries in Tehran and Qum ended, the *ulama* returned to Tehran, greatly respected and

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73 Afary certainly regarded Dawlat-ābādī (Afary 1996: 41) and Majd al-Islām Kirmānī (1872–1922: 45) as Azalī; cf. Malikzādih (1363/1983: vol. 3, 500), who regarded Majd as a supporter of the queen and reported his secret relations with the monarchy. In addition, Afary (1996: 42) cautiously regarded Nāẓim al-Islām Kirmānī as Azalī. She (Afary 1996: 27–8) introduced Sayyid Jamāl al-Dīn Asad-ābādī, but exaggerated his Azalī inclinations. Then she (Afary 1996: 44) rejected Kasrawī for ignoring the role of Bahāʾism and accused him of anti-Bahāʾi bias. Nonetheless, she highlighted the role of religious minorities and women in the Revolution for the first time in her works.

74 On the role of this practice, which is tantamount to striking, mostly in religious places, see s.v. 'Bast' by J. Calmard in *OEMIW*.

75 On his biography, see s.v. 'Abdallah Behbahani' by Hamed Algar in *EIr*.

76 On his biography, see Bāmdād 1357/1978: vol. 3, 279–80; and Ṣafaʾī (1380/2001: 507–9).

77 He joined the supporters of constitutionalism for about a year and then changed his mind (see Turkamān 1362/1983).

78 See the list of their demands and a discussion on their progress in Abrahamian (1982: 82, 85).

warmly welcomed by the public and some representatives of the shah. Among those welcoming the clerics were religious minorities who had erected tents in their encampments in the streets. When the leaders, Ṭabāṭabā'ī and Bihbahānī, entered their encampments, they ate and drank without heed to the purity or impurity of their dishes, or lawfulness or unlawfulness of their foodstuffs. In describing the scene, Kirmānī (1362/1983: vol. 1, 571–4) reported that the people were noticing the events with much surprise. I will use this report in Chapter 5 to back my own view that if it enhances one's legal status in Muslim societies, it is possible to *ignore* or *forget* some Islamic rulings about non-Muslims.

The second of the two events concerned the formation of the new system of government. After the declaration of the constitutional system on 5 August 1906, the government appointed a committee to write a draft of *niẓām-nāmi-yi intikhābāt* (electoral law).[79] The committee was anxious that the shah might change his mind and cancel his edict, so, only thirty-six days later, on 8 September 1906, the electoral law was presented to and ratified by the shah. In this step, there was no mention in the electoral law of non-Muslim deputies. The Parliament was inaugurated on 7 October 1906, by Ṣanīʿ al-Dawla[80] as its first speaker. Its duty was to prepare the final version of the Constitution for the shah's approval. The deputies were able to fulfil the task and Muẓaffar al-Dīn ratified the Constitution only five days before his death on 30 December 1906.

When Muhammad Ali Shah was crowned on 19 January 1907, he showed his opposition to the Parliament in various ways. He was able to obtain the support of certain clerics, like Sheikh Faḍlu Allah Nūrī, who, after the ratification of the Constitution, changed his mind and began writing monographs and giving speeches against it, especially against articles on the equality of all before the law. In addition, the sheikh and his followers, demanding *mashrūṭi-yi mashrūʿ-ih* (the divinely-legitimized Constitution) secured asylum in Rey.

As far as our study is concerned, it was Sheikh Nūrī's sayings that revived the *fiqhī* opinions of Shiite jurists about non-Muslims. They are still noticeable and their details will be discussed shortly. In August 1907, the opposition to constitutionalism coincided with important events, such as the Anglo-Russian Entente (1907); the assassination of the new *ṣadr-i aʿẓam* Amīn al-Sulṭān[81] by

79 The committee consisted of five persons, two of whom, Hassan and Hussein Pīrnīyā, the sons of Mushīr al-Mulk, the last foreign minister of Muẓaffar al-Dīn. They also wrote a draft of the Constitution and its Supplement. We shall discover more about their biographies in Chapter 3.

80 On his biography and role in the first Parliament, see Bāmdād 1357/1978: vol. 4, 63–9.

81 See s.v. 'Atabak Aʿẓam, Ali Aṣghar Khan Amīn al-Sulṭān' by J. Calmard in *EIr*.

a revolutionary from Tabriz;[82] Russian threats; and Turkish aggression. In this period, some revolutionary newspapers misused their freedom and harshly criticized the government and Muhammad Ali Shah himself; in other words, they were preparing the ground to rile him.

In the early autumn of 1907, while parliamentary deputies were eagerly busying themselves with the country's executive affairs, the Supplement to the Constitution, which Muhammad Ali Shah ratified on 7 October, was being prepared. Gradually, however, conflicts were beginning to emerge between two groups. On the one side these consisted of the shah and his bodyguards, and Sheikh Faḍlu Allah Nūrī and his followers, who opposed the Revolution. On the other side, and supporting the revolution, were the parliamentary deputies, despite all their internal differences; the radical societies of various cities, especially Tabriz; and the top-ranking clerics of Tehran and of Iraq's holy cities. It was reported that the *Majlis* (Parliament) had secretly dismissed the shah from office. The conflict came to a head in June 1908 when, with backing from the Russian army and Cossack Brigade, the shah arrested some constitutionalists, executed two revolutionaries, and bombarded the *Majlis*.

When Tehran fell under the shah's control, the centre of opposition shifted to Tabriz and two revolutionaries, Sattār Khan and Bāqir Khan,[83] led the movement with support from organized groups of mainly Armenians[84] and Sheikhites.[85] Nūrī in Tehran justified the shah's actions by arguing that constitutionalism and a parliamentary system contradicted *sharī'a*. On the other hand, Iranian *ulama* resident in Iraq and some ambassadors in Tehran wrote letters asking the shah to reopen Parliament and restore socio-political stability. Muhammad Ali Shah, though, paid no heed to any of them until May 1909. Under new economic and political pressures, however, he then declared the restoration of the Constitution and proclaimed the date of general elections as 19 July 1909 for the second parliamentary period. Before this date, the revolutionaries or *mujahidin*, who were engaged in battle against Russian

82 According to Browne (1909: 26), after the *coup d'état* of 23 June 1908, "the Shah got his [that revolutionary] body exhumed and burned and his grave obliterated."

83 Both had no revolutionary precedents and were *lūṭīs* (street toughs) who changed their minds and followed the line of the *mujahidin*.

84 They were freedom-fighters, led by an Armenian known as Yeprem Khan; about them see s.v. 'Dāshnak' by Arkun Aram in *EIr*; for further information concerning the role of Armenians in the revolution, see Berberian (2001).

85 Sheikhīyya, who lived at that time mostly in Kerman, Yazd, and Tabriz, had a more mystical approach to the Shiite teachings. In the nineteenth century, they prepared some ground for the rise of the Bābī movement. About them, see s.v. 'Sheykhiyah' by Y. Richard in *OEMIW*, and by D. MacEoin in *EI2*; see also Abrahamian 1982: 16–17.

intervention in Tabriz, captured Tehran on 13 July 1909 with support from the Bakhtīyārī tribe of Isfahan.[86] 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 Faḍlu Allah Nūrī (31 July 1909) and Muhammad Ṣanīʿ Ḥaḍrat,[87] by special tribunal.

After a few months, a new electoral law was prepared in which the main change consisted of allotting particular seats to Jews, Zoroastrians, Armenians, and Assyrians, each with their respective representatives. The selection of only these groups of non-Muslims corresponded with what we observed about *fiqhī* opinion in Chapter 1. When the second Parliament opened on 15 November 1909, the administration of the country was very confused and, after about six months, the Parliament split into two factions, each with outside armed support – the radical democrats led by Sayyid Hassan Taqīzādih,[88] who had links with the Social Democrat Party in Baku, and the moderates led by Bihbahānī and Ṭabāṭabā'ī, consisting of courtiers, merchants, and *ulama*.

With conflicts mounting, in June 1910 two high-ranking constitutionalism-supporting ayatollahs, Sheikh Muhammad Kāzim, known as Ākhūnd-i Khurāsānī (d.1330/1911),[89] and ʿAbd Allah Māzandarānī (d.1330/1911), wrote to the government requesting Taqīzādih's dismissal from the Parliament because of his harmful activities and, in their opinion, anti-religious stance.[90] Then, on 16 July 1910, a *mujāhid* connected to Taqīzādih, assassinated Bihbahānī before fleeing the country. The influence of the Bakhtīyārī tribe on the administration gradually increased until the end of the second *Majlis* (24 December 1911) – there was even talk of reinstating former shah Muhammad Ali. Meanwhile, Britain and Russia occupied vast regions of northern and central Iran and continued with their relentless competition.

86 See s.v. 'Bakhtīārī Tribe, I. Ethnography' by J.P. Digard in *EIr*.

87 He had an oppressive precedent in his life before the victory of the revolution. One of his crimes was to play a major role in assassinating two Zoroastrian merchants in Yazd and Tehran who supported the revolution financially. For more information about him, see Bāmdād 1357/1978: vol. 3, 278–9.

88 He played complicated roles in different events. At the time, he was accused of assassinating Sayyid ʿAbd Allah Bihbahānī and of being linked with the British diplomatic mission. Then he became a senator and even the speaker of the Senate in the Pahlavi period. See s.v. 'Taqīzādih, Sayyid Hassan' by ʿAbd al-Hussein Ādharang in *EWI*. Of the works written about him, this seems to be the best academically.

89 On his biography and role in the revolution, see s.v. 'Ākhūnd-i Khurāsānī' in *EIr* by A. Ha'irī and S. Murata.

90 See his letter in Afshār 1359/1980: 207–12.

3.3 *Analyses*

The main question is why did the Iranians have a revolution that led to the formation of a constitutional monarchy? According to one viewpoint, it was because Nāṣir al-Dīn Shah, followed by Muẓaffar al-Dīn Shah and the governing class, wanted to introduce fundamental reforms to all the country's socio-economic and cultural institutions. A wish to compete with the Ottoman Empire, which had had a constitution since 1876 and already had a limited parliamentary system, encouraged the shahs to take reform seriously. At the time, the shah, courtiers, and intelligentsia looked upon Britain and France as models of progress and modernization, and believed that the reasons for their development lay in the codification of laws and regulations, the formation of parliamentary systems, and the implementation of economic freedoms. After his third trip to Europe in 1889, Nāṣir al-Dīn announced his decision to uphold some laws and regulations and, accordingly, he sent a representative to Germany to seek advice on administrative reforms (see Ādamīyyat 1355/1976: 4–5, 12). Thus, the idea of a royal constitution, as a badge of prestige in the Middle East, was one way of following the model of the French Revolution yet retaining a monarchy, although in a new form.

Some courtiers and governors, however, disagreed with the remedy. They believed that the common people, who remained ignorant, were incapable of understanding what a constitutional system meant. Among the documents, there are two letters worth noting to prove the claim. The first, written in early 1906, is from a courtier named Nāṣir al-Mulk to Sayyid Muhammad Ṭabāṭabā'ī saying that a constitutional monarchy, freedom, and the formation of Parliament would create disorder and confusion in society. He argued that such developments needed at least a thousand learned men, and he was sure that not even a hundred people in Iran knew what a parliament was, let alone how to make parliamentary decisions for the country (see his unabridged letter in Kirmānī 1362/1983: vol. 1, 461–3). The second is a letter from Sulṭān ʿAbd al-Ḥamīd (r.1876–1909) to Muẓaffar al-Dīn Shah, saying why the Constitution and Parliament should be suspended in the Ottoman Empire. He asserted that a constitutional state and constitutionalism were premature for ignorant and illiterate Iranians (IDF 1370/1950: 196).[91] The events that actually happened after 1911 endorsed the arguments of this group of courtiers and governors.

Based on the above information, it seems evident that the people living during the Qajar period were too weak and oppressed to muster the will to free

91 Some scholars like ʿĀrif-i Qazwīnī, Yaḥyā Dawlat-ābādī, and Farrukhī Yazdī agreed with this idea and considered the Constitutional Revolution to be a defective revolution (see Ājudānī 1382/2003: 205–7, 498–9).

themselves from their conditions. As we saw in the first sanctuary, the people's initial demands were minor and only later developed into a request for a *majlis* and constitutional monarchy. Common people, even clerics,[92] were unfamiliar with the idea of a constitutional monarchy, while some members of the intelligentsia and courtiers referred to it frequently. When clerics and activists were rallying people to protest and participate in demonstrations to proclaim their demands, they were emphasizing issues such as the backwardness of the country, and the oppressive and unjust behaviour of local governors. Notions of a constitution, Parliament, state, nation, and equal rights were modern and familiar only to the intelligentsia who had been exposed to new systems of education, whether in Iran or abroad.[93] The word "constitution" was purportedly first introduced by the foreign minister Mushīr al-Mulk's two sons, Hassan and Hussein Pīrnīyā, in the royal proclamation of Muẓaffar al-Dīn Shah in August 1906 (Kirmānī 1362/1983: vol. 1, 527), although the idea of demanding justice had been in circulation among the people and governors since the time of Mīrzā Hussein Khan Sipahsālār (r.1871–82).

The merchants, intelligentsia, and clerics formed a triangle of participants in the revolution. There is ample evidence, however, that by no means everyone sought a constitutional monarchy from the outset. Also, while the intelligentsia and courtiers saw it as a means of progress and a mark of prestige, there was no single interpretation of what it actually meant. Some members of the intelligentsia regarded it as a means to freeing people from outdated customs and historical superstitions (see Kasrawī 1357/1979: 274–5), but there were no doubt others who probably had a very clear idea of what they wanted from it (see Ādamīyyat 1355/1976: 156–9, 206). Some merchants hoped for better economic circumstances, a decrease in governmental interference, and

92 The author of a monograph supporting constitutionalism, who was a cleric, wrote, "The Quran is abrogating all previously revealed scriptures and includes all common, civil, and political laws. European countries, even, wrote their fundamental laws by using the Quran, the sayings of the imams, and the Shiite *fiqhī* opinions. We do not need any codified law in social affairs but we do need the implementation of *shari'a* in our country." But he believed that the codifiers of the laws and regulations should not translate every article from the European corpus because most of them opposed *sharia* (see Zargarīnizhād (ed.) 1374/1995), 'Imād al-'Ulamā' al-Khalkhālī's monograph, 1325/1906: 307, 312, 325–6).

93 A point should be made here on the meaning of the word intelligentsia. Here it refers to graduates from the new systems of education who were cooperating with the government. However, since the second Pahlavi and especially since the 1979 Revolution, the word has assumed a Russian or Marxist connotation. Accordingly, it indicates a group of clergymen or laymen who oppose the government (see Abbas Mīlānī, *ṣayyād-i sāyih-hā* [*King of Shadows*]*: Essays on Iran's Encounter with Modernity,* US: Ketab Corp, 2005: 144–6).

financial security, while others were more concerned about the interests of their masters in foreign embassies. The clerics thought that the proper means of implementing Islamic law and attaining security and justice might be was to endow constitutionalism with divine legitimacy. According to the proceedings of the first Parliament, Sayyid Muhammad Ṭabāṭabā'ī (1325/1907: 503–4) said that "we ourselves have not seen countries with a constitutional monarchy but have heard from those who have seen that it is a good idea and an effective system which leads to security and development of the country. Thus we enthusiastically accept the constitution."

More clarification is needed to find out the precise position of the major participants. Their support for or opposition to a constitutional monarchy was based not only on theoretical grounds but also on how it might affect their assets, interests, and socio-political statuses. For the purposes of this study, the positions of two eminent people, Mīrzā Malkam Khan and Sheikh Faḍl Allah Nūrī – an effective supporter and an influential opponent respectively – are worth illustrating.[94] One sentence attributed to Nūrī at an especially fateful time for him, the moment of his execution, supports the assumption that opposing or supporting constitutionalism had more than a mere theoretical basis. After kissing the rope, he referred to his conflicts with other clerical leaders and said, "I was neither a dictator nor were Sayyid 'Abd Allah [Bihbahānī], and Sayyid Muhammad [Ṭabāṭabā'ī] constitutionalists; it was merely that they wished to excel me, and I them, and there was no question of dictatorial or constitutional principles" (Ādamīyyat 1355/1976: 430–1; Browne 1910: 444; Kirmānī 1362/1983: vol. 2, 535–6).

According to the epistemological rule that one often gives one's reasons for what one has already chosen, Nūrī indeed opposed constitutionalism, for his competitors were on the other side. A closer look at Malkam may provide another case for the epistemological rule. As we noticed, Malkam was considered the father of modern law in Iran and – as expressed in all his works apart from the *Qānūn* newspaper – was a secular intellectual. He openly criticized the shah in his newspaper and, at the same time, presented modern ideas in

94 Browne, Kasrawī and Kirmānī portray a very negative portrait of Sheikh Faḍl Allah Nūrī not merely as to his position on the revolution, regard him as a supporter of the shah's dictatorship, and report his financial corruption and bribery (see Browne 1910: 429–30; Kirmānī 1362/1983: vol. 1, 304, vol. 2, 459, 535). After the 1979 Islamic Revolution, Ayatollah Khomeini praised him and gave him the honorific title of Sheikh-i Shahīd and took him as the father of the ideology of the Islamic Revolution (see Khomeini 1370/1991: vol. 18, 135, 181, 231); about him, see also Abd al-Hādī Ha'irī, 'Shaykh Fazl Allah Nūrī's Refutation of the Idea of Constitutionalism', *Middle East Studies*, 13 (1977), *Middle East Studies*, 13 (1977): 327–9.

an Islamic tone; this tone was absent in his works before 1890. His later writings support a constitutional government with religious overtones: "the status of the clerical leadership of the nation should be higher than that of any shah … according to Shiite doctrines the present monarchy of Iran is an outlaw and the Shah is an usurper" (Ājudānī 1382/2003: 196, quoting Malkam's comments in the *Qānūn*. Cf. Abrahamian 1982: 67; Browne 1910: 35–42).[95] The ideas of August Comte (1798–1857) and John Stuart Mill (1806–73), who influenced Malkam, were absent from the *Qānūn*. With reference to Malkam's later suggestion, we can suppose that if Sheikh Nūrī had attained the status of clerical leader then a constitutional system would have been a very good idea.

To get an accurate sense of the context of constitutionalism, it is important to ascertain how the clerics saw it and what they thought about the modern concepts. Their position, whether for or against, should be evaluated in terms of the rights of non-Muslims and should be analysed in relation to their viewpoints regarding the legitimacy of government during the Occultation of the Hidden Imam. In the Qajar period, the *ulama* divided sovereignty (*wilāya*) into political and religious realms. Political power, with the *ulama*'s permission, belonged to the shah, who was considered the guardian of the country and of the nation (and by nation they meant *sharia*, not in the modern sense of the term).[96] Religious power belonged to the *ulama*, some of whom believed that the appearance of the twelfth imam was predicated on the unification of the two realms.[97] According to this view – in support of which its adherents could quote some hadiths and Quranic verses[98] – a believer is someone who obeys the shah absolutely and would regard any attempt to diminish the power of the shah or of the clerics as unthinkable.[99]

Consequently, in the early phase of the revolution most clerics, including Sheikh Nūrī, did not join the revolutionaries to support constitutionalism

95 In my analysis, the judgement on Malkam comes entirely from Ājudānī 1382/2003.

96 There is more on the terminology applied at the time in Chapter 3.

97 There are monographs explaining the idea of unification in which the authors supported absolute monarchy. For example, Hussein Damāwandī's monograph 1264/1885; and Muhammad Rafī'Ṭabāṭabā'ī's monograph 1312/1894; both quoted in Zargarīnizhād (ed.) 1374/1995: 59–61.

98 Zargarīnizhād (ed.) (1374/1995), Abū al-Hassan Marandī's monograph 1326/1908: 196–262, esp. 197, 203–6.

99 See Zargarīnizhād (ed.) (1374/1995), Abū al-Hassan Marandī's monograph 1326/1908: 251–2. Based on the verses of the Quran and on hadiths, Marandī argued that *mashrūṭih* (Constitutional Revolution) is equal to *mushrik* (polytheism) based on *Abjad numerals*, a system to calculate numbers by assigning the specific values to the specific letters of the Arabic alphabet.

but to uphold the House of Justice in support of the royal monarchy and the oppressed. Some thought that constitutional monarchy would lead to the implementation and restoration of Islamic rules like "Islam is high and nothing is higher". At first, they had no comprehensive idea of what a constitutional system was and imagined that it had nothing to do with the codification of laws and regulations, but merely meant limiting the shah's power and parliamentary supervision of executive affairs (see Zargarīnizhād (ed.) 1374/1995, Maḥallātī's monograph 1326/1908: 516, 539, 544). One piece of evidence in this regard surrounds the utterances of a revolutionary cleric, Majd al-Islam Kirmānī,[100] who gave sermons to incite people into participating in the revolution. As Kirmānī (1362/1983: vol. 1, 322) put it:

> Constitutional state means religious state and it means the Shah and the beggar are equal before the law according to Islamic rulings. When Christians say constitution, they mean the people should act in accordance with positive laws, which by their intellectuals determined, and since they do not have divine law they codified positive laws but we are Muslims and do have the law of Islam and should act accordingly … constitutionalism contradicts dictatorship.

Other clerics argued that constitutional monarchy was not new: "everyone who does not know should know that the monarchy of Iran from ancient times has been constitutional … and the basis of Islam and Mohammedan Law has been absolutely constitutional" (Kirmānī 1362/1983: vol. 2, 133).[101] Ayatollah Muhammad Hussein Na'īnī,[102] who wrote one of the best books in favour of a constitutional system, declared that it was an old concept, as well as closer to the principles of Islam and less oppressive than absolutism. He argued that *ulama* had to choose the lesser of two evils (Na'īnī 1361/1981: 49–50). He described the Constitution in terms of being *risāli-yi 'amalīyya* (a practical manual) providing *niẓāmāt nu'īyya* (the general regulations of mankind), and having been written for political purposes (Na'īnī 1361/1981: 51).[103] Yet, on

100 See his biography in Bāmdād 1357/1978: vol. 6, 201–5. Afary and Malikzādih regarded him as Azalī and a supporter of the queen.

101 Kirmānī quoted this sentence from unknown man, a Sheikh Ali 'Irāqī.

102 See his biography in s.v. 'Na'īnī, Mīrzā Muhammad Hussein' by 'Abd ul-Hādī Hairi in *EI2*; Nouraie, F. (1975) 'The Constitutional Ideas of a Shiite Mujtahid: Muhammad Hussein Na'īnī', *Iranian Studies*, 8 (4), 234–8.

103 He reported a dream on page 48, in which the Prophet told him that the constitutional system was new in name but had a precedent in content. See also, 'Mukālamāt-i Muqīm

seeing the chaotic state of the country after the victory of the revolution, Na'īnī changed his mind and regretted ever having written *Tanbīh al-umma wa tanzīh al-milla*, which had been published in Baghdad in 1327/1909. He famously withdrew all remaining copies, later even opposed the idea of Iran being a republic, and supported Reza Khan in establishing his new dynasty (see Hairi 1977: 177–81).

To find out the real differences between the opponents and supporters of a constitutional system, it is necessary to clarify what caused Sheikh Nūrī to change his mind. According to him (see Zargarīnizhād (ed.) 1374/1995, *ḥurmat-i mashrūṭih* [Forbiddance of the Constitutional System]: 153–4):

> The origin of this new sedition was that some naturalists presented plausibly certain concepts like justice, which if everybody hears he will like them willingly and so I too endorsed them. When they came to establish this, I found some illusive words and I tolerated them. They then came to hold the constitutional system and legitimacy of the majority. I firstly tolerated them to support social justice but afterwards when they came to write the constitution I felt that there was a heresy in their minds; what does a deputy [of *majlis*] mean? What is a parliamentary system? … If they aim to codify customary laws, there is no need for such a religious ordering; if they aim to interfere in the religious rulings, such deputies do not have such rights. In the period of the Occultation this right belongs only to *ulama*, not to such people like a grocer or a cloth-seller.

After Mohammad Ali Shah's attack on Parliament, Nūrī expanded his ideas by making some judicial and political announcements and writing monographs opposing constitutionalism. In a monograph called *Tadhkiratu al-ghāfil wa irshādu al-jāhil*, or a reminder to the ignorant and guidance to the unknowing (see Zargarīnizhād (ed.) 1374/1995: 184, 174), he said:

> Do not you know that discussing and issuing legal opinions on the *umūr-i ʿāmmih* (public affairs) and *maṣlaḥa* (public interests) of Muslims are 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 … it is evident for

wa Musāfir' (Conversations between the Resident and the Passenger), in Zargarīnizhād (ed.) 1374/1995: 89. The author believed that there was a constitutional form of government during the period of the Prophet and early caliphs.

> a Muslim and does not need an argument that we Shiites, praise to God, have the best and the most complete divine laws. Since the laws and regulations sent unto the Prophet are divine laws … Islamic societies have divine laws, ranging from politics to acts of devotion … and to respect this great capital, the establishment of any law by man is a fruitless effort.[104]

Nūrī in his treatise *Ḥurmat-i mashrūṭih*, which was written after the enactment of the Supplement, states (see Zargarīnizhād (ed.) 1374/1995: 159–60):

> One of the articles of that *ḍalālatnāmih* [literally misleading work, his reference to the Supplement] is that a penalty should not be carried out save by the law and then in order to fool the people they (enactors) divide the regulations as regard to the lawmaker 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 that one intends to redress it.

Further serious protests by Nūrī and other opponents refer to the content of the articles dealing with everybody's right to freedom and equality before the law. Although their statements are not new to us and cover much of the same information dealt with in the previous chapter, it is helpful to review them here to get a clearer picture of the context. Addressing MPs after setting out examples of different subjects and rulings in Islam, including those on non-Muslims, Nūrī remarked (Zargarīnizhād (ed.) 1374/1995: 161–2):

> The rulings of Islam are based on inequality among mankind, so you took an oath to agree with equality! The Quran states that a Muslim should not be retaliated for a non-Muslim, then you took an oath to agree with the right of retaliation for non-Muslims! Whatever sounds contrary to Islam will never have any legality whatsoever. Oh knaves! Oh the dishonest! The owner of *sharī'a* gives you dignity and superiority, then you yourself give it up and say you should be brothers with and equal to Armenians, Zoroastrians, and Jews!

104 It is well known among historians that the author of this monograph is Sheikh Faḍl Allah Nūrī, but Iraj Afshār (1362/1983: 235–7) presents a document indicating that the work is written by Mīrzā Ali Isfahānī, a follower of his. See Ādamīyyat (1355/1977: 259), who argues that it is written by Sayyid Ahmad, the son of Sayyid Kāẓim, and does not add any further information about these names.

On Article 8 of the Supplement, which states "the people of the Persian Empire are to enjoy equal rights before the law", Nūrī wrote: "when I am told that foreign countries will not recognize us as constitutionalists if we do not enshrine this article in the constitution, I stood and said that in such a case *faʿala al-Islām-i salāmun* [then say goodbye to Islam]" (Zargarīnizhād (ed.) 1374/1995: 159–60).

The clerics who supported the constitutionalists answered their opponents' questions on the philosophy of parliament by stating that they did not intend to codify new laws in the realm of *sharīʿa* because the Islamic rulings introduced by the Prophet and imams are permanent. Furthermore, the main duties of parliament are to supervise the executive affairs of the state, to limit the powers of the shah and officers of the state, to stop the oppression exercised by local governors, and to deal with issues that are beneficial to the people. Furthermore, they believed that establishing a Parliament enabled the nation to save the country from invasion by foreign powers and their interference in internal affairs and, finally, to realize *al-amr bilmaʿrūf wa al-nahy-i ʿan al-munkar* (the Islamic duty of commanding the right and forbidding the wrong).[105]

It seems to me that the opinions of Nūrī and his followers on the rights of religious minorities reflected the general belief of the Shiite jurists. On the inequality of rights between Muslims and non-Muslims, all clerics, both *uṣūlī* and *akhbārī*, regardless of their positions on constitutionalism, were in agreement. From this viewpoint, legal inequality is an injunction that *allegedly* God has ordered in the Quran and this permanent injunction is *naṣṣ* (explicitly recorded) and does not accept any new interpretation or inference (*ijtihād*). If the clerical supporters of the revolution, namely Muhammad Hussein Naʾīnī, Akhund-i Khurāsānī, Sayyid ʿAbd Allah Māzandarānī, Sayyid ʿAbd Allah Bihbahānī, and Sayyid Muhammad Ṭabāṭabāʾī, were asked if they had entered the arena to equalize rights between Muslims and non-Muslims, their answers would surely have been in the negative. They did not even agree to the participation of women in elections, which they regarded as contrary to the rulings

105 These claims are repeated in all the monographs written by the pro-constitutionalists. See monographs in Zargarīnizhād (ed.) 1374/1995 by Ahrumī Būshihrī (1325/1906), 279–80; Maḥallātī's (1326/1908), 500–3, 509–10; and Taqawī (1324/1906), 267–8. In his defence of the Constitutional Revolution, Ahrumī evoked hadiths that pointed to the signs of the end of time and of the time when the twelfth imam [the Hidden Imam] would appear. He then tried to equate the signs of that time with the characteristics of 1906 Iran. Using *Abjad* numerals and some astrological data (see Zargarīnizhād (ed.) 1374/1995: esp. 292), he concluded that the Hidden Imam would appear in the year 1324/1906.

of *sharīʿa*.[106] Naʾīnī explicitly states that by freedom and equality he does not mean the equality of Muslims and *dhimmīs* in matters of inheritance, blood money, retaliation, and marriage.[107] As further evidence, Muhammad Ismāʿīl Maḥallātī (see his 1326/1908 monograph in Zargarīnizhād (ed.) 1374/1995: 546), a pro-constitutionalist cleric, answers Nūrī by saying:

> We do not by equality mean that Muslims, Jews, Christians, and Zoroastrians are equal in their rights … yes, they are equal to Muslims with respect to the implementation of the law. Moreover, we mean that they are equal to Muslims in acquiring national benefits (*fawāʾid-i waṭanīyya*) provided that their efforts are not contrary to the conditions of *dhimma*. Accepting a constitutional system does not mean that the Islamic prerogatives will be cancelled and the Quran will be equal to the abrogated Old Testament.

Again, we read in another monograph written in 1325/1907 by a constitutionalist cleric called Khalkhālī (see Zargarīnizhād (ed.) 1374/1995: 330) that:

> Some verses of the Quran indicate that the religion of Islam is the only true religion for all creatures and God will not accept others. Thus, every Muslim and every Shiite should be silent on the freedom of religion … the law in this realm is only the law of the Quran and the issue of constitutionalism refers to customary efforts and royal assignments.

Although the clerics agreed on legal inequality between Muslims and non-Muslims, this one did not allow radical groups to attack religious minorities and issued a *fatāwā* making it obligatory to extend good treatment towards them.[108]

There seem to be some purely political differences, the roots of which can be traced back to the emergence of modernization in Iran, between the supporters and opponents of constitutionalism. The pro-constitutionalists merely saw the Constitutional Revolution as a means of rejecting the tyranny of the shah and his governors, which all Iranians including non-Muslims needed to support. In addition, the clerics in favour of constitutional government tried to

106 See Articles 3 and 5 of the Electoral Law of September 1906 in Browne 1909: 68.

107 See Ādamīyyat 1355/1976: 238–40. Naʾīnī, however has a particular opinion about dictatorship, he believes it is not confined to the realm of politics and he occasionally refers to a religious dictatorship, which, according to him, relies on deceiving and misleading others (Ādamīyyat 1355/1976: 233, 235, 247).

108 As an example, see *fatwā* by Khurāsānī in Browne (1910: 421–2). The subject of violent acts towards religious minorities will be examined later.

Islamize the contents of the Constitution because they knew that the allocation of four seats to the religious minorities in the Parliament would, according to Article 2 of the Supplement, not only have no effect on their right of veto, but also might serve to unite the people against the shah's tyranny. The opponents of constitutionalism, namely Nūrī and his camp, for some or other emotional reason, seemed incapable of grasping the point and, consequently, their position, in effect, served to sustain the dignity of the shah and his dictatorship.[109]

4 Non-Muslims in Iranian Society

While Zoroastrians, Jews, Christians, Ṣābiʾīn (Mandaeans), and Bābīs, including Bahāʾis and Azalīs, were living in Iran during the focal period of our study (1848–1911), broadly speaking, there is still very little systematic information on them, particularly on the Ṣābiʾīn. However, there are enough existing sources to provide short descriptions of the mostly recognized religious minorities.

4.1 *Demography*

According to some reports, by 1881 the entire Iranian population was estimated to be around six million people and by 1904 it had risen to about ten million (Netzer 1999: vol. 3, 145–204, esp. 149–52). Religious minorities lived in various cities, but with different early histories accounting for their presence. Most Zoroastrians lived in two cities, namely Yazd in the east and Kerman in the southeast. Their quarters, called *gabr-mahallih*,[110] were outside the city walls and they had to live in them. According to some reports, in 1850 about 9,000 Zoroastrians were living in these cities, and by 1883 the number had risen to 23,000. However, in the early years of the Safavid dynasty (around 1510) the number was as high as a million (Raḍī 1365/1986: 14–19).[111] Then, after the 1906 Revolution, most Zoroastrians gradually moved to Tehran.

Jews have a long history of living in Iran. In 1854 there were approximately 13,000 and by 1903/4 the estimate had risen to between 33,680 and 49,500 (see

109 According to Ājudānī (1382/2003: 365), between 1860 and 1909 in Iran, only two people explicitly said that Islam and constitutionalism were incompatible – Nūrī from an Islamic viewpoint and Fataḥ Ali Ākhūndzādih from a secular one. As representatives of tradition and modernity respectively, their conflicting positions continue into the present.

110 This two-word Persian combination literally means a region where the infidels are living. *Gabr* is originally a title used only for Zoroastrians but sometimes allegorically for all non-Muslims.

111 Raḍī attributed the number of Zoroastrians in the early Safavid dynasty to Comte De Gobineau. See also Benjamin 1887: 356; Boyce 1979: 210–11.

Keywān 2000: 33–4; Tsadik 2007: 6, 8–9). According to the head of the Jewish society *Anjuman Kalīmīyān*,[112] about 35,000 Jews were living in Iran in the first decade of the twenty-first century, but their numbers have gradually decreased (Sarshar 1997: vol. 2, 335–6; cf. Yeroushalmi 2009: section II, sources 10, 11, and 12). They were scattered in various regions, namely the Shiraz and Isfahan provinces, Hamadan, Nahāwand, Kermanshah, Sanandaj, and Sāwujbulāgh in the west and northwest, and Mashhad in the northeast. In some cities, like Isfahan and Tehran, they owned and governed certain districts of the city called Yahūd-bārih, or Jewish Borough, now also known as *Jūbāreh*. In 1839, some Jews from Mashhad who were forcibly converted to Islam became known as *Jadīd al-Islam* (Aubin 1908: 295–9; Waterfield 1973: 112).[113] Many Jews moved to Tehran after 1906 to find more security and to improve their economic situation. They had synagogues in those cities and were highly respected in Hamadan, where the tomb of Esther (fourth century BCE) is located. Most Iranian Jews have been living in Tehran, Isfahan, Yazd, and Shiraz provinces since the 1906 Revolution. A notable point is that they were able to build fifteen synagogues in Tehran during the Pahlavi period[114] but, at the same time, their population decreased in number.[115]

Christians, including Gregorian Armenians and Assyrians[116] (known as Nestorians and Chaldeans respectively), were living mostly in Isfahan, Shiraz, Khuzestan, Būshihr (in southwest Iran),[117] and Urūmīyya (in the northwest), with very few in Tehran. They have very old churches, which fall into three categories: (a) those built before the fourteenth century, like the Church of Saint Thaddeus, or Qarā, in the northwestern city of Mākū; (b) those built in the Safavid period, like Wānk in Isfahan; and (c) those built in the nineteenth and twentieth centuries in the major cities in which these Armenians were living (see Hūwīyān 1380/2001: 111–54). Shah ʿAbbās I (r.1588–1629) resettled the Armenians from Julfā in Armenia to a new Julfā in Isfahan, where they were permitted to build their own churches. Until 1958, they retained their

112 See s.v. 'Anjuman Kalimīyān' by A. Netzer in *EIr*.

113 Aubin, who was the French ambassador to Iran from 1906 to 1907, reported that there was no trace of any Jews in Mashhad in those days. See also Amanat 2011: 47–50, 55–7; Pīrnaẓar 1379–1380/2001: 41–59.

114 On names and places, see Kamran 1996: vol. 1, 118–19.

115 For more demographic information on Jews between 1854 and 1911, see Keywān 2000: 35–40; and Waterfield 1973: 115–21.

116 The majority of Christians in Iran are Armenians. On the Assyrians, see s.v. 'Āšūrīān in Iran' in *EIr* by R. Macuch. For more information, see Sanasarian 2000: 39–42; on the roots of Nestorians in Persia, see Waterfield 1973: 30–8; see also Wigram 1929.

117 On the history of the immigration of some Christians to Būshihr, see Mashāyikhī 1382/2003.

relationship with and dependency on the Armenian Church of Armenia but then shifted it to that of Cilicia. According to some reports, during that period the Armenian population shrank to 20,000.[118] The exact number of Assyrians in the period, however, has not been ascertained.

The Ṣābi'īn have been living in the southwest, especially in the cities of Ahwaz and Shūshtar, for many centuries. I had assumed that they were Mandaeians, but according to some reports, they are converted Jews who believe in John the Baptist, the son of Zechariah; hence they were called Ṣābiḥīn (swimmers), which was later changed to Ṣābi'īn or Mandaeans (see Rāmyār 1347/1968: 24–54). No is accurate information available about their population in the period under study. They write and speak in the Mandaeian language, which is close to eastern Aramaic (see interviews 5 and 6).

Sayyid Ali Muhammad Bāb, the founder of Bābī faith, was executed in 1849. Great conflicts and eruptions have been reported among his successors who were divided into two main denominations: Azalī and Bahā'ī.[119] In Iran, his followers, who were regarded as heretics, were living in various cities like Yazd, Būshihr, Shiraz, Zanjān, and in Mazandarān province (in the north). There is no reliable source about their population in that period.

4.2 *Social Conditions*

In the period under discussion, the country's economy was based mostly on agriculture and primitive trade, with the government obtaining its income through taxation. The cities were similar to those of other underdeveloped societies. Sociologists have listed their main features as having high levels of poverty; low educational standards; low incomes; poor health provision; a propensity to interfere in other people's affairs; and a tendency to look upon those with different tribal or religious affiliations as strangers. However, because Iranian religious minorities accepted their inferior status in the society, they often coexisted peacefully with ordinary Iranian Muslims and, like them, endured misgovernance. To enhance their security, the religious minorities in most cities preferred to live together in certain local areas, to which local governors paid insufficient attention. The particular conditions in which they were living might provide one explanation for the general lack of information about them, especially since their neighbourhoods had no independent systems of education and health. It was only with the emergence of modernization in

118 In his travelogue *Iran and Iranians*, Edward Pollack (quoted in Mashāyikhī: 1382/2003: 118), who lived in Iran from 1851 to 1860, reported on the number of Armenians.

119 See Amanat 2011: Ch. 3; Browne 1910: 424–8; Kasrawī 1357/1979: 291. See Amanat 2005 for a sympathetic rendering of events leading up to the advent of the Bābī movement.

the late nineteenth century that, with support from foreign countries, some schools were established for Jews and Christians. It has been reported that religious minorities, especially Jews, some Zoroastrians, and Christians, who had no land to work on, turned to activities such as playing music and dancing at weddings, trading in alcohol, cloth, silk, and antiques, changing money, practising usury, and selling traditional medicines.[120] The majority of Zoroastrians and Ṣābi'īn were peasants and artisans (see Benjamin 1887: 356–8; Tsadik 2007: 179–86; Waterfield 1973: 113).[121]

While socio-cultural and economic standards of living were low for everybody at that time, the religious minorities had more problems than others, and these sometimes made their situation particularly difficult. For example, the Christians in the northwest were engaged in continual conflicts with the Kurdish and Turkish tribes of Iran and Turkey, and were occasionally attacked by Kurds (Waterfield 1973: 130–1; on the problems of Jews, see Tsadik 2007: 185–6). Although it is reported that non-Muslims "are treated with much toleration, and are rarely forced to submit to greater injustice and indignity than that awarded to Muslims as well" (Benjamin 1887: 358), they, especially the Jews and Zoroastrians, were occasionally oppressed by local governors who were ever eager to extract more taxes or take more bribes.

Furthermore, there were also religious reasons to attack non-Muslims. Low-ranking clerics and radical groups were likely to misuse *fiqhī* opinions to justify attacking non-Muslims or putting pressure on them either to convert or accept restrictive regulations. Muslim preachers, evoking religious motives to exhort their followers to protest against the prevailing unfavourable conditions, would blame any failure to implement *sharīʿa*, including the rulings against non-Muslims, for every social calamity and natural disaster, even the spread of cholera (see Iʿtimād al-Salṭana 1033/1623: 172).[122] In such a climate, radical clerics in search of evil (*munkar*) would point to the religious minorities and their practices of usury and selling or drinking alcohol in public. The clerics sometimes even claimed that if non-Muslims had converted to Islam, or at least obeyed the jurists' injunctions, Muslims would have been in a better

120 See Philipp (1984: 391–409) for a list of the crafts and professions of Isfahan's Armenians. Some Jews and Christians, although in very small numbers, became physicians and practised medicine in the nineteenth century; see Tsadik 2007: 11; Yeroushalmi 2009: section III, sources 13, 14, and 15.

121 Further information is available in Willem Floor, *Traditional Crafts in Qajar Iran, 1800–1925* (Costa Mesa, CA: Mazda Publishers, 2003).

122 Tsadik (2007: 159–74, 182–3) describes the backgrounds to or pretexts for the anti-Jewish events, but, as he pointed out, there were similar attacks on other minorities in the nineteenth century.

social situation in the light of God's grace. Treatment of this kind, according to some reports, had gone on intermittently since the Mongol period and lasted right up to the end of the Qajar dynasty. Sometimes, there were reasons other than socio-psychic dynamics for the attacks on non-Muslims. For example, when Amīn al-Dawla[123] decreased the monthly allowances of clerics and influential courtiers, some fanatical groups, with the support of various clerics, attacked Jews and insisted they be distinguished from Muslims by a dress code. For a while, the government felt compelled to order Jews to wear a silver necklace with a *musa'ī* (attributed to Moses) inscription or to attach the mark to their clothing. Some clerics even accused Amīn al-Dawla of being a naturalist or anti-religion (Ājudānī 1382/2003: 272–5, and footnote 465).

Despite the context, and the activities of certain Muslim clerics, one can rarely find, as far as I have researched, a *fatwā* of a high-ranking jurist, or source of emulation (*marja' taqlīd*), to attack non-Muslims, to force them to convert, or to impose a distinguishing dress code or sign on them. The main references in my research are derived from the unpublished documents lodged in the archives of the Iranian Ministry of Foreign Affairs between 1279/1862 and 1324/1906. There were approximately two hundred recorded cases of attacks on religious minorities, none of which was authorized by a *mujtahid*. The main reason for them was usually the tyranny of local governors or on a pretext put forward by some low-ranking political *ulama*.[124]

To understand the context of the 1906 Revolution better, it is pertinent to add some further information on the violent treatment meted out to non-Muslims. Before doing that, however, I shall point to some obstacles that stood in the way of codifying articles about equal rights for Muslims and non-Muslims in the Constitution. One important reference is Ḥabīb Liwī's *Tārīkh-i yahūd-i Irān* [*The History of Iranian Jews*],[125] which is mostly confined to the oppression of the Jews, yet suggests four explanations for why it might have happened.

123 The grand vizier, *ṣadr-i aʿẓam*, for a short period in 1314/1896.

124 The whole list deserves a specific study, but here I limit myself to some more important cases that have been evaluated for this research. See, Year 1317/1899: box 24, file 20, 53–4, 56, 82–4, 91, 92; Year 1318/1900: box 15, file 14, 35, 36, 63–6, 99; Year 1318/1900: box 26, file 21, 24, 34–5, 40, 42, 64, 71, 74–6, 82; Year 1320/1902, box 24, file 4, 10–11, 16, 23, 35, 61, 64, 120, 161, 197, 202–4; Year 1321/1903, box 28, file 5, 11, 39, 49, 99, 109, 131, 145; Year 1323/1905, box 11, file 4, 23, 41, 47; Year 1323, box 22, file 13, 2.

125 The sources on the history of Iranian religious minorities are inadequate. The work of Liwī, which is sometimes regarded as the main reference for studying the position of Iranian Jews before 1979, is indeed written by a non-expert, an army officer in the Pahlavi regime who tried to attribute the oppression of Jews in the Qajar period to pseudo-clerics (as he liked to call them) and rascals, and not to the shah and his governors. In addition,

First, the Iranians learnt such behaviour from the way they themselves had been treated by the Mongols (Liwī 1334–9/1955–60: vol. 3, 4).

A second arose from the impact of the anti-Semitism of radical European Christians on Iranians. Liwī held that Iranians became used to the brutal way in which Europeans visiting Iran in the period of the Safavid dynasty treated them. He asserts that levying *jizya* and imposing dress codes to distinguish Jews from the mainstream population were also commonly practised in European countries. The colour used in the dress code in Islamic countries, including Iran, was red while it was yellow in Europe (Liwī 1334–9/1955–60: Introduction, 219, 277, 283, 313, 501–2).[126]

A third explanation can be traced to the religious motives of Muslim clerics and radicals, which mostly came from hidden intentions like enhancing their reputations in the eyes of the people, amassing wealth, or securing a good position in the government (for different cases of attacks see Liwī 1334–9/1955–60: vol. 3, 757, 762, 773, 801–4).[127]

The fourth and final explanation is that converted Jews created difficulties for their relatives. Following their conversion, they would be employed to collect *jizya* and other taxes and were trying to win the approval of local governors by persecuting, or even killing, their former co-religionists (Liwī 1334–9/1955–60: vol. 3, 393–4). As already stated, these people, known as *Jadīd al-Islām* or *nuw-musalmān* (the newly-converted), could prevent their non-Muslim relatives receiving an inheritance.[128] Liwī even reports cases of Jewish clerics converting to Baha'īsm (Liwī 1334–9/1955–60: vol. 3, p 795; see also Waterfield 1973: 118). Since the circumstances under which the Baha'ī people were living were even worse than they were for the Jews, the reasons for such conversions are complicated. Liwī fails to provide a credible explanation, but merely complains about the decisions of his co-religionists. He hints at the possibility that these

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his book is mainly based on secondary sources and contains some myths, exaggerations, and mistakes. Here I tried to report the content of volume 3 briefly. After about fifty years, Sharifi (1387/2009), recompiled Liwī's book in a popular tone, with the addition of certain historical and legal views against *ahl al-dhimma*. See also Sarshar 2002.

126 Sometimes, the colour of the dress code is reported as yellow in the Islamic sources and at other times as red, as we saw in Chapter 1. See also Daghīghīyān (1996: vol. 1, 171–90).

127 In this case, the author explained why Sheikh Ibrahim Qazwīnī, who intended to become famous, attacked Jews and Christians in Tehran in the period of Muẓaffar al-Dīn Shah. This motivation was not limited to attacking religious minorities, and there were even some reports of attacks on Sunni Muslims and Shiite Ismā'ilīs as well. See, for example, Ājudānī 1382/2003: 112–13.

128 There are more cases in the nineteenth century in Tsadik 2007: 44–6, 84.

Jews might have been dissatisfied with the failure of Jewish law and theology to adapt to the demands of the time.[129]

Jewish conversion to other faiths, including Bahā'īsm, is investigated in detail by Mehrdad Amanat. After evaluating the various justifications for conversion, he explains it in terms of an adjustment to modernity, as a kind of Reform Judaism capable of adapting to an indigenous form of modernity rooted in ancient Iranian cultural traditions. He argues that a religious conflict between a conformist, legalistic approach and an eclectic approach favouring tolerance, diversity, and dialogue has always existed in Iran, and extends back to the pre-Islamic era (see Amanat 2011: 10–15, 77, 93). He has based his fifth to eighth chapters, in which he outlines the details of such conversions, on several autobiographies written by Jewish Baha'ī converts.

In *The History of Iranian Jews*, Liwī neglects some obvious conversions, particularly cases of Jews converting to Islam or Christianity,[130] or to the Azalī or Bahā'ī faiths.[131] In their treatises or essays criticizing Jewish law and theology, converted Jews occasionally tried to preach their new faith to their former co-religionists, which encouraged Muslims to cooperate with the *Jadīd al-Islām* to convert yet more Jews. In the nineteenth century, two notable conversions, which Daniel Tsadik (2005: 95–134) covers in detail, had a huge impact on the position of Jews. Here, I provide a brief summary to add a few points.

Two Jewish clerics, Ḥājjī Bābā Qazwīnī, son of Muhammad Ismā'īl, and Muhammad Riḍa'ī, known as *Jadīd al-Islām*, converted to Islam and wrote two controversial books refuting Judaism. Qazwīnī's book, *Maḥḍar al-shuhūd fī radd al-yahūd* [*The Court of Refuting the Jews*] was written in Persian in 1797. Riḍa'ī's book, *Manqūl-i riḍa'ī* [*The Discourse of Riḍa'ī*] was written in the Hebrew alphabet. Although its exact date of writing is unknown, we do know that Riḍa'ī was a contemporary of one of the most famous *ulama*s of the period

129 See Liwī 1334–9/1955–60: vol. 3, 795; cf. Tsadik (2005: 97), in which he claimed that "by the early 1890s, as their numbers increased [the numbers of those who converted from Judaism to Baha'i], Hamadan Baha'īs of Jewish descent felt secure enough to profess *Baha'ism* openly." This analysis is based on inadequate evidence because, as stated in Chapter 1, while the Muslims recognized the Jewish tradition but never Baha'īsm its followers had no security in the nineteenth century. Mehrdad Amanat (2011: 11), referring to the historico-religious context of Iran in the nineteenth century, says one can argue that the Baha'ī scriptures offer ample room for rational thinking and usually minimize ritual obligations compared with other organized religions. This argument suggests unsatisfactory Jewish theology and law at that time.

130 Some cases are reported in Waterfield 1973: 136–7.

131 See Fischel 1934: vol. 7, 47–55. See also s.v. 'conversion v' by Amnon Netzer in *EIr*, especially where the author adduces that "more than 5,000 Jews, mainly from Hamadān, Kāšān, Arāk, Shiraz, and Tehran seem to have converted to the Bahai faith alone."

named Ahmad Narāqī (d.1245/1831) (see Āghā Buzurg Ṭihrānī 1403/1983: vol. 25, 61; Tsadik 2005: 98).

According to Āghā Buzurg Ṭihrānī (d.1389/1969), the historian biographer who compiled a list of Shiite works from the seventh to the twentieth centuries in 26 volumes, the original Hebrew of Riḍa'ī's book is unavailable but Sayyid Ali Ṭihrānī cooperated with Muhammad Ja'far, the son of Riḍa'ī's brother, and Muhammad Ali Kāshānī, known as Mullā Aqā Jānī, to prepare a Persian translation, which was published in 1292/1875–6.[132] In describing the contents of the book, Tsadik (2005: 99 and footnote no. 9) uses the Persian version, but in one of the cases in which he offers his judgement, he uses the same Hebrew words as Qazwīnī.

Following this brief information on 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" (Tsadik 2005: 99). The confession suggests that some conversions took place for the sake of property. Therefore, the highly-motivated conversions of these two rabbis naturally increased the cultural pressure on the religious minorities of the period. It is worth noting that, with support from the Qajar shahs, especially Fataḥ Ali Shah, many polemic works were written against Sunnism, Wahhābism, Sūfīsm, Sheikhīsm, Baha'īsm, Christianity, and Judaism.[133]

There are cases of Zoroastrians converting to Islam to access better socio-economic conditions, usually women wanting to marry Muslim men. However, Zoroastrians, like Jews, regard themselves as the only chosen tribe of God and consider their blood pure, marriage with others unlawful, and conversion a great heresy (Amīnī 1380/2001: 339–40). The Zoroastrian documentation considers all cases of conversion as forced (Amīnī 1380/2001: 339–84), but there is evidence expressly indicating that they were voluntary (Amīnī 1380/2001: 375–6). As to Christians and Ṣābi'īn, there were then no cases of conversion.

Of all the conflicts affecting religious minorities in the period of this study, the Hamadan disturbance of 1892/3 was noteworthy and reported in detail. According to I'timād al-Salṭana (1351/1973: 1027), a learned man who read newspapers for Nāṣir al-Din Shah and then became minister of cultural affairs, the disturbance was started by a cleric called Mullā 'Abd ullāh, who issued a

132 See Āghā Buzurg Ṭihrānī 1403/1983: vol. 23, 152, and vol. 25, 60; cf. Tsadik 2005: 99 and footnote no. 14. It seems that Tsadik had not seen Āghā Buzurg Ṭihrānī's 25th volume.

133 For example, see Āghā Buzurg Ṭihrānī 1403/1983: vol. 2, 52, 216, vol. 10, 189, 214–16, 219; Moreen 1999: 570–89; Pourjavady and Schmidtke 2006: 69–94; Tsadik 2004: 5–15; Tsadik 2005: 100–1.

verdict that the Jews of Hamadan had to convert to Islam or accept restrictions, including a dress code to distinguish them from Muslims. Since there were more than five or six thousand Jews in Hamadan at that time, and they had the support of the British Embassy, the ambassador complained about the *mullā* to the shah who immediately summoned the *mullā* to Tehran. With some exaggeration, Liwī (1334–9/1955–60: vol. 3, 757–63) reported that the *mullā* had converted some Jews to Islam and imposed regulations on the rest. These included obliging their men to wear a red patch on their coats and their women to wear red or khaki veils, forbidding Jews to ride horses or venture outdoors on a rainy day lest they defile Muslims, and not allowing Jews to build their houses higher than those of their Muslim neighbours. There were similar regulations for Zoroastrians in Kerman and Yazd between 1880 and 1911 (see Amīnī 1380/2001: 392–400, 421, 428, 452–7, esp. fn. on p. 341). From the lengthy lists of regulations that are available, I have only briefly mentioned those instances that can be traced back to the works of Shiite jurists from Sheikh Ṭūsī onwards.[134]

Similar riots took place in Kermanshah and Shiraz in 1896. While there is only one available reference to the former incident (see Liwī 1334–9/1955–60: vol. 3, 763), the latter displayed various characteristics, including a purportedly religious motive. The people of Shiraz had called on their governor, Shuʿāʿ al-Salṭana, to deliver certain of their requests, which included finding a way of identifying religious minorities, especially Jews, in Shiraz. According to the governor, the people had complained that since the religious minorities were unrecognizable, the Muslims were worried about purity and impurity and other Islamic considerations (IDF 1370/1950: 115–16). To calm them down, the governor then agreed to ask *walīʿahd* to permit him to do something about it and, on ordering the Jews to attach red patches to their clothing, the revolt ceased temporarily, but only stopped completely a few months later when the governor was removed from office (IDF 1370/1950: 121–2).[135] This event had thus demonstrated that, rather than being religiously motivated, the riot had really been a response to the oppression and pressures imposed on the people by the governor. Similar reports are available during the same period on the Zoroastrians, Armenians, and Sheikhīyya, but in different cities (see Iʿtimad al-Asalṭana 1351/1973: 950–1; IDF 1370/1950: 93). According to one report, about

134 Sahim (2005) provides details of the regulations, report, and analysis of the event. See also Tsadik (2007: 1, 99–103, 125–6); and Yeroushalmi (2009: section I, source 3 and section VIII, source 40 about the Jews of Hamadan; section I, source 6 about the Jews of Kurdestan; and, section I, source 9 about the Jews of Yazd).

135 See also unpublished documents in the archives of the Ministry for Foreign Affairs (Year 1323/1905, box 22, file 13, 2), in which some details are mentioned.

seventy clerics from Yazd sent a letter to *ṣadr-i aʿẓam* in 1299/1902, complaining about the Zoroastrians' clothes and requesting they be made more identifiable (Amīnī 1380/2001: 428).

With the inception of the protests against the tyranny of the local governor of Tehran in 1905, which led to the Constitutional Revolution, the religious minorities joined forces with the Iranian Muslims. Some reports indicate the participation of Jews, Christians, Zoroastrians, and Azalīs in the revolution in Tehran, Isfahan, Tabriz, Urūmīyya, and Shiraz (Netzer 1996: vol. 1, 31–40; Waterfield 1973: 140).[136] These documents only briefly refer to their contribution and contain no detailed expositions. However, the prejudices against and traditional standpoints towards religious minorities did not substantially change during or after the revolution, even among the revolutionaries. For instance, when religious minorities were about to elect their deputies for the first Parliament, Kirmānī (1362/1983: vol. 1, 583–4) reported, in one of the secret committees (*anjuman-i makhfī*)[137] established to implement the revolutionary decisions, that

> The committee decided to convince them to ignore electing representatives because of the opposition of *ulama* in Najaf and Isfahan. After great efforts, the Christians and Jews accepted the justification. They then gave their rights to Sayyid Muhammad Ṭabāṭabā'ī and Sayyid ʿAbd Allah Bihbahānī, respectively, to represent them in *majlis*. We tried to convince the Zoroastrians to be represented by a Muslim deputy, just like the Jews and Christians, since they will suffer if any riot occurs in the society but they elected Arbāb Jamshīd.[138]

Bihbahānī then praised the Zoroastrians for being very decent people, indeed the fathers and original owners of the land. According to Bihbahānī, supporting and praising Zoroastrians fortified Arbāb Jamshīd's position. Reacting to such praise, the author of one anti-constitutional monograph, *Tadhkiratu al-ghāfil wa irshād al-jāhil* [*The Remembrance of the Ignorant and the Guidance of the Unknown*] wrote (Zargarīnizhād (ed.) 1374/1995: 181; see also Ādamīyyat 1355/1976: 265–6):

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136 See Berberian (2001) on what created the unique circumstances under which Armenians became actively involved in the revolution,.

137 About these committees, see s.v. 'Constitutional Revolution, V' by Mansoure Ettehadieh in *EIr*.

138 About him, see Amīnī 1380/2001: Ch. 2.

> Which stupid [person] can accept that infidelity supports Islam and Christian Malkam Khan supports Islam and asks for the creatures the Islamic justice which is based on inequality of the rights of individuals … why do they describe the Zoroastrians as *decent* while they are the most wicked ethnic group?

4.3 *Communal Institutions*

For the focal period of this study, there is limited information available on the communal institutions of Iranian Jews, Christians, and Zoroastrians, and even less on those of the Mandaeians. For this reason, and to help the reader understand communal institutions better, I have added information that goes slightly beyond the period in question. In addition to their synagogues, since 1850 the Jews have had their own society (*Anjuman* or *Hibra* in Hebrew) in a number of cities. Its functions are to fulfil the community's needs for such things as registering marriages and divorces, practising Jewish law (*halakha*), supervising kosher practices, resolving family and financial conflicts, and burying their dead.[139] The first Jewish *Anjuman* was officially registered in Tehran in 1316/1937.[140] Iranian Jews choose the officers of these societies from among trustworthy members of their community, in which they exercise autonomy in training rabbis and building synagogues. It is worth noting that between the establishment of the second Parliament in 1909 and 1959, the Jews had their own parliamentary representative, who was also head of their society, but since then they have been electing two officers for these two separate roles (Kāmrān 1996: vol. 1, 119–21).

Another Jewish institution was the new educational system founded by the Alliance Israelite Universelle.[141] Six Parisian Jews established the Alliance in 1860 for "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."[142] The Alliance actually started establishing modern schools in Iran in 1898 in the period of Muẓaffar al-Dīn

139 See Yeroushalmi 2009: section IV, source 17.

140 This information is based on my interview with Hārūn Yashāya'ī (see interview 1 in References at the end of this chapter), then head of *Anjuman-i kalīmīyān* in Tehran.

141 For the old educational system of Iranian Jews, see Yeroushalmi 2009: section V, source 21.

142 See s.v. 'Alliance Israelite Universelle' in *JE* by Jacques Bigart. This organization was founded many years before the emergence of the Zionist movement and the idea of establishing Israel as a country. Cf. Ringer (2001: 129), who mentions 1884 as the year of establishing the Alliance in Paris. Some radical Iranian groups regard this organization as a branch, or even as the founder, of Zionism; for example, see Ābādīyān 1383/2003: Ch. 8, esp. 265–6, 268–9. Nowhere does the author mention the sufferings of Iranian Jews in various periods; rather, he concentrates on the Jews and their activities as they pertain to

Shah with the support of the French Embassy (Tsadik 2007: 13, 184, 201). The shah also gave it a monthly allowance of 200 *tomans*. In 1898, the school in Tehran was educating 350 boys on a budget of 14,900 francs.[143] Later, they also managed to establish schools in Hamadan, Shiraz, Kermanshah, Isfahan, and Sanandaj, all of which were mostly for Jews and rarely for Muslims. They had a total of 2,225 students in these cities in 1906 (Aubin 1908: 299).[144] At the time, Jews had no newspaper or other publication.

The Zoroastrians benefited from the legal support of their co-religionists in India from 1854, when Manekji Limji Hataria (1813–90),[145] a representative of the Parsis[146] of India, came to Iran and became a strong supporter of their cause. Since he had British nationality, he also managed to gain the support of the British Embassy in his attempt to develop communal Zoroastrian institutions. One of the most effective of his accomplishments was the establishment of societies to cater to the personal needs of the Zoroastrians and to keep them legally independent of the Islamic communal courts (Amīnī 1380/2001: 283–4). From 1854, societies were established first in Yazd and Kerman (Amīnī 1380/2001: 4–6) and later in other cities in which Zoroastrians were living like Tehran (1907) and Shiraz. Zoroastrian women were not entitled to participate in the elections of their societies until 1345/1966 (Amīnī 1380/2001: 286).

During the history of these societies, which are renewed every two years, the Zoroastrians have had numerous conflicts with each other (Amīnī 1380/2001: 284–5, 290–3). A priest or clergyman (*dustūr* or *mūbad*) heads the society and, although we know that the *mūbad*'s office is hereditary, there is no information available on the education or training of their clergymen at that time or on their relationships with other Zoroastrian societies. Before Manekjī, who established their first Zoroastrian schools, there were no facilities for educating Zoroastrian children in Iran, but thirty-five years later, during the late Qajar dynasty, their schools were highly successful. In the early twentieth century,

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Israel and Zionism. On p. 276, he regards E.G. Browne as a colleague of the Jewish English Society; cf. s.v. 'Browne' in *EIr* by Michael Wickens et al.

143 For more information on the development of Jewish activities in Iran, see s.v. 'Anjoman-e Kalīmīan' in *EIr* by A. Netzer; see also Sanasarian 2000: 45–8.

144 See also Naṭiq 1997: vol. 2, 55–130. On pp. 62–3 she states that the British government disagreed with these activities in Iran. For more information on these schools from 1922 to 1925, see Netzer 1999: vol. 2, 123–34.

145 His ancestors were Iranians who moved to India in the Safavid period. Manekji was born in Seurat and grew up in India. About him, see Amīnī 1380/2001: Ch. 1; see also s.v. 'Hataria, Manekji Limji' by Firoze M. Kotwal, Jamsheed K. Choksy, Christopher J. Brunner, and Mahnaz Moazami in *EIr*.

146 About this community, see Jesse S. Palsetia, *The Parsis of India: Preservation of Identity in Bombay City* (Leiden: Brill, 2001); and s.v. 'Parsis' by J.R. Hinnels in *EI2*.

special high schools, even for girls, were gradually established and Zoroastrians became experts in revising and reprinting Zoroastrian scriptures and sources (Boyce 1979: chapters 13 and 14, esp. 210–11, 219–23), but they published no newspapers or books between 1848 and 1911.

The churches, which is where Christians conduct their rituals, including christenings, marriages and funerals, have kept their institutional and cultural affiliations to foreign churches, especially the Middle Eastern ones, and this has been a kind of legal support for them. The Armenians, for example, have three dioceses in Iran – in Azerbaijan since 1833; in Isfahan and all the southern provinces since the early seventeenth century; and in Tehran and the northern provinces since 1945. Despite *fiqhī* opinions forbidding the building churches, most in Tehran were built during the Qajar dynasty, with the oldest dating back approximately 235 years (Malkamīyān 1380/2001: 39, 69, 113). Christians have lived bi-dimensional lives in Iran in that they regard themselves as Iranian yet respect their own ethnicity, culture, religion, and language, which they sustain with foreign support.

Consequently, Christians have never been forced to convert and, to the best of my knowledge, have not encountered the same problems as Jews and Zoroastrians. When missionaries and archbishops visit Iran, they have their own dedicated churches to attend, whether Presbyterian, Orthodox, or Roman Catholic.[147] The exact date of the arrival of American, English, and Roman Catholic missionaries is unclear, but there are reports of some of them having been in Iran since at least 1834 (Benjamin 1887: 359).[148] The Lazarus and Presbyterian missionaries came to Tabriz and Tehran in 1876 and established their first schools and orphanages in 1901. One of their explicit aims was to convert Jews and Muslims to Christianity, but since the conversion of Muslims carried the death penalty, they failed to convert any of them. There have of course been Jews who converted to Christianity.[149] Nonetheless, the achievements of missionaries in the fields of education and medicine in various cities

147 See s.v. 'Christian Missions in Persia' by Y. Armajani and 'Armenians of Modern Iran' by A. Amurian and M. Kashefi in *EIr*.

148 For a brief Persian report on the activity of churches and missionaries in various Iranian cities in the nineteenth and early twentieth centuries, see Hussein Dihqānī Taftī, *Masīḥ wa masīḥīyyat nazd-i Iranians* [*The Christ and Christianity before Iranians*] (London: Sohrāb 1992): vol. 1, 67–98; vol. 1; John Elder, *History of the American Presbyterian Missions in Iran 1834–1960* (Tehran: Literature Committee of the Church Council of Iran, 1960); James F. Goode, 'A Good Start: The First American Mission to Iran, 1883–1885', *Muslim World*, vol. 74, no. 2 (1984): 100–18; Ringer 2001: 109–29.

149 For more information on the situation of Christians, especially in Tabriz and Urūmīyya in the period of the Constitutional Revolution, see Aubin (1908: 69–75, 108–9). He also gave a short report (295–9) on the Jews and Zoroastrians of Isfahan and Mashhad.

were considerable. It is notable that when Belgians and Austrians were managing the Ministry of Ports and Customs in Tehran (1890–1906), they only employed Iranians from religious minorities, especially Christians, which aroused Muslim resentment towards non-Muslim Iranians.

Among the religious minorities, between 1905 and 1911 the Christians were the only ones to publish their own newspapers and weeklies in the Armenian and Chaldean languages. Christian Assyrians brought out the daily *Orthodoxunā* (1907) in Urūmīyya and the Armenians produced two weeklies – *Ārwād* (1909) and *Zāng* (1910) – in Tabriz.

Mandī is the main place in which Mandaeians perform their rituals. To achieve ritual purity, a kind of baptism needs to take place in a river, and for this purpose the Kārūn River in the southwest of Iran and the Euphrates in the southeast are considered to be their most important sacred places. The ceremony must be performed and their status accomplished by Nāṣūra'īyān, their own clergymen, whose office is hereditary and hierarchized according to a specific rank ranging from Tirmīdā and Ishkandā to Ganzūrā or Ganjūrā. The clergymen base their legal opinions on the teachings of their own scripture Ganzā-ribbā (the Great Treasure, originally written in Aramaic and recently, in June 2018, translated into Persian (see interviews 5 and 6; *Beitmanda*: vol. 16, no. 183, p. 5). Sālim Ṣābūrī established the first official Mandaeian society in Ahwaz in 1349/1971. A Mandaeian woman is entitled to participate as a candidate or voter in the society's biannual elections, but she is not entitled to become a cleric. The Mandaeian community received no financial or legal support from either foreigners or the Iranian government during the period of this study. Although not regarded as *de jure* People of the Book and not having entered any particular *mu'āhida* (peace contract), they are nonetheless seen as *de facto dhimmī* (interviews 5 and 6).

4.4 *The Legal Situation*

Extant documents and reports show that, during the focal period of this study, the recognized religious minorities were coexisting with the Muslim majority; it was as if their legal status had the backing of an unwritten contract or *dhimma* to ensure their protection (BDF 1985: vol. 14, 13–18). Their legal representatives had agreed that they would pay *jizya* and, occasionally, they were obliged to obey certain regulations such as wearing identifiable clothing. As mentioned earlier, the people would elect the members of their respective Jewish, Zoroastrian, or Mandaeian societies, and then each society would elect its own *kalāntar* or representative to manage its legal relations with the government (Amīnī 1380/2001: 57–8; interview 6). Before the establishment of these societies, the government would choose, either from among their

co-religionists or the *Jadīd al-Islām* group, who would represent the minority religions. The Armenians and Assyrians paid *jizya* directly through their main churches and this brought them more security because it prevented local governors or other authorities from bothering each and every Christian in the region to levy *jizya*.

Zoroastrians had been paying *jizya* for a long time before Manekjī, with support from the Parsis of India, came to their rescue. By making a single payment directly to the shah to the tune of twenty-five years of *jizya*, he improved the security of Zoroastrians considerably (Amīnī 1380/2001: 9–10). Furthermore, in 1290/1882, with support from the British and French ambassadors, and from Kerman's Imam of Friday Prayer, Manekjī managed to convince Nāṣir al-Dīn Shah to issue a decree to cancel *jizya* for Zoroastrians (Amīnī 1380/2001: 10). He had already asked Sheikh Murtaḍā Anṣārī[150] (d.1281/1864), a great Iranian *usūlii* jurist in Iraq, fourteen questions about legal relationships between Muslims and Zoroastrians, including their conversion to Islam by force. In his answers, the sheikh deemed it necessary for Muslims to respect religious minorities and to observe all their rights. In his opinion, other than paying *jizya*, there was no obligation whatsoever remaining for non-Muslims. In addition, he declared conversion by force unlawful (Amīnī 1380/2001: 340). It is worth noting that in 1851 Amīr Kabīr had announced that the conversion of a non-Muslim to Islam could not prevent that person's relatives from receiving inheritances. Then, with foreign support, particularly from France and Britain, Nāṣir al-Dīn Shah issued similar decrees in 1880 and 1884 (see Ādamīyyat 1348/1970: 304–5). Nevertheless, pressure from clerics who supported the opposite *fiqhī* opinion remained problematic.

The societies, synagogues, and churches also preserved the legal autonomy of religious minorities in terms of personal status, which covered matters such as family law, inheritance, and testimony. The main question here, however, is how they accomplished their personal status. Did they have their own codified and written laws and regulations or did they, like Muslim Iranians, obey the common codes? According to what little information is available, Zoroastrians did not have codified laws pertaining to personal status until 1320/1925 and were following the legal opinions of their *mūbad*. Prior to this, they had to refer to governmental courts and to obey the common codes in cases where they were unable to find solutions in their societies (see Amīnī 1380/2001: 610–11).

According to the Iranian Jewish Society, the Jews do not have codes on family law and testimony and have to rely on regulations from the *Halakha*, which probably only their rabbis understand. They do, however, have their own

150 See s.v. 'Anṣārī, Sheikh Murtaza' by S. Murata in *EIr*.

written inheritance laws (interviews 1 and 4).[151] Armenian Christians, on the other hand, have long had their own published codes in the realm of personal status.[152] Unfortunately, I was unable to find any relevant information on the Assyrians.

What remains obscure, however, is the position of the Mandaeians, for they are not generally interested in introducing themselves and explaining their personal status details. What is presented here comes from reliable sources, including my interviews with the head of the society Sālim Chuḥaylī, the officer in charge of their registration office in Ahwaz, Farrukh Ṣābūrī, and some members of the community (see interviews 5 and 6). While they had premises in which to carry out and register their legal affairs, they had no personal status codes with respect to wills, testaments, inheritances, or family law, which is restricted to marriages, whether monogamous or polygamous, since divorce is unlawful in their faith.

In these matters, they follow the opinions of their clergymen and tribal elders. The clergymen, who are in charge of registration, enter their personal status details in a notebook called *iẓhār-namih*. The marriage ceremony entails the couple taking an oath to treat one another well and to acknowledge that whatever they have earned or will earn will be divided equally between them. The oath must be taken before three clergymen. Religiously, there is equality between man and woman in the field of inheritance. Since the codification of the last part of the Iranian Civil Code (1935), however, Mandaeians have been following it, especially if unable to resolve their conflicts through their own society.

The final but nonetheless important point here is that, as mentioned earlier, through the Turkamanchāy treaty (1828), a formal unilateral capitulation existed initially for Russia but later also for places with political and commercial ties with Iran such as Britain, Austria, Germany, France, and the Ottoman Empire (see Said Wazīrī 1355/1976: 16–18).[153] Three groups could benefit from this juridical right – foreigners living in Iran; foreigners travelling to Iran; and foreigners seeking refuge in embassies, or those the embassies had agreed to protect.

Reports on crimes against religious minorities in Hamadan, Tehran, and Shiraz, show that some embassies, including the French and British ones,

151 See also in Appendix II the original letter (no. 8355, dated 17 Ādhar 1378/7 December 1999) sent from the Jewish Society to the Judiciary Power, approving the claim.

152 The Gregorian Armenian Church has had a special written personal law that has occasionally been revised. See the latest version in seventy-six articles, *Muqarrarāt-i aḥwāl-i shakhṣīyya* [*The Codes of the Christian Personal Status*] (Isfahan: Wānk Church, 1380/2001).

153 See also s.v. 'Imtiyāzāt, iii-Persia', esp. 1189–91 by A.K.S. Lambton in *EI2*.

accepted the need for and operated a policy to protect Iranian Jews. The Iranian government then had no option but to concede and subsequently referred legal conflicts between Jews and Muslims to the *dīwān* (high court), which was affiliated to the Ministry of Foreign Affairs, to verify the accounts in the presence of British representatives (Chilungar 1382/2003: 186–7). However, since Jews mostly wanted to retain their Iranian identity, they would only request foreign assistance in the event of an emergency. The Christians were supported by the Russian Embassy and its consulates in various cities, particularly in the northern provinces.[154] The point is that the capitulation was sometimes considered a means of supporting the legal status of the religious minorities. However, due to their original Iranian identity, Zoroastrians and Babīs could never enjoy the right of capitulation, which remained valid between 1828 and 1927, when Reza Shah unilaterally cancelled it after the codification of the Civil and Penal codes.

5 Conclusion

The above examination of various aspects of the lead-up to the 1906 Revolution has cast light on the social and legal positions of religious minorities in the second half of the nineteenth century and the probable reasons for their participation in it. According to one viewpoint, Nāṣir al-Dīn Shah, Muẓaffar al-Dīn Shah, and the class of governors did not really intend comprehensive reform in the country, but thought that the idea of a constitutional system might enhance their prestige and save the royal government in a new form. It is generally agreed that common people and even most clerics in the Qajar period were too weak and oppressed to grasp the meaning of what a constitutional system was, let alone have the will to seek justice, freedom, and equality, especially the equality of Muslims and non-Muslims, before the law.

When some clerical leaders and intellectual activists were inciting people to protest and participate in demonstrations and proclaim their demands, they were emphasizing issues like the backwardness of the country and the oppressive and unjust behaviour of the local governors. Terms or concepts such as constitution, parliament, state, nation, or equal rights, were modern and familiar only to those members of the intelligentsia who had graduated from the

154 For cases, see IDF 1370/1950: 93. In a letter (dated 1904, no. 109), the Russian Embassy asked the Iranian government to guarantee the safety of the Armenians of Sabzevar who had taken refuge in the telegraph house; see also Aubin 1908: 299.

new system of education. Consequently, in its early phase, most clerics joined the revolutionaries to defend the House of Justice in support of the royal monarchy and the oppressed, and not to support constitutionalism. The best evidence to prove this is that all clerics, whether *uṣūlī* or *akhbārī*, regardless of their stances on constitutionalism, were in total agreement over the rights of religious minorities. Their beliefs were consistent with those of the Shiite jurists, namely that legal inequality is *allegedly* something that God ordered and that, as an integral part of their faith, this pseudo-permanent injunction does not accept any new interpretation. Therefore, as we shall see in Chapter 3, the ratification of certain constitutional articles indicative of equality finds a problematic story.

Although at that time everybody's socio-cultural and economic standards of living were low, those of the religious minorities were even worse. Their incentive to participate in the revolution came from a wish to free themselves from the religious and political dictatorship they faced. It seemed natural that any social group suffering from tyranny and low status, including the religious minorities, would support the revolution and that any group that had a stake in the government would join the line of opponents.

Despite the dearth of information on the demography, social conditions, communal institutions, and legal situation of religious minorities, the facts and arguments that have emerged from this study do in fact enhance our understanding of the context in which the Constitutional Revolution played out. It was a great achievement that, although they failed to improve on the legal status they enjoyed between 1905 and 1911, non-Muslims were rarely subjected to violence and forced conversion after the revolution.

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CHAPTER 3

The Codification of Laws and Regulations (1906–1979)

1 The 1906 Constitution

The codification of the Constitution is seen as a great achievement of the 1906 revolution. As we saw in the previous chapter, debates on the nature and function of the Parliament, and on the themes of certain articles in the Constitution and Supplement, took place inside and outside the first Parliament. These debates, particularly those relating to the rights of non-Muslims, ushered in the first theoretical confrontations between the representatives of modern and traditional Islamic thought. The main question to address in this chapter is whether there is any difference between the laws in the Constitution on the status of non-Muslims, especially the Iranian religious minorities, and the legal opinions in Shiite *fiqh*? To answer the question, I shall first give a brief review of the process through which the first Parliament was established in 1906 before considering the methods used to draft and codify the Constitution, and then, finally, I will respond to the question by providing a textual analysis of the related articles.

The chain of events began in August 1906 when Muẓaffar al-Dīn Shah (r.1896–1906) declared Iran to be a constitutional monarchy. This led to the formation of a committee first to compose the draft of the electoral law (*niẓāmnāmi-yi intikhābāt*) and then to write the actual Constitution. In October 1907, this committee, with the cooperation of some deputies from the first Parliament, presented the draft of the supplementary law, which the Parliament approved and the new shah, Muhammad Ali (r.8 January 1907–16 July 1909) ratified. According to the electoral law, sixty representatives from Tehran and another sixty from other cities, representing certain social strata, would be elected to sit in the Parliament for two years. There is little information on either the structure of the society at the time or conditions prevailing in it, but articles in the first electoral law of 1906 demonstrate the existence of a class structure with clearly demarcated strata and distinctions. The designated classes offering candidates for election were princes, the Qājār tribe, *ulama* (including the religious scholars and their students), nobles and notables, tradesmen, landowners, peasants, and trade guilds. Each voter had only one vote, but it could

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only be used for a candidate from one's own class. Therefore, the deputies only represented their own classes and not, as expected, everyone. As already noticed, women were not allowed to participate as either candidates or voters.[1]

There was no article in the electoral law indicating how religious minorities could elect their representatives, although there was an oral agreement: the Zoroastrians were entitled to choose a coreligionist, Arbāb Jamshīd,[2] as their own representative, and in the literature written about the 1906 Constitutional Revolution it is alleged that the Jews and Christians gave their right of deputyship to two clerical MP s, Sayyid ʿAbd Allah Bihbahānī and Sayyid Muhammad Ṭabāṭabāʾī.[3] However, as the parliamentary proceedings showed, when electing representatives became serious for the Jews and Christians, the two clerics announced that they themselves could represent these two minorities (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 85). Since the shah was seriously ill and in the throes of death, the sixty representatives of Tehran started their activity and did not wait for the other sixty to join them. This decision vis-à-vis the condition of the shah and the society was appropriate and of crucial importance.

Only a few of the representatives knew anything about constitutionalism, the law in its modern sense, and the functions and tasks of Parliament. There is evidence to substantiate this claim, but I would like to mention just two instances. First, the representatives sought to justify every new suggestion that might benefit the people by wrapping it in religious garb and placing it in a religious framework, which is why most deputies saw Parliament in terms of upholding justice and implementing *sharīʿa*. This position was a reaction to the view that regarded Parliament as a modern instrument for undermining the role and function of Islam. The tendency to modify the word *majlis* with the adjective *muqaddas* (sacred Parliament) was very much in keeping with the then prevalent attitudes towards the role of Parliament.[4] Second, most people suffering under the oppression of local rulers, including the religious minorities, sought help from their parliamentary representatives by sending them their many complaints and expecting them to react. Using parliamentary

1 Articles 3 and 5 of the electoral law of 1906.

2 He was introduced in Chapter 2.

3 The two clerical leaders of the revolution attended the Parliament to help the deputies in their discussions and, more importantly, to lend religious legitimacy to their decisions, albeit in accordance with their own attitudes.

4 When the Parliament came to ratify the law of the municipality (*Baladīyya*), which was translated from French, some of the representatives asked their colleagues to avoid using the words 'theatre' and 'museum' in the "sacred majlis" because the former disrespected the dignity of parliament and the latter, in their opinion, was of no benefit (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 140).

time to read these complaints and discussing what had happened and what the deputies could do about them, which was not in principle the main task of the Parliament, took up a great deal of time.

In reviewing the biographies of the main members of the committee and examining their methods it became abundantly clear that constitutionalism in 1906 was a solution planned by the aristocratic elite to save the monarchy and to improve the prestige of Iran in the international political arena. Ordinary people and clerics, however, unaware of the meaning and implications of constitutionalism, supported the revolution to rescue themselves from deplorable conditions and, allegedly, to realize the Islamic dream. The members of the Foreign Ministry who composed the committee came from a different world, for they belonged to the intelligentsia and had either been educated abroad or graduated from the *Dār al-Funūn* or School of Political and Legal Sciences.

It is pertinent to mention that the biographies of the main contributors to the Constitution have not been investigated or reviewed critically in the relevant literature. What we find in the memoirs of the influential actors is insufficiently clear. There are no independent reports of their discussions on the articles of the Constitution in the first Parliament. What is presented below, however, has been uncovered through studying and evaluating extant documents, including all the proceedings of the deputies and some related memoirs.

1.1 *Review of the Biographies*

The initial committee consisted of the following people (see Bāstānī Pārīzī 1354/1975: 92; Hidāyat 1363/1983: 189).[5] In descending order of effectiveness they were first Hassan Pīrnīyā, known as Mushīr al-Mulk, second Mushīr al-Dawla along with his brother Hussein Pīrnīyā, known as Mu'taman al-Mulk; third Murtaḍā Qulī Ṣanīʿ al-Dawla, fourth his brother Mahdi Qulī Hidāyat, known as Mukhbir al-Salṭana; and fifth Hassan Isfandīyārī, known as Muḥtasham al-Salṭana.[6] The committee was quickly able to prepare a draft constitution,

5 Cf. Ādamīyyat (1355/1976: 385, 392) added Mīrzā Reza Khan Girānmāyah (Mu'ayyid al-Salṭana), the first ambassador to Germany in the period of Nāṣir al-Dīn Shah. Ādamīyyat (1355/1976: 174) also added Muhammad Ṣadīq Ḥaḍrat, a teacher of law in the School for Political and Legal Sciences. These differences are illustrative of the ambiguity in the documents. See also Amir Arjomand, s.v. 'Constitutional Revolution, III', esp. 187 in *EIr*, who mentioned only four of the five people; Browne (1909: 16), who added Mahdi Qulī Mukhbir al-Mulk, the third brother of Ṣanīʿ al-Dawla; and Kirmānī (1362/1983: 514), who assumed that Ismāʿīl Mumtāz al-Dawla had been the author of the electoral law but he was actually one of the members of the translation committee.

6 He was educated in the traditional system (*ḥawza*) and wrote some books on *sharīʿa* and ethics. He, as a Foreign Ministry employee, attended the Parliament every day on behalf of the shah and the state in the early months of the Parliament. He also became the speaker of the

which was then approved by the deputies and ratified by the shah only five days before his death. After a few months of discussions on various issues in Parliament, the state and its representatives identified some general defects in the structure and content of the Constitution, especially on people's rights. Consequently, the Parliament agreed to appoint seven people to help the earlier committee prepare the draft of the supplementary law – they were Jawād Saʿd al-Dawla (who headed the committee); Maḥmūd Iḥtishām al-Salṭana; Muhammad Ṣadīq Ḥaḍrat;[7] Naṣr Allah Taqawī; Muhammad Hussein Amīn al-Ḍarb;[8] Ṣādiq Mustashār al-Dawla;[9] and Hassan Taqīzādih.[10] The available references indicate that, of the contributors, the following six were pioneers and had prominent roles in preparing the draft of the Constitution and its Supplement and in managing the first Parliament.

1.1.1 Hassan Pīrnīyā (1874–1936) and Hussein Pīrnīyā (1876–1947)

They were the sons of Naṣr Allah Khan Mushīr al-Dawla, the foreign minister (d.1907) from a pious mystic family that went back to Mīr ʿAbd al-Wahhāb, a master (*pīr*) of the *Nūrbakhshīyya* Ṣufī order who lived and died in Naʾīn, Isfahan – hence the honorific family name "Pīrnīyā" (descendants of the master). Naṣr Allah moved from Naʾīn to Tehran and step by step moved up the political hierarchy. After the 1906 Revolution, he became the first prime minister.[11]

Parliament three times in the period of Reza Shah. Later on, he was one of the serious advocates of the forcible removal of women's veils in 1317/1939, a policy practised by Reza Shah. See more on his biography in Bāmdād (1357/1978: vol. 1, 321–2). His father was the deputy of the Foreign Ministry for twenty years.

7 He was graduated from the School of Political and Legal Sciences and then became a teacher of law there. It is said that he taught some new concepts of law and constitutionalism to the representatives of trade guilds at his home every night. The author of *General International Law* in 1906, he was also a representative in the second Parliament.

8 He (d.1932) was the parliamentary representative of tradesmen. See more on his biography in Bamdād (1357/1978: vol. 1, 429–30, vol. 3, 348–62).

9 He was head of the moderate faction in the first Parliament. Then, he headed the second Parliament for one year. Later on, in the process of overthrowing the Qajar dynasty in 1304/1925, he was head of the senate and voted to establish the new Pahlavi dynasty.

10 He headed the revolutionist faction in the first Parliament. Having held controversial positions during his lifetime, he was once accused of murdering Sayyid ʿAbd Allah Bihbahānī but later praised for being one of Iran's best servers. Each of his biographers had a different perspective on his life. See s.v. 'Taqīzādih, Sayyid Hassan' by ʿAbd al-Hussein Ādharang in *EWI*.

11 See Ṣafaʾī (1380/2001: 453–6); the author explains how Naṣr Allah was able to gain a high position in the Foreign Ministry.

Born in Tehran, Hassan and Hussein received their early schooling at home and then, with the family's third son Ali, they were sent abroad to continue their education. Hassan graduated first from a military college and then from a law school in Saint Petersburg in 1898 and immediately began to work as an attaché at the Iranian Embassy in Saint Petersburg. Hussein and Ali went to law school in Paris to complete their education. When only twenty-four years old, Ali contracted tuberculosis in Paris and died there. Hussein, however, continued his education and graduated in 1317/1899. When their father became foreign minister in 1899, first Hassan and then Hussein were summoned to Tehran to work with him.

Hassan was appointed first secretary at the ministry and, during his tenure there, established its office of archives, and framed regulations for issuing visas and handling the legal affairs of Iranians living abroad. He had also been appointed first secretary to the *ṣadr-i aʿẓam*, 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. His major interest throughout his life was legal reform, including changes in juridical staff. This life-long concern successfully led him, with the aid of his father, to secure the shah's agreement to establish the School of Law and Political Sciences in which to train diplomats in late 1899. He became head of the school and both brothers taught international private law there. In late 1901, Hassan published his school lectures in a book called *International Law*. He believed that *fiqh* should be a required course for students at the school, but the *ulama* insisted that learning *fiqh* should be restricted to religious students, so none of them agreed to teach *fiqh* there (see Furūghī 1339/1960: 340–1).[12]

From the very beginning of the Constitutional Revolution, the two brothers received staunch support from the intelligentsia. On their suggestion, the word "constitution" was enshrined in the shah's proclamation and it was Hassan who read it out to the people (Browne 1910: 449; Kirmanī 1362/1983: vol. 1, 446). Because both Pīrnīyā brothers were, throughout their lives, moderate in their conduct and their policies, they were seen as trustworthy in the eyes of the state and among MPs. Through their personal skills they helped the revolution, the people, and the government several times, especially in securing the constitutional proclamation and persuading the shah to ratify the Constitution

12 See more information on Hassan and Hussein Pīrnīyā in Bāmdād (1357/1978: vol. 1, 323–6, 388–9); Bāstānī Pārīzī (1354/1975: esp. 81 onwards); see s.v. 'Pīrnīyā, Hussein' by Bāqir 'Āqilī and 'Pīrnīyā, Hassan' by Muhammad Mahdi Amīnī in *EWI*; see also some strong criticism of their political behaviour in Iḥtishām al-Salṭana (1366/1987: 524, 543–6).

earlier than expected. Hassan was appointed head of the committee responsible for preparing the draft.

Hassan Pīrnīyā believed that Iran's development depended on reforming the Ministry of Justice. Based on this belief, from 1907 to 1916, when Iran was suffering from political instability, in various cabinets he accepted the post of minister of justice on four occasions, all of short duration. During that time, he was able to restore and alter the structure of the ministry and prepare the background for subsequent reforms. By the end of 1911, he had produced and presented to Parliament 311 articles on the juridical structure of the ministry, 812 articles on codes of legal procedure, and 506 articles on codes of criminal procedure, all of which helped to shape ideas about the equality of Muslims and non-Muslims before the law (Bāstānī Pārīzī 1354/1975: 510).[13] He employed a French supervisor, Adolph Perny, to reform the structure of the Ministry of Justice and to write the first draft of the penal code. For the first time, he established a new two-step procedure in the courts for auditing claims – the court of first instance (*badwī*) and the appellate court (*istīnāf*).[14] Under Reza Khan, Hassan was isolated and spent the last twelve years of his life writing the history of ancient Iran and promoting his nationalist approach.

From 1907 to 1909, Hussein Pīrnīyā served as minister of trade under various cabinets. From the second Parliament (1909) to the sixth one (in 1926) he was the Tehran representative, and usually appeared as the speaker. By the seventh Parliament (1928) though, Reza Khan's manner had become too dictatorial to allow free elections and, in fact, all the representatives were being indirectly appointed by the government. Inevitably, like his brother, Hussein had to bid farewell to his political life.

1.1.2 Murtaḍā Qulī Khan (1856–1911) and Mahdi Qulī Khan (1863–1955)

These were two sons of Ali Qulī Khan, known as Mukhbir al-Dawla (d.1897), who had been born in Tehran into an influential aristocratic family, all of whom had been educated in Europe. After graduating from *Dār al-Funūn*, their father sent them abroad to continue their education. In 1873, when Nāṣir al-Dīn Shah made a trip to Europe, Ali Qulī Khan, who was accompanying the shah, took his elder son Murtaḍā with him and left him in Germany to study mineral engineering there. After five years, his brother Mahdi joined him for the same purpose. Murtaḍā graduated from the faculty of engineering in Berlin

13 See also Furūghī 1354/1976: vol. 1, 346–8.

14 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 legal opinions of jurists.

after seven years while between 1876 and 1879 Mahdi studied German, a little English and French. When the brothers returned home in 1879, they were both employed in government offices. In late 1879, Murtaḍā married a daughter of Muẓaffar al-Dīn Shah, and between 1879 and 1906 secured high positions in the ministries of mines, internal affairs, education, and culture. He established the first private spinning factory in Tehran and received the honorary title of *Ṣanīʿ al-Dawla*.

At the beginning of the revolution, both pro-revolutionary brothers became members of the committee. The nobility then chose Murtaḍā as its representative and he became the Parliament's first speaker, playing a vital role in managing its early days and months. When a radical group assassinated the anti-constitutionalist *ṣadr-i aʿẓam*, Amīn al-Sulṭān, Murtaḍā resigned from his post in protest. In the second Parliament, he was again chosen as the Tehran representative. Eventually, in 1911 when he was minister of financial affairs, he was assassinated by two Georgians. Afterwards, the murderers took refuge in the Russian Embassy in Tehran from where they were transferred to Russia to escape punishment through the right of capitulation.[15]

Besides working on certain governmental boards, Mahdi taught German in *Dār al-Funūn* and was translator for Nāṣir al-Dīn Shah on his second trip to Europe in 1878. He became head of the Tehran Military School in 1904. His life took a completely different turn after the 1906 revolution. He became minister of education in the first post-revolution government and, from 1907, also taught German at the high school that Germany and Iran had co-established in Tehran. He lived for 95 years and attained high political positions; for example, he became prime minister four times, one of which was under Reza Shah between 1927 and 1933. His memoirs, *Khāṭirāt wa khaṭarāt* [*Memoirs and Dangers*], provide a valuable primary source on the history of Iran in modern times.[16]

1.1.3 Jawād Saʿd al-Dawla (1842–1929)

He was born in Khuy, in northwest Iran, and received an elementary education, including some French, from a French missionary living there at the time. He was one of the young students sent to Georgia in 1870 to learn telegraphy, and when he returned home in 1871 he was employed at the telegraph house

15 For more information on him, see Bāmdād 1357/1978: vol. 4, 63–9; Dawlat-ābādī 1371/1992: vol. 1, 346–57, vol. 3, 142–4; Ṣafaʾī 1380/2001: 549–62.

16 Bāmdād, who regarded most courtiers in the Qajar period as corrupt, believed that Mahdi was trustworthy, diligent, and very cooperative with superiors during his lifetime (see Bāmdād 1357/1978: vol. 4, 184–7).

in Tabriz. It is reported that he became a brigadier general in 1874, apparently despite having no military education. He then became head of the telegraph house in Azerbaijan Province. Between 1874 and 1877, he travelled to Austria and France twice, and the experience had a profound effect on him. In 1879, he married a sister of Murtaḍā and Mahdi Qulī Khan but, because of his proud and irascible manner, he had a bad and sometimes violent relationship with her. They eventually divorced, but shortly thereafter she became ill and died. As we shall see, this private fact had a direct influence on important subsequent events in the Constitutional Revolution.

Jawād Saʿd al-Dawla was employed in the Ministry of Foreign Affairs in 1884 and for about seven years served as the Iranian ambassador to Belgium. During his tenure, he was able to arrange for financial advisers to be sent to Iran and some of them later became managers of Iranian customs house. After about twelve years, he returned and, in 1905, became minister of financial affairs. However, when in early 1906 he lent his support to a group protesting against the governor of Tehran, whose conduct he opposed, the prime minister ʿAyn al-Dawla dismissed him and he was exiled to Yazd. As a direct result of this event, Saʿd al-Dawla gained popularity as a pro-constitutionalist and was later elected as the Yazd tradesmen's representative. Although he had already translated the Belgian Constitution into Persian, he was not invited to play any role in preparing the draft Constitution, but then his former wife's brothers were among the key players. This annoyed him greatly, especially since he had learnt a lot about modernity and new legal concepts while living in Belgium. Nonetheless, his experience was eventually acknowledged and he was among those who suggested a Supplement to the Constitution; the representatives then chose him to head the committee to prepare the draft.

According to the proceedings of the first Parliament, he was very active in putting forward valuable proposals such as establishing the first national bank, or summoning ministers to answer questions in Parliament, yet he could not abide Murtaḍā Ṣanīʿ al-Dawla, his former brother-in-law, being the speaker of the Parliament. When Ṣanīʿ al-Dawla resigned from his post, he then tried to become the speaker, but the representatives chose Iḥtishām al-Salṭana instead. Afterwards, in 1907, he refused to talk to deputies, left Parliament, and cultivated secret relations with the Russians. During the bombardment of Parliament in 1908, he supported the shah's dictatorial position and later, when guerrilla fighters (*mujahidin*) captured Tehran, he sought refuge in the Russian Embassy and, with their support, went to Europe. After about ten years, he came back to Tehran in 1915 and lived in isolation until his death in 1929 (see Bāmdād 1357/1978: vol. 1, 288–295; Hidāyat, 265, 267; cf. Ṣafaʾī (1380/2001), 565–583).

1.1.4 Maḥmūd Iḥtishām al-Salṭana (1860–1935)

His aristocratic family belonged to the Qajar tribe and his father, Muhammad Raḥīm Khan (d.1882), had been a courtier in the period of Nāṣir al-Dīn, and had accompanied the shah on his first trip to Europe. The father sent his son to *Dār al-Funūn* to study, but after only six years Maḥmūd left the school to join the guards in the royal court. In his memoir, he criticized the curriculum and teaching methods at *Dār al-Funūn*, which he took to be a sign of Iran's backwardness. He returned to government service on being appointed governor of Zanjān in 1889, and then for two years from 1894 served as the Iranian consul in Baghdad. In 1900 he became deputy foreign minister for two years before being made the governor of Kurdistan province. While serving as the Iranian ambassador to Berlin for five years (1901–6), he learned German and acquired more political experience.

Despite being on a mission abroad at the time, Iḥtishām al-Salṭana was elected as the representative in Parliament of the nobility and notables. Then, in 1907, following the resignation of Murtaḍā Ṣanīʿ al-Dawla, he became the Parliament's second speaker. In helping to draft the Supplement and encouraging Muhammad Ali Shah to ratify it quickly, and asking the shah to swear on the Quran that he would continue to support the Constitution, he went a long way towards consolidating the political power of the Parliament. Although it is said that he was the most politically influential member of the first Parliament, his hot temper and blunt disposition alienated his colleagues and he had to leave after only seventeen months.[17] After the Parliament was bombarded, he escaped to Kurdistan and Azerbaijan to support fighters (*mujahidin*) trying to liberate Tehran. He was also elected as a representative for the third Parliament. He had two Iranian wives and one French one (see Bāmdād 1357/1978: vol. 4, 33–4; Ṣafaʾī 1380/2001: 627–39).[18]

1.2 *Method*

Little attention has been given to exactly how the committee prepared the draft Constitution and there are virtually no reliable documents on the subject. The introduction I offer is derived from contextualizing various documents, including the memoirs of the appropriate players and the proceedings of the first Parliament.

Since most members of the committee, especially its president Hassan Pīrnīyā, occupied high positions in the Ministry of Foreign Affairs, they were

17 See Ādamīyyat (1355/1976: 158–62, 363, 378–82), who gave an exaggerated report of his role in the first Parliament.

18 See also Iḥtishām al-Salṭana 1366/1987.

presumably well placed to obtain the texts of foreign constitutions from Iranian embassies. One piece of evidence of this is a statement by Ṣanīʿ al-Dawla addressed to Adīb al-Tujjār, a deputy in the first Parliament, in the session dated 21 Dhū al-ḥajja 1324 (5 February 1907) to the effect that "we have requested sixty volumes of books from foreign countries. Do not think that it is easy to write the law; it should be in good order and takes longer" (*Mudhākirāt-i majlis-i awwal* 1384/2004: 131). The first step was to organize teams to translate the texts of four constitutions – those of Belgium, France, Russia, and the Ottoman Empire – for use as models (Ādamīyyat 1355/1976: 407–8; Hidāyat 1363/1983: 145; Kasrawī 1357/1979: 151–3, 251; Ṣafa'ī 1380/2001: 257).[19] As a second step, the committee set about altering the texts to accommodate a monarchy, or more specifically a shah, on the one hand, and the Shiite teachings in which the majority of people believed and on which the power and influence of the *ulama* was based, on the other (see Iḥtishām al-Salṭana 1366/1987: 654; *Mudhākirāt-i majlis-i awwal* 1384/2004: 134; Ṣafa'ī 1380/2001: 574).

To fulfil the former, they adopted the constitutions of a monarchy such as Belgium to accommodate the ambitions and visions of leaders such as Nāṣir al-Dīn Shah, Mīrzā Hussein Sipahsālār, Ali Aṣghar Khan Amīn al-Dawla, and Mīrzā Malkam Khan, who envisaged establishing a kind of consultative *majlis*.[20] Although the final versions of the Constitution and Supplement separated power into three branches – *legislative* power made up of the shah, National Parliament, and Senate; the *judicial* division; and the *executive* branch controlled by the shah (Article 27), only the shah could enact and ratify any law, appoint ministers and half the members of the Senate, dissolve the National Parliament, and operate as the supreme commander of all military forces.[21] These privileges, legally speaking, were to assure the shah that the crown was still quite powerful in a constitutional monarchy according to the proposed Constitution. By codifying such a constitution, the committee could carry out its task while maintaining and respecting the authority of the shah.

To fulfil the latter, namely to adapt the texts to conform to Shiite teachings, the committee rejected the idea of Westernizing the law in its encounter with

19 Cf. S. Amir Arjomand, s.v. 'the Constitution III', esp. 188, in *EIr*. He added the Bulgarian constitution to the sources. It is true that some articles in the Iranian constitution are similar to those in the Bulgarian one, but there is no historical evidence to substantiate the claim. Amir Arjomand did not specify where and how Iranians could use this source or which documents verified his claim (see Black 1943).

20 Some information on these individuals and their activities was reported in Chapter 2. They intended to form a consultative assembly like that of the Ottoman Empire, established in 1876.

21 See also Articles 35–57 of the Supplement, which set out the rights of the Persian throne.

modernity without considering the society's religious milieu. On the other hand, the idea of adopting an integrative approach, which involved consulting committee members familiar with both jurisprudence and the new concept of law, evoked the failures of Mīrzā Malkam Khan and Mīrzā Hussein Sipahsālār.[22] Furthermore, they had at least two models in mind – the Constitution of the Ottoman Empire and the *One Word* of Mustashār al-Dawla. The former, which the committee had translated,[23] promised the possibility of consistency between the new concept of law and the Sunnite School of *sharī'a*.

In *One Word*, which requires some further clarification here, the author had condensed his summary and explanation of the French Constitution into nineteen basic principles. Then, against each principle he added comments taken from the Quran and Sunna to demonstrate that Islam already contained the same elements and teachings mentioned in the French Constitution. He was thus, through this process of integration, able to Islamize and simplify the modern concepts. Irrespective of the different epistemological bases of the two systems – French law and the legal opinions of Islamic law[24] – he attempted to show that, in principle, no contradiction existed between the Shiite and Western teachings.

At the same time, he mentioned some differences (five cases). For example, laws in Persia were not codified and were unavailable to people wanting to know and prove their claims. Mustashār al-Dawla described a modern country as a place in which there is a collection of codes (*kitāb-i qānūn*) that include articles and procedures that are constantly and periodically revised to meet the demands of the time. Because the codification of this collection is carried out according to an agreement between the state and people, the procedure is quite unlike that in the Islamic countries, Persia included, in which the laws and regulations are oral and carried out by following the jurists' works, irrespective of the will of people. Again, the codes only refer to people's worldly interests, so every faith can accommodate them (see Mustashār al-Dawla 2008: 12–20).

22 Hassan Isfandīyārī of the first committee and Naṣr Allah Taqawī and Sayyid Hassan Taqīzādih of the second had received traditional educations.

23 It was translated by Ismā'īl Mumtāz al-Dawla (1879–1933). Employed at the foreign ministry, he then became a member of the staff at the Iranian Embassy in Istanbul. When the parliament was bombarded, he was the speaker of the Parliament and took refuge in the French Embassy and then moved to Paris. After Tehran was conquered by *mujahidin*, he came back and again became a member of the Parliament.

24 In my opinion, it is inappropriate to equate 'fiqhī opinions' with 'Islamic law', for doing so has led to some misinterpretations of the word 'law' in the Constitutions of 1907 and 1979.

Despite its temporal nature, *One Word* had not been written in legal language, but, following the model of the Ottoman Empire, the committee managed to produce a clear, legal, and technical text. In any case, certain members of the committee liked the idea of creating consistency between modernity and Islamic teachings. For instance, they imagined that the act of *shūrā*, which the Prophet was obliged to carry out as the order of the Quran, was the same activity in which parliaments in modern countries engaged (see Hidāyat 1983/1363: 147, footnote 1). Furthermore, they compared the role of parliamentary representatives with that of the procurer (*wakīl*) in jurisprudence and, again, the function of newspapers with *quwwi-yi ḥiss-i mushtarak* (the faculty of common sense) as expounded in Aristotelian philosophies (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 279–80).

The Constitution's great deficiency was that it contained no articles clarifying the rights of the people, which is why these were written into the Supplement. In preparing the Supplement, the committee drafted some general articles for the section covering the rights of the nation, especially Article 8, stating equal rights for all.[25] The motif of certain articles suggested that their details were to be determined by the "law". The ambiguity of the word "law" in the text gave the legislators an opportunity, vis-à-vis the radical clerics, to enact and rapidly approve the Supplement at a time when the country was unstable. The legislators had presupposed that the details of the "law" would later be prepared in an atmosphere that was more compatible with the paradigm of modernity. In this process, the committee managed to insert into the text some new and unprecedented concepts, such as citizens' rights,[26] nation, and equality before the law. These terms will be explained in detail below, but because the story of enacting the people's rights 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, the new concepts basically contradict the *fiqhī* opinions held by Shiite jurists. For example, he disagreed with the conciseness of the phrase "before the law" in the Supplement that treats all instances without due differentiation, like the differentiation in the amount of punishment for a Muslim and non-Muslim, and for man and woman, which should not be equal according to *fiqh*. Other clerics, including revolutionaries,

25 The draft of Article 8 states, "The people of the Persian Empire are to enjoy equal rights before the Law" (*ahālī-yi mamlakat-i Iran dar muqābil-i qānūn mutasāwī al-ḥuqūq khāhand būd*).

26 It is true that 'citizen' (*shahrwand*) is a new term and the word was not used in the text, but there are some phrases that imply the meaning, such as '*hich yik az Irānīyān*' (Article 14), '*afrād-i mardum*' (Article 9), and '*ahālī-yi mamlakat-i Iran*' (Article 8).

were not at variance with him in this regard but, with respect to public interests (*maṣlaḥa*) and to the revolutionary climate that had united the people, they agreed with the notion of equality of peoples before the "ratified laws" and ignored the legal opinions implying inequality. Nurī and radical religious groups protested against the Parliament codifying a Supplement that promoted equality. The protests finally caused the committee and MPs to accept Nūrī's suggestion, with which the clerics in principle agreed. The suggestion was to enshrine an article, namely Article 2,[27] which obliged Parliament to set up a committee composed of no less than five jurists (*mujtahids*) familiar with the requirements of the time to recognize whether the laws proposed by the Parliament and the Senate were in conformity with the rulings of Islam. In this article, the process of implementation was defined in a way that entitled *ulama* to introduce twenty clerics to Parliament and then the representatives could elect five to fulfil this task.[28] No article was to gain legality and ratification without undergoing the process of the jurists' confirmation.

The enshrinement of Article 2 in the Supplement made it reflect two contradictory aspects or, more precisely, made it appear paradoxical regarding the section on "the rights of the people". I shall look at the paradox more closely below. With respect to the articles denoting equal rights for all, religious minorities celebrated the enactment of the new law and the prominent figures of the minorities sent telegrams to the Parliament, appreciating the representatives' endeavour in approving their rights (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 272, 273, 316, 449). On the other hand, *ulama* were confident that no alteration had ever occurred in the Supplement by enshrining Article 2 and that their legal opinions would take priority over the articles implying equality. Unfortunately, no record or proceeding is available on the order or content of the articles in question.

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27 The draft of the article was suggested by Sheikh Faḍl Allah Nūrī, but what was ratified in Parliament was similar to what was included in the Ottoman Constitution. Later, Islamic countries that came to codify their constitutions enshrined the article exactly as Article 2. See an inquiry on the history of Article 2, especially in Egypt, in Lombardi (2006: esp. Introduction and Part II, Article 2 of the Egyptian Constitution). See also s.v. 'Dustūr' in Islamic countries in *EI2* by various authors.

28 It is also mentioned that the content of the article will be permanent and maintained until the appearance of Imam Mahdi. A major difference between Nūrī and the clerical leaders of the constitutionalism was whether the placement 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 legal status of the clerics in the Parliament in *Mudhākirāt-i majlis-i awwal* 1384/2004: 288, 289b, 291–3. The differentiation was not highlighted in the works written on the Constitutional Revolution but, as it will be observed, the codifier of the 1979 Constitution paid close attention to this experience.

1.3 *Textual Analysis*

The Constitution was codified in fifty-one articles with a short preamble, mainly emphasizing the rule of law rather than the rule of the shah (Articles 2, 15, 16). It recognized the division of powers and the establishment of new institutions like Parliament (Articles 1–42, esp. 27) and the Senate (Articles 43–51), clarifying the rights and duties of these bodies, such as permitting foreign concessions and financial contracts (Articles 23, 24, 26).[29] It is worth noting that the Senate was not established until 1328/1949. The Constitution actually resembled the internal law of the National Parliament, mostly explaining the duties and functions of the Parliament and Senate before the state and vice versa, and did not include any article on the rights of the people, including the rights of religious minorities. Therefore, the Supplement, which despite its name was the Constitution proper, will be examined here.

Summed up in 107 articles, the Supplement contained ten parts – general disposition; the rights of the Persian nation; the powers of sovereignty; the rights of the Persian monarchy; the rights of the representatives of the parliament; the duties of the ministers; the powers of the tribunals of justice; the provincial and departmental councils (*anjumanhā*); finances; and the army. I will analyse the articles related to this study, which can be found mostly under two headings – general disposition and the rights of the Persian nation.[30]

1.3.1 General Disposition

The general disposition consists of seven articles. Articles 1 and 2 introduce the official religious and political authorities and focus on their legitimacy in the society. Article 1 declares that "Islam, under the rubric of the orthodox *jaʿfarī ithnā ʿasharī* or *Twelver Shīʿism*, is the official religion of the state, which the Shah must profess and promote." Using the term "official religion" had certain consequences, which included rendering the legal status of non-Twelver Shiite Muslim communities and non-Muslim communities ambiguous. During the period in question, the majority of Iranians were Twelver Shiites. However, non-Twelver Shiite Muslims, like the followers of the Shāfiʿī, Ḥanafī, Ḥanbalī, Zaydī, and Ismāʿīlī schools, who lived in various regions, were ignored. The enactors perhaps did not, or could not, pay attention to them and, moreover, set the adjective orthodox (*madhhab-i ḥaqqa*) to the Shiite school, stressing their exclusivist attitudes. The question of what the enactors meant by "official religion" and what its function was in the text remains unanswered. Was it mentioned just to reveal the majority religion, or as a source for codifying

29 See the English version of the 1906 Constitution in Browne 1909: 75–101.

30 See the original Persian of the articles in Appendix II.

laws and regulations that might be needed later? Or did they mean that faiths other than the religions and Islamic schools mentioned in the Supplement were neither legal nor recognizable? Since the proceedings contain no clues to an answer, I have to rely on probabilities.

On the probability that the stipulation of an "official religion" in Article 1 served as the source, one can say that this function is realized in Article 2, which insists that "Islamic sacred rules" are consistent with governmental rules and regulations. Nonetheless, there is no evidence to support this probability and the meaning of the term "official religion" remains both concise and ambiguous. It seems that Article 1, besides specifying the religion of the majority of Persians, is redolent of the theory of legitimacy prevailing in the Qajar period, which divided power into religious and political spheres. According to that theory, the shah's legitimacy, if any, lay in his duty to profess and promote the religion – a task also determined and emphasized in Article 39, where it is asserted that he should take an oath in Parliament to promote Shiite doctrines.[31] The text remains silent on the legality of other faiths, and offers no exceptional circumstance to warrant recognizing the status of non-Shiite Muslims and religious minorities. Perhaps the codifiers of the draft, most of whom had no religious inclinations, thought that if the Supplement were to express nationality explicitly and exclusively, then it would include all peoples and would realize their rights; hence, due to the radical religious context, it was probably better not to mention other faiths. It is also probable that Article 1 in its final format was added to the text to satisfy the shah, the *ulama*, and the majority of people.

Article 2 confirmed the legality of laws codified by Parliament so long as "they are not at variance with the sacred rules of Islam and the positive laws established by the Prophet Muhammad."[32] As already mentioned, the method chosen to implement Article 2 was to empower some jurist MPs to veto any governmental laws that might contradict the sacred rules. The question of whether this new body of jurists should operate within Parliament and its members be regarded as equal to other deputies, or whether it should operate outside Parliament and its members be considered superior to the deputies,

31 Part of Article 39 states: "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, … endeavour to promote the Shiite *ja'farī* doctrines."

32 A passage from the original text is needed for our analysis. This reads: "bāyad dar hich ʿaṣrī az aʿṣār mawād-i qānūnīyya ān mukhālifatī bā qawāʿid-i muqaddasa Islām wa qawānīn-i muḍūʿih haḍrat khayr al-anām nadāshtih bāshad." See the original Persian of the articles in Appendix II.

was the major point of disagreement between the clerics and intelligentsia. Finally, in accordance with the opinion of the constitutionalist clerics and intelligentsia, it was decided to base the body of jurists in Parliament and instruct them to oversee the laws.

In the analysis of the contents of Article 2, some noteworthy points, both positive and negative, remain unexplained. As mentioned in the previous chapter, before the Revolution, the *ulama* exercised a powerful influence over the social and legal affairs of various regions of the country. Each jurist had his own legal opinion and, in some cases, his own court (*maḥkama*), to deal with legal claims, including those pertaining to personal status and criminal cases. Although their legal opinions were mostly similar, they sometimes had problematic relations with competitors, the government, and the people, especially non-Shiite Muslims and non-Muslims. The great role that Article 2 played was to centralize and concentrate religious power in the newly established parliamentary body; this meant that when the parliamentary jurists accepted an opinion, which the state would then ratify as law, no jurist outside Parliament could oppose it. Since Article 2 conferred great legal power on the parliamentary clerics, this limited the power of influential jurists and other legal authorities (*marājiʿ-i taqlīd*) operating in other regions. Under these more centralized conditions, no jurist could declare a given event, case, or opinion to be unlawful merely by claiming that it contravened Shiite law in terms of how he might have understood his duty. Article 2 could thus protect non-Shiite Muslims and non-Muslims in local regions from the actions of radical Muslim groups and their low-ranking clerical supporters. There is significant evidence that, once constituted, the first Parliament, especially its clerical representatives, received numerous official complaints from religious minorities about the oppression to which they were being subjected by local governors and Muslim radical groups. The representatives felt that it was their responsibility to consider these petitions and to follow them up by evoking the power of Parliament.[33] In practice, however, as we shall see, the new group did not last long and the disunity of *fiqhī* opinions continued.

Another point about Article 2 is that, in theory and practice, and despite the wishes of *ulama*, it could have provided a background for subsequent alterations in two areas – Islamic social precepts and, more importantly, theoretical relationships between state and religion. Before Article 2, the legal authority of high-ranking jurists and those in the society who emulated them governed

33 For example, see *Mudhākirāt-i majlis-i awwal* (1384/2004: 216) on the complaints of Jews living in Kāshān in 1907, and of Zoroastrians living in the same year in Yazd (*ibid.* 1384/2004: 246).

both social and individual legal rulings. If the new body of parliamentary jurists took charge of social laws and regulations, or of transactions (*muʿāmalāt*) vis-à-vis devotions (*ʿibādāt*), it would compromise or reduce the authority of those in the field seeking to imitate them. This is because when Parliament enacted new social laws and regulations, people had to obey them without referring to the various *fiqhī* opinions of one or other great jurist as someone to emulate (*marjaʿ*). This reduced authority could have helped to accelerate the process of secularization (*ʿurfī shudan*) or, in other words, rationalization, which might have given non-Shiite Muslims and non-Muslims more security. In the Pahlavi era, however, the functions of Article 2 and of the new parliamentary group were suspended and secularization continued to oppose religion.

A second change in relations between the state and religion, which perhaps unwittingly arose from Article 2, was the emergence of a theory that the intelligentsia and revolutionary clergies could now offer on what criteria legitimated the government and its laws in the light of the new revolutionary paradigm. Before Article 2, according to the old theory, the *ulama* had to give the shah permission to rule, but after Article 2 and according to the new theory, legitimacy could be secured through the consistency between governmental law and "Islamic Sacred Rules". Thus, as long as the parliament ratified laws that did not contradict Islamic rulings, the government and its laws would enjoy legitimacy. This theory would have gradually superceded the earlier one that separated power into political and religious realms and looked upon the shah as the Shadow of God and implementer of *sharīʿa*. It is notable that the clerics of the first Parliament had no ideological disagreement with the shah and whenever recalling Nāṣir al-Dīn, would add the appellation "the martyr" to his name (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 381). The new criterion for legitimacy – consistency – was compatible with a republican form of government as claimed by the Islamic Republic.

Yet another point about Article 2 is that it would gradually have made *fiqhī* opinions more relevant to the demands of the early twentieth century. The jurists who were MPs were naturally aware of the requirements of the time, relatively more consistent and open-minded in their approach, and more tolerant towards non-Shiites than jurists outside Parliament. They had to look at problems by relying on commonsense and had to take into consideration social demands and real elements, such as internal and international conditions and Iranian public interests. Consequently, non-Shiite Muslims and non-Muslims would have been dealt with more tolerantly.

Apart from the above-mentioned points on its function, Article 2 brought an internal structural contradiction to the Supplement. As mentioned in Chapter 1, *fiqhī* legal opinions on religious minorities do not recognize equal

rights between Muslims and non-Muslims. These opinions were rapidly gathered together in Article 2 and, under the heading *Islamic Sacred Rules*, approved as a kind of "law" and elevated above the articles in the Supplement and Constitution that implied equal rights for all Iranians. Article 2 was thus able to block the approval of any laws and regulations suggesting an equality of rights between Muslims and non-Muslims. The Supplement and Constitution thus had a dual nature – both the *equality* of people's rights deduced from the part referring to "the rights of the Persian nation", and the *inequality* of people's rights arising from Article 2 being based on *fiqhī* opinions. And, according to Article 7 of the Supplement, the foundations of constitutionality cannot be suspended either wholly or partially. Consequently, the contradiction became highly significant in circumstances where preserving one part necessitated sacrificing the other. The following analysis illustrates further internal contradictions in the Supplement and Constitution.

1.3.2 The Rights of the Persian Nation

The appearance of the term "the Persian nation", which is indicative of all Iranians despite their religion or tribe, was one of the great achievements of the Constitutional Revolution. In this sense, according to the law, everybody's legal and political rights would be equal. The word *nation* in foreign constitutions, meaning all people or citizens, took precedence in nineteenth-century nationalism. The committee that prepared the draft of the Constitution translated the word as "the Persian nation" or *millat-i Īrān*. This term and other similar phrases like "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 setting and played a major role in establishing a new identity and new rights for Persians.[34] Despite the prevailing theory that linked the legitimacy of government to its service to religion, it was then the new concept of the nation (*millat-i Īrān*) that legitimized the power of the shah.[35] The new concept, however, introduced a paradox into the contents of the Constitution and Supplement. The paradox is that although the law asserts that all powers are derived from the will of the nation, it also states that the legitimacy of the shah's sovereignty stems from God or from his service to religion. The best evidence for the paradox is in Article 35,

34 There is one explicit exception in the Supplement 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 87 also permits the government to establish military courts as a capitulation for military men.

35 The concept might be supported by Article 26 of the Supplement, 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 original Persian in Appendix 11.

which ironically states that "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 constitutionalism unless we justify the efforts of the lawmakers in two ways – either they intended to affirm the legitimacy of the state and keep its religious colouring, or they really did not know that adding this stipulation would make the Constitution inconsistent.

With respect to the rights of the people, Article 8 became the source of long debates between the supporters and opponents of constitutionalism. The article states that "the people of the Persian nation are to enjoy equal rights (*mutasāwi al-ḥuqūq*) before the Law." Subsequent articles on the rights of the people rely on this article. The theme of Article 8, theoretically and indirectly, nullified the content of the legal opinions in *fiqh* regarding the rights or duties of religious minorities. The opposing clerics agreed to apply the law equally to all and supported their views with evidence from the Quran and Sunna. They believed, however, that what had been mentioned in the *fiqhī* opinions regarding the inequality of the *amount* or *quantity* of penalties and blood money should also be considered divine and sacred.

Regardless of Article 8, other parts of the Supplement stressing the rights of the nation could abrogate traditional *fiqhī* opinions. Some examples could be considered as evidence. While in *sharīʿa* the reason for levying *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 honour from every kind of interference … save in such cases and in such ways as the laws shall determine." Thus, unlike *fiqhī* opinions, the life and property of everyone, whether Muslim or non-Muslim, is absolutely protected. This understanding could be proven by the content of Article 97, which states that "in the matter of taxes there shall be no distinction or difference amongst the individuals who compose the nation." Therefore, according to the Supplement, it made no sense to levy further taxes such as *jizya* or *kharāj* on religious minorities. However, 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 makes *jizya* legitimate through Article 2 and included in "the Law". Fortunately, this interpretation of *jizya* and *kharāj* received no attention from the jurists in the Pahlavi era and in the Islamic Republic.[36] The interpretation of "the Law" might also have been extended to other *fiqhī* opinions on retaliation and punishment indicative of inequality between Muslims and non-Muslims. Needless to say, without

36 However, we shall see in Chapter 4 that this interpretation of "the Law" is in some cases applied to the Penal Code in the Islamic Republic.

Article 2, the content and structure of the 1907 Supplement would have been closer to justice and would have protected the rights of all people, non-Muslims included.

Protesting against the content of some articles, especially Article 8,[37] Sheikh Faḍl Allah Nūrī and his followers proposed two alterations – one that the attribution *governmental* be added to the phrase "the Law" in Article 8, and the other that Article 2 be added to the Supplement. Because most representatives were unfamiliar with the legal implications of constitutionalism, both proposals were readily accepted. After adding the attribution, the final version of Article 8 read, "all people are to enjoy equal rights before the *governmental Law*." This meant that all people were equal merely in the application of governmental law and in court procedures, though not in all civil and criminal rulings derived from *fiqhī* opinions. By adding the attribution *governmental*, the division of the courts into religious (*sharʿī*) and customary (*ʿurfī*) continued to remain.[38] In governmental courts, everybody merely enjoyed the right of political equality, not the right of legal equality, before the law. We shall see that the codifiers of the Penal Code had to accept this division of the courts.

The second proposal, adding Article 2 to the Supplement, indirectly led to the acceptance and legitimization of an independent package of *fiqhī* opinions. The main critique of the proposal is that these opinions were not already codified let alone accepted by people and were not, properly speaking, compatible with the implications of constitutionalism. The proposal, as mentioned above, rendered the structure and content of the Supplement paradoxical and ambiguous. Adding Article 2 did nothing to improve the rights of religious minorities during the Constitutional Revolution. Consequently, there were two contradictory types of articles on these rights: (a) Article 2, the basis for the Shiite *fiqhī* rulings as the permanent superior law pointing to unequal rights; and (b) the articles establishing equal rights for all. The introduction of Article 7, which stated that the principles of the Constitution could not be suspended either wholly or in part, rendered the contradiction permanent in the process of legislation.

Here, analysing certain Articles such as 15, 16, and 17 can help us understand the ambiguous structure and content of the Supplement far better. According to Article 15, "no property shall be removed from the control of its owner save

37 Some of his main legal opinions against the supporters of constitutionalism were reported in Chapter 2.

38 According to Article 74, "no tribunal can be constituted save by the authority of the Law". In practice, however, there was no alteration to this procedure until the period of Reza Shah, who prevented jurists from establishing official tribunals in their homes to investigate criminal or civil claims.

by legal sanction (*mujawwiz sharʿī*) and then only after its fair value has been determined and paid." What is ambiguous about the rights of non-Muslims is the condition *legal sanction*, for it is not known whether or not the term includes legal opinions in *fiqh*. For instance, as we have seen in Chapter 1, in Shiite *fiqh*, blasphemy (*kufr*) and apostasy (*irtidād*) can prevent a person's relatives from receiving an inheritance. Therefore, if for any reason a non-Muslim inheritor becomes Muslim, his or her conversion can prevent all that person's non-Muslim relatives from being entitled to inherit. According to Article 2, this case would be taken as a *legal sanction* (*mujawwiz sharʿī*). Thus, Article 15, which apparently recognizes and protects the rights of religious minorities, remains neutral. A similar analysis might serve for Articles such as 13, 16, and 17, in which the stipulation "the Law" is applied absolutely and ambiguously. Moreover, based on Article 2, the meaning of "the Law" could be reduced to *fiqhī* opinions in various articles.[39] We shall see below that in the period of the second Parliament (1909) through to the seventh (1928), especially before the kingdom of Reza Khan, when the Civil and Penal codes had not yet been systematized, the meaning of *legal sanction* and of "the Law" was explained and reduced in accordance with what was generally understood from legal opinions in *fiqh*.

Article 20 here is also worth analysing with regard to the rights of the people. "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." Mahdi Qulī Hidāyat translated the French Press Law into Persian and then the representatives approved it after discussions and modifications.[40] The analysis here centres on the definition of a concept – *kutub-i ḍalāl* (heretical books and matters hurtful to Islam) – that was of central importance to the ruling class and clergy, both of which were sensitive to how the press conveyed their attitudes and interests. The question is whether, in the opinion of the jurists, printing

39 See the application of the term in the following instances. 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*".

40 Some sources introduced Hussein Pīrnīyā as the translator of the French Press Law, but the proceedings of the first Parliament explicitly confirms what I have mentioned here; cf. *Mudhākirāt-i majlis-i awwal* 1384/2004: 437, 521 569.

the Holy Bible and Zoroastrian sacred books fell under the heading "heretical books and matters hurtful to the Islam". There is no definition of the concept *kutub-i ḍalāl* in the Press Law, but what is understandable through the proceedings is that there were narrow-minded and exclusivist attitudes about the definition. Some deputies even believed that printing works belonging to the *ashʿarī* approach of Islamic theology and to mystical orders were heretical and must be forbidden (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 302). Taking such exclusivist attitudes into consideration, the legal circumstances around printing non-Muslim scriptures are more problematic since, in the opinion of jurists, these scriptures are distorted by the People of the Book and abrogated by the Quran.[41] Practically speaking, however, publication policy on non-Muslim scriptures between 1906 and 2020 depended on the socio-political climate and tastes of the rulers.

1.4 *Terminology*

1.4.1 Nation

The committee translated the word "nation" in foreign constitutions into *millat-i Īrān* or *ahālī mamlikat* (the Iranian people). One synonym, *millat*, had already been used in the literature preceding 1906 and had at least two other meanings. First, *millat* meant *sharīʿa* and its followers, and was derived from the Quranic terminology (*millata ibrāhīma ḥanīfā*; see Q, 2:135; 22:78, for an example). Accordingly, the heads or fathers of *millat* were jurists who, because they would be the general deputies of the Hidden Imam, saw themselves as the guardians of *sharīʿa*, which is why people at that time regarded *ulama* as the leaders of the revolution. It was *millat* in this sense that could justify the legitimacy of the government before 1906, and when jurists used the term "the union of *millat*" they meant that the government should imitate the rulings of *sharīʿa*.[42] Second, *millat* meant the people, but in its pre-modern sense, which often meant peasants (*raʿyat/ruʿāyā*), not citizens, as opposed to the ruling class (*arbāb*/sultan). The individuals of the nation (*millat*) in this sense had no *right* to define their destinies but had a *duty* to obey the ruler, which meant that it was the shah, not the jurists, who was father.

After the 1906 Revolution, according to the Supplement (Article 26), it was *millat* in the new sense of the term that justified and legitimated the state in its

41 According to this argument, most Iranian Muslims, including students of Islamic studies at universities and seminaries, are unfamiliar with the scriptures of other religions, while the Quran is peripheral to them in a way that makes it impossible to understand the Quran without them.

42 See, for example, Mufīd 1410/1989: 34; Sharīf Murtaḍā 1405/1984: vol. 2, 366.

new sense. The state was responsible before the parliament and, as such, the parliament could detach the state from legal and actual power. The union of *millat* and the state meant that each with respect to the other had a *right* and *duty*, and the people would be the supporters of the state and vice versa. This definition was unprecedented in the history of Iran. Familiarity with the new terms "nation" and "state" dates back to the 1906 Revolution; nonetheless, the differences between the two senses of the term *millat* in the early twentieth-century sources are still unclear.[43]

1.4.2 The Sacred Rules of Islam

As already noted, according to Article 2, a group of *ulama* needed to be present in the parliament to play a supervisory role. Their duty was to consider all suggestions carefully and they would reject, wholly or in part, "any proposal which may be at variance with the *Sacred Rules of Islam* and/or *the laws established by the Prophet Muhammad*, so that it shall not acquire the title of legality."

For a start, I should examine more closely the relationship between two terms in the article – "the Sacred Rules of Islam" and "the laws established by the Prophet". The word used as a conjunction in the original Persian is *wa* (and), which is ambiguous and in this context can be interpreted in two ways. First, the conjunction *wa* can be interpreted as joining a general conjunct with a particular one mentioned as an instance for emphasis. Accordingly, all rulings established by the Prophet, the imams, and then by the jurists would come under the title "the Sacred Rules of Islam" and any mention of the Prophet's name is merely for emphasis. Second, the conjunction *wa* can be interpreted as adding an appositive, as Edward Browne understood and translated it, and consequently, the word *and* would simply be used to modify the first conjunct. In this sense, the Sacred Rules of Islam meant the rules established only by the Prophet, whether through the Quran or the Sunna. With respect to the Shiite doctrines, it seems that this interpretation is far from the intention of the representatives who proposed adding Article 2 to the text, for they regarded what was established by the imams as tantamount to what was established by the Prophet.

Then, the legislators had no clear or agreed definition of what the Sacred Rules of Islam were, so left the interpretation to the *ulama*. Since remaining sources on the meaning of the term are sometimes unclear, we are having to deal here with some important questions. Given the unity and consistency between jurists on the nature and instances of rulings, under what criterion is

43 For more information on the meaning of *millat* in the Qajar period, see Chs 8, 9, and 10 in Ājudānī 1382/2003: esp. Ch. 10, 190–7.

a rule considered sacred? Is it sacred because it is confirmed by and attributed to the Prophet Muhammad or the imams of the Shiite school? Or, is it sacred as such, and the jurists' mission is to protect it as a heritage? Thus, one is entitled to ask why the Prophet confirmed such rulings, especially those that relate to social affairs. If a jurist says that the rulings were confirmed or established because they could benefit all Muslims and lead to the realization of social justice, then, consequently, this criterion could apply to any beneficial ruling that led to social justice. If this were the case, then many rulings could gain the attribution "sacred". The advocates for and against constitutionalism did not ask such questions during the Constitutional Revolution. They had a naïve understanding of the subject and thought that the meaning and instances of the sacred rules and laws established by the Prophet were clear. They were content with what had been repeatedly said throughout the history of Shiite *fiqh*, namely that Islamic rulings have an acceptable and rational aspect, yet at the same time the hidden, secret and real reasons for the establishment of these rulings are not completely known.

Certain questions arise over how the jurist MPs were supposed to recognize the Sacred Rules of Islam or over how they were expected to give their legal opinions. Should they rely on the meaning of rulings as understood from the literal import of the Quran and Sunna? Should they rely on the understanding of the majority of Shiite jurists? Should they rely on the well-known legal opinions of Muslim jurists? Or, should they rely on their own legal opinions? With respect to the first three questions, the jurists would be functioning solely as recognizers and in the fourth as people who deduce the rulings and have their own independent legal opinions (*mujtahid* or *muftī*). Some reports indicate that the jurists acted according to their own legal opinions while others show that they relied on well-known ones.

Now we are faced with another question: what does the lack of opposition between the Sacred Rules and governmental rulings, including the rules enacted by parliament indicate? Does it mean absolute consistency between them or merely a lack of contradiction? Would a rule be categorized as consistent with the Sacred Rules or merely lacking a contradiction if there is no record of it in the Quran and Sunna and on which Shiite *fiqh* has no injunction? What are the criteria for each of them? Many social issues not mentioned in the Quran or Sunna may need rulings, yet one jurist could regard a new issue as being in the realm of the permissible (*mubāḥ*) and grant permission to accept it, while another may place it in the realm of caution (*iḥtiyāṭ*) and forbid it. The decision will depend on the jurist's interpretation of the Quranic verse and scope of hadith to understand legal opinions. The discrepancy between the two main schools of thought, *akhbārī* and *uṣūlī*, has existed for a long time,

but received attention again as a serious topic in legal discussions leading up to the 1906 and 1979 revolutions.

1.4.3 The Law

The concise term "the Law" is used many times in the Constitution and Supplement. Since the constitutional monarchy needed concrete laws and regulations, the lawmakers and draft committee rapidly codified the laws, article by article, to reflect the revolutionary atmosphere. Logically, they had to be content with the term, the Law, although they actually meant subsequent laws and regulations that would later be codified in parliament, not the *fiqhī* legal opinions coming though Article 2. Because every minister in the pre-revolutionary period managed the affairs of his office according to his own whim or by an order from the shah, to bring an end to that procedure the first Parliament insisted on ratifying every ministry's administrative by-laws. Thus, the Parliament managed to enact the Press Law, the administrative by-laws of the Ministries of Justice, Interior Affairs, Commercial Affairs, Education, and Public Interests. Naturally, this all took a lot of time and, consequently, the representatives were unable to codify other necessary laws. Codifying the civil and penal codes was thus postponed until 1307/1928. Meanwhile, the meaning of "the Law" in the Constitution and its Supplement was reduced to *fiqhī* opinions, if they were any, in the field of criminal, civil, and tort laws. This meant that after the revolution and before the enactment of the civil and criminal laws, the religious minorities saw no improvement in their rights.

1.4.4 Religious Minorities

The lawmakers introduced the Islam of the *Jaʿfarī* doctrine of Twelver Shīʿīsm as the official state religion. Other Muslim groups, as well as non-Muslims, were ignored in the Constitution, the Supplement, and other laws, and the term "religious minorities" was simply not used. During the first and second Parliaments, however, whenever representatives discussed issues involving other religious groups, they mentioned only Zoroastrians, Jews, and Christians, with the term Christian incorporating the Armenian, Assyrian, and Chaldean ethnic communities. From what I have seen of the proceedings, the representatives ignored Ṣābiʾīn or Mandaeians and regarded Bābīs, including Azalī and Bahaʾī groups, as heretical faiths (see *Mudhākirāt-i majlis-i awwal* 1384/200: 456). Other than the well-known *fiqhī* opinions, there is nothing to explain why only Zoroastrians, Jews, and Christians were recognized. With regards to the Ṣābiʾīn, the deputies might well, as we have seen in Chapter 1, relied on well-known legal opinions in Shiite *fiqh*, which mostly go back to the time of Sheikh Ṭūsī, who did not regard Ṣābiʾīn as People of the Book.

From the second to the fifth Parliament (between 1909 and 1921), the great modification relating to the legal status of religious minorities was the alteration enshrined in the Electoral Law. According to Article 2 of the new Electoral Law ratified in October 1909, four groups – Armenians in two regions, northern and southern Iran, Assyrians, Jews, and Zoroastrians – could each have one representative in Parliament.[44] Consequently, they were allowed to vote in the election and choose their favourite representatives for the second Parliament. This right had two aspects, one positive and one negative; on the one hand, they had their own representatives who could pursue their concerns and this would be in their favour, but, on the other, since they were Iranians, it was expected that they could, like others, elect more representatives. Accordingly, one Muslim from Tehran, for example, could choose fifteen candidates but a Zoroastrian could choose only one.[45] Another shortcoming was that a member of a religious minority could not be a candidate in the expectation of attracting Muslim votes. Finally, this regulation for religious minorities became an enduring feature of the Electoral Law in subsequent parliaments and even in the Islamic Republic. Zoroastrians have actually had their own representatives in all twenty-four parliaments (1906–79) and were the most active among the religious minorities. The Assyrians had no representative in eight parliaments (1909–35).[46]

2 Modifications in the Pahlavi Period (1925–79)

Between 1907 and 1925 Iran was suffering from socio-political instability, with no laws or regulations ratified in the civil and criminal codes. The 1906 Revolution had severely weakened the power of the shah and government, but the will of the nation and the authority of the law had yet to be consolidated. As before the revolution, jurist opinions were the only authoritative rulings for the entire population. When a customary court needed to investigate a claim, it would often encounter different *fiqhī* opinions, which litigants would provide from their favoured jurist in support of their respective claims. The situation created uncertainty in legal affairs. The balance of power between the

44 See the original Persian in Appendix II.

45 Some representatives such as Mahdi Qulī Mukhbir al-Mulk, the third brother of Ṣanīʿ al-Dawla, agreed with the proposal that all people were entitled to choose their representatives without any religious discrimination (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 647–8).

46 See the list of representatives of religious minorities over the course of twenty-four parliamentary periods in Appendix I.

religious and political spheres tilted in favour of the clerics and they remained the referees.

Reza Khan came to power first as supreme military commander (1299/1920), later as minister of war, then as prime minister, and finally as shah in 1304/1925. The uncertain structure of the Constitution had created fertile ground for rivalry among clerics and politicians, which Reza Shah was able to quash with his military power. He believed that he had acquired his legitimacy through being the servant of the people and a soldier who loved his country. Therefore, feeling no need for the permission of jurists, the spirit of God, or the theories of the Safavid and Qajar periods, he ignored the provision in Article 2 that elevated the rights of jurists in parliament over those of all others. Practically speaking, from the second Parliament to the fifth, the representatives were content with the official attendance of some representive jurists, like Sayyid Hassan Mudarris,[47] and did not pursue the entire process of electing jurists mentioned in Article 2. After the seventh Parliament (1928), the purpose of Article 2 and the attendance of jurists were totally forgotten. According to some evidence, from the fifth Parliament (1924) onwards, Reza Shah began to interfere in elections and, after the seventh Parliament, used his power to appoint deputies formally. In this way, Reza Shah improved the modernization process and created a climate of security for all tribes and religious minorities.

Meanwhile, he was promoting the nationalist tendencies that were gradually developing into a new ideology that was detrimental to all religious identities.[48] For example, when he ratified the law on military service in 1305/1926, the religious minorities were delighted because, for the first time, they could join the Iranian armed forces, which, as the government saw it, was a victory for nationalism over religious sectarianism. Under the umbrella of this new ideology, some influential media,[49] taking their cues from the government's insistance on promoting Iranian identity, held in contempt and ignored all local entities such as tribes, languages, dialects, clothing, customs, and religions. As a result, when the shah showed himself as religious or insisted on Islam, his actions would have roots in the idea that Islam could maintain

47 It is well known that he was assassinated by Reza Shah in 1316/1938. On his different positions on Reza Shah, see Ghani 1998: esp. 288–372.

48 On the socio-political situation of minorities in the Pahlavi period, see Sanasarian 2000: 34–49.

49 For example, the *Īrānshahr* daily, published by Hussein Kāẓimzādih, and the *Āyandih* journal, published by Maḥmūd Afshār.

Iranian unity and identity. This policy lasted more or less until the end of the Pahlavi dynasty.[50]

During the Pahlavi era, at the shah's suggestion and with the agreement of the parliament and senate, some articles of the Constitution were revised five times – in 1304/1925, 1317/1939, 1328/1949, 1336/1957, and 1344/1965. All modifications were based on establishing and consolidating the new dynasty. None had anything to do with the rights of the people, including non-Muslims, and with the development of democracy or other elements of progress and modernity. They were initiated simply to expand the power of the shah. Evaluating these modifications is beyond the scope of this study.[51]

3 The Penal and Civil Codes

The codification of the penal and civil codes under the first Pahlavi dynasty greatly advanceed the rights of the people. The draft of the Penal Code was prepared in 1925 and ratified during the fifth Parliament (1924–6). The codifiers who had to translate the French Penal Code as a first step were well aware that it would trigger harsh debates among jurists and that it contradicted Article 2 of the Supplement. Thus, calling it the 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 will correspond to Islamic penalties, viz. *ḥudūd* and *ta'zīrāt*."[52] Legally, this article recognized the previous separation of the courts into customary (*'urfī*) and religious (*shar'ī*) divisions, but in practice the codifiers were able to keep the *ulama* quiet while the government gradually restricted the power of the religious courts to issues associated with personal status. The articles of the Penal Code were written to include,

50 The policy against religious tendencies was applied to all faiths except the Baha'ī, especially in the period of the second Pahlavi. This exception, besides being a nationalist tendency, gradually led to the emergence of the popular belief that the ruling class intended to oppose Islam and support the Baha'ī faith. During the 1979 Revolution, the revolutionary clerics were able to use the current popular belief to attract ordinary Muslims to join them.

51 See the report on modifications occurring in the first twenty-two years of the second Pahlavi dynasty, when the shah intended to show himself as a democrat, in Fakhr al-Dīn 'Aẓīmī 1989.

52 The French Penal Code was translated by Francis Adolph Pierny, the French adviser to the Ministry of Justice, who was invited to Iran by Hassan Pīrnīyā. The story of enshrining Article 1, which recognizes these two kinds of courts, is mentioned briefly in the memoirs of Ahmad Matīn Daftarī. See Bāqir 'Āqilī 1370/1990: esp. Ch. 7, 453–62.

at first implicitly, each person who committed a crime in Iranian sovereign territory, but then, in subsequent amendments, equality before the law was explicitly mentioned in either the application of the law or in the severity of the penalties. In this relation, in accordance with the amendment to the Penal Code in 1352/1973, Article 3 states that "the articles of this Code will include all who commit crimes in the Iranian sovereign territory, save the cases that are excluded according to the law." Consequently, the primary separation of the courts into customary and religious divisions was abolished.

Two other points about the contents of the Public Penal Code are worth mentioning. First, the legality of the death penalty, on which there are many instances in *fiqhī* opinions, was confined to three cases – armed action against the regime; retaliation in the event of a murdered person's heir (*walīī dam*) asking for the death penalty; and where the family code supports capital punishment.[53] Second, imprisonment and financial penalties, viz. modern punishments – which some jurists regarded as unlawful because they were not explicitly mentioned in the Sunna[54] – were enshrined in the Penal Code and the legislature did not consider any torture, including lashing and scourging, as lawful. The Penal Code had been rather briefly modified on several occasions during the Pahlavi period, but in 1352/1973, when the legislators omitted Article 1, the code underwent a significant modification. Its final version included all claims and all Iranians without discrimination on grounds of sex or religion. Consequently, the duties of the religious courts and powers of the clergy were limited to only a few personal status cases in the civil code to do with the registration of marriages, divorces, and wills.

The codification of the Civil Code was another great advancement for the rights of the people in the period. A committee of jurists and lawyers prepared the draft of the first volume containing 955 articles in 1306/1927,[55] with the

53 See Articles 61, 170, and 179 of the Penal Code in Appendix II. According to Article 179, "if a man certainly sees his wife with another man engaged in adultery in her bed, he is entitled to kill both and is exempt from any punishment." We will see the same article in the Islamic Penal Code.

54 That is why when they came to ratify the Press Law the representatives of the first Parliament disagreed with financial penalties (see *Mudhākirāt-i majlis-i awwal* 1384/2004: 569).

55 The members of the committee were Sayyid Kāẓim ʿAṣṣār, Sayyid Muḥsin Ṣadr, Sayyid Naṣr Allah Taqawī, Muṣṭafā ʿAdl Manṣūr al-Salṭana, and Sayyid Muhammad Fāṭimī Qummī, the major author of the draft. Most of them were educated in the traditional system (*ḥawza*) and, apart from Manṣūr al-Salṭana, were all judges. Having graduated from the legal faculty of Paris and written the first textbook on constitutional and civil law in 1909, Ṣadr later became the first Iranian representative to the UN. For more information,

minister of justice, Ali Akbar Dāwar (1885–1937), serving as its president.[56] After the sixth Parliament (1926–28) ratified the first volume in 1307/1928, the second volume, containing Articles 956–1206, was prepared and ratified by the ninth Parliament in 1314/1935 and, finally, the third volume, containing Articles 1207–1335, including the tort law, was approved after six months by the tenth Parliament in 1935. Although drawing heavily on Belgian and Swiss laws, and following the French model, especially the Napoleonic Code, which the committee called the Civil Code,[57] they only actually replicated these foreign laws in a few sections, such as those dealing with tort law, regulations on nationality, documentations, and arguments on proving claims. The committee skillfully codified the laws pertaining to transactions, contracts, personal status, and family law according to the well-known *fiqhī* opinions of Shiite jurists.[58] Although the committee was aware that the sections adopted from foreign laws had no precedent in Shiite *fiqh*, the codifiers were nonetheless careful to ensure that the laws were either compatible with *fiqhī* opinions or, in some cases, derived entirely from its body. From evaluating the data, we can conclude that they were able to adjust the format of *fiqhī* opinions to fit the new official legal code and, more importantly, though they applied Arabic vocabulary and terms, for the first time write the Civil Code in a Persian legal style.

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see Bāmdād (1357/1978: vol. 4, 107–8). For his memoirs in Persian, see Ṣadr al-Ashrāf 1364/1985.

56 He lived and studied in Switzerland for eleven years and, although failing to complete his doctoral thesis, became well-versed in the legal sciences. He returned to Iran in 1300/1920 and, as a deputy during the fourth, fifth, and sixth parliaments, tried to change, or at least interpret, some articles of the constitution to help Reza Khan secure the position of shah. Afterwards, as minister of justice, he totally reformed the structure of the ministry and, between 1928 and 1934, skillfully composed several legal regulations and proposals for the Parliament to ratify. These included 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. Fearing the dictatorial conduct of Reza Shah following an accusation of financial corruption, he committed suicide in 1315/1937. For more information on his cultural activities, see s.v. 'Mard-e Āzād' by N. Parvin in *EIr*.

57 The division of the discipline of law into public and private and then the division of the latter into civil and criminal, which is rooted in the Roman code, has no precedent in Islamic law. Most jurists divide the rulings into the acts of devotion and the acts of transaction according to different criteria.

58 The best sources for them might have been the following legal works of Shiite jurists – *Sharāyiʿ al-īslām* by Muḥaqiq Ḥillī (d.676/1277), *Sharḥ al-lumʿa al-damishqīyya* by Shahīd Thānī (d.966/1558), and *Al-makāsib* by Sheikh Murtaḍā Anṣārī (d.1281/1864).

Two additional points about the Civil Code are worth noting. The first is that, according to Article 5, all Iranians, including religious minorities, whether living abroad or within the country, should obey the regulations of the Civil Code, except for cases excluded by the code. On the personal statuses of religious minorities, the Civil Code made no exceptions and regarded them all as Iranians, despite the contents of the code being of a wholly Islamic Shiite hue. This meant that even in their personal statuses non-Muslims and non-Shiites were expected to obey Islamic regulations just because they were Iranians. After five years, however, in 1312/1933, on the suggestion of Ali Akbar Dāwar, the Parliament added an additional article to the Code. It contained three provisos to signal the independence of recognized non-Shiite Muslims – *ahl al-Sunna* – and of the personal statuses of the recognized religious minorities.[59] According to the article, in such cases the courts should observe the familiar and undisputed rules and regulations of these religions and Islamic denominations.[60] In addition, according to Article 10 of the Civil Code on direct taxes (ratified in 1312/1933), both Muslim and non-Muslim places of worship were exempted from paying tax.[61] Iranian Jews argue that Reza Shah cancelled *jizya* for them (see Liwī: vol. 3, 854–5), but I failed to find any evidence of that in the laws that the Parliament ratified over the period in question.[62] We can surmise that the issue of levying *jizya* was basically forgotten in the process of modernization. In the Pahlavi period the term "recognized religious minorities" continued to remain ambiguous and there was no article to clarify it.

The second point about the Civil Code is that most members of the committee in charge of preparing its draft did not have particularly radical religious mindsets, but in the new context in which nationalism was on the rise, they were careful to ensure that the Civil Code was compatible with *fiqhī* opinions.[63] They therefore tried to draft the regulations in a way that would cause the least argument or conflict with *fiqhī* opinions on the one hand, yet protect the rights of all people on the other. To achieve these aims, they meticulously drafted all

59 See the original Persian in Anon (1379/1999): 888–95. It is also available in Appendix 11.

60 The courts would follow the rules of the husband's faith in cases of marriage and divorce, and of the deceased's faith in cases of inheritances and testaments.

61 See the original Persian in Appendix 11.

62 I would like to thank Mr Amir Poursinā, former head of the *Iranian Official Gazette*, for helping me locate the relevant documents when they were not yet digitized.

63 An Iranian author has claimed that the committee preparing the Civil Code had seen *Majalla al-aḥkām al-ʿadlīyya*, which was regarded as the civil code during the period of the Ottoman Empire, but there is no evidence to support that claim (see Shāygān 1375/1996: 42. On *Al-majalla*, see s.v. 'Medjelle' by C.V. Findley in *EI2*).

the articles to include everyone. For example, unlike *fiqhī* opinions, the committee ignored infidelity (*kufr*) as a factor able to prevent its perpetrators from receiving an inheritance.[64] The Civil Code on this issue was of great benefit to religious minorities compared with their previous legal status under Shiite *fiqh*, for they were now independent in the realm of personal status and, furthermore, when someone converted to Islam, the Islamic courts or clerics could not claim that the conversion could prevent unconverted relatives from receiving an inheritance.

The exceptions to the codifiers' methodology 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," but unlike *fiqhī* opinions, remains silent on conditions surrounding the marriage of a Muslim man with a non-Muslim woman. Article 1313, which is on the prerequisites for admitting a witness to court, differs from *fiqhī* opinions insofar as it fails to stipulate *faith* as a necessary precondition. As we shall see, in the period of the Islamic Republic the legislators added the stipulation of *faith* to the Civil Code, although it is unclear what they actually had in mind because if they meant the *Islamic faith*, it would imply that no court could accept a member of a religious minority as a witness.

After the enactment of the Civil and Penal Codes, in 1927 Reza Shah unilaterally cancelled the right of capitulation that had been in operation since the Turkamanchāy Treaty (February 1828) involving Russia and fifteen other countries. This process of codification withdrew from foreigners living in Iran or taking refuge in foreign embassies any excuse for capitulation or opportunity to evade court decrees. Then, in 1928, Reza Shah also closed the tribunal office responsible for investigating the claims of foreigners in the Ministry of Foreign Affairs. During the period of Pahlavi rule, until 1979, certain articles of the Civil Code were very briefly modified twice – in 1337/1958 and 1348/1970 – but neither modification is relevant to this study.

By the end of the Second World War, by which time the international political legal discourse had basically changed, the Iranian government under Muhammad Reza Shah apparently intended to join other countries in their resolve to improve human rights. Therefore, Iran was one of the forty-eight of the fifty-six countries in the world at the time that voted to approve the UN's Universal Declaration of Human Rights (1948). Between 1948 and 1979, when the UN ratified some international conventions and protocols that were

64 See Articles 875–85 of the Civil Code, which belong to the Pahlavi period. In Chapter 4 we will see that legislators under the Islamic Republic added the stipulation 'against religious minorities' in Article 881 to make the civil code more compatible with Shiite *fiqh*.

considered *jus gentium* and compulsory for all countries, Iran annexed them and ratified the covenants in its parliament.[65] Muhammad Reza Shah and his administration wanted to show themselves to international institutions as supporters of human rights and of the international will to improve the legal situation.[66] In 1341/1962, through a movement called the White Revolution, the shah and his nation initiated certain reforms with respect to people's rights.[67] Protesting to the shah, Ayatollah Khomeini and some clerics declared some elements of the White Revolution to be unlawful, such as the land reforms and the right of women to vote in elections. Khomeini also criticized the shah's policy of restoring the right of capitulation for American military advisers two years later, and for this he was exiled to Turkey and then to Iraq for fifteen years.

Among the international conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Cultural Rights, General Assembly resolution 2200A, both ratified at the UN on 16 December 1966, are worth mentioning. The state of Iran signed them in 1347/1968 and afterwards they were ratified in full by the National Parliament in 1351/1973 and by the Senate in 1354/1976.[68] Both these international covenants included articles that contradicted *fiqhī* opinions or the Sacred Rules of Islam (as stated in Article 2), as were the articles in the section on the rights of the people in the 1907 Supplement. For example, jurists might regard Article 2 of the International Covenant on Civil and Political Rights – which states that "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"[69] – as contrary to *fiqhī* opinions because the absoluteness of the article implies equal rights for

65 The history of the encounter of Iranian scholars and clerics with human rights deserves an independent enquiry. Nonetheless, for a short history of the conduct of the Iranian state from 1948 to 2003, see ʿIbādī 1383/2003: esp. Ch. 12; Mihrpour 1383/2003: esp. 408–13.

66 In 1968, which was called the year of human rights, Iran organized a conference for the Committee of Human Rights in Tehran, in which the representatives of the organizations affiliated to the UN participated. This conference issued the Tehran Declaration on Human Rights and chose Ashraf Pahlavi, the twin sister of the shah, as its honorary head. See ʿIbādī 1383/2003: 62–5.

67 On the positive and negative roles of the reformation, see Halliday 1979: esp. 103–37; Muhammad Reza Pahlavi 1345/1965.

68 See *Iranian Official Gazette*, 1354, 75–9, retrieved 2 November 2017 from www.dastour.ir/brows/?lid=88710 and www.dastour.ir/brows/?lid=87592

69 Some cases such as public emergencies are excluded in Article 4 of the International Covenant on Civil and Political Rights.

Muslims and non-Muslims in all spheres. Another example is Article 26 of the International Covenant on Civil and Political Rights, which reads:

> 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The theme of Article 26 is what Sheikh Faḍl Allah Nūrī and other Shiite jurists did not accept. Again Article 27 of the International Covenant on Civil and Political Rights[70] authorizes the implementation of the privileges mentioned for minorities in the 1907 Supplement.[71] An even better example of the instances that are clearly incompatible with *fiqhī* opinions or the Sacred Rules of Islam is Article 18 of the International Covenant on Civil and Political Rights, which contains the right of freedom of religion, since part of the article is the same as or tantamount to what jurists concider instances of apostasy (*irtidād*). Particularly, the right of freedom of religion might result in the death penalty for a Muslim who has converted to other faiths or to non-religion.[72]

By setting aside Article 2 of the Supplement during the clerics' absence from parliament, the government was able to ratify the international covenants without any obstacle. Most clerics were politically conservative and although in public they remained silent about the state's decisions, they privately regarded

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70 Article 27 reads: "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 practise their own religion, or to use their own language."

71 See Articles 8, 9, 12, 18, and 21. See the original Persian in Appendix II.

72 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.

them as illegitimate and felt uneasy about the Pahlavi state gradually hardening its anti-religious position. Then, on 8 May 1971, when the Muslim countries came together to establish the Islamic Conference with a view to codifying the Islamic Charter of Human Rights in Saudi Arabia, Iran fired a warning shot. In a letter to the general secretary of the conference the foreign minister ʿAbbāsalī Khalʿatbarī announced that "if there is any contradiction between the universal declaration and the Islamic charter, the former should be given superiority" (see ʿIbādī 1383/2003: 326). With this stipulation and similar activities, the shah was definitely demonstrating his commitment to international human rights. Yet, his dictatorial manner and corrupt administrations between 1968 and 1977 almost prevented his government from reforming or modifying those internal laws and regulations that were incompatible with the Declaration of Human Rights and the international covenants. However, between 1977 and 1979, a constellation of factors came together to provide a backdrop to the revolution. Most Iranians, including the religious minorities, were sympathetic towards the revolution because they saw it as a way of saving the country from the dictatorial conduct of the regime and of gaining more freedom and independence for themselves. In this atmosphere, like that of the 1906 revolution, none of the Muslim groups and religious leaders of the revolution regarded the religious minorities as *dhimmī*; instead, they looked upon them as Iranians who were participating in a nationwide protest to improve their situation.

4 Conclusion

The biographies of the committee members preparing the draft and codifying the laws and regulations, including the Constitution, show that they all belonged to the aristocratic and courtier classes. Most of them were working for the Foreign Ministry and their main concern was the prestige of Iran in the region; there was little room in their thoughts for justice and the rights of the people. Nonetheless, they were unable to withstand the authority of the jurists and they eventually agreed to enshrine Article 2 in the Supplement.

By this act alone, the clerics were able to wipe out all the efforts made by the intelligentsia to improve the rights of the people, including non-Muslims and females. This was because the Constitution and Supplement had acquired a dual nature – the equality of people's rights as enshrined in the "Rights of the Nation", and the inequality of their rights resulting from the *fiqhī* opinions imposed by Article 2. Thus, to sum up, it was as if no alteration had occurred in the legal status of non-Muslims and females.

During the Pahlavi period, debates between the two classes, clerics and intelligentsia, continued throughout the process of codifying the Civil and Penal Codes. A committee responsible for preparing the Civil Code, which was made up of both clerics and lawyers, would simultaneously draw on Shiite *fiqh* and take the rights of all Iranians into consideration. The presence of clerics in decision-making and compiling the Civil Code, however, gave customary, secular regulations a somewhat religious, legitimizing hue. This feature, including the presence of clerics, was absent from the codification of the Penal Code simply because it was translated directly from the French. As Reza Shah continued to expand the process of modernization, the importance of the clergy steadily decreased until, after 1926, they were no longer allowed to attend parliament and the role of the jurists as designated in Article 2 was forgotten. The final observation is that under the Pahlavi dynasty, the status of non-Muslims improved socially rather than legally, for the government did nothing to modify the latter.

In the last decade of the Pahlavi period, various clerics began to reappear on the scene to protest against the rise in modern Western ideas such as secularism and Marxism. The revolutionary clerics, including Ayatollah Khomeini and some members of the religious intelligentsia like Ali Sharīʿatī (d.1356/1977) and Murtḍā Muṭahharī (d.1358/1979), argued that the Shiite branch of Islam had a great capacity to encompass modern ideas and respond to social demands. In their analyses of modernity, however, they only sought to change a few instruments and, intellectually, made no serious contribution to the world. In Chapter 4 we shall see to what extent they were able to understand and encompass modernity, especially the equality of rights for all Iranians.

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The initial *al-* is intentionally ignored from the names. These references do not include encyclopaedia entries introduced in the footnotes for further reading and information.

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CHAPTER 4

The Codification of Laws and Regulations (1979–2020)

1 Introduction

Various theories have been put forward on why the 1979 Revolution succeeded. These include political pressure on the Pahlavi regime to commit to international covenants on human rights; an increase in the secret militant activities of (pseudo-) Marxist groups against the regime; Ayatollah Khomeini's explicit and courageous stand against the shah in 1978 and the important role played by cassette tapes and pamphlets in disseminating his views to the people; the formation of a middle class in Iranian society; the worldwide increase in oil prices and, consequently, the wealth of the state as against growing poverty and inequality; and, finally, the popular belief among Iranians, including non-Shiite Muslims and religious minorities, that the dictatorial manner of the Pahlavi regime was incorrigible and Iran needed a democratic government.[1] People thus participated in protests, relying on the charisma of Ayatollah Khomeini.

In his opposition to the Pahlavi regime, Ayatollah Khomeini introduced political Islam, which, in his opinion, would solve the problems of Iranians living in a Muslim world in the modern era. Initially, he had no intention of changing the regime and had simply asked the shah to accept the 1906 Constitution and its 1907 Supplement to keep his commitment to the independence of the country and to encourage political openness. From 1977, however, the idea of changing the government began to creep into his and other leaders' speeches (see Khomeini 1370/1991: vol. 1, 445–7, 542–4).[2] Gradually, most people started

1 For various theories about the victory of the 1979 Revolution, see Bernard Chery, *The Government of God: Iran's Islamic Republic* (New York: Colombia University Press, 1984); Sādiq Haghighat (ed.) *Six Theories about the Victory of the Islamic Revolution* (Tehran: Al-Hudā, 2000); cf. Humāyūn 1981: esp. 7–33, 48–60, 74–88. Dāryūsh Humāyūn was an influential courtier in the last years of the Pahlavi regime. He was critical of the shah's policies and believed that his failed economic strategies after the massive increases in oil prices and state incomes were responsible for the appearance of an unnecessary revolution. He was appointed minister of information and tourism from 1976 to 1977; see also Jala'īpour 2006: 207–15.

2 See a biography of Ayatollah Khomeini in Baqir Moin, *Khomeini: Life of the Ayatollah* (London: Tauris Publishers, 1999).

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to participate in the protests against the shah and a consensus grew around the inevitable need to change the regime, although it was still unclear what an ideal government would look like.

While very few academic or even non-academic works were produced between 1977 and 1979 that might point to an ideal form of government, whether secular or religious,[3] the Muslim leaders gave an Islamic sanction to people's demands to encourage their broader participation in the demonstrations. Towards the end of the Pahlavi period, Ayatollah Khomeini promised an Islamic government in which everybody, women and non-Muslims, especially religious minorities, would be better off (see Khomeini 1370/1991: vol. 2, 37, 295–6).[4] Responding to some anxieties concerning the Islamic regulations, in an interview with the *Guardian* on 10 Shawwal 1357/1 November 1978 Khomeini (1370/1991: vol. 2, 163–5) stated that:

> The implementation of *ḥudūd* in Islam needs many stipulations … if you consider our situation, you will see that the Islamic code is less violent than the other regulations in the world … the Islamic Republic should not be compared with 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 favourite government.

After this phase, the slogan Independence, Freedom, and Islamic Republic gained increasing popularity at demonstrations.[5] Although no clear explanation had been offered on the nature of an ideal Islamic Republic, 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 were dreaming of and longing for.[6] There is evidence to suggest that nobody, not even Ayatollah Khomeini himself, knew exactly

3 Ayatollah Khomeini's lectures to religious students in Najaf on *wilāyat-i faqīh* (the theory of the political rule of jurists) were published in Arabic in *Kitābu al-bayʿ* [*The Book of Transactions*]. Some of his popular speeches on the theory were later published in Iran in a Persian book under the assumed title *Nāmi-ʾī az al-imām kāshif al-ghiṭaʾ* [*A Letter on Behalf of al-Imam Kāshif al-Ghiṭa*ʾ]. These two books were the only sources to justify the theory. About this figure, see s.v. 'Kāshif al-Ghiṭā'' by Wilferd Madelung in *EI2*.

4 Ayatollah Khomeini repeatedly promised that 'the conditions of life for non-Shiite Muslims and religious minorities in the Islamic government would be better than those which existed during the Pahlavi regime' (Khomeini 1370/1991: vol. 2, 37, 160, 250, 287, 295, 303); 'dictatorship and Islamic government are contradictory,' he added (Khomeini 1370/1991: vol. 2, 103).

5 The motto in Persian is 'Istiqlāl, Āzādī, Jumhūrī-yi Islāmī'.

6 In addition to my own experience of the context, many reports on non-Shiite participation can be found in the newspapers published at the time.

what political parameters would shape the government of the future Islamic Republic. However, the fact that Ayatollah Khomeini went to Qum immediately after the revolution to continue his traditional clerical work before embarking on anything else and strongly believed that clerics should not interfere directly in governmental affairs (Khomeini 1370/1991: vol. 2, 295–6) does at least tell us something about his mindset.

2 The Formation of the 1979 Constitution

In the revolutionary climate of 1978–80, the legal legacy of the previous regime was seen as the heritage of an arrogant despot (*ṭāghūt*), which must be changed.[7] The revolutionaries were determined to change the nature of the laws and, eventually, incorporate them all into an Islamic Shiite legal corpus. The first attempt to prepare a draft constitution began when Ayatollah Khomeini had to leave Iraq and go to France on 6 October 1978. He asked Hassan Ḥabībī (d.2015), a lawyer educated in Paris, who afterwards became a member of the Council of Revolution and, later on, the first deputy of President Akbar Hāshimī Rafsanjānī (r.1989–97), to put together a team to prepare the draft.

The committee, residing in Tehran and nominated by Ḥabībī, consisted of Nāṣir Kātūziyān (d.2014), professor of law at the University of Tehran; ʿAbd al-Karīm Lāhījī (b.1940), a secular professional lawyer, who after the Revolution was accused of apostasy because he opposed the retaliation proposal (*qiṣāṣ*) and had to leave Iran; Muhammad Jaʿfar Langrūdī (b.1922), a clerical lawyer who was professor at the University of Tehran and after the Revolution migrated to England; Fatḥ Allah Banī Ṣadr, a lawyer and brother of Abū al-Hassan Banī Ṣadr (r.1980–1), the first president of the Islamic Republic; and, Nāṣir Mīnāchī (d.2014), who cooperated with the committee for a short time.

Mīnāchī was a close friend of Ali Sharīʿatī and a member of the liberal religious group known as the Liberation Movement of Iran (*Nahḍat-i Āzādī Iran*),[8] which was banned from political activities after the resignation in November 1979 of Mahdi Bāzargān,[9] the movement's leader and first prime minister of the new government. Of the committee members, only Langrūdī

7 Ayatollah Khomeini declared in a general decree that all ratified laws and regulations, and even executive by-laws in courts, offices and municipalities, that contradicted Islam would automatically be abolished (see Khomeini 1370/1991: vol. 5, 234–5). However, hardly anybody understood what was meant by 'automatically' in that decree.

8 On this group, see s.v. 'The Liberation Movement of Iran' by H.E. Chehabi in *EMIW*.

9 On his biography, see s.v. 'Bāzargān, Mahdi' by Ghulām Ali Haddād ʿĀdil in *EWI*; 'Bāzargān' by M. Dorraj in *EMIW*.

had a precedent in *Ḥawza*, the traditional educational seminary. The structure of the proposed draft was very similar to that of the 1907 Supplement. Its model was akin to that of the Constitution of the Fifth Republic of France, which gives more power to the president than the prime minister, and the authors thus gave the power and the rights of the ex-shah to the president.[10]

Ayatollah Khomeini returned to Iran on 1 February 1979 and on 5 February appointed Mahdi Bāzargān (1907–95) as the prime minister of the provisional state. The Council of Revolution, a parallel power to the state, which was already established in Paris, assumed the main policy-making role. It consisted of clerics and intellectuals educated in the new system of education, all appointed by Ayatollah Khomeini. The Council had to endorse the provisional state's decisions.

One of the first controversies between the two arose over the draft constitution because, although both had religious revolutionary attitudes, they were of a different kind. The members of the provisional state and the intellectuals in the Council believed that the realities of the time should be taken into consideration when realizing Islamic norms and principles and that certain Islamic rulings should sometimes be ignored. Another difference was that the former and some of the latter disapproved of the radical actions of the revolutionary guards and courts, a position with which non-revolutionary clergymen and apolitical ayatollahs were greatly sympathetic.[11] In contrast, most clerical members of the Council, who were closer to Ayatollah Khomeini, were opposed to the intellectuals, as well as to the members of the provisional state, and strove to implement all the Islamic rulings manifested in the accepted *fiqhī* opinions of the Shiite jurists. They gradually claimed that the revolution took place basically to implement Islamic rulings and that the people came onto the political scene to realize such an aim. This line of argument was also later incorporated into the Preamble of the final version of the Constitution.[12]

The debates between the intellectuals and revolutionary clergies nominated by Ayatollah Khomeini were similar to those that occurred between Sheikh Faḍl Allah Nūrī and the supporters of constitutionalism in 1906. The main axis around which the debates revolved was the relationship between

10 On the features of the draft, see Kātūziyān 1378/1998: vol. 1, 243–90.

11 One of those who criticized these radical activities after the victory of the revolution was Ayatollah Sayyid Kāẓim Sharīʿatmadārī (d.1986); he was later accused of activities against the Revolution. In 1962, he was one of the *ulama* who confirmed that Ayatollah Khomeini was a *mujtahid* and by announcing their opinions saved Khomeini from the death penalty during the Muhammad Reza Shah period.

12 We will see below the theological preamble of the Constitution. See the original Persian in Appendix 11.

tradition and modernity and most issues, questions, answers, and reactions were similar. This time, however, the clerics were in a better position and had more experience than in 1906.[13]

The process of what the clergymen called the complete implementation of *sharīʿa*, or Islamizing all the laws and regulations, began immediately after the revolution. The very narratives over traditional and modern ideas surrounding the 1906 conflicts re-entered the socio-political arena through a new door. In March 1979, the Council of Revolution announced that the draft, which the committee had prepared and the provisional state had ratified, must be revised in accordance with "the Islamic rules and the principle of freedom". The members of the Council mentioned this criterion many times but never adequately explained what exactly they meant by "the principle of freedom". Nevertheless, the Council revised the text with the main result being that they highlighted one section (Articles 151–6 of the draft) which, like Article 2 of the 1907 Supplement, gave to a group of jurists as an institution the power to cancel each rule that might not be in conformity with "the undisputed Islamic principles" (*usūl-i musallam-i sharʿī*).[14] This superior institution was called the Guardian Council of the Constitution[15] and was based outside parliament. Its main function, theoretically, was akin to that of a supreme court insofar as it protects the constitution against probable acts that might exceed the Assembly's limits. Through some modifications, the draft ironed out certain inconsistencies, especially over the rights of the people.

In May 1979, the revision process came to an end when both the Council of Revolution and Ayatollah Khomeini ratified the draft.[16] Since representatives from a range of different groups had helped to prepare it, this draft contained some amalgamated features, including a democratic face, an emphasis on both republican and Islamic forms of government (Article 4), a division of powers (Article 16), the assertion of the rights of the people (Article 22–47), and the transfer of the shah's power and duties to the president (Article 75,

13 It is clear from Ayatollah Khomeini's support of Sheikh Faḍl Allah Nūrī in the first days after the 1979 Revolution that he more or less knew the details of the history of the Constitutional Revolution (see Khomeini 1370/1991: vol. 8, 489, vol. 10, 336–7, 388–9).

14 The words 'Sacred Rules of Islam' in the 1907 Supplement were changed to 'Undisputed Islamic Principles' in the draft of the 1979 Constitution and then into 'Islamic Norms' in the ratified constitution. The significance of this alteration will be discussed later in this chapter.

15 *Shūrā-yi nigahbān-i qānūn-i asāsī*.

16 This is evidence again that the revolutionary leaders had no definite model or structure in mind for the new government. It is worth noting that certain grand ayatollahs, like Sayyid Muhammad Reza Gulpāygānī, Sayyid Abū al-Qāsim Khūʾī, and Sayyid Kāẓim Sharīʿatmadārī, disagreed with *wilāyat-i faqīh*.

89, 90, 93, 95). The draft also recognized the religions of Zoroastrians, Jews, and Christians and allowed them the same rights before the law as Muslim Iranians, which entitled them to observe their rites and customs in the realm of personal status (Article 24). More importantly, it excluded articles based on the rulings of jurists or *wilāyat-i faqīh* (see original Persian of the draft in Kātūzīyān 1378/1998: vol. 1, 197–228). A number of articles had a rather tenuous association with the constitution, such as those covering the administration of radio and television and the provision of free education for people at all levels. It also contained articles that had found their way into the draft via some Marxist inclinations, which suggested a lack of respect for and unwillingness to protect private ownership.

It was then the people's turn to declare their agreement with the constitution, and high-ranking members of the government turned their attention to the question of how to organize this. One suggestion was first to publish the final version in the media and give everybody two months in which to record their opinions. The next stage would involve a group of experts acting for Ayatollah Khomeini evaluating the proposed opinions, before the people would be invited to agree to a final version through a referendum. Had this solution, which is attributed to Ayatollah Khomeini and Akbar Hāshimī Rafsanjānī (d.1395/2017), been accepted, the subsequent events would not have happened and the Constitution of the Islamic Republic would have been approved without the jurists' rulings. Another suggestion, which according to one of the Ayatollah Khomeini's speeches, came from Mahdi Bāzargān and Abū al-Hassan Banī Ṣadr (d.2021), was to set up a *majlis*, to be called the Constituent Assembly, to evaluate and ratify the draft.[17]

Following intense debate, in June 1979 the Council of Revolution decided to hold a referendum to establish a *majlis* of seventy-three designated individuals, including four representatives of the religious minorities. It was called the *Majlis-i barrisī naha'ī qānūn-i asāsī* (Assembly for the Final Revision of the Constitution) – henceforth FRC Assembly – and its task was to evaluate the final version of the constitution, after which the people could register their agreement in yet another referendum. Although Ayatollah Khomeini had ordered his deputies to accomplish their task within a month, through unforeseen circumstances, which I explain below, it actually took almost three months of sixty-seven intense meetings lasting from 19 August to 15 November 1979 and, during this period, the FRC Assembly unexpectedly changed some of the

17 Ayatollah Khomeini promised to establish such a *majlis* on 1 February 1979 (see Khomeini 1370/1991: vol. 3, 204).

contents. From a summary of their discussions, it has become evident that, by enshrining extra provisions and articles, they created an entirely new Islamic Shiite constitution.

The overall political system of the new regime was rather unstable while the FRC Assembly was busy revising the draft. On the one hand, ethnic riots broke out in different regions, such as Kurdistan in the northwest and Baluchistan in the southeast, with the ethnic minorities wanting autonomy from the central government. On the other hand, while the leftists, namely Marxist groups of various ideological persuasions, were insisting on their ambiguous idealistic fantasies, the Islamic groups led by clerics were reacting to them in one voice, firmly demanding the implementation of Islamic norms and the acceleration of the Islamization process. Debates between the provisional state and the Council of Revolution came to a head over various issues, including policy-making, interference from Revolutionary Guards and revolutionary courts, and the FRC Assembly's methods of evaluating the draft constitution. There was even a dispute over the name of the new regime, with the provisional state calling it the "Islamic Democratic Republic" and the Council of Revolution and Ayatollah Khomeini "the Islamic Republic". The provisional state and some advocates of equal rights before the law wanted to dispense with the FRC Assembly altogether, but they could not counter the influential power of Ayatollah Khomeini, so their efforts came to nothing.

In the midst of such unstable conditions, a group of radical students, who later became "reformists", occupied the American Embassy in Tehran (November 1979) and sixty-six Americans were taken hostage. They were protesting over US interference in the internal affairs of Iran and the US decision to accept the shah for medical treatment. One aim of these students was to exert pressure on the provisional state and they were successful in this regard, for the interim state immediately resigned. The FRC Assembly finally accomplished its mission and a referendum was held on 2 and 3 December 1979. According to official reports, 79 per cent of those who were entitled to vote participated in the referendum and 99.5 per cent of these voters approved of the new constitution.

2.1 *Analysis on the Members of* the *FRC* Assembly

It was noted earlier that the modifications the FRC Assembly made were more extensive than expected, so below I provide a brief analysis of those who were influential either for or against the suggested alterations. It was natural that in such a revolutionary climate and in the light of Ayatollah Khomeini's recommendations to the people that two-thirds of the chosen representatives would

be clerics, considered to be reliable experts in the eyes of the people, while the rest had more or less religious views.[18] We can categorize the representatives into three groups: (1) a group of traditional conservative clerics who constituted the majority and officially attended the FRC Assembly without either playing an important role or contributing much to the discussions, but almost always taking their lead from the second group; (2) a group mostly affiliated to the Islamic Republican Party,[19] and managed by Ayatollah Muhammad Bihishtī (1928–81);[20] they were planning the details of the ideal constitution outside the FRC Assembly and had the most effective role in its codification; (3) a group that opposed some of the second group's positions, which might cautiously be called "the opponents"; they were in the minority and the prevailing climate prevented them from expressing their legal and political ideas, if indeed they had any.[21] It is possible to uncover the role of the latter two groups through the proceedings, published in 1364/1985 (see *Mudhākirāt* 1364/1985 in References).

The members of the FRC Assembly were elected by Iranians participating from all provinces, except the non-Muslim representatives, who were elected only by their respective coreligionists. The method of electing non-Muslim representatives was the same as that practised in the preceding twenty-three periods of the parliament from 1909 to 1979. Non-Muslim Iranians chose the following in this election – Sirgin Bayt Ūshānā and Harāyir Khālātīyān as the representatives of the Christians; ʿAzīz Dānish-i Rād as the representative of the Jews; and, Mūbad Rustam Shahzādī as the representative of the Zoroastrians. Of them the Zoroastrian deputy was more active, followed by the Jewish one. While the former was in his speeches concerned with the rights of the religious minorities, the latter, who had great sympathy with the Islamic revolution, gave three speeches mostly concerning the loyalty of Iranian Jews to Ayatollah Khomeini, emphasizing the idea of separation between Zionism

18 Ayatollah Khomeini argued that the people should select representatives who have Islamic knowledge since they would prepare the Islamic constitution. He added, "since God has sent down the Islamic regulations for us, the Western and Westernized scholars are not entitled to give their opinion regarding the laws" (see Khomeini 1370/1991: vol. 4, 431–2).

19 On the role of this party after the revolution, see s.v. 'Islamic Republican Party' by E. Sanasarian in *OEMIW*.

20 In addition to Bihishtī, the group consisted of Hassan Āyat, Sayyid Ali Khamenei, Muhammad Jawād Bāhunar, and Hussein Ali Muntaẓirī. The deputies elected Muntaẓirī as the official speaker of the assembly but Bihishtī actually directed most of the sessions.

21 The following can be found in this group – Nāṣir Makārim-i Shīrāzī, Abū al-Hassan Banī Ṣadr, ʿIzzat Allah Saḥābī, Raḥmat Allah Muqaddam Marāghi'ī, Mīr Murād Zihī, and Rustam Mūbad-i Shahzādī.

and Judaism, which was already mentioned by Ayatollah Khomeini (see *Mudhākirāt* 1364/1985: vol. 1, 488–90, 722). Besides the four non-Muslim deputies, there were also two active representatives from the Sunni community – Mulawī ʿAbd al-ʿAzīz and Ḥamīd Allah Mīr Murād Zihī, both from Baluchistan province.[22]

Two further points deserve mention here. The FRC Assembly had only one female deputy, Munīrih Gurjī, who was a preacher and member of the Islamic Republican Party. Although she gave only one brief confusing speech, it showed where she stood and how some narrow-minded religious groups were able to distort the aims of the 1979 Revolution. She said that "since Iranian women have not been educated adequately, they have not been entitled to occupy high political positions such as the presidency" (*Mudhākirāt* 1364/1985: vol. 1, 190–1). On the other hand, a famous cleric in the FRC Assembly, Sayyid Maḥmūd Ṭāliqānī (1910–79), who had long been an opponent of the Pahlavi regime and had been imprisoned for a lengthy period, was isolated in the assembly for his open-minded pluralistic opinions. Unfortunately, he died in mid-September 1979 after taking part in fourteen sessions.[23]

2.2 *The Form, Content, and Method of* the *FRC* Assembly

The members of the FRC Assembly at first rejected the executive by-law that the provisional state had prepared and set up a committee to codify a new one. The assembly had received the provisional state's draft consisting of 160 articles in 12 chapters, but some representatives, most of whom supported the Islamic Republican Party, initially wanted to ignore it and, instead, replace it with a new one containing additional sections that would focus more on "the rule of the jurist" (see *Mudhākirāt* 1364/1985: vol. 1, 179–81). However, that suggestion gained insufficient support and, as a result, the draft underwent substantial revision. The predominant opinion of most deputies was that various parts of the draft needed to be much more Islamic in tone. There is ample evidence of this claim in Ayatollah Khomeini's inauguration message to the assembly and in his subsequent speeches. He explicitly rejected the idea of using Western terms to codify the constitution and asked the representatives to rely wholly on Islamic concepts (see *Mudhākirāt* 1364/1985: vol. 1, 6–7). Ayatollah Sayyid Ali Khamenei's main objection to the provisional state's draft was that (*ibid.* 1364/1985: vol. 1, 54–5):

22 The Sunni representative, ʿAbdu Al-Raḥmān Qāsimlū, who was elected from Kurdistan, never attended the FRC Assembly because of his position against Muslim groups and clerics.

23 See his biography in s.v. 'Ṭāleqānī, Maḥmūd' by H.E. Chehabi in *OEMIW*.

> It is full of Western terms such as democracy and the division of powers … they have Greek origin … 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 case the conduct of government may lead to dictatorship but we have the jurist ruler who is in the position of God's deputy and such a ruler cannot naturally be a dictator.

Three steps were taken to achieve the aim of Islamizing the Constitution: (a) creating a new institution in the constitution, viz., the rule of the jurist;[24] (b) expanding the supervisory role of the Guardian Council; and, (c) enshrining the proviso "in the realm of Islamic norms" (*mawāzīn-i islāmī*) in several articles in the section on the rights of the nation. It is believed that three figures, Muhammad Bihishtī, Hassan Āyat, and Hussein Ali Muntaẓirī, had key roles in suggesting and establishing the new institution of the Rule of the Jurist in the Constitution. Since this is not directly relevant to our discussion, only the two other steps will be evaluated.

The contents of Article 2 in the 1907 Supplement simply affirmed that at least five jurists were needed to oversee the ratified laws to ensure that they did not contradict the Sacred Rules of Islam. Ambiguity about the number of jurists, their placement, and the nature of overseeing the events, as well as events following 1907, all stood in the way of establishing the institution at the time. But the new format of the article in the 1979 Constitution (now Article 4) explains that "this principle applies absolutely and generally to all articles of the Constitution and to all other laws and regulations."[25] Then, Articles 91–9 explicitly expanded the powers of the jurists by granting them the right to interpret the Constitution rather than just simply oversee it. According to these articles, the Guardian Council is composed of six jurists appointed by the leader, and six lawyers who are first introduced to the National Parliament by the Judiciary Branch and then chosen by the deputies of the Parliament (Article 91). In accordance with Article 96, a vote by the majority of jurists determines the

24 See *Mudhākirāt* 1364/1985: vol. 1, 375–81, vol. 3, 1092–3, 1114–19; on the rule of the jurists, see s.v. 'Wilāyat al-Faqīh' by Roy Mottahedeh in *EIr*; Ājudānī 1382/2003: 73–96.

25 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 Islamic Consultative Parliament's research centre. See Anon 1387/2008. It is notable that the translation of this part of Article 4 is inaccurate. A more precise translation may read, "the generality and non-specificity of this article is superior to all articles of the Constitution and to all other laws and regulations."

compatibility of the ratified laws with Islamic norms, but determining the compatibility of the ratified laws with the Constitution requires the majority vote of all council members.

The Guardian Council was given broad discretion to ensure that all laws and regulations in the field of social affairs remained distinctively Islamic in tone, yet without making the religious source of their decisions too obvious. This is because all rulings in the field of social affairs have to be ratified under the *fiqhī* opinions of the jurist members of the Guardian Council, who are in turn appointed by the supreme leader. Thus, when people go to places such as insurance companies, courts, banks, the stock exchange, and so forth, they have to comply with governmental laws ratified by the National Parliament and Guardian Council, rather than the rulings of the supreme legal authority. The significant change here was that a modern legislative body, a combination of parliament and the Guardian Council, had now supplanted the supreme legal authority or sources of emulation. Of course, non-governmental jurists, whether they are sources of emulation or not, have their own *fiqhī* opinions on acts of devotion (*ʿibādāt*) and social transactions (*muʿāmalāt*), but their social *fiqhī* opinions might be used as a theoretical basis for the Guardian Council and are not considered official regulations for the people. Jurists sympathetic to the government are naturally expected to understand the implications of the time and to change their narrow-minded opinions into more rational ones. We will see that ten years after the 1979 Revolution, while the jurists of the Guardian Council were insisting on their literal understanding of the Islamic texts and were unwilling to adjust their opinions appropriately, the conditions compelled Ayatollah Khomeini to create a new institution, the Expediency Council, to solve the legal problems and to codify more appropriate rulings.

To conclude, it may be argued that, after passing through the above three steps, the final version of the Constitution was more Islamic Shiite than its authors had originally intended. After all, in 1979 the global and domestic socio-political climate was such that the members of the FRC Assembly had no option but to produce a modern constitution using contemporary terms such as formal democracy, elections, the division of powers, the rights of the nation, and a system of councils. The final version of the Constitution was approved first by sixty-one representatives of the FRC Assembly, then by Ayatollah Khomeini, and finally by the people through a referendum held on 3 December 1979. Thus, Iran had forged a unique political and legal instrument that contained both traditional and modern features. In the discussions below, we shall become more aware of the relationship between these traditional and modern aspects and the government's double standards.

2.3 *Textual Analyses*

The 1979 Constitution contains 175 articles in twelve chapters. Chapter 1 (Articles 1–14) covers definitions of the new government, of the official religion, of other recognized religions, and of the institution of leadership. It also emphasizes the need to ensure that the contents of all laws and regulations conform to Islamic norms, and the role of the people in determining the fate of the country. Chapter 2 (Articles 15–18) contains definitions of the language, alphabet, calendar, and flag. Chapter 3 (Articles 19–42) deals with the rights of the nation. Chapter 4 (Articles 43–55) is about economic policy and financial affairs. Chapters 5, 6, 9, and 11 deal with the division of powers and the duties of the respective power holders. Chapter 7 (Articles 100–6) outlines the duties of the city and provincial councils. Chapter 8 (Articles 107–12) concerns the election of the leader and his duties. Chapter 10 (Articles 152–5) outlines the foreign policy. Chapter 12 (Article 175) deals with the management of the government's radio and television station. The articles in Chapters 1 and 3, which are directly related to the present study, will be analysed here.[26]

2.3.1 General Principles

The text begins with a Preamble, which, the authors stress, is not part of the Constitution. It explains the ideology and basic principles of the revolution and simply shows the revolutionary zeal of the Iranians in the 1980s to establish a new regime. In the Preamble, and also in the proceedings, the frequency of the term *maktabī* (literally of the school), referring to the school of thought of political Islam vis-à-vis other Eastern or Western schools, as well as apolitical Islam, suggests that the revolutionary leaders were influenced by and reacting to a Marxist discourse. In much the same way as the evaluation of every leftist idea and attitude was based on the rules of the party, the evaluations of modern concepts such as institutions and cultures were subjected to the legal and theological principles of the Shiite school before being accepted into the Islamic Republic.[27] Principles that, according to the ahistorical view of the revolutionary leaders, were perennial and permanent were not to be modified save in a case of dire necessity (*ḍarūra*).

The Islamic Republic's form of government is defined in Article 1. Adding unnecessary information to the text, the article asserts that this form of

26 See the articles relevant to our discussion in Appendix 11.

27 See *Mudhākirāt* 1364/1985: vol. 1, 376–81 for representatives' discussions on Ayatollah Muhammad Bihishtī's intention to defend the theory of the rule of the jurist. On the other hand, pseudo-Marxist terms also frequently crop up in the speeches of Abū al-Hassan Banī Ṣadr, his rival in the first presidential election, and Jalāl al-Dīn Fārsī, a member of the Islamic Republican Party. Both tried to blend Marxist terms and ideas with Islamic ones.

government is endorsed by the Iranians, who chose it "on the basis of their longstanding belief in the sovereignty of truth and Quranic justice in the referendum of 29 and 30 March 1979 through the affirmative vote of a majority of 98.2 per cent of the eligible voters." Accordingly, the legitimacy of the government is derived from the people's votes but on the assumption that they are seeking a form that can be understood through the Quran and Sunna.[28] Article 1 prepares the ground for Article 5, which reads:

> during the Occultation of *walīī ʿaṣr* (may God hasten his reappearance) [the Hidden Imam], the leadership of the *umma* devolves upon the just and pious person [the 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.[29]

According to one interpretation of the Shiite doctrines, part of which is illustrated in Article 5, it is assumed that God has already defined the form of government and the fate of the people by choosing imams and then *ulama*, especially jurists, as their successors. A crucial question may thus arise over how it is possible to justify the people's role alongside that of the imams or their successors in according legitimacy and popularity to the state. Finding an answer to this question is beyond the scope of this study. However, one can conclude that if God has already made His decision on the form of government then He should have also ordained the inferior status of non-Muslims in Muslim societies. The prevailing understanding among the jurists suggests that He has indeed already done so.

Article 1 of the 1979 Constitution, like the 1907 Supplement, implicitly points out that Islam in its Twelver Shiite Jaʿfarī denomination is the official religion and Article 12 explicitly repeats and adds that "this principle will remain eternally immutable". Sunni representatives in the FRC Assembly, especially Mulawī ʿAbd al-ʿAzīz, insisted on Islam without any additional attribution being mentioned in Article 12 as the official religion. In this way, they argued, it would keep the unity of Iranians and the Constitution could be presented as a model to other Muslim countries. He added that, "if the attribution *Shiite* is mentioned, it would result in limiting the Revolution to Iran." On the other hand, their opponents argued that the term 'official religion' was intentionally

28 The proviso "Sunna" is added in Article 3, Clause 6a.

29 Again, the English translation of the Constitution is not so precise. The brackets here and below are mine.

mentioned to indicate the Shiite school of thought as the source of legal matters, and if "Islam" were mentioned without any attribution, it would lead to disunity and disorder in the codification of laws and regulations. Some radical Shiite clerics, also insisted on inserting the attribution "righteous" or "orthodox" (*haqqa*), juxtaposing *Jaʿfarī*, as is mentioned in the 1907 Constitution as well as in the draft offered by the provisional state (see Anon 1364/1985: vol. 1, 459–63).[30] After discussions, Article 12 was finally approved in a form that first mentioned "Shiite" without the attribution "orthodox" as the official religion, and second recognized other Islamic schools – Ḥanafīyya, Shāfiʿīyya, Mālikīyya, Ḥanbalīyya,[31] and Zaydīyya – 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.[32] These schools enjoy official status in matters pertaining to religious education, affairs of 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,[33] 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 further point about Article 12 regards the names of the other schools. First, it is unclear why the authors selected Zaydīsm among the Shiite schools and ignored other Shiite denominations such as Shiite *Ismāʿīlī* and Shiite *Ahl al-ḥaqq*, which have more followers in Iran than Shiite Zaydī, and second why they conjoined Zaydīsm and the schools of *ahl al-Sunna*. In the proceedings of the discussions, there is no justification for these.

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30 The argument was presented by Mulawī ʿAbdu al-ʿAzīz, a Sunni representative of Baluchistan. Sheikh Murtaḍā Ḥaʾirī, the Shiite clergy who opposed this suggestion, left the FRC Assembly when the deputies ignored his proposal, enshrining the designation *ḥaqqa* in juxtaposition to *Jaʿfarī*.

31 Here, I quote the sequence of these schools according to the text of the Constitution, but it seems that this sequence has no logical justification. This is because they are historically in this order: Ḥanafīyya, Mālikīyya, Shāfiʿīyya, and Ḥanbalīyya. A possible justification for the above formal sequence may be that the first two have more followers in Iran.

32 Surprisingly, in the English version of the Constitution, the translator and/or those who were in charge omitted the names of the other schools and simply stated "other Islamic Schools".

33 Such as Kurdistan in northwest, Turkamanṣaḥrā in northeast, and Baluchistan in southeast, where these schools constitute the majority.

In Article 13, only the Zoroastrians, Jews, and Christians are mentioned as recognized religious minorities. By mentioning these three communities, the authors of the 1979 draft pursued the very regulation remaining from the 1909 Electoral Law in the second Parliament to the end of the Pahlavi period. As already noted in Chapter 3, religious minorities were not defined in the 1907 Supplement but the members of the FRC Assembly recognized only these faiths, following the *fiqhī* opinions of the Shiite jurists. They argued that the majority of jurists, both *Sunni* and *Shīʿa*, believed that the term the People of the Book includes only the Zoroastrians, Jews, and Christians. In the 27 Shahrīwar 1358/18 September 1979 session, while the deputies were discussing Article 13, some of the Ṣābiʾīn attended the FRC Assembly and asked to be recognized. Ayatollah Nāṣir Makārim-i Shīrāzī, a member of the assembly, giving a brief report on behalf of the committee inquiring into the identity of the Ṣābiʾīn, said (*Mudhākirāt* 1364/1985: vol. 1, 493–4):

> According to the Islamic sources, they are a subdivision of the Jews or Christians, or both.... I have heard that they introduce themselves as Jews in some regions. Thus, to make them satisfied, we can include them in the Constitution under the Jews or Christians; otherwise, we may draft an independent article which deals, broadly speaking, with the legal status of non-Muslims in the Islamic Republic, if we are going to deal with them fairly.

This report, in fact, added no more information on the Ṣābiʾīn than had already been mentioned in the jurists' early works. In its last version, Article 13 was approved without mentioning Ṣābiʾīn.[34] A further point about this article concerns the atmosphere in which the FRC Assembly was discussing the legal status of the religious minorities, for a controversial discussion broke out between non-Muslim and Muslim deputies, especially those leading the Assembly, about the stipulation "within the limits of the law" in Article 13. The main debate referred to the third step in the process of Islamizing all articles. In the process, even though Article 4 guaranteed that the laws would be approved in accordance with the Islamic norms (*mawāzīn-i islāmī*), some deputies insisted on repeating the stipulation "the Islamic norms" in certain articles, including Article 13. Rejecting the suggestion, Rustam Shahzādī, the

34 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 status and religious education." See the original Persian in Appendix II.

Zoroastrian deputy, argued that, by adding this stipulation, the Assembly was going to consider non-Muslims as *dhimmī*, who had an inferior status in *fiqhī* opinions. He nervously added (*Mudhākirāt* 1364/1985: vol. 3, 1529–32):

> But we are the Iranians who have joined the Revolution, supported Ayatollah Khomeini against the Shah, and voted for the Islamic Republic. But while we discuss the Constitution article thirteen, we see some fanatic approaches to us … some deputies think that we are *dhimmīs* who were opposing Muslims, who were until yesterday bearing weapons then taking refuge and asking the Caliph to support them. You must not repeat the historical events…. If you take a look at the Indian Republic, where the Muslims are minorities, a Muslim can receive a high position even the presidency.

He then gave some examples for his claim that the Muslim representatives had no intention of saying, like "you are going to impose on us the Islamic rituals such as prayer and fast." The speaker, Bihishtī, tried to explain what the representatives meant by "the Islamic norms". He ambiguously answered, "we mean by 'the Islamic norms and rulings' what is mentioned in the official codified law…. We hope the experience of living under the Islamic government will show that the minorities are not on a warpath and they do not have to perform their rituals like Muslims." After the discussions, Article 13, referring to the freedom of non-Muslims in their rituals and personal status, was finalized with the ambiguous phrase "within the limits of the law", not "the Islamic norms".

However, it seems that Shahzādī, despite giving irrelevant examples, curiously predicted the legal future of non-Muslims in the Islamic Republic. He was entitled to object to the content of the stipulation "the Islamic norms", since the law-makers later approved an article that gave judges the right to refer to *fiqhī* opinions in certain cases. This is Article 167, which states, "the judge is bound to endeavour to judge each case on the basis of the codified law. In any case of the absence of law, he has to deliver his judgment on the basis of the authoritative Islamic sources and authentic *fatawā* [*fiqhī* opinions]." As we shall see, for the first ten years after the 1979 Revolution, when the criminal code had yet to be codified, judges were referring to the *fiqhī* opinions of Ayatollah Khomeini, which are similar to those of the other jurists insofar as they look upon religious minorities as *dhimmīs*.

During discussions about Article 13, the non-Muslim deputies made two requests, neither of which was finally accepted. First, they asked for a change of title from "minority" (*aqallīyat*) to "community" (*jāmiʿa*). They were arguing that they were all Iranians with a long history who had lived in a brotherly

fashion and in peace with their Muslim compatriots and the term minority was pejorative and humiliating. Recalling the religious minorities' feelings about what Ayatollah Khomeini had promised in Paris about their future rights in the Islamic Republic, namely that all of them would have equal rights with Muslims, Bayt Ūshānā, a Christian Armenian deputy, argued that they were all are Iranians with a long precedence and it was his Iranian ancestors who from their mother tongue translated great Aramaic and Syriac philosophical and scientific works for the Muslims during the eighth and ninth centuries. He emphasized that they must be treated as Iranians. The opponents of this request believed that the term "minority", in contrast with "majority", just referred to a measure of the population though it was true that they were Iranians who had equal rights before the law.[35]

Second, they proposed a modified version of Article 13, containing an additional phrase, "under governmental support, they are entitled to form religious ethnic [communal] councils and to teach their culture and language." This request was also rejected. The opponents were indeed dividing it into two parts, answering each respectively: their freedom to practise religious rites and their freedom in social activities. It was argued that the former was mentioned in Article 13 and the latter would be considered among the rights of the nation, where the freedom of activities of all parties, communities, religious societies, and so forth, would be mentioned in Article 26 (see Anon 1364/1985: vol. 1, 473–4, 483–6, 493–500).[36]

The last point here concerns the general legal status of non-Muslims in the Islamic Republic. As noted in Chapter 1, according to certain hadiths and *fiqhī* opinions of *Shiite* and *Sunnite* jurists, the adherents of other religions save Zoroastrians, Jews, and Christians, whether belonging to the great historical religions such as Hinduism or Buddhism or to new religious movements like

35 One of the main opponents was Abū al-Hassan Banī Ṣadr, who became the first president of the Islamic Republic. When one of the representatives suggested applying the phrase "religious non-Islamic communities", 'Azīz Dānish-i Rād, a Jewish deputy, said, "I would not like the designation *non-Islamic* because we believe in what is mentioned in the Constitution, while looking for freedom to practice our personal status" (see *Mudhākirāt* 1364/1985: vol. 1, 473–4).

36 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 Islamic criteria, 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 (previously, Article 31 of the first draft; see Kātūzīyān 1378/1998: vol. 1, 203), the religious minorities were not mentioned in the text and were added in the final version as the deputies had promised.

Bābī and Bahā'ī, or whether converted from Islam, are regarded as "infidels", who are not considered *dhimmīs*. Theoretically, these infidels have no rights whatsoever in *dār al-Islām* (Muslim territories) and are faced with only two options – death or conversion to Islam. Under the circumstances of the modern world, however, the law-makers did not follow these *fiqhī* opinions and ignored them.[37] The enactors, theoretically speaking, respected the followers of other religions in Article 14 and relied on explicit verses of the Quran (such as Q, 2:83; 60:8), which proposed using good manners when speaking to others. The members of the FRC Assembly paid no attention to the interpreters of the Quran and the majority of jurists believed that Q, 9:29 abrogated these verses.[38] Instead, they offered a draft of Article 14, advocating a pluralistic attitude towards non-Muslims. It had a particular structure since law-makers, quite unusually, stated their argument in the text of the article. One can rarely find any reference or argument in other articles. The final version reads:

> 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 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 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.

This article provides all non-Muslims with enough room to live safely in Iranian society. Theoretically, however, there is an ambiguity around the phrase "conspiracy or activity against Islam and [the] Islamic Republic". Since it is not a legally-defined offence, there is a chance that non-Muslims might find themselves suspected of being engaged in such an activity, or even of having their beliefs interpreted as conspiratorial and thus as acting against the interests of Islam. Apart from this ambiguity, all non-Muslims, including the followers of new religious movements, are according to the article free to pursue their

37 The stance taken by the codifiers is subject to question, needing further evaluation. The policy of *ignoring/forgetting* some early legal opinions will be discussed and highlighted in Chapter 5.

38 Q, 9:29 reads: "Fight against such of those who have been given the Scripture (*al-kitāb*) 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." In Chapter 1, I discussed the meaning of *al-kitāb* in this verse and how the verse could abrogate those that advocated good treatment of others.

beliefs. Nevertheless, over the last four decades, this ambiguity in Article 14, combined with other political factors, has led to instances of violence and discrimination against Iranian non-Muslims, especially in the Azalī and Bahā'ī communities. It is worth mentioning that, to the best of my knowledge, Ayatollah Hussein Ali Muntaẓirī (d.2009) is the only Muslim jurist to have issued in the last years of his life a judicial decree recognizing the citizenship and civil rights of non-Muslims in Islamic countries, despite their religions being recognized in neither the Constitution nor *fiqhī* opinions.[39]

2.3.2 The Rights of the Nation

The third chapter in the 1979 Constitution, 'The Rights of the Nation', was partially lifted from the 1907 Supplement. The rights of the nation and equality before the law are two elements of modernity enshrined in the Constitution. The terms "nation" vis-à-vis "imitating people" (*raʿyat*) and "right" vis-à-vis "duty" are generally used in the text to respect the dignity of human beings in the modern world. This usage has no precedent in the Shiite conceptual framework because the chapter contains articles that explicitly confirm rights for everyone, non-Muslims included. These include the indisputable right of every citizen to seek justice through recourse to competent courts;[40] the right to select an attorney in every court;[41] the right to choose one's own employment[42] and housing in every place;[43] and the right to participate in determining one's political, economic, social, and cultural destiny.[44] The chapter also contains a section on respecting people's privacy.[45] In addition, Article 3, which expounds on the duties of government, orders it to at least try to realize "the abolition of all forms of undesirable discrimination and the provision of equal opportunities for all in both the material and intellectual spheres", as well as "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."[46]

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39 The full text of the original decree, which is based on Q, 60:8 as well as the Universal Declaration of Human Rights is retrieved from https://kadivar.com/8284/.

40 Article 34.

41 Article 35.

42 Article 28.

43 Article 31.

44 Article 3, proviso 8.

45 Article 25 reads: "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 wilful failure to transmit them and all forms of covert investigation are forbidden, except as provided by law."

46 Article 3, proviso 7, 9, 14, and 15.

Going through these articles, one can find the modern concepts in a new context explicitly enshrined in the body of law. There is no reference to *fiqhī* opinions or traditions attributed to Shiite imams or to what the caliphs did in the early centuries. However, the law-makers intended to show the audience and the readers that new conceptual teachings with regard to the equality of all peoples, for example, had existed in Shiite Islam. To this end, they mentioned the references to the Quran and Sunna for each part and sometimes for each article in the Constitution's appendix. Thus, the references cited on equality of people before the law are one verse from the Quran (49:13) and one hadith attributed to the Prophet Muhammad, highlighting social justice, and indicating that there is no superiority of men over women, Arabs over non-Arabs, and whites over blacks, save according to piety (*taqwā*).[47]

It has been claimed that all modern teachings, like those in the Universal Declaration of Human Rights, are included in the Islamic teachings. In the legal context, especially in the declaration, this claim seems to ignore the developmental history of the new legal discourse and, consequently, the new laws and their different epistemological bases, especially after the two world wars. Furthermore, had the claim been really true, more effort could have been put into justifying extant legal discriminations between men and women, or Muslims and non-Muslims, in the Islamic rulings.

Here, I am not going to evaluate the claim, but we are faced with a paradoxical teaching in the hadith attributed to the Prohpet; the part that determines piety as a criterion or basis for superiority violates the part that indicates equality for all. This is because piety is not a concrete entity that automatically bestows superiority on either those who claim it or those who are really pious. As a possible consequence, the non-objective claim of piety can be abused socially and politically and even ideologically. Thus, the yardstick of *taqwā*, or piety, could violate that of equality before the law. Piety would be an acceptable subjective criterion for believers if it were considered alongside that of superiority before God, as the Quran asserts,[48] but not before the law.

The principle of freedom (*aṣl-i āzādī*) in the Constitution is considered necessary if one is to improve the rights of the nation. Respect for non-Muslim opinions (Article 14), the prohibition of inquisition (Article 23),[49] and an

47 Quoted in the canonical texts of the Sunnite and Shiite schools, compiled after the third/ninth century. The law-makers, however, non-methodically referred to Muhammad b. Ahmad al-Qurṭubī al-Anṣārī (d.671/1272) (see Qurṭubī al-Anṣārī 1985: vol. 16, 342).

48 Q, 49:13.

49 Article 23 in the Constitution is akin to part of Article 18 in the International Covenant on Civil and Political Rights. It reads, "everyone shall have the right to freedom of thought, conscience and religion." However, the second part of Article 18 is omitted from Article 23;

emphasis on freedom and independence (Article 9) are instances of what the law-makers enacted under this principle.[50] The freedom of the press and the right to protest against government policies are authorized, provided they are not detrimental to the fundamental principles of Islam.[51] The executive and juridical branches of the government should guarantee and protect legal freedom for all.[52] To sum up, according to these articles and especially Articles 13 and 14, we can see that the 1979 Constitution provides more rights and freedoms to people, including non-Muslims, than the 1907 Supplement. The comparison, however, has another aspect, for there are ambiguous terms and conditions that make the Constitution more contradictory than the corpus of the laws enacted between 1907 and 1979. In addition, some articles in the later Islamic Penal Code contradict the above-mentioned rights and freedoms. An explanation of these ambiguities may pave the way to a better understanding of the legal status of non-Muslims in the Islamic Republic.

Ambiguities over the rights of non-Muslims in the 1979 Constitution can be seen in the following cases: confusingly, Article 19 considers all people, including every tribe or ethnic group, equal before the law. This article is apparently a partial duplicate of Article 2 of the Universal Declaration of Human Rights in that it asserts that certain characteristics such as "colour, race, language and the like (*mānand īnhā*) do not bestow any privilege".[53] The ambiguity arises from the words "the like", for three unique properties are explicitly mentioned but it is unknown whether or not that includes religion. It is obvious that the law-makers, totally aware of the *fiqhī* opinions, knew the legal implications of inserting the word "religion" in the text. During the session when this article was being discussed, Rustam Shahzādī asked the speaker about the ambiguity

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this part states that "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."

50 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."

51 See Articles 24, 26 and 27. Take also the ambiguity of the phase "detrimental to the fundamental principles of Islam" into consideration.

52 See Article 3 proviso 7 and Article 156 proviso 2, respectively.

53 See the original Persian in Appendix 11.

of "the like", but Muhammad Bihishtī cleverly replied: "we have already discussed religion but here we intend to negate the privilege of characteristics [such as] colour, race, etc. which come from geography" (see *Mudhākirāt* 1364/1985: vol. 1, 690).

There is another ambiguity in Article 20. While it points out that all citizens have equal access to the enjoyment and protection of the law, it adds the condition "in conformity with Islamic norms".[54] If the stipulation "Islamic norms" is reduced to *fiqhī* current opinions, the article would become contradictory since, in accordance with the Islamic Shiite jurisprudence, the rights of Muslims and non-Muslims are not equal. Thus, the first part of the article affirms equal rights while the stipulation at the end negates them. In this relation, Hussein Mihrpour, a member of the Guardian Council for about ten years, justified the ambiguity by saying that

> the vague stipulation *Islamic norms* is tantamount to such ambiguous stipulations[55] as *protection of national security*, *of public order*, and *of public health/morality*, or *the rights and freedoms of others*, applied in the text to limit the unrestricted freedom found in the Universal Declaration and its Covenants.

He added that in every country the rulers may understand and interpret the stipulations in accordance with their own interests (see Mihrpour 1383/2003: 367–95, esp. 385–7). His argument, however, should be treated with caution because, although it is true that every rule may be abused and it is also true that the stipulation "Islamic norms" includes "public health/morality" and so on, the stipulations in *fiqhī* opinions on non-Muslims have no permanent or reliable justification, unlike those of the Universal Declaration that do have a rationally acceptable justification in common understanding.

Another ambiguity concerns Article 26, which permits the formation of parties, societies, and associations for Muslims and recognized religious minorities, but not for non-Muslims in general. This condition stands in contrast to others like Article 23, which definitely legalizes free activities for all citizens and forbids inquisition.

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54 Article 20 states that "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 the Islamic norms." See also the original Persian in Appendix II.

55 See, as an example, Article 12 proviso 3 of the International Covenant on Civil and Political Rights.

The great structural paradox in this part of the Constitution is its justification of the legality of the ruler or government in the Islamic Republic. On the one hand, it is the people who, by referenda, give the government legitimacy and, on the other hand, as the theory of the political rule of the jurists instructs, the office of leadership is granted to the jurist by virtue of general succession to the Hidden Imam in the period of the Occultation. To this end, there is a specific institution, the Assembly of Experts, consisting of competent jurists chosen by the people to choose the supreme leader (see Articles 107 and 108). In the Constitution, the position of the leader or Leadership Council is higher than that of the three branches of government. Arguments are put forward to solve the paradox, but the subject per se is beyond the scope of this study.

2.4 *Terminology*

The first encounter of traditional Shiite opinion with modernity in 1906 led to the appearance in the Constitution of certain modern concepts and terms, which, given their popularity, the leaders of the 1979 Revolution were unable to ignore. In the second phase of encountering modernity, the religious leaders suggested reconsidering and revising these terms and concepts with a view to bringing them more in line with Islamic teachings. To this end, the legislators put forward some new terms, which are the central focus of this study here.

2.4.1 The Rule of the Jurist (*wilāyat-i faqīh*)

As already mentioned, the rule (or sovereignty) of the jurist entered the Constitution very soon after the victory of the Revolution,[56] with Ayatollah Khomeini's popularity and charisma compared with other sources of emulation ensuring its rapid acceptance. Even the few deputies in the FRC Assembly who opposed it, like Abū al-Hassan Banī Ṣadr and Raḥmatullāh Muqaddam-i Marāghi'ī, supported Ayatollah Khomeini's leadership in principle but argued that the theory might encounter problems after his death.

The "rule of the jurist" has a long history in Islamic law. Under its original meaning – *walīī* (ally) – it was limited to legal cases in which individuals lacked guardianship or protection, such as orphans (*yatīm*), lunatics (*majnūn*), the insane (*safīh*), the destitute (*muflis*), and minors (*ṣaghīr*). In addition, the term

56 I could not find the term in any of Ayatollah Khomeini's speeches or interviews in France although, as we have seen, he explicitly insisted on its guiding role in the Revolution (see, as an example, Khomeini 1370/1991: vol. 2, 295–6). The term and position of leader entered the socio-political arena after the debates on the draft had taken place in the FRC Assembly. Later, Ayatollah Khomeini (1370/1991: vol. 5, 523) agreed to enshrine the rule of the jurist in the constitution and called it "one of the best articles of the Constitution and a gift of God".

walīī has found a further meaning in Sufi terminology, which is based on the assumption that every disciple seeking spirituality in a general sense, or seeking God in the Islamic sense, needs to be allied to a master (*pīr* or *walīī*). It is believed that this master or *walīī* will guide an individual in the right direction because he has already found his way to God and has seen the inner aspects of the world in which that person abides.

Ayatollah Khomeini, who had studied jurisprudence and practised mysticism, integrated the two meanings of the term *walīī*, to give it a political as well as a spiritual dimension. He relied on certain hadiths, which are contextually stated in the field of legal affairs and judgment.[57] He then defended the expansion of the power of jurists from pure legal cases into socio-political realms with a view to leading people to their felicity (Khomeini 1410/1989: vol. 3, 125–38). The argument was never taken seriously in the seminary contexts of Qum and Najaf and has always had serious opponents, both before and after the Revolution. Also, the intellectuals never vociferously objected to the theory during 1978 and 1979.

The term *wilāyat-i amr wa imāmat-i ummat* (literally the guardianship of the Muslim community and leadership of its affairs), applied in Articles 5, 107, and 109 of the Constitution, refers to the position, role, and duties of the leader. It implies the legal and mystical aspects of the term. On the one hand, the term *wilāyat* signifies the legal rule or sovereignty of the jurist, that is an ally for those without protection, but on the other, it has a mystical connotation and conveys the authority and superiority of the master because of his spiritual state. *Amr* literally means affair, implying in certain legal contexts the affairs

57 The main hadith that Ayatollah Khomeini used in his argument was related by ʿUmar b. Ḥanẓala, which reads as follows. "Concerning two of our companions who are involved in a dispute over debt or inheritance and seek judgment before a sultan or *Qāḍī* [judge], I asked Abū ʿAbd Allah Jaʿfar b. Muhammad [The Sixth Imam] 'Is this legal?' The Imam answered, 'Whoever seeks judgment from the *ṭāqūt* (i.e., the tyrant or the cruel) and obtains judgment receives only abomination, even if his claim is valid, because he has accepted the decision of the tyrant. God has commanded that such a one be considered an unbeliever (*kāfir*).' 'Umar b. Ḥanẓala asked, 'What should they do?' The Imam answered, 'Look to one of your number who relates our hadiths, observes our lawful (*ḥalāl*) and our unlawful (*ḥarām*), and knows our decrees. Accept his judgment, for I have made him *ḥākim* over you. If he gives a decision in accordance with our decisions and the litigant does not accept the judgment, then verily this denial is contempt for the ruling of God and rejection of us, and he who rejects us rejects God and is subject to the penalty for getting partners to God (*ʿalā hadd-i al-shirk*)" (Kulaynī 1388/1968: vol. 7, 412). Ayatollah Khomeini emphasized the term *ḥākim* and interpreted it in the political sense as the ruler, not the judge. For more elaboration on and criticism of this theory, see Calder 1982: 39–58.

of individuals who lack guardianship or protection, and in mystical contexts the affairs of people who enjoy the spirituality and superiority of the master. When the Constitution's text was being prepared, the word *amr* was expanded in meaning to include all general legal subjects and individual affairs. *Imāmat-i ummat* is synonymous with *wilāyat amr* and refers to a Shiite theological rule known as *qā'ida luṭf* (the rule of grace), which implies that God by virtue of His grace never leaves the community without religious guidance. Consequently, in the period of the Occultation, the jurists are general successors (*nuwwāb-i 'ām*) of the Hidden Imam and their role is to guide the community in all affairs, including political ones. The role of the people is simply to imitate their *fiqhī* opinions. Recognizing both certain modern elements and the Shiite institution *wilāyat-i faqīh*, the legislators thought that they could Islamize the Constitution and, at the same time, make an accommodation between tradition and modernity.

2.4.2 The Islamic Republic

This term, used in Article 1, shows the form of government. In their discussions, the codifiers did not offer a precise definition of the republic and its democratic form of government. The question of what the codifiers intended by the designation "Islamic republic" is still unresolved. However, from the leaders' subsequent discussions and from the government's actions in the years after the Revolution, it might be said that the usage was compatible with what Ayatollah Bihishtī, head of the Islamic Republican Party, defined as the "superiority of the school of Islam". He explained that each and every modern term and concept can only be accepted if it conforms to "Islamic norms". Accordingly, the people's vote is worth regarding as long as the outcome complies with Islamic norms. In this framework, the leader and jurists of the Guardian Council assume responsibility for deciding whether the results are compatible with Islamic norms. In sum, it is the vote of a group of particular believers that defines the term, determines its destiny, and maintains the form of government. This conclusion was gradually crystallized in the utterances of the leaders and certain theologians as interpreting the term "democracy" to mean "the will of religious people" (*mardum-sālārī-yi dīnī*). In other words, democracy, which has various definitions and models, was condensed into using formal devices such as elections, parliament, councils, and so on to define a new model of government called the Islamic Republic. It is worth mentioning that Articles 5 and 107–11 determine the status of leadership in such a democracy, and give the leader an authority beyond that of the three branches of the government.

2.4.3 The Islamic Norms

In the draft version of Article 4 (that is Article 78 of the draft), prepared by the provisional state, it was mentioned that "all rules must be ratified with complete consideration of the undisputed Islamic principles (*usūl-i musallam-i shar'ī*)". The term replaced that of "the Sacred Rules of Islam", which had been used in the 1907 Constitution. Some deputies in the FRC Assembly argued that the draft article in that form was ambiguous because in the event of a conflict between the two sets of laws, Islamic and international, the legislature had to consider and act on both versions. They believed that some laws ratified later in the assembly might have no basis or grounds in the Islamic sources, thus making it impossible to ensure that they remained consistent with undisputed Islamic principles. To solve the problem they thus proposed to change "undisputed Islamic principles" to "Islamic norms" (*mawāzīn-i islāmī*). According to the advocates of this proposal, the term does not mean that the laws and regulations have to be based on or derived from the Quran and Sunna, but it does mean "that they should be in conformity with the general framework of Islam, though not necessarily derived" from it. They argued that applying the term would provide an appropriate way of understanding the norms hermeneutically in any future case that might require interpretation (*Mudhākirāt* 1364/1985: vol. 1, 314–21).[58] The opponents believed that all laws and regulations should be based on and taken precisely from the Quran and Sunna, for these sources were imbued with answers to all needs and requests of human beings (*ibid.* 1364/1985: vol. 1, 318, 350).[59]

I believe that the change of term resulted from the experiences and lessons that the Shiite jurists had learnt from modernity. The best evidence for this claim is that the members of the FRC Assembly were familiar with the rudimentary concept of the Sacred Rules of Islam, which were prevalent in the debates of the 1907 National Parliament. However, the speaker and the group managing the Assembly were aware that, first, the application of certain Islamic rulings was inappropriate for modern times, and second, that some Islamic rulings could restrict the attainment of fairer laws. In addition, while

58 The well-known adherents of this idea were Ayatollah Muntaẓirī, Ayatollah Bihishtī, and Ayatollah Sayyid Hassan Ṭāhirī Khurram-ābādī. Among them, Bihishtī had an effective role in approving the article. Unlike most deputies, he knew that it would be impossible to say that all regulations needed by the country had already existed in the Quran and Sunna.

59 Hassan Āyat and Sheikh Murtḍā Ḥa'irī were in the rank of opponents. According to their suggestion, the Assembly finally added the following to the text of Article 4 to comply more with the 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 adjective "sacred" implicitly suggested that the rules of Islam would never be subject to question or change, this substitution provided a greater capacity to interpret and perhaps to change or even ignore some *fiqhī* opinions in accordance with the demands of the time.

The position of non-Muslim deputies in the process of substituting the term is worth mentioning. They approved the substitution because they believed that the term "Islamic norms" implied justice for all and that the decision of the deputies could guarantee the interests of all Iranians (*Mudhākirāt* 1364/1985: vol. 1, 326–32).

It was asserted in the draft (Articles 151–6) that a body, the Guardian Council of the Constitution, would be responsible for ensuring that the laws and regulations conformed to Islamic norms. Accordingly, this body would remain outside and above the parliament. The FRC Assembly ratified these articles and in addition made the institution more authoritative than a supreme court, which would only be brought into play in the event of a conflict. Over the last forty-two years, the Guardian Council has steadily been reducing the meaning of "Islamic norms" to fit its own *fiqhī* opinions, despite the original intent of the codifiers, who open-mindedly ratified the term in a wider sense.[60] I cannot find a case of the Guardian Council having rejected a law for being incompatible with "justice", an "Islamic norm", or "reason", one of the main sources in Islamic law.

2.4.4 The Recognized Communities

The Zoroastrians, Jews, and Christians, the followers of four official Sunni schools, and the followers of certain Shiite denominations, like Zaydī and Ismāʿīlī, are recognized. The legal status of these groups is defined in Articles 12, 13, and 14. Though Shiite Twelver is introduced in Article 1 as the official religion, it may be argued that recognizing the other communities in the Constitution is a great step towards pluralism in Iranian society. As already stated, certain deputies suggested adding the designation *madhhab-i ḥaqqa* (literally orthodox) to *Twelver Shīʿīsm* in Article 1, just like Article 1 of the 1907 Supplement. The codifiers, mostly clerics, had no theoretical basis for a pluralistic viewpoint, but for utilitarian reasons and because of the revolutionary atmosphere of 1979 they agreed to recognize these communities and their rights. In fact,

60 One piece of evidence is that when they were asked what they meant by "conformity", the jurists of the Guardian Council answered that the term meant lack of contradiction between the ratified laws and the rules of *sharīʿa* in accordance with their own *fiqhī* opinions and recognition, not necessarily meaning that all ratified laws should be taken from Islamic sources (see *Mudhākirāt* 1365/1986: 345–6).

they needed all Iranians to be united against their enemies. Iranian Ṣābiʾīn are not recognized in the Islamic Republic. The Bahaʾī community among non-Muslims is also not recognized but is regarded as heresy in the Shiite school.

2.4.5 The Expediency Council

By insisting on applying Islamic Shiite rulings to different realms, the Islamic Republic encountered practical and legal difficulties in its internal and international relations. The first problems to appear were legal in nature, but then further ones gradually surfaced in the political, social, and even theological arenas. The religious leaders of the 1979 Revolution, like the clerical ones of the 1906 revolution, at first thought that all solutions to modern legal problems could be found in the Islamic legal sources. The Shiite clerics had enormous confidence in the capacity of *fiqh* to deliver their needs and, in the first years after the 1979 Revolution, it informed all the discourses of the Guardian Council.

On the other hand, the Parliament and state sought to find solutions to legal issues and relations through a secular understanding of humanity and through the rational methods that other countries had already adopted. These laws and regulations sometimes opposed Islamic law or the Constitution as the Guardian Council understood it. Again, the Guardian Council sometimes rejected the more flexible rules and regulations that the state needed if it was to be more active, such as those pertaining to labour, employment, and insurance, even if the parliament or cabinet had already ratified them. On several occasions, Ayatollah Khomeini accused the Guardian Council of using narrow-minded methods to judge legal subjects, irrespective of the *zamān* (time), *makān* (place), or context, but the Guardian Council was legally entitled to hold on to its initial opinions.

Ayatollah Khomeini resolved some cases directly by issuing his own *fiqhī* opinions, which were then regarded as secondary rulings (*aḥkām thānawīyya*). Since secondary rulings in Islamic law are limited to cases of dire necessity (*ḍarūra*) or public interest (*maṣlaḥa*), and because the leader could not be expected to recognize each and every case, he assigned that responsibility to the votes of two-thirds of the deputies of the National Consultative Parliament. However, it was usually difficult to convince the deputies of the existence of a necessity or public interest and, in any case, authenticating such a need took time and the state could not wait for the Parliament to undergo such a long process. On 17 Bahman 1366/5 February 1987, Ayatollah Khomeini finally established a new body, the Expediency Council, to recognize the feasibility of the system (*majmaʿ-i tashkhīṣ-i maṣlaḥat-i niẓām*), and to resolve any conflicts arising between the National Parliament and Guardian Council. It comprised the

jurist members of the Guardian Council, the heads of the three powers, some deputies from the National Parliament, ministers directly involved with the given issue, and some experts (in total twenty-five people). To legitimize the council, the functions and duties of the Expediency Council were enshrined in an amendment to the constitution two years later.[61]

The formation of the Expediency Council accelerated the process of rationalization or, as I would like to call it, the secularization (*ʿurfī sāzī*) of laws and regulations. For the first time, the Shiite school accepted cases in which governmental jurists officially had to commit themselves to considering rational arguments and social contexts instead of merely quoting evidence from the Quran and Sunna. It is true that, in legal theory (*uṣūl-i fiqh*), reason (*ʿaql*), as the power to recognize what is good and what is evil, is considered to be a resource with which to understand and interpret the scriptures and to issue relevant rulings, but no Shiite jurist had indeed applied "reason" as an independent resource.[62] In jurisprudence, the Shiite jurists relied on reason as a means of reconciling apparent contradictions between the Quran and Sunna, or among the discrepancies, if any, in either of these references. In addition, the terms *ḍarūra* (necessity) and *maṣlaḥa* (expediency) in Shiite jurisprudence were mostly being applied in cases of individual affairs or in those of what is now included in a branch of private law. The Islamic Republic recognizes these terms in the context of social affairs and public law, but needs to formulate the corresponding logic and method of applying them at governmental level. In the Shiite school, unlike the Sunnite schools, such a methodology has no significant precedents or records. As the Shiite school represented a minority and an opposition, especially in the early centuries, the element of public expediency (*maṣlaḥat-i ʿāmmah*) lacked much history in Shiite jurisprudential literature and has played no significant role in deducing *fiqhī* opinions on governmental affairs (see Stewart 1998: 160 ff.; cf. Hallaq 1984: 679–89).

Over the last three decades, the decisions of the Expediency Council have gradually become more secular and more appropriate for all Iranians,

61 The additional Article 112 of the 1989 Constitution reads as follows. "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 Parliament to be against the principles of *sharīʿa* or the Constitution and the Parliament 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 appointed by the Leader. (3) The rule for [by-laws of] the Council shall be formulated and approved by the Council members [and are] subject to the confirmation by the Leader."

62 See some functions of reason in Shiite legal theory in Anṣārī 1419/1998: vol. 2, 54–9, vol. 3, 17–25, 318–19.

including religious minorities, than those of the Shiite jurists, the Guardian Council included. In what follows, we shall see the Expediency Council modifying some laws and regulations in favour of the religious minorities in connection with the civil and penal codes, and with certain regulations about social activities. The Expediency Council's attitude, which one might call utilitarian, has helped to set in motion a process in which Shiite *fiqh* gradually became secularized. The term secularization, which has different meanings, is used here in the sociological sense of giving priority to matters of the world rather than to those of the hereafter. The term, according to Max Weber, means the rationalization of social affairs and regulations irrespective of the beliefs of individuals.

2.5 *The Amendments to the Constitution*

In 1989, after ten years of constitutional rule, the Islamic Republic and Ayatollah Khomeini became aware of certain shortcomings in need of quick fixes. One of these was the presence in the Constitution of multiple councils. This had come about because in the revolutionary atmosphere of the time, the codifiers were eager to remove signs of dictatorship and to prevent the accumulation of powers in one office. To this end, they enshrined a number of councils in the Constitution, such as the Supreme Council for the Judiciary Branch, the Council for the Management of the Radio and Television Organization, and the Leadership Council, the latter being composed of sources of emulation in the event of there being no single qualified leader available. In practice, however, multiple councils seemed to be creating administrative obstacles rather than providing a convenient structure for the Islamic Republic. This and several other shortcomings led to the idea of amendments. The proposed ones were to expand the power of the president and leader, to replace the councils with a centralizing power, to legitimize the Expediency Council, to change the name of the National Parliament into the Islamic Consultative Parliament, and, most important of all, to replace the term "the source of emulation" in the article defining the Leadership Council with that of "jurist".

In the last days of his life, on 24 Urdībihisht 1368/14 May 1989, Ayatollah Khomeini issued a decree to establish a council to amend the Constitution in two months' time. The new council was to consist of twenty-five people – Ayatollah Khomeini himself appointed twenty, including the jurists of the Guardian Council and the heads of three branches; and the National Parliament selected five deputies. The scope of this council's activities, known as the Council of Amendments to the Constitution (*shuwrā-yi bāznigarī-yi qānūn-i asāsī*), henceforth the CAC Council, was also determined. As far as our study is concerned, there are a few points worth noting, one being the qualifications of the leader and his power (Articles 109 and 110). Despite Article 107, which

indicates that "the Leader is equal with the rest of the people of the country before the law", the term *wilāyat-i faqīh* or "the rule of the jurist" was changed into *wilāyat-i muṭlaqi-yi faqīh* or "the absolute rule of the jurist" in Article 57 to express the dominance of the leadership over the three branches and even over the Constitution per se. During the process of amendement, Ayatollah Khomeini died on 14 Khurdād 1368/3 June 1989 and the new leader, Ayatollah Sayyid Ali Khamenei was, according to the Constitution, "allegedly" elected. Afterwards, the new leader ratified the new constitution and the amendment was approved in a referendum on 8 Murdād 1368/30 July 1989.

According to Article 64, the number of representatives on the Islamic Consultative Parliament "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 Article 64, it was predicted that one deputy for every 150,000 people would be added for each ten-year increase in the population. If the article had not been modified, the number of deputies would have been doubled after ten years. Regarding the non-Muslim deputies, the situation was the focal point of attention for the CAC Council. The number of these deputies would be increased after each ten-year period according to the previous version, but the number is fixed according to the new amendment, where the article reads, "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" (see *CAC Council* 1369/1990: 423–6, 430).

A brief discussion also ensued on the names Assyrian and Chaldean. At first, the deputies of the CAC Council thought that they were one and the same thing and intended to omit the latter. Then, after talks with followers and adversaries alike, some representatives argued that the term Chaldean referred to four churches in Iran and Assyrian denoted the ethnic identity of certain Iranians and Iraqis, Chaldeans included; consequently, the latter could be omitted. A further point by the Assyrian deputy of the National Parliament clarified that Chaldeans were a very important part of the Assyrians so they preferred to retain the title in the article (see *CAC Council* 1369/1990: 758–61, 1570–2).

3 The Penal Code

A few days after the victory of the Revolution, the Council of Revolution abrogated the Penal Code (1304/1925), which it regarded as contrary to Islamic rulings. The Penal Procedure Code was also completely removed from the

judiciary office. Lacking an alternative, the judges, who were mostly clerics at the time and had practised *fiqh*, not law, were entitled to rely on well-known *fiqhī* opinions according to Article 167 of the Constitution. The courts in the Islamic Republic thus became purely religious when it came to investigating civil and criminal claims, unlike in the Qajar and first Pahlavi eras when they were divided into *ʿurfī* (common or customary) and *sharʿī* (religious), and unlike the second Pahlavi era when they were completely common. Often, the main reference for the judges of the Islamic Republic was the jurisprudential work of Ayatollah Khomeini *taḥrīr al-wasīla*, which was written in Arabic and in *fatwā* style, versus a rational analytical one, and was very much akin to Sheikh Ṭūsī's opinions. Therefore, in every case related to non-Muslims in general and to religious minorities in particular, the judges based their injunctions on the opinions we have already seen in Chapter 1. In addition, the judges failed to distinguish between *fiqh* and law and between sin and crime. They thought that every sinner was a criminal, hence deserving punishment. As a consequence, the sentences of the courts were inevitably inconsistent since every judge was entitled to refer to his own favourite *fiqhī* works to issue his injunction.

Almost three years after the Revolution, on 21 Tīr 1361/12 July 1982, the Commission for Judicial Affairs in the first National Parliament proposed certain articles as the Penal Code. These articles were in the organized translated form of *fiqhī* opinions that had come from various jurisprudential Arabic works, especially from *Taḥrīr al-wasīla*. The commission approved a corpus in the fields of *ḥudūd* and *qiṣāṣ* in 218 articles, known as Chapters 1 and 2 of the Islamic Penal Code (IPC).[63] Since it was believed that Islamic criminal rulings were sent down by God, the corpus was provisionally ratified by the parliament without considering the commonsense, the general understanding of criminal acts, and the social demands of the time, to be tested for a period of five years.

The code was expanded in the field of *dīyāt*, comprising Chapter 3 of the IPC in 210 articles, which the Parliament provisionally ratified on 24 Ādhar 1361/15 December 1982. Between 1982 and 1991, the only reference the judges had in criminal cases was this very corpus, with minor alterations during the period, henceforth IPC-v1982.[64] After the first five-year period, the application of the corpus was extended for five more years. On 18 July 1991, the Parliament and Guardian Council ratified the new Islamic penal code in 497 articles and

63 These chapters on *ḥudūd* and *qiṣāṣ* were translated into English by Ali Reza Naqavi in Islamabad, Pakistan, in 1986. Here I have used the English version with some revision. See References at end of chapter.

64 The Islamic Penal Code, 1982 version.

103 provisos, which included *ḥudūd*, *qiṣāṣ*, *dīyāt*, *taʿzīrāt*, and *mujāzāthā-yi bāzdārandih* (preventive penalties).[65]

The new reorganized version, henceforth IPC-v1991,[66] included more chapters from the 1304/1925 Penal Code and its subsequent amendments and from the experiences gained over the preceding eleven years. The next version, ratified on 2 Khurdād 1375/23 May 1995, henceforth IPC-v1995,[67] included 233 additional articles and 44 provisos in some chapters on tort law and preventive penalties, with a few revised articles, 730 articles in total. Between 1995 and 2012, every five years the Parliament extended the validity of the IPC to be tested for five more years. The final version, henceforth IPC-v2013,[68] ratified on 11 Ṣafar 1392 or 1 April 2013 and approved by the Guardian Council, includes 728 articles and is still valid for five years. Unfortunately, the codifiers of this version changed the sequence of the articles. In the following discussion, since it is impossible to show the reader the amendments and developments under the old numbers, I have to refer to new numbers of the articles independently.

Now it seems pertinent to take a chronological look at the content of the IPC 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 state accepted in 1948 and 1968 respectively, and which the National Parliament ratified in 1972.[69] Because the Islamic Republic has offered inadequate legal justifications for the application of the IPC, the Human Rights Committee (HRC) in the UN has several times accused and condemned Iran for violating human rights. Although containing various penalties, the code nonetheless allows discrimination against women and non-Muslims. Unfortunately, every legal criticism of these discriminations by a few intellectuals is reduced to political debates and consequently leads to socio-political controls being imposed on the critic.

The tone of the articles in the IPC gradually found generality and came to include all Iranians.[70] A positive aspect for non-Muslims in some chapters of

65 The definitions of these terms will come. See the relevant articles in Appendix II.

66 The Islamic Penal Code, 1991 version.

67 The Islamic Penal Code, 1995 version.

68 The Islamic Penal Code, 2013 version.

69 Of 25 international conventions, Iran accepted seven in the Pahlavi period and three in the Islamic Republic on genocide, racial discrimination, children's rights, and apartheid in sports. However, the Islamic Republic did not accept the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty (ratified by the UN in 1989). See Mihrpūr 1383/2003: 407–17.

70 Article 3 of the Islamic Penal Code in all versions states: "The Penal Code applies to all the persons who commit an offence within the territorial jurisdiction of the Islamic Republic of Iran."

the code, especially Chapter 5 (IPC-v1991, and IPC-v1995), on preventive penalties (*mujāzāthā-yi bāzdārandih*) is that no hint could be discerned of their application to different faiths. However, the various versions were ratified on the assumption that those governed by the code were all Iranian Muslims. Thus, non-Muslims would have to refer to the Islamic courts for criminal claims and accept their injunctions according to current *fiqhī* opinions. So, when an article sets out the size of penalties for stealing, committing adultery, drinking intoxicating beverages, or not wearing the Islamic veil, the code has presupposed that the agent is a Muslim and has determined the punishment accordingly, irrespective of the defendant's faith. The two last examples here are to illustrate that these acts may not be regarded as crimes in other faiths. In Chapters 1 to 3 of the IPC, especially its first three versions, a few articles on *ḥudūd*, *qiṣāṣ*, and *dīyāt* distinguish between Muslims and non-Muslims. We will see that the religious minorities are regarded as *dhimmīs* in these articles. This is the point that Rustam Shahzādī, the Zoroastrian deputy, made in the FRC Assembly. In what follows, I briefly discuss the various forms of discrimination.

Let us begin with the definitions of the three terms *ḥudūd*, *qiṣāṣ*, and *dīyāt* in all versions of the IPC. According to Article 13 (in IPC-v1982, IPC-v1991, and IPC-v1995), *ḥadd* (plural *ḥudūd*) is the penalty that *sharīʿa* has prescribed and that judges are not entitled to change or reduce.[71] The term *taʿzīr* (plural *taʿzīrāt*), on the other hand, is applied to a kind of penalty that *sharīʿa* has prescribed but it is left to the discretion of the judge to determine its nature and amount; examples are imprisonment, pecuniary punishments, and fewer than 75 lashes – the minimum amount of *ḥadd*.[72] In IPC-v2013, the Article 18 definition of *taʿzīr* assigned decisions on the nature and amount of the punishment to the law rather than to the judges. It ordains that the courts should look at the family situation, the histories of the people committing the crimes, and the likely impact of the punishment on them. On *qiṣāṣ*, Article 14 (Article 16 in IPC-v2013) states that "retaliation is the penalty to which the offender is sentenced, and the amount should be equivalent to his offense." There are two kinds of retaliation – *qiṣāṣ* in the form of taking a life or *qiṣāṣ* in the form of taking a part of the human body. As the distinction between Muslims and non-Muslims in the IPC is limited to *qiṣāṣ* on a life, the second kind of *qiṣāṣ* is not explained here. The third, *dīya* (plural *dīyāt*), is monetary compensation prescribed by *sharīʿa* for an intentional offence for which no retaliation is requested or for an unintentional offence to human life, to vital parts of body,

71 See Articles 15 and 219 in IPC-v2013.

72 See Article 16.

or to some significant individual capabilities (Article 15 in the first three versions; and Article 18 in IPC-v2013).

Now we can explore discrimination in the application of the three abovementioned punishments, starting with *ḥudūd*. Under particular conditions and in certain cases, the IPC will issue a death sentence for *zinā* (illegal sexual intercourse), especially if it occurs between a non-Muslim man and a Muslim woman whether married (namely in a state of *iḥṣān*)[73] or not.[74] However, if it is committed by a Muslim man with a non-Muslim woman, he receives one hundred lashes provided he is not in a state of *iḥṣān*.[75] The text of the code is unclear on whether a Muslim man in the state of *iḥṣān* who commits *zinā* with a non-Muslim woman receives the death penalty or one hundred lashes.[76] The other discriminatory punishment is over mutual masturbation or similar acts between males. Article 121 (Article 236 in IPC-v2013) and its proviso states that:

> 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.

However, according to the proviso of Article 130 (see Articles 238 and 240 in IPC-v2013), one hundred lashes is the *ḥadd* for lesbians irrespective of whether they are Muslim or non-Muslim. There is further discrimination over the *ḥudūd* for drinking alcoholic beverages. The *ḥadd* here is eighty lashes for any man or woman, irrespective of their differences in faith or reasons for consuming alcohol, which might be for the purposes of entertaining or a ritual ceremony, and irrespective of whether or not the consumption of alcohol caused drunken behaviour or led to social disorder. However, according to the proviso of Article 174 (Articles 265 and 266 in IPC-v2013), "a non-Muslim shall be sentenced to eighty lashes only when he is convicted of drinking alcoholic beverages in public." After the revolution, religious minorities became entitled to drink in their own clubs or restaurants, but had to prevent Muslims from joining them.

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73 The term *iḥṣān* means that the perpetrator is already married and can thus enjoy legal sex whenever he or she wishes.

74 See Article 82 in IPC-v1982, IPC-v1991, and IPC-v1995 (Article 224 in IPC-v2013).

75 Articles 83 and 88. According to Article 83, execution should be realized by stoning (*rajm*). See Articles 225 and 226 in IPC-v2013. See also the original Persian in Appendix II.

76 See Article 82; cf. Articles 224 and 225 of IPC-v2013.

One last point about *ḥudūd* concerns the problematic nature of death sentences in the IPC. Punishing people who convert to other religions or who abandon religion altogether – with a death sentence for a male Muslim apostate (*murtad*) and life imprisonment for a female Muslim one – is rooted in *fiqhī* opinions. However, since the definition of the term and the punishment associated with it are absent from the three early versions of the IPC, conversion is not therefore considered a crime by law. Nonetheless, on the basis of one interpretation of Article 167 of the constitution,[77] courts in the Islamic Republic have regarded it as a crime and have in some cases issued the death sentence. Following debates about whether the legislature intended to include criminal claims in Article 167, or merely confine it to legal ones, the codifiers of the last version of Article 220 (IPC-v2013) allowed judges to refer to *fiqhī* opinions in the absence of any ratified punishment. The enshrinement shows that first the codifiers failed to understand the difference between *law* and *fiqh*, and second that Article 220 of IPC-v2013 contradicts Article 36 of the constitution,[78] which confines execution to law, and again it contradicts Article 2 of IPC-v2013, which states that the crime is an action or an omission for which the punishment is determined by law. Therefore, we have here an ambiguous interpretation of the term law.

There is also discrimination against non-Muslims in the IPC over the right to retaliate. According to Article 207 of the three early versions, "whenever a Muslim is killed in an intentional murder (*qatl-i ʿamdī*), the murderer shall be liable to *qiṣāṣ* and his accessory shall bear the pain of imprisonment for three to fifteen years." The stipulation "Muslim" in this article denies non-Muslims the right to retaliate in cases where the murderer is a Muslim and the victim a non-Muslim. In such cases, the victim's heir (*walīī dam*) is only entitled to receive *dīya*. The stipulation restricts the right to retaliate to cases in which both the murderer and the victim are non-Muslims. The point is explicitly asserted in Article 210, which states that "whenever an infidel *dhimmī* intentionally murders another infidel *dhimmī*, he shall be liable to *qiṣāṣ*, even though they may be the followers of two different faiths." In the last version (IPC-v2013), the

77 Article 167 asserts that: "the judge is bound to endeavour 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 *fatawa*. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment."

78 Article 36 reads: "the passing and execution of a sentence must be only by a competent court and in accordance with law."

contents of Articles 207 and 210 are retained, but reworked into Article 310 with two provisos, which state that:

> Whenever a non-Muslim, from every faith, commits an intentional crime against a Muslim, a *dhimmī*, and a *musta'min* or a *mu'āhid* (one who has a contract with the Islamic government), the right to retaliate is affirmed for the heir of the victim but if a Muslim, a *dhimmī*, or a *musta'min* commits an offence against a non-Muslim, the offender shall not be liable to retaliation. In such cases, the offender receives the punishment which is defined by law in the chapter of *ta'zīrāt*.

Accordingly, the term "non-Muslim" is problematic in the new version because the intention of the legislature is unclear. On the one hand, according to the article, victimized non-Muslims who are unrecognized in the Constitution, like Ṣābi'īn and Bahā'is, still have no right of retaliation. On the other hand, the first proviso of the same article states that non-Muslim Iranians who are not *dhimmī* and non-Iranians who legally travel to Iran are regarded as *musta'min* and have the right to retaliate. Nobody therefore remains under the heading "non-Muslim". In the second proviso, the legislature enshrined a *fiqhī* opinion in the code, which we have seen in Chapter 1; accordingly, when the victim and the murderer are non-Muslims but the latter converts to Islam before retaliation, the right of the victim's heir to retaliate is negated and the murderer must both pay the blood money and receive a punishment. This is again another form of discrimination against non-Muslims.

A further point to be emphasized here is that, despite the atmosphere that existed in the first days of the 1979 Revolution, the legislature explicitly regarded the members of Iranian recognized religious minorities as *dhimmīs*. From what I have deduced from the documents, the non-Muslim representatives in the National Consultative Parliament (later the Islamic Consultative Parliament) amazingly never protested against ratifying the article with the attribution *dhimmī* in their discussions on the IPC. Another point worth noting concerns the sequel of the article (Article 210 in earlier versions and Article 382 in the last one), which states that "if the murdered [person] happens to be a woman, her heir shall pay half [the] *dīya* of a male *dhimmī* to the murderer before the execution of *qiṣāṣ*." Since this Islamic ruling, which determines a Muslim woman's *dīya* in accordance with current *fiqhī* opinions, is generalized to include the followers of other faiths as well, this is the best evidence of the legislature assuming that all subjects are Iranian Muslims. The last point here concerns one way of proving intentional murder (*qatl-i 'amdī*). According

to Article 237, "an intentional murder may be proved through the testimony of two men of reputed integrity (*mard-i ʿādil*) while an unintentional murder may be proved through the testimony of either two men or one man and two women of reputed integrity."[79] Although the term "of reputed integrity" (*ʿādil*) in the earlier versions of the IPC and the term "faith" (*īmān*) in the last one are undefined, what is meant by these terms in *fiqhī* opinions is tantamount to pious or believer. There is still serious doubt over whether or not the term *ʿādil* covers pious believers in other faiths.

Now let us turn to the third area of discrimination in the IPC – blood money or *dīya*. The first and second versions of the code (IPC-v1982, Article 3; IPC-v1991, Article 297) specified only the amount of *dīya* for a Muslim man and were silent on the required amount for non-Muslims. This meant that the amounts of *dīya* for Muslims and non-Muslims were unequal. In practice, between 1979 and 2002, judges sometimes issued their injunctions in accordance with *fiqhī* opinions and sometimes with the amount specified by the judiciary branch of the government. During this period, there were many cases of inequality involving non-Muslims, especially of homicides by misadventure (*qatl-i khaṭāʾī*), as in driving accidents. Ridiculously, in driving accidents, the insurance companies would establish the religion of the victim before paying the blood money, thus using *sharīʿa* to discriminate against non-Muslim victims. Human rights activists and non-Muslim representatives in the National Parliament protested against this injunction and tried to reform it.

However, following a proposal that the judiciary branch of the government submitted to the Parliament (a proviso to Article 297, ratified in 2002), the law left the determination of the amount of *dīya* to the decree of the supreme leader (*ḥukm-i walīī amr*), and in this case only for recognized religious minorities and not for all non-Muslims. The Article adds, "the courts must give their injunctions with respect to this decree, the gender of the victim, the time of the crime, and other conditions." The article still remains ambiguous about the amount. In addition, it is unknown how the decree should be implemented, whether the courts should ask the leader in every case or if the leader should issue his opinion in general. Because the content of this article was clearly out of line with extant *fiqhī* opinions, the Parliament passed the problem on to the Expediency Council to determine the amount. On 6 Diy 1382/24 December 2002 the council added the second proviso to Article 297 stating that "according to the governmental injunction (*ḥukm-i ḥukūmatī*) [not a *fiqhī* opinion] of *walīī*

79 Cf. Articles 177, 181, and 199 in IPC-v2013.

amr [Ayatollah Sayyid Ali Khamenei], the amounts of *dīya* for Muslims and for the recognized religious minorities in the Constitution are equal."[80]

There has been a development on the amount of blood money, which deserves a mention here. In May 2008, the judiciary branch of the government issued a by-law stipulating that the amounts of blood money for men and women and for Muslims and non-Muslims (not only religious minorities) would be determined as equal only in the case of driving accidents. The justification for this by-law was that the procedure of paying blood money was based on the internal by-laws of the respective insurance companies and, since the companies' contracts fail to mention discrimination between genders and religions, the equality makes sense. Be that as it may, the equality between Muslims and non-Muslims, even in such limited cases as driving accidents, is a great step towards accepting the norms of human rights, or towards a kind of secularization of laws in an Iranian context. It was a step achieved not through theological-legal discussions but through the socio-political development in which the government was involved and, in which it had to ignore or forget certain Islamic rulings or *fiqhī* opinions.

Finally, Article 554 of IPC-v2013 restates the content of Article 297 of IPC-v1991; accordingly, it is the the governmental decree of the leader and not his legal opinion that decides if the amounts of blood money for Muslims and certain non-Muslims should be equal, even if there is no difference in the result.

A further point is that on 13 January 2021 the Islamic Consultative Parliament added two articles to Chapter 5 of IPC-v2013, which were called Article 499-Repeated (*mukarrar*) with two provisos and Article 500-Repeated with four provisos. In the former, the legislature agreed to respect the beliefs of recognized religious minorities and implied that anyone who intentionally insulted Iranian ethnic or religious minorities, or non-Shiite Muslims, with a view to creating tension or violence in the society would receive a fixed punishment. Various articles provided a definition for "insult" and it was stipulated that if the insult occurred in the public sphere, the punishment would be harsher (see Article 499-Repeated of IPC-v2013). In the latter, the punishments that the legislature inflicted were designed to restrict educational and propagandist activities considered harmful to Islam and Muslims. Mentioned in the text as examples of what the government envisaged in this respect were sects with "misguided teachings", the followers of non-recognized religions, and communities claiming a kind of "pseudo-spiritual doctrine". The general tone, especially the inclusion of "educational" activities, is contradictary to several articles of the

80 See the original Persian in Appendix II.

Constitution, including Article 14 and some provisos of Article 3. Furthermore, the content clearly violated some international conventions accepted by the Islamic Republic (see Article 500-Repeated of IPC-v2013).

4 The Civil Code

According to Article 12 of the 1979 Constitution, non-Shiite Iranians, including religious minorities, are entitled to use their own courts or institutions for matters of personal status. The article of the Civil Code ratified in 1312/1933, indicating the independence of recognized non-Shiites in the realm of personal status, remained unchanged in the Islamic Republic (see Anon 1379/1999: 888–95).[81] In such cases, the courts must observe the recognized and undisputed rules and regulations of these religions and Islamic denominations.[82] On personal matters, religious minorities have been allowed to use their own institutions, generally known as *anjuman* (society), which have their own socio-religious representatives. These societies are sometimes located within and sometimes outside places of worship. Furthermore, according to Article 10 of the Code of Direct Taxes (ratified in 1312/1933), Muslim and non-Muslim places of worship are exempt from taxes.[83] If the followers of non-recognized religions, including Bahāʾīs, refer their legal claims to the courts, they are treated in the Civil Code as if they were Muslim Iranian Shiites and the courts will ignore their own personal-status rules.

In general, minute modifications were made to the Civil Code between 1979 and 2020, though only one article on inheritance is worth evaluating as far as the present study is concerned. All other articles in the Civil Code, such as Article 1059, which states that a Muslim woman is not entitled to marry a non-Muslim man, are still valid. In the years immediately after the 1979 Revolution, when according to Article 167 of the Constitution the courts could rely on *fiqhī* opinions, judges insisted on implementing a legal maxim to the effect that "if a non-Muslim converts to Islam, his/her relatives, even those who are in the same level of priority in inheritance, are prevented from inheriting."

In Chapter 2, I have already discussed how the relatives of some Jews and Zoroastrians who converted to Islam, whether through conviction or by force,

81 See the whole text of the article in Appendix 11.

82 In the cases of marriage and divorce, the courts follow the rules of the husband's faith; in the cases of inheritance and testament, they obey the faith of the deceased.

83 See the original Persian in Appendix 11.

were denied their inheritances. Through some legal and political documents, it is possible to trace instances of this legal maxim being implemented after the 1979 Revolution, especially with respect to non-recognized faiths. This maxim was applied from 1979 to 1991 without having a ratified law. Then, on 5 November 1991, the Islamic Consultative Parliament added Article 881-Repeated (*mukarrar* or *ilḥāqī*) to the section on inheritance in the civil code, which legitimized the legal maxim for all non-Muslims without exception.

Protesting against the content of this article, non-Muslim representatives argued that it contradicted Article 12 of the Constitution and a 1312/1933 independent article in the Civil Code. Following the protest, in June 1993 the Expediency Council, despite objections from the Guardian Council, amended the article to restrict the application of Article 881-Repeated to non-Muslims who remained unrecognized in the Constitution.[84] The final version states that "if one of the inheritors of a deceased non-Muslim became or later becomes Muslim, then the division of the inheritance is done only in accordance with the regulations of the faith of the deceased" (see Anon 1379/1999: 980–1). In sum, amended Article 881-Repeated remains ambiguous and non-Muslims in general, and religious minorities in particular, are still dissatisfied with it and want it removed from the Civil Code.

In another instance, in July 2018 the Expediency Council, despite the opinions of the Guardian Council, supported parliamentary decisions entitling members of recognized religious minorities to serve as city councillors. In 2017, believing that only Muslims were allowed to stand as candidates for city council elections, the Guardian Council suspended the membership of Sepanta Niknam, a Zoroastrian who had been elected from Yazd by both Muslims and non-Muslims. The members of the Guardian Council justified their opinion by resorting to a verse from the Quran (4:141), which reads that God never allows disbelievers to overcome believers,[85] and also resorting to the legal maxim "Islam is high and nothing is higher" (see interpretation in Chapter 1). They imagined that if a Zoroastrian were a member of the city council, the content of the verse and of the maxim would be violated. Again, the Expediency Council decided to resort to its own mechanisms to *ignore* or *forget* about both the verse and the maxim.

84 See the original Persian of the documents in Appendix II.

85 Known in jurisprudence as the rule of *nafy-i sabīl*.

5 Extra Regulations

According to the International Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, which Iran accepted in 1963, and to Article 28 of the 1979 Constitution, all people are free to choose whatever occupations they please. However, the 1979 Constitution insists that some official positions, such as leader, president, dean, high-ranking judges of the judiciary branch, and jurist members of the Guardian Council, must be held by Shiite Muslims. In addition, it is an unwritten requirement that candidates for these legal positions must wear a turban and mantle. Apart from these exceptions, there is no other stipulation for a person seeking a governmental position. However, it is mentioned in the employment by-laws of all governmental offices, including universities, that all applicants are welcome provided they are Muslim and practise Islamic rituals.[86] It is unclear in this regulation how an employer is supposed to recognize if an applicant practises these rituals. The practicalities of this stipulation are problematic and in most cases lead to discrimination. The regulation then adds that "religious minorities are accepted provided they do not show themselves as acting contrary to Islamic law." In addition, there is a proviso in this regulation indicating that all women must wear the veil. These employment regulations, which contravene the Constitution and the International Convention No. 111, were approved by the Islamic Consultative Parliament. In practice, however, between 1979 and 2020, Sunni Muslims rarely and religious minorities never managed to achieve high ranking positions in the ministerial and provincial offices, the municipalities, or the military forces. It was even difficult for them to enter the lower echelons of certain ministries such as Foreign Affairs, Petroleum, Culture and Islamic Guidance. Shiite managers are even given precedence in regions where *ahl al-Sunna* make up the majority population.

The conditions surrounding the Islamic Republic's employment laws and regulations compels most religious minorities to opt for non-governmental occupations. Nonetheless, for a few non-Muslim employees the government has enacted certain regulations that could be considered a privilege, such as giving special leave on special ceremonial days, like Pesach, Rosh Hashanah, the Day of Atonement (*yawm kīpūr*), Easter, Christmas, and the anniversaries

86 See employment regulations in Appendix 11, which were first declared by Ayatollah Khomeini in 1361/1982 and then ratified by the Parliament. These regulations were applied in the first step only to teachers in the Ministry of Education and were then generalized to all governmental administrations.

of the births and deaths of Zoroaster.[87] Nonetheless, the official day off for all Iranians is Friday, even although Saturday is the Jewish Sabbath and when all their educational and economic centres are closed. It is notable that a similar privilege is not provided for non-Shiite Muslims. There is a further privilege for Jewish boys about to embark on their compulsory military training, for they can either serve in their own cities or in cities with Jewish populations where kosher meals are more readily available.[88]

Three further points need to be mentioned in this last section. First, according to Article 67 of the Constitution, non-Muslim deputies in the Parliament and non-Muslims in courts take oaths where necessary on their own sacred books. Second, the exemption of their worship places and their societies from taxation, ratified by the National Parliament on 28 Isfand 1345/19 March 1966, has remained valid in the Islamic Republic. In addition, societies affiliated to religious minorities have received monthly funds from the Ministry of Interior since 1380/2001, as have officially registered Muslim parties.[89] Third, religious minorities have been living in Iranian society without conflict since the Islamic Revolution, enjoying their own relationships, culture, language, ceremonies, parties, schools, religious textbooks, and societies and have had very friendly relationships with their Muslim compatriots. Here I do not intend to enhance the status of non-Muslims in Iranian society, but to emphasize that their lower status is rooted in the attitudes and actions of the government, from which both non-Muslims and open-minded Muslims are suffering.

Some official offices in three ministries – namely Security, Interior Affairs, and Culture and Islamic Guidance – oversee the activities of non-Muslims, especially their cultural and political relations with Muslims. Religious minorities have been able to field their own candidates in assembly elections, but they do not necessarily have to vote for their coreligionists. Thus, practically, it is possible for a Jew, for example, to vote for a Muslim candidate and for a Muslim to vote for a non-Muslim one. Despite a regulation ratified in 1984 to the effect that the registration of religion on national identity documents

87 The most recent version of the list of these days was announced in circular No. 20302/28518 on 30 Jumādā al-Awwal 1378/18 August 1999. See complete list in Appendix 11. It contains five days of leave for Zoroastrians, six days for Jews, eight days for Assyrian Christians, seven for Catholic Armenians, and six for Gregorian Armenians. A few Iranian Christians belong to Evangelical Churches and the government pays little attention to them because of their missionary approaches and activities.

88 See a report on this in *Ufuq-i Binā* 1378/1998: vol. 3 (16), 13. The journal is affiliated to the Iranian Jewish Society (*Anjuman-i Kalimīyān*).

89 There is a ratified by-law (No. 1417, on 30 Ābān 1380/12 November 2001) for paying funds to parties, societies, and communities, including those of religious minorities, by the Ministry of Interior. See *Iranian Official Gazette*, No. 16557, 8 Diy 1380/28 December 2001.

(*asnād-i sejjillī*) is obligatory for all Iranians,[90] so far the national identity cards (*shināsnāmih* and *kart-i millī*) do not reveal a person's religion. It has even been possible since 2002 for recognized religious minorities to remove words from their family names that might reveal their religions.[91] Since 2016, when the Registration Office issued new smart identity cards, applicants have had to fill in official forms that contain their religious affiliations. Thus, it is possible for the government to ascertain the religious affiliations of all its citizens, but there is still no mark on the national cards to indicate a person's religion.

6 Conclusion

In the revolutionary climate of 1978–80, the legal legacy of the Pahlavi regime was regarded as the heritage of Satan, which must be changed. Very soon the new regime managed to prepare an entirely new constitution, a new penal code, and a partially revised civil code, all with Islamic Shiite considerations. The 1979 Revolution and the codification of the Constitution are indeed partly a reaction to modernity and modernization by some Shiite *ulama* who believe in political Islam and the political rule of the jurist.[92] The Constitution, as their manifesto, contains new concepts of modernity that are based on the assumption that political Islam should have a governmental form and that modern concepts and institutions can coexist with Islamic norms. The compounded format contains double features: on the one hand, complying with modern legal discourses, it recognizes the rights of the nation and of religious minorities, and respects the lives and freedoms of non-Muslims; and, on the other hand, complying with Islamic rules and regulations, it discriminates between Muslims and non-Muslims. Again, it respects the fact that the people vote for the National Parliament, accepts the division of powers, considers most articles

90 See Article 20 proviso 4 of the Civil Status Registration Office (*qānūn-i thabt-i aḥwāl*), ratified on 18 Shawwāl 1363/7 January 1984. Proviso 6 of the same article states that it is obligatory to register changes in religious affiliations.

91 I received this information in an interview (see References) with Ārash Ābaʾī, an influential member of the Jewish community.

92 The opposite belief in the Shiite tradition belongs to great non-political clerics like Ayatollah Sayyid Abū al-Qāsim Khūʾī and Ayatollah Sayyid Ali Sīstānī, who disputed the assumption that the political rule of the jurist has a basis in *fiqhī* opinions. This belief has some similarities with that of the *Sunni* secular version of Islam in Egypt, which was offered for the first time by Ali Abdel Raziq (d.1966) in *Islam and the Foundations of Governance* (see Abdel Raziq 1978). Unlike those who believe that an ideal system of Islamic ruling is only possible in a caliphate form, he believes that Islam does not advocate any specific form of governance.

of the international legal discourse valid, and, at the same time, determines the various ways of Islamizing laws and regulations, for example by enshrining Article 4 in the Constitution to establish the Guardian Council and Articles 5, 107, and 109 to establish the highest position for the political rule of the jurist.

Instead of denying the importance of modern teachings and institutions, as was the wont of the clergies who opposed constitutionalism in 1906, the clerical leaders of the 1979 Revolution first accepted the modern elements and then, step by step, came to Islamize the format and content of the legal corpus. The advocates of Islamizing sometimes argued that the modern concepts had their origin in Islamic teachings and, insofar as it was possible, tried to create a relevant terminology. By means of this strategy, the clerical leaders managed to get both religious people and some religious authorities to support the new regime. Nonetheless, the nature of the new events and issues led them first to ignore or forget some *fiqhī* opinions indicative of inequality between Muslims and non-Muslims, and second to accept secular customs, rules, and regulations. The Shiite Islamic government thus employed a twofold strategy to consolidate its legitimacy and to reconcile the modern elements with the traditional concepts and institutions: (1) to satisfy the religious strata of the society by Islamizing the laws and regulations, and (2) to find a secular political solution, if any, to encounter the objective problems. In practice, the second strategy led to a rather pragmatic approach to codifying laws and regulations, despite the initial recalcitrance of the clerical leaders.

On the legal status of non-Muslims, Article 13 of the Constitution asserts that certain religious minorities are recognized and are free to follow their own rulings in the realm of personal status. Article 14 ambiguously respects the rights of unrecognized non-Muslims provided they do nothing to harm Islam or the Islamic Republic. In practice, this stipulation, which can be legally applied to both Muslims and non-Muslims, has led to some injustices being perpetrated against non-Muslims over the last four decades, for non-Muslims sometimes found themselves accused of doing or even thinking something that might be interpreted as being engaged in a conspiracy detrimental to Islam.

The Islamic Penal Code underwent more developments than the public penal code of the Pahlavi period; in fact, it duplicated the *fiqhī* opinions discussed in Chapter 1. Regardless of the differences between law and *fiqh*, the government's clerical leaders insisted on applying legal *fiqhī* opinions in criminal cases. Since 1979, the Islamic Penal Code has seen four revisions, but all of them are based on *fiqhī* opinions. Although it is true that there is rather less discrimination against non-Muslims in the last version, there is no logical justification for the existence of any discrimination at all. Some articles in the last version of the code use historical terms like *dhimmī*, *musta'min* and *mu'āhid*

to refer to non-Muslims, which not only somewhat distorts the rights of the nation and types of freedoms asserted for non-Muslims in the Constitution, but also discriminates against them.

Since the Islamic Republic introduced only minor changes to the Civil Code, non-Muslims in general and religious minorities in particular were all categorized as Iranians and enjoyed the same general rights as did Muslims. With respect to their personal statuses, they had their own laws and regulations and socio-legal institutions. However, a problematic article concerning inheritance (Article 881-Repeated) creates some injustice.

Taking all the extra regulations on non-Muslims into account, one can say that to some extent the Islamic Republic legally protects their freedoms, especially if they follow religions that are recognized in the Constitution. They can worship freely in their sacred places provided they do not invite Muslims to join them or to convert. Legally, non-Muslims are not entitled to occupy prestigious positions in the government, administration or army.

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Interview

Arash Ābā'ī, an influential member of Jewish community, Tehran: 15 September 2007, updated 26 December 2017.

CHAPTER 5

Towards a New *Ijtihād*

The legal status of religious minorities under Iranian law has improved over the last century (1906–2020) compared with that under *Shiite fiqhī* opinions (from the tenth century, when the Shiite legal works were compiled). There has been a clear shift in their circumstances from a paradigm that enumerated their *duties* in *fiqh* towards a paradigm that codifies their *rights* in law. Evidence of this improvement lies in the fact that, nowadays, some rulings have been changed or forgotten, or at least no longer exist in a legal official form – among these are forcible conversion, the levying of *jizya* and *kharāj*, considerations of purity and impurity in relations with non-Muslims, charging discriminatory amounts of blood money, and the imposition of special restrictive measure, such as those mentioned in the Pact of ʿUmar (see Chapter 1).

While offering their proposals, the lawmakers, not only in Iran but also in almost all Muslim societies, have decided not to follow certain Islamic rulings and to ignore others as if they were unknown to them. Of course, in theory and in practice, some legal and political discrimination remains. In this chapter, I would like to emphasize the major factor that has had an influence on changing, or more precisely ignoring, rulings that are discriminatory and unequal. The favoured explanation is that the encounter of Shiite tradition with modernization and modernity was the main cause of the shift. No theoretical discussion, be it theological or legal, has had as much of an impact on changing laws or on shifting the attitudes of legislators and jurists. To address the contradiction between Islamic rulings and human rights, including the rights of non-Muslims in general and of recognized religious minorities in particular, it might be helpful to examine more closely the relationship between Islam and modernity. This relationship, which entails a shift in attitude towards the Islamic scriptures rather than an interpretation of them, has given rise to a new *ijtihad, or interpretation* and, by paying attention to it, I hope that the legal status of non-Muslims in Iran and other Muslim countries will improve.

Modernity and modernization have created a completely new world. As far as the present study is concerned, it is unnecessary to enter into long discussions about the definition of these terms and their differences. Nonetheless, we can assume that modernity introduces a set of new interpretations of God, the world, nature, man, society, the state, and their relationships with one another. The point of departure of these new interpretations was famously set by René Descartes (d.1650) and developed by later thinkers such as Robert Boyle

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(d.1691), Gottfried Wilhelm Leibniz (d.1716), Immanuel Kant (d.1804), and Charles Darwin (d.1882), whose accomplishments resulted in the emergence of scientific revolutions and discoveries. Their achievements, not to mention their methods, were not only in the natural sciences but also in the social sciences and humanities, including religious studies. The interpretations mostly stand in contrast to the ideas that emereged in the Middle Ages. Again, let us assume that modernization is a process of development through which some technical instruments, methods and their implications have been created and enhanced over the last three centuries.

In their first encounter with the West in the nineteenth century, Muslim politicians and scholars welcomed technical developments and were oblivious to the theoretical changes, especially the scientific revolutions that had played supporting roles in those developments. The main concern of Muslim politicians, first in Egypt and Tunisia, then in Turkey and Iran, and later in other countries, was modernization, especially in its military aspects. Some scholars, whether clerical or secular, later referred to as "the intellectuals", also supported the modernization process in their own countries. The intellectuals had two prominent characteristics – (1) they were not quietists and were socially active; and (2) they were enthusiastic about discovering the nature of and truth about the new interpretations being presented by philosophers and scientists. The main question confronting the intellectuals was why were their countries, in comparison with Western ones, monetarily, economically, and politically backwards? Questions about their backwardness have assumed various forms but have basically remained unanswered for at least a century. Features of modernization, such as the development of cities; easier means of communication and transport; the development of a manufacturing sector; reforms in education, banking, taxes, and the army; and the enactment of laws and regulations started to characterize Muslim countries and are still ongoing. Gradually, Muslim scholars began to engage in serious discussions about the relationship between modernity and modernization in an attempt to find an appropriate answer to the following question. To what extent should Muslim societies follow modernity, where should they rein back, and why?

While politicians were and are only interested in those aspects of modernity that benefit their governments, and while some non-religious scholars were and are eager to imitate all theoretical and practical aspects of modernity and modernization, Muslim scholars tend to question the relationships between modernity and modernization on the one hand and between Islamic principles and a Muslim way of life on the other. We saw some examples of this in Chapter 2 with respect to the need for a constitution, the codification of laws and regulations, and the role of the people's vote in forming a state and

parliament. Such questions are, however, not limited to these examples and are generally raised under the broad banner of 'Islam and human rights', followed by discussions on their relationships, accommodations, or contradictions.

Since many may think that the main problem for the intellectuals lay in their attempt to impose Western ideas on Muslim communities, here I would like to look at the relationship between Islam and human rights from another angle. According to that viewpoint, human rights were seen as a new means of Western culture dominating Muslim contexts in a post-colonial setting. In fact, some problems like the legal inequality between Muslims and non-Muslims and between men and women, which even Muslims cannot accept as just, are not directly related to being influenced by post-colonial approaches. Therefore, Muslim scholars and communities face a dilemma – how are they to justify legal inequalities in a way that at least the majority of stakeholders can accept? And, how are they to solve the problem in a methodical way? To my knowledge, the first option has acutally failed to convince the Muslim audience, so naturally one has to resort to the second.

Muslim reformers have tried to solve the contradictions between Islam and human rights in areas such as women's rights and the rights of non-Muslims. Their attempts in this area fall into two categories – those who favour a critical historical approach towards solving the problem, and those who prefer a more hermeneutical approach. The former insist on dividing the teachings of the Quran and Sunna into two periods – those formed when the Prophet was living in Mecca and those formed when he was living in Medina. The main representative of these reformers is Abdullāh Ahmed An-Naʿīm, an Islamic scholar from Sudan, who currently teaches at Emory University in the United States, following his teacher Maḥmoud Muhammad Ṭāhā, who was executed in Khartoum in 1984.

Ṭāhā had held that these two stages suggested a kind of theological ranking. Whereas the teachings belonging to the Mecca period contained the eternal universal message of Islam, the Medina ones mostly referred to the particular local needs of the first Muslim community and could not be applied directly to other audiences and times. In fact, the rulings belonging to the Medina period paved the way for discrimination and inequality (see An-Naʿīm 1996: 52–6). Moreover, according to his abrogation theory (*naskh*), Ṭāhā believed that the process of revoking the Quranic verses should be applied in the opposite direction: in other words, the Mecca verses that had already been abandoned should be brought back into play to form new *fiqh* or *sharīʿa* and the Medina verses set aside. Accordingly, the new *fiqh* should rely on some verses of the Quran just as the old *fiqh* relied on others (see An-Naʿīm 1996: 56, 59–60). An-Naʿīm suggests that an Islamic reformation can be achieved by reading the Quranic normative rules of the Medina period in the light of the theological principles

that formed the first and the most important message of Islam. He argues that, "since *sharīʿa*'s view of human rights was justified by the historical context, it ceases to be so justified in the present drastically different context …; unacceptable discrimination on grounds of gender and religion is untenable today" (An-Naʿīm, 1996: 180–1; see also Bielefeldt 1995: 606–10).

The second group of Muslim reformers, those who advocate a hermeneutical approach, differentiate between essential Quranic principles and accidental historical rulings introduced and implemented under particular circumstances. While the essential principles remain valid, whether formed in Mecca or Medina, the modes of their implementation may change in accordance with new experiences and opportunities. Likewise, particular historical rulings, whether formed in Medina or Mecca, should be reinterpreted in the light of the essential principles. Many contemporary reformers in Muslim societies, like Muhammad ʿAbduh and Nasr Hāmid Abū Zayd in Egypt and Muhammad Mujtahid Shabistarī and ʿAbd al-Karīm Soroush in Iran, although with different justifications, belong to this category.[1] They believe that the punishments and discriminations demanded by the Quran cannot be justified in modern circumstances and must be reinterpreted. Although the opinions of this group have convinced some audiences in theological, philosophical, and political circles, they have failed to alter either the jurists' legal opinions or the laws and regulations codified by the legislatures of different Muslim countries. A detailed evaluation of these solutions is beyond the scope of our discussion.

My solution, which is pragmatic and sociological in tone, stems from the traditional method of the jurists. It is that the development of human rights in Muslim countries, as a method of solving this politico-legal problem rather than as a Western or European idea, needs premises that can convince Muslim jurists and law-makers to *ignore*/*forget*, not *deny* or even *interpret*, old rulings on non-Muslims, whether formed in Mecca or Medina, and whether regarded as essential or accidental.

To clarify my point, let me briefly review the Islamic sources on non-Muslims and the reactions of clerics and intellectuals to codifying the Iranian Constitutions of 1907 and 1979. As noted in Chapter 1, there is indisputable evidence in the Islamic sources of intolerance towards non-Muslims, whether created by Muslim caliphs or current tradition, and of the imposition of social restrictions on them. There is also evidence of tolerance, coexistence, and respect for the rights of others in general, and of recognized religious minorities in particular. These inconsistencies in the evidence created two trends in Iran over the period in question. On the one hand, local governors, some

1 For the reactions of Iranian intellectuals and clerics to modernity in the last century, see Boroujerdi 1992; Dahlen 2003; and Vahdat 2003.

clerics, and radical Islamic groups chose the intolerant aspects of the teachings; while on the other hand, moderate intellectuals and high-ranking clerics, who understood the demands of the time politically, though perhaps not legally, focused on the tolerant aspects and gradually ignored the others. The hegemony more or less belonged to the first group until 1906 when it ran out of social and legal alternatives. While drafting the Supplement in the wake of constitutionalism, two groups of clerics had serious debates about human rights, which were finally resolved through all clerics agreeing to enshrine Article 2 in the Supplement along with an independent section on the rights of the nation. In fact, it was the former legal (*fiqhī*) hegemony that took on the new garb and retained its role by means of Article 2.

The entire context of Article 2 was reproduced for the Islamic Republic, the only difference being that the clerics of the time had to accept certain demands of modernization, so tried to represent the Islamic Shiite rulings as rational, flexible, and timely. To make it easier to change or interpret *fiqhī* opinions, they changed the wording of "the Sacred Rules of Islam" in Article 2 of the 1907 Supplement to "Islamic Norms", which was then used as an umbrella term in Article 4 of the 1979 Constitution. In addition, the jurists in these revolutionary times dealt with modern notions such as constitution, democracy, and parliament in two ways: they either offered an Islamic interpretation of them, or (2) they legally disagreed with the application of, or denied the implications of, new phenomena such as modern systems of education, the media, virtual networks, and the achievements of science and technology. Then, when people welcomed the new phenomena, they either ignored or changed their legal opinions. As a result, according to sociologists, the role of *fiqh* and *faqīh* has usually been a passive one. The jurists tend to wait for social developments to occur before issuing their *fiqhī* opinions or Islamizing them. There is much evidence of this process in relation to different issues and it has been repeated many times in the Islamic Republic.

I now turn to my solution, which needs further explanation. How, one might ask, does one convince law-makers and jurists to *ignore* or *forget* certain rulings about non-Muslims? In reaching their opinions, jurists have had to rely on stagnant sources, outdated methods, and pre-modern contexts. Unlike the context, which has changed profoundly in the last century, their sources and methods have so far remained unchanged. If a jurist follows the same classical sources and methods as his ancestors, and fails to take the context into consideration, he will arrive at the same inferences and conclusions; this means that the gate of *ijtihād* is closed.

The social effects of modernization naturally negated or changed old issues and, consequently, old rulings and jurists' judgements. Modernization, quite

unexpectedly, brought new attitudes, experiences, and relations between people, including legislators. Therefore, some legal concepts and terms like apostasy, *dhimma*, slavery, stoning (*rajm*), poll tax (*jizya*), and land tax (*kharāj*), which served a particular context, are not necessarily suited to all contexts. A jurist who wants to apply these concepts and terms to another context should try to establish whether they are relevant to or appropriate for the new context. A distinct feature of these terms is that they were applied within the context of the "duties", not "rights", of the religious minorities and there is thus no reason to use them in modern times. Nonetheless, some jurists and radical Muslim groups still believe that wherever religious minorities live in Muslim societies, they can be called *dhimmī* and can be expected to follow the same regulations that prevailed in the early centuries of Islam. They are reluctant to recognize that, in the light of the new social relationships of today, non-Muslims and Muslims have the same identity and, in this case, they are all Iranians.

Furthermore, the terms that jurists use as criteria, such as "reason" and "justice", change semantically in different contexts. To understand concepts such as "equitable" or "rational", it is necessary to recognize their commonsense meaning in any given context. The majority of people may consider a ruling to be fair and justified at one particular time, but not so at other times. The function of commonsense is similar to what, in legal theory (*uṣūl-i fiqh*), is sometimes called "the conduct of the rational or the reasonable" (*sīri-yi ʿuqalāʾ*), as opposed to that of "ordinary people".[2] Jurists introduce the idea of conduct to differentiate between ambiguous cases of right (*ḥasan*) and wrong (*qabīḥ*). Nonetheless, the conduct and judgements of rational people are clearly not predetermined in every place and time.

The paradigm of modernization influenced people's tastes in distinguishing between right and wrong. Within this paradigm, competition between religions to attract more followers makes no sense and rationalists (*ʿuqalā*) believe that everyone should have a right to freedom of thought, conscience, and religion. Again, rationalists dislike unfair discrimination based on race, colour, sex, or religion. Jurists, especially Shiite ones, have in their discussions accepted the authority of rationalists when differentiating between right and wrong. Provided the decisions and judgements of members of the United Nations gain consensus, or at least the vote of the majority, they can be considered rational and, in the same way, jurists are supposed to accept the removal of unfair forms of discrimination based on religion. Thus, the elimination of

2 The conduct of rationalists is also considered a major reason to accept single-source accounts of *ḥadīth* (*khabar-i wāḥid*) and indications (*amārāt*) in Shiite legal theory. On the term "the conduct of rationalists", see Anṣārī 1419/1998: vol. 1, 346–7, vol. 2, 318–19.

discrimination is not a Western idea imposed on Islamic rulings, but rather a set of decisions made by rationalists who can also exercise their authority among Muslim jurists. Again, the existence of legal discrimination between Muslims and non-Muslims is not necessarily a fixed Islamic ruling, or even part of the Islamic faith that jurists think they have a responsibility to defend. Needless to say, this consideration does not imply that every opinion of which the rationalists approve will triumph over the Islamic rulings. In each and every case the jurists are entitled to evaluate the content and its relevance to the Islamic rulings.

It is pertinent to note that the discriminations mentioned in the legal works of jurists do not necessarily rely on some verses of the Quran. What the Quran (in many verses, such as 3:28) forbids for Muslims or believers is forming an allegiance with disbelievers (*al-wilāya*), and accepting the mastery of disbelievers over Muslims (*sabīl*) (Q, 4:141), neither of which is relevant to the question of discriminating against non-Muslims.

I now ask, is it really possible to apply my solution? The answer is yes, and the best evidence of this is in its realization. Jurists verify that there are already precedents in the history of *fiqhī* opinions for forgetting or ignoring rulings. Sociologically speaking, if they are to change their orientation and to ignore or forget a ruling, they certainly have a method with which to do so. When jurists ignore, as opposed to deny, a ruling, they are resorting to a variety of justifications – ignoring rulings contrary to the main aims of *sharīʿa* or the public interest (*maṣlaha*) is just one example. In fact, any examination of all the various occasions when jurists have *ignored* or *forgotten* certain rulings is proof enough that my solution can work.

The first category consists of all those instances that occurred under the influence of modernization. In both revolutions (1906 and 1979), some rulings pertaining to religious minorities, such as those prescribed for *ahl al-dhimma* in jurisprudential works, and those on the purity or impurity of non-Muslims, were *ignored* or *forgotten* in the interests of boosting national unity against the regime's dictatorial behaviour. In addition, as we have seen in Chapter 4, and as the 1979 Constitution demonstrates, legally and politically although not theologically, the jurists and government recognized the identity of non-Shiite Iranians, including Sunni Muslims, religious minorities, and even non-Muslims. One could regard this as a kind of pluralism acquired through modernization, rather than through theological and/or legal debates. If one refers to the theological and legal works, it becomes evident that the declaration of unbelief (*takfīr*) is broadly applied and that many Muslim theologians and jurists fail to recognize one another, let alone non-Muslims. Since recognizing others is an acknowledgement of pluralism, in Article 14 the drafters of the 1979 Constitution theoretically respected the followers of other religions

and relied on verses that focused explicitly on treating others well. The enactors, including jurist MPs, actually *ignored* or *forgot* interpretations in which verses (such as 2:83) were abrogated by another verse (Q, 9:29).[3]

A further example of this category is that if certain cities in Iran, Iraq, and other countries in the Middle East had not expanded, they would have kept their walls around them and the religious minorities would have had to live on the outside them, or in special quarters (*maḥall-e* and *jew-bārih*) as they did in the early years of this century in Baghdad, Isfahan, Yazd, and Kerman. Legal or theological discussions did not ruin the walls; new geographical conditions under modernization were responsible for that and for creating new socio-legal relations. Meanwhile, the jurists forgot to object to the presence of non-Muslims in their city centres, especially on rainy days.

Another example is the emergence of the recognition that the religion one chooses does not depend on one's own free will, but on where and when one is born. Such insights are not gained through discussion – long theological discussions never yielded any such result – but through modernization, sociocultural communications, and global information networks. Rulings on the duties of religious minorities in the early centuries of the advent of Islam were based on the assumption that conversion to Islam, whether by coercion or free choice, was a desirable outcome. The Muslim rulers incorporated these rulings into their policies, which were then transmitted to and repeated in the jurists' works.

The supporters of this policy believed that conversion would increase the Muslim population and thus strengthen the political system of Islam. They reasoned that, since strength is desirable, so too is conversion. One outcome of this argument was that the rulers divided the societies into *dār al-ḥarb* and *dār al-Islām*; thus, by imposing special duties and social restrictions on non-Muslims they were preparing the ground for an increase in the number of Muslims. Moreover, first the caliphs and then the jurists came to consider whoever converted from Islam to another religion as an apostate (*murtad*) and imposed severe penalties on them. Modernization gradually weakened the first premise of this argument by replacing population growth with alternative factors, such as increases in the number of thinkers, higher incomes, and greater economic power, which would strengthen any political system.

3 Verse 9:29 of the Qur'an 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." Some interpreters and recently ISIS and other Islamic radical groups claim that this verse is abrogating those verses (Q, 2:109; 7:199; 15:85; 43:89) that suggest dealing with others in good conduct. See for example, Ibn Kathīr 1412/1991: vol. 2, 350; Ṭūsī 1409/1988: 2: 83.

The same logic applies to politico-geographical changes, especially those emerging after the formation of nation-states, and of the United Nations as the overseer of new geographical borders, under which the division of societies into *dār al-ḥarb* and *dār al-Islām* ceased to be relevant, so was *ignored* or *forgotten*. Still another example is that the rulings surrounding slavery have been ignored or forgotten in modern times because of the universal acceptance of its abolition; now only radical Islamic groups intend to revive such rulings.

In the second category, jurists try to *ignore* or *forget* some rulings by means of purely jurisprudential rules. *Taʿāruḍ adilla*, or the conflict of the arguments, belongs to this category. It means that when jurists are in possession of satisfactory arguments both for and against applying a ruling, they opt for the option that best serves the interest (*maṣlaḥa*) of Muslims or, to justify their precept, the one for which there is the most evidence. This is a form of rule-utilitarianism as against action-utilitarianism, or the rule of 'rational correlations' that is found in legal theory.[4] According to rule-utilitarianism, the better rule, as John Stuart Mill would have it, is the one that would promote most happiness, or as the jurists would have it, the one that would best serve the interests of Muslim societies. Although evidence of and arguments in favour of imposing restrictions on religious minorities occupy a significant place and have a long precedence in jurisprudence, it would be lawful to *ignore* or *forget* them if a jurist thought that any abuse of these regulations might bring dishonour to Islam.

As I mentioned in Chapter 2 vis-à-vis reports in the Foreign Ministry Archives (1848–1911), the interests of local governors were behind many of the riots that radical Muslim groups and low-ranking clerics were organizing under the pretext of defending Islam against non-Muslims. We also saw how high-ranking jurists, like Sheikh Murtaḍā Anṣārī (d.1281/1864) and Akhūnd Muhammad Kāẓim Khurāsānī (d.1329/1911), ignored the rulings mentioned in *fiqhī* works and advised Muslims to behave fairly and avoid attacking religious minorities. Another example in this category is if a ruling causes great difficulty (*ʿusr*) or distress (*ḥaraj*) to Muslims. In such cases, it is argued that Islam is a religion of moderation and tolerance, and decisions to *ignore* or *forget* a ruling are therefore assigned a higher rank, or *jus cogens*. Many examples of this category can be found in jurisprudential works throughout the history of *fiqh.*

The last category in this respect concerns theological debates. There is, and always has been, a theological viewpoint among Shiite jurists that justifies

4 Here, by the term "utilitarianism", I mean what is narrated according to John Stuart Mill in *Utilitarianism* (1861). His version is plausible if not a very defensible ethical theory (see Mill 1969: esp. Chapter 5).

restricting *hadd* punishments to the period of the presence of the Twelfth Imam, Imam Mahdi, and rejecting them for the period of his absence, or occultation, which started in 940 (see, for example, Khʷānsārī 1405/1983: vol. 5, 411–12). This group of jurists believes that any decision to implement such punishments should be left to the imam. From this position, it becomes possible to conclude that it is justifiable to *ignore* or *forget* corporal punishments that are insufferably cruel. One line of reasoning with regard to this way of dealing with *fiqhī* hadiths is that Muslim jurists were well aware that the infliction of such punishments could hamper the expansion of Islam and damage the humane reputation of Islamic teachings. Since the methods currently applied in seminaries do not allow jurists to change or reinterpret such rulings, they postpone the punishment until the reappearance of the Hidden Imam. Moreover, *hadd* punishments have very few practical advantages and its application, especially in recent years, usually brings disgrace to the Muslim society that inflicts it.

The major obstacle to the application of my solution might be an opponent's assumption that *ignoring* or *forgetting* the aforementioned rulings would change Islamic identity, as if such rulings against non-Muslims were an integral part of the Islamic faith. It is true that, by applying my solution, some rulings in the field of social affairs vis-à-vis acts of devotion, would be forgotten; however, one is entitled to ask whether Muslim identity indeed depends on rulings that discriminate. Would it be possible to construct new elements in support of a Muslim identity from the Islamic teachings? What is wrong with Muslims relying on Quranic verses (Q, 5:48–49; 2:256; 109:6) and hadiths that encourage a kind of pluralism, greater tolerance, and more respect for the rights of non-Muslims in different legal matters?[5] For example, why would a jurist not rely on the content of a hadith attributed to the Sixth Imam, Jaʿfar al-Ṣādiq, who advocated the complete freedom of non-Muslims with respect to inheritance?[6] Would it be possible to extend what the hadith in Shiite jurisprudence calls an obligatory rule (*qāʿida ilzām*)[7] to the entire area of personal status? This rule states that all non-Shiites, including non-Muslims, are entitled to apply the legal rules of their own family law. Why should jurists refuse to choose hadiths that are more compatible with our time and seem to be based on more rational justifications? By and large, Muslims have mostly shown

5 I disagree with a strategy that conceals or denies exclusivist aspects of Islam and highlights pluralistic ones, but my suggestion is to ignore the former. Cf. ʿAṭīyya Muḥammad 2003; Sachedina 2001, both of whom conceal the exclusivist aspects of Islam in their works.

6 In the *Book of Inheritance* (*Kitāb al-farāʾiḍ*) there is a rule attributed to the Sixth Imam which indicates that it is lawful for every one to obey what is legal in his or her own faith (Ḥurr al-ʿĀmilī 1372/1992: vol. 26, 158n4).

7 As regards this rule in Shiite jurisprudence, see Bujnūrdī 1419/1998: vol. 3, 179–209.

tolerance towards religious minorities, following the command of the Quran: "There shall be no compulsion in religion" (Q, 2:256). Historic evidence shows that some Christians and dissidents preferred living under Islamic Ottoman rule than to being persecuted by their fellow Christians in the Byzantine and Habsburg empires (Bielefeldt 1995: 597).

Another impediment to my solution and to implementing human rights in Muslim societies lies in the fact that many conservative Muslim scholars misunderstand the concept of human rights. By equating Western society with what politicians think and do, as if there were no distinction between political society and civil society, these Muslim scholars fail to see the conflicts between intellectual reformers and politicians that have characterized the history of implementing human rights in the West. Political leaders throughout the world dislike human rights; if they discuss and show concern about them at all, it is invariably to make instrumental use of them for the purposes of gaining prestige. For political reasons, conservative Muslim scholars tend to interpret human rights as the new means through which Western culture seeks to dominate Muslim countries in a post-colonial setting.

On the basis of this view, some Muslim countries have compiled alternatives to the Universal Declaration of Human Rights (1948), which are more geared towards the Islamic world and perhaps more restricted in content. These alternatives include the Cairo Declaration on Human Rights in Islam (1990) and the Arab Charter on Human Rights (2004) (see Rohe 2013: 29–36),[8] as well as the Iranian Islamic Human Rights Commission (IHRC) of 1996.[9] These Muslim countries are reluctant to educate their young generations in human rights discourse without qualifying and modifying them as Islamic. Nevertheless, as Bielefeldt (1995: 593–4) states, the supporters of human rights discourses should emphasize that "the idea of human rights is not essentially and exclusively connected with Western culture and philosophy and hence only applicable to Western societies. Human rights do not stem from, and are not dependent on, a particular Western philosophy or ideology." According to this view, the universality of human rights does not mean the global imposition of a particular set of Western or Christian values, but instead, aims at the universal recognition of pluralism and different religions, cultures, political convictions, and ways of life insofar as such differences express the unfathomable potential of human existence and the dignity of the individual. In other words, human rights are not, and should not be presented as an international civil religion; rather, they are legal political principles provided to improve the life

8 See Mayer (2018) for a rather pervasive review of governmental Islamic activities on solving the contradiction between Islam and human rights.

9 See www.ihrc.ir on this allegedly independent institution.

of human beings (see Bielefeldt 1995: 616). It should be asserted that the idea of human rights is not a way of life intended eventually to replace the Islamic faith and its practice. Nonetheless, it will probably take a long time to change such prejudices and impressions in Muslim societies.

Conclusion

Some attempts have been made to solve the contradictions that exist between Islam and human rights with respect to discrimination against women and non-Muslims. I argue that theoretical solutions have been ineffective and, consequently, offer a pragmatic solution derived from the literature, language, and practice of Muslim jurists, which is a solution that has some precedents in jurisprudence. I believe that some premises should be provided to enable jurists and law-makers to *ignore* or *forget*, not deny, old rulings on the legal statuses of non-Muslims, whether formed in Mecca or Medina, and whether regarded as vital or inadvertent. Here, I am silent on how these premises could be created, but an expansion of various aspects of modernization and the introduction of economic reforms would naturally usher in new attitudes, legal relations, and political reforms and, in the process, certain discriminatory *fiqhī* opinions would fall by the wayside and be forgotten.

Ignoring or forgetting legal opinions that complicate relations between Muslims and non-Muslims seems to present us with an appropriate strategy, orientation or new approach to *ijtihād* that involves a shift in attitude rather than in the interpretation of the scriptures. It is clear that the application of this model is of vital importance, especially when we bear in mind that since the onset of the twentieth century many Muslims living in non-Muslim liberal countries, where religion does not form the basis of law, have been enjoying comparatively better legal protections than religious minorities residing in Muslim countries.

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Index