

November 2021

Combatting Nationalism by Applying Catholic Teaching and Studying Iran's Constitution

Raj Bhala

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Law and Politics Commons](#), and the [Other Law Commons](#)

Recommended Citation

Raj Bhala, *Combatting Nationalism by Applying Catholic Teaching and Studying Iran's Constitution*, 17 U. ST. THOMAS L.J. 521 (2021).
Available at: <https://ir.stthomas.edu/ustlj/vol17/iss3/2>

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

COMBATTING NATIONALISM BY APPLYING CATHOLIC TEACHING AND STUDYING IRAN'S CONSTITUTION

RAJ BHALA*

Keynote Address and Article for publication in
University of Saint Thomas Law Journal
Annual Law Review Symposium, Spring 2020
Sovereignty in a Fragmenting, Globalizing World

ABSTRACT:

Among the causes of *nationalism* is a lack of *empathy* (the ability to stand in the position of another person and see legal issues from that person's perspective). A lack of empathy, in turn, is caused in part by a lack of *understanding* (of the legal culture of the other), which leads to *prejudice* (the demonization of the other). Once prejudice sets in, nationalism thrives: one country and its citizens (e.g., the US and Americans) are exalted over another country and its citizens (e.g., Iran and Iranians). Nationalism, however, is distinct from *patriotism*: nationalism, but not patriotism, violates the

* See http://en.wikipedia.org/wiki/Raj_Bhala. Brenneisen Distinguished Professor, The University of Kansas, School of Law; Senior Advisor, Dentons U.S. LLP (Kansas City); "On Point" Columnist, BloombergQuint (Mumbai), www.bloombergquint.com; Member, United States Department of State Speaker Program; J.D., Harvard (1989); M.Sc., Oxford (1986); M.Sc., London School of Economics (1985); A.B., Duke (1984). Marshall Scholar (1984–86). Member, Council on Foreign Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK* (5th ed., 4 vols., 2019); *MODERN GATT LAW* (2d ed., 2 vols., 2013); *TPP OBJECTIVELY* (2d ed., 2019); *TRADE, DEVELOPMENT, AND SOCIAL JUSTICE* (2003); and *UNDERSTANDING ISLAMIC LAW (SHARI'AH)* (2d ed., 2016). The views expressed herein do not necessarily represent those of the University of Kansas, Dentons, Bloomberg, or the United States government, or their employees, affiliates, or clientele.

Special thanks are owed to Dr. Charles J. Reid, Jr., Professor of Law, University of St. Thomas School of Law; Mr. Nathaniel Fouch, Symposium Editor, *University of St. Thomas Law Journal*; and Megan E. Kratzke, Associate Editor, *University of St. Thomas Law Journal*, for the blessing of inviting me to research and write this article and present it as the Keynote Address at the March 20, 2020 symposium. Special thanks also are due to my colleague and friend Mr. Eric Witmer, Research Attorney, Kansas Courts of Appeals, for his helpful review and editing of the penultimate draft.

fundamental Catholic social justice teaching (CSJT) of *human dignity*. Patriotism is legitimate love for one's country, while acknowledging diversity across and within countries, and recognizing that all persons (including Chinese and Iranian citizens) are created in the image and likeness of God.

In the long term, there is *no* military or law enforcement solution to nationalism. The use of force to put down nationalism is a sometimes-necessary measure, but a short-term one to cope with harm or imminent threats thereof.

The long-term solution is *education*. The onus is on international legal educators to be innovative and revise their syllabi to combat ignorance (a lack of understanding) and stereotypes (born of prejudice). We should aspire to be at the forefront to build empathy. Educators would not (or could not) perform this function during the Nazi era, as visitors to Yad Vashem in Jerusalem (like me, in 2017 and 2018) know well: these visitors see the book burning exhibit, and they learn that the majority of participants at the January 1942 Wannsee Conference were lawyers. (That there were so many law-trained participants horrified me, made me wonder what I am doing in my teaching, and made me think about Hannah Arendt's phrase "the banality of evil"¹ and C. S. Lewis's writings on white collar professionals doing evil.)

There is no single correct educational strategy—other than to do nothing, which, candidly, some comfortable tenured professors do. Their syllabi are stuck in the mid-twentieth century. Their International Trade Law course syllabi are worthy of the 1976–79 Tokyo Round. To do nothing is what nationalism needs to triumph.

Yet, nationalism will not be fought by replacing one intellectual orthodoxy with another. There are multiple options—ways to revamp scholarship agendas and teaching pedagogies—to enhance understanding and fight prejudice.

One way to approach the selection of options is to consider America's most pressing national security challenges, those which stoke nationalism. Dealing with Iran, in particular, and the Near East generally, is at or near the top of that list. Iran lies at the intersection of my two specialties, international trade law and Islamic law. It has been of interest to me since November 4, 1979, when the hostages were seized, and it is of keen importance to my students, who include US Special Operations Forces. And, as an Indian American, I am keenly aware that India is one of the few countries on good terms with both Iran and America.

Therefore, to my mind, learning more about Iran's legal culture is among the pertinent strategies for the world into which law students are

1. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

graduating and in which they are practicing. And that is the world—not the world of the mid-twentieth century—on which we must focus.

One obvious way to learn about a foreign legal culture is to study its constitutional structure, in this case, the *1979 Constitution of the Islamic Republic of Iran*. That is, among the ways to break the link from insufficient empathy to ignorance to prejudice to nationalism is to learn more about Iran’s Constitution. To be sure, this methodology is not a full remedy. But it is illustrative. It is what I can do with my scholarship and syllabi.

Simply put, understanding more about Iran can foster empathy among the next generation of American-trained international lawyers. If those lawyers are more empathetic than their predecessors, they might help combat the descent into nationalism, a descent that Catholic social justice teaching makes clear leads to hell.

- I. CATHOLIC SOCIAL JUSTICE TEACHING ON “NATIONALISM”
VERSUS “PATRIOTISM” 524
 - A. Thesis 524
 - B. Reasoned Truth and “Patriotism” versus “Nationalism”. 524
 - C. Revealed Truth and “Patriotism” versus “Nationalism” . 526
- II. THE EMPATHY-IGNORANCE-PREJUDICE-NATIONALISM LINK
AND CURRICULAR OPTIONS TO SEVER THIS LINK 531
- III. CURRICULAR APPROACH TO IRAN’S CONSTITUTION 532
 - A. Disclaimer 532
 - B. Golden Rule Methodology 537
 - C. Structure and Preamble 542
 - D. Thematic Examination 551
- IV. THEMES FOR CURRICULAR STUDY OF IRAN’S CONSTITUTION. 552
 - A. Theme 1: Islamicization 552
 - B. Theme 2: *Velayet-e-Faqih* and Reappearance of *Walī al ‘Aṣḥ* 563
 - C. Theme 3: Bounded Religious Freedom 571
 - D. Theme 4: Bounded Civil Rights 574
 - E. Theme 5: Rejection of Foreign Oppression 580
 - F. Theme 6: Rejection of Despotism 584
 - G. Theme 7: Human and Social Capital Development 587
 - H. Theme 8: Mixed Economy 589
 - I. Theme 9: Three (or Four?) Branches of Government... 596
- V. IF NOT INTERNATIONAL LEGAL EDUCATORS, THEN WHO?.. 609

I. CATHOLIC SOCIAL JUSTICE TEACHING ON “NATIONALISM” VERSUS “PATRIOTISM”

A. *Thesis*

What are the causes of nationalism, and what might international legal educators do to address those causes? I argue, in part I, that nationalism is born of ignorance and prejudice, both of which are rooted in a lack of empathy, and that among the options for addressing both is revising appropriate course syllabi to cover postcolonial literary theory and the Constitution of the Islamic Republic of Iran. That is, my thesis is that a lack of empathy born of ignorance and prejudice fuels nationalism (as distinct from patriotism), and among the curricular reforms that might engender empathy and thereby combat nationalism is fostering understanding of the Constitution of Iran. Part II draws the links from unempathetic thinking to ignorance, prejudice, and nationalism. Parts III and IV discuss the proposed solution of curricular reform. This solution is neither all-inclusive (many other options are available to international law teachers) nor mutually exclusive (in respect of deploying other options contemporaneously).²

This thesis and these parts prompt a question—namely, “What is nationalism?” They presume a clear differentiation of “patriotism” from “nationalism.” So, I begin by clarifying the distinction and assessing why it matters, relying on reasoned truth—principally, standard lexicography—and revealed truth—namely, Catholic social justice teaching (CSJT).³

B. “Patriotism” versus “Nationalism”

“Patriotism” and “nationalism” are two easily confused “-isms.” As the *Oxford English Dictionary (OED)* points out, “[i]n earlier use, . . . the two appear to have been more or less interchangeable.”⁴ Yet the distinction matters: patriotism is acceptable, even good, while “nationalism” is unacceptable, and even evil. “Patriotism,” the *OED* teaches, means “love of or

2. For example, another, indeed complementary, option is to learn postcolonial theory, pioneered by Edward Said, with a view to studying texts, including the Constitution of Iran. The methodology of this approach encourages us to examine our “Orientalist” stereotypes and appreciate how legal texts are interpreted in the “Orient.” We may understand better what the “Orient” is and how it views itself and its engagements with America. For a discussion of postcolonial theory, see Raj Bhala & Eric Witmer, *Interpreting Interpretation: Textual, Contextual, and Pragmatic Interpretative Methods for International Trade Law*, 35 CONN. J. INT’L L. 58, 112–15 (2020) [hereinafter, Bhala & Witmer].

3. The CSJT principles discussed and applied herein are explained in PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (Washington, D.C.: United States Conference of Catholic Bishops, Vatican: Libreria Editrice Vaticana, 2004) [hereinafter, COMPENDIUM]. For a thorough historical account of the origins and evolution of CSJT, see RODGER CHARLES, S.J., CHRISTIAN SOCIAL WITNESS AND TEACHING—THE CATHOLIC TRADITION FROM GENESIS TO CENTESIMUS ANNUS, VOLUME 1 (FROM BIBLICAL TIMES TO THE LATE NINETEENTH CENTURY) and VOLUME 2 (THE MODERN SOCIAL TEACHING CONTEXTS: SUMMARIES: ANALYSIS) (1998).

4. *Nationalism*, OED OXFORD ENGLISH DICTIONARY, <https://www.oed.com>.

devotion to one's country."⁵ In contrast, "nationalism" refers to "[a]dvocacy of or support for the interests of *one's own nation*, esp. to the *exclusion or detriment of the interests of other nations*. Also: advocacy of or support for national independence or self-determination."⁶ Moreover, "[w]hereas *patriotism* usually refers to a general sentiment, *nationalism* now usually refers to a specific ideology, esp. one expressed through political activism."⁷ Thus, all "nationalists" are "patriots"—they love their own country. But not all "patriots" are "nationalists"—they do not denigrate others.

Under the banner of reasoned truth, there are several justifications for distinguishing between "patriotism" and "nationalism." Manifestly, lexicographic accuracy is one of them. Unless terminology is clear, accurate diagnosis of a problem and dialogue toward a solution are stymied. That justification is both necessary and sufficient for present purposes: engendering empathy is not a "nationalistic" aim but is consistent with "patriotism."

Another rationale for why this distinction matters is utilitarian, in the sense of devising policies that maximize net social gains. The argument is that internationalist responses are more effective at solving problems than nationalist ones (that is, internationalist responses are efficient, producing the maximum benefits with the least costs). Evidence for this utilitarian stance is seen in Germany's multilateral approach to dealing with the COVID-19 pandemic as contrasted with America's and India's nationalist ones.⁸ Arguing from efficacy, however, requires a full analysis of costs and

5. *Patriotism*, OED OXFORD ENGLISH DICTIONARY, <https://www.oed.com>.

6. *Nationalism*, *supra* note 4.

As articulated in the March 20, 2020 presentation at this symposium by Jeremy Rabkin, I acknowledge a distinction between "nationalism" and "sovereignty." Viewed historically, "nationalism" may be seen as a nineteenth-century doctrine about peoples, namely, that ethnic and linguistic communities should be within the same nation-state. "Nationalism" is a passion, or mood, which is mobilized in defense of a "nation" drawn along those communal lines, typically because of a sense of grievance (i.e., a grievance culture unifies these communities). Those lines are short of a common bond with humanity, but broader than persons' own immediate families. "Sovereignty" is a seventeenth-century concept about states responding to the breakdown of Christendom and the rise of the nation-state. Nationalist movements have no recognition under international law. That law is primarily concerned with nation-states, which are primarily concerned with protecting their sovereignty. Indeed, not every state is "sovereign," but only a state is "sovereign" under international law. To the extent "nationalism" is connected with Enlightenment ideas (developed, for example, by Jean Jacques Rousseau), it may avoid the uglier, violent dimensions that, unfortunately, it typically spawns. Interestingly, there may be an inverse relationship between the two: the greater the ability of a nation-state to defend its sovereignty, the less virulent its nationalist sentiments may be. Or the relationship could be direct: a nation-state's sense of national superiority may drive it to conquest (as occurred in Germany during the Nazi period).

A similar distinction exists between "patriotism" and "sovereignty." But, as per the definition of "patriotism" discussed above, this distinction is without those nefarious implications. Thus, whether the relationship between "patriotism" and "sovereignty" is inverse or direct, the impulse to dominate others does not exist.

7. *Id.*

8. See Andreas Rinke, *For Virus-tamer Merkel, Global Alliances Trumped Nationalism*, REUTERS (June 10, 2020), www.reuters.com/article/us-health-coronavirus-germany-merkel-ins/

benefits over time associated with agreed-upon “nationalist” versus “patriotic” goals. For example, are “nationalist” trade policies more efficient at reindustrializing the American heartland than “patriotic” ones? It might be ventured that the Sino-American trade war, which the United States unilaterally launched in March 2018 under Section 301 of the Trade Act of 1974, as amended,⁹ exemplifies a nationalist trade policy, as distinct from advancing America’s interests collaboratively through the auspices of the World Trade Organization (WTO), which is not unpatriotic.¹⁰ Tempting as it is, pursuing that suggestion is not within the scope of my thesis, which is about combating nationalism through empathy-based curricular reform. I simply beg indulgence and point to the well-known horrors of twentieth-century world and regional conflagrations. The arguments from revealed truth (specifically CSJT) in part I.B, and the two examples in part II, support my premise that nationalism is, indeed, worth combating.

C. *Revealed Truth and “Patriotism” versus “Nationalism”*

Reasoned truth, as quoted in the above secular sources, is not the only justification for distinguishing “nationalism” from “patriotism.” Revealed truth provides a complementary rationale. Indeed, it would be odd, to say the least, if the Catholic Church conflated “patriotism” and “nationalism” and thereby tolerated both as acceptable. There are three sources of Catholic doctrine: sacred tradition, sacred scripture, and sacred teaching (magisterium). Each counsels against “nationalism.” Consider three examples, one from each source, respectively: the Epiphany, the Two Great Commandments, and social justice principles.

Long before the institutional Church arose, sacred tradition developed. “Epiphany” is one such tradition, and the word itself intimates globalist thinking at variance with “nationalism.” Three Wise Men, known traditionally as “Casper,” “Balthazar,” and “Melchior,” came from afar to pay homage to the baby Jesus.¹¹ These four figures were of different backgrounds: an Arab, a Turk, and a Persian, on a perilous journey to Bethlehem to see a Jewish baby.¹² As worldly kings, each one of the three might have been expected to view the ethnic and religious makeup of his secular realm as

for-virus-tamer-merkel-global-alliances-trumped-nationalism-idUSKBN23H1KC; Andy Mukherjee, *Economic Nationalism Is a Wrong Turn for Covid-Hit India*, BLOOMBERG (June 8, 2020), www.bloomberg.com/opinion/articles/2020-06-08/india-s-modi-uses-economic-nationalism-in-covid-19-china-crises.

9. See 19 U.S.C. § 2411.

10. See generally 3 RAJ BHALA, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK 831–946 (5th ed. 2019) [hereinafter BHALA TRADE TEXTBOOK] (discussing Section 301, and analyzing the Sino-American Trade War).

11. Jean-Pierre Isbouts, *Who were the three kings in the Christmas story?*, NAT’L GEOGRAPHIC (Dec. 24, 2018), <https://www.nationalgeographic.com/culture/article/three-kings-magi-epiphany>.

12. *Id.*

superior. Yet as far as is known from tradition, none of them exalted his kingdom over that of the other two. Rather, all three humbled themselves in the face of difference.

To be sure, the Bible does not explicitly say there were *three* Wise Men, nor that there were three *kings*. Rather, the Epiphany story speaks of *three gifts*.¹³ So, there could have been one gift bearer, or any number of them. There are different traditions about the details of the journey following a star that came to rest in the sky over the Bethlehem manger.¹⁴ Regardless of their exact historical veracity, the versions share the same theme: to be *open hearted to strangers*, like the multicultural gift bearers were to Jesus.¹⁵

Sacred scripture records the teachings of Jesus, among which are the Two Great Commandments. “Nationalism,” but not “patriotism,” violates both of the Two Great Commandments. Jesus articulates them as recorded in the three synoptic Gospels, Matthew 22:35–40, Mark 12:28–34, and Luke 10:27.¹⁶

The second of these Commandments requires love of one’s neighbor as oneself. It is integrally related to the first Great Commandment—namely, to love God with all one’s heart, mind, and soul. How one loves God is manifest in how one loves one’s neighbor, and vice versa. To love God is to love one’s neighbor; to love one’s neighbor is to love God.

Put differently, as the Holy Father counseled in a February 23, 2020, homily at an outdoor Mass in Bari (on Italy’s southern coast) concelebrated with sixty bishops from the Mediterranean basin region (i.e., Europe, the Middle East, and North Africa), the only acceptable form of extremism for a Christian is an “extremism of love”:

“‘Love your enemies and pray for those who persecute you.’ This is the Christian innovation. It is the Christian difference,” the Pope said. . . .

The Mass, . . . marked the conclusion of a five-day meeting to address common concerns, including the need for peace, the

13. See *Matthew* 2:10–11 (Catholic Study Bible: New American Bible 1990) [hereinafter Catholic Study Bible].

14. *Id.*

15. An interesting variant within the Sacred Tradition is that Casper, Balthazar, and Melchior were young, middle-aged, and old-aged, respectively. Melchior entered the manger first. He reflected with Saint Joseph about life: its ups and downs experienced, and the wisdom gained to forgive the trespasses of others and be overwhelmed with joy and gratitude for life’s blessings. Next, Balthazar spoke of middle-aged matters: the need to nurture a strong family and pursue justice in the society in which the family lives. Finally, Casper entered. He spoke with Saint Joseph from the perspective of young people: the importance of ideals and never losing sight of one’s dreams. Together, they marveled at Jesus and observed that He speaks to humanity at all phases of life: beginning, middle, and end.

16. See Catholic Study Bible, *supra* note 13, at *Matthew* 22:35–40, *Mark* 12:28–34, and *Luke* 10:27.

care of migrants and refugees, the defense of religious freedom and the promotion of interreligious and ecumenical dialogue.

Pope Francis' homily . . . focused on the day's Gospel reading from St. Matthew in which Jesus tells his followers not to retaliate against those who harm them and to love and pray for their enemies.

"Pray and love: this is what we must do," Pope Francis said. "The love of Jesus knows no boundaries or barriers. The Lord demands of us the courage to have a love that does not count the cost, because the measure of Jesus is love without measure."

Jesus' Commandment of love is not just a suggestion or even a challenge, the Pope said. "It is the very heart of the Gospel."

"Where the command of universal love is concerned, let us not accept excuses or preach prudent caution," he said. "The Lord was not cautious; he did not yield to compromises. He asks of us the extremism of charity. It is the only legitimate kind of Christian extremism: the extremism of love."

Pope Francis said he knew some people would object and say, "That is not how life really is! If I love and forgive, I will not survive in this world, where the logic of power prevails, and people seem to be concerned only with themselves."

"So is Jesus' logic, his way of seeing things, the logic of losers?" the Pope asked. "In the eyes of the world, it is, but in the eyes of God it is the logic of winners."¹⁷

Vitality, the definition of "neighbor" is not bounded by race, ethnicity, language, or gender. Pope Francis made that clear in his Divine Mercy Sunday homily in April 2020:

As the world slowly recovers from the COVID-19 pandemic, there is a risk it will be struck by an even worse virus—that of selfish indifference, Pope Francis said.

This dangerous virus is "spread by the thought that life is better if it is better for me and that everything will be fine if it is fine for me. It begins there and ends up selecting one person over another, discarding the poor and sacrificing those left behind on the altar of progress"

. . . .

The current pandemic instead must compel people to prepare for a "collective future" that sees the whole human family as one and holds all of the earth's gifts in common in order to be shared justly with those in need, he said.

17. Cindy Wooden, *Gospel Challenges Believers to Love Without Measure, Pope Says*, CATH. NEWS SERV. (Feb. 23, 2020), <https://cnstopstories.com/2020/02/23/gospel-challenges-believers-to-love-without-measure-pope-says/#noredirect>.

“This is not some ideology: it is Christianity,” and it mirrors the way the early Christian community lived.¹⁸

Patriotism allows for a citizen of any one country to love equally a citizen of any other country. In that openness, it is Christlike. Nationalism, because it exalts one country over another, leaves no such space. Its closure to love impedes adherence to the first of the Two Great Commandments, because God’s love is boundless.

The difference between “patriotism” and “nationalism” with respect to the second of the Two Great Commandments is glaring. In extreme cases, such as war, patriots and nationalists alike will work toward victory. Which “-ism,” however, leaves room for post conflict forgiveness?

The love of one’s country resonating within patriotic hearts and minds does not preclude reconciliation with erstwhile enemies. Patriots are open to “the path to peace.”¹⁹ This path was the theme of a speech at the Apostolic Palace by the Holy Father in December 2019 to ambassadors from Andorra, Latvia, Kenya, Mali, Niger, and Seychelles who were presenting their letters of credential to Pope Francis.²⁰ Peace requires “a culture of inclusion, a more just economic system, and various opportunities for the participation of all in social and political life,” he said.²¹ Pope Francis also wrote in the Spanish magazine *Vida Nueva* in an April 2020 article entitled “Un Plan Para Resucitar” (“A Plan to Resurrect”) of paralysis borne of fear and uncertainty that thwarts new beginnings: “If there’s one thing we’ve been able to learn in all this time, it’s that no one is saved alone. . . . Borders are falling, walls are crumbling, and *all fundamentalist discourses are dissolving* before an almost imperceptible presence that shows the *fragility* of which we are made.”²² Acceptance of this “fragility,” which in effect is a humble disposition toward realities, is not inconsistent with patriotism.

Nationalism, however, is arrogant. It arouses and sustains ongoing hatred for one’s enemies, because of its innate attitude of relative superiority. It is incongruous with reconciliation, which is the starting point on the path to peace. Pope Francis made clear that reconciliation “entails *renouncing*

18. Carol Glatz, *Now Is Time to Build a New World Without Inequality, Injustice*, *Pope Says*, CATH. NEWS SERV. (Apr. 19, 2020), <https://cnstopstories.com/2020/04/19/now-is-time-to-build-a-new-world-without-inequality-injustice-pope-says/#noredirect>.

19. See Carol Glatz, *Set Aside Indifference, Fear in Order to Build Peace*, *Pope Tells Diplomats*, CATH. NEWS SERV. (Dec. 19, 2019), <https://cnstopstories.com/2019/12/19/set-aside-indifference-fear-in-order-to-build-peace-pope-tells-diplomats/#noredirect> [hereinafter *Set Aside Indifference*].

20. *Id.*

21. *Id.*

22. Junno Arocho Esteves, *Pope Pens Editorial on Joy in the Time of Coronavirus*, CATH. NEWS SERV. (Apr. 17, 2020), <https://cnstopstories.com/2020/04/17/pope-pens-editorial-on-joy-in-the-time-of-coronavirus/#noredirect> (emphasis added). The Holy Father also wrote of the common good: “Pope Francis said that the current pandemic also has highlighted the need ‘to unite the entire human family’ and that the only way to conquer the coronavirus is through ‘the *antibodies of solidarity*.’” *Id.* (emphasis added).

our desire to *dominate* others and learning to *see one another as* persons, sons and daughters of *God*, brothers and sisters.”²³ Yet no such renunciation resonates in nationalism. Seeing the other—the “enemy”—as not from a common creator is endemic to nationalist dominance, because it facilitates indifference and stokes fear. Thus, Pope Francis counsels, “[o]nly when we set aside indifference and fear can a genuine climate of mutual respect grow and flourish.”²⁴

As for the third source of Catholic doctrine, the magisterium, Catholic social justice theory is relevant to understanding why “nationalism,” as distinct from “patriotism,” is unacceptable. The theory includes four core principles: human dignity, common good, preferential option for the poor, and subsidiarity.²⁵ “Nationalism” is incongruous with each principle.

Human dignity refers to respect for each person as a unique, unrepeatable, and priceless creature created in the image and likeness of God. All persons share this common creator, and thus equal due is owed to the interests of each person. To exalt the interests of one group over another (for example, through legislation or policy) necessarily entails acting to the detriment of the interests of that other group. Instead, the common good should be pursued whenever possible. The interests of all groups should be advanced, or at least no one group should be rendered worse off, by public decisions. Economists refer to such decisions as “Pareto optimal.” Nationalist-driven decision-making is not about the common good. Rather, it is about vaulting the good of one group regardless of the consequences to the well-being of another group.

To be sure, in any society, compromising or excluding the interests of the most vulnerable—namely, the poor—occurs. By definition, the poor lack strength of voice and command over resources relative to the rich. Thus, if a trade-off among interests must be made (again, for example, in legislative or policy decision-making), then a preference ought to be given to the poor. This preferential option for the poor may be viewed as an exception to advancement of the common good so as to safeguard the human dignity of the poor. Nationalist groups—even if ironically composed in part of members from lower socioeconomic strata—regard the poor as weak and diluting the strength of a country, and thus creatures to be marginalized (or worse) rather than lifted. History has shown nationalism to operate orthogo-

23. Glatz, *supra* note 19.

24. *Id.*

25. See COMPENDIUM, *supra* note 3, at 55–70 (human dignity), 72–75 (common good), 79–80 (universal destination of goods and preferential option for the poor), 81–82 (subsidiarity), 316–18 (entries for human dignity), 342–43 (references to common good), 399–401 (references to poor and poverty), 430 (references to subsidiarity); 1 BHALA TRADE TEXTBOOK, *supra* note 10, at 15–31; see generally RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE (2003) (defining and applying the different types of “justice” to special and differential treatment rules in international trade law). Note additional CSJT principles, such as participation and solidarity. See COMPENDIUM, *supra* note 3, at 83–87.

nally to this preference, as is demonstrated perhaps most notoriously by the National Socialist (Nazi) Party in the 1920s through 1945.²⁶ Moreover, nationalism that leads to great power rivalry opposes globalization, as occurred in the early twentieth century, and may again be occurring with respect to the Sino-American confrontation.²⁷

Finally, and consistent with human dignity and the common good, subsidiarity calls for decision-making at the lowest level, closest to the individual, as possible. Here, too, historical reference is helpful. Nationalist regimes, such as those in Nazi Germany (1933–1945), Mussolini’s Italy (1922–1943), and Franco’s Spain (1936–1975), inclined to centralization with directives from the top (indeed, from one strongman). The examples are not confined to far-right-wing (Fascist) regimes.²⁸ Extreme left-wing ones, such as those of the former Soviet Union (1917–1991) and (with periods of decentralization) Communist China (1949–present), overrode local decision-making to suit their ideological, nation-building ends. Indeed, the central thesis of F. A. Hayek’s critique of socialism, *The Road to Serfdom* (1944), was that the centralization of power consequently crushes human dignity.

II. THE EMPATHY-IGNORANCE-PREJUDICE-NATIONALISM LINK AND CURRICULAR OPTIONS TO SEVER THIS LINK

What can international legal educators do to combat nationalism? Odd as it may seem, the answer to that question is not to tighten nationalism, nor is it to follow the legal instinct to rebut and pretend there is no threat. Rather, the first resort should be to empathize. What gives rise to and catalyzes a sense of victimhood from a different group or idea, and then leads to aggressive behavior? While the surest answer might come from interviews with actors professing aggrievement, I argue the answer is ignorance that

26. In respect of the January 1942 Wannsee Conference, at which the majority of participants were lawyers, see Ubaka Ogbogu, *The Lawyers of Wannsee*, UNIV. OF ALTA. FAC. OF L.: FAC. BLOG (Aug. 7, 2008), <https://ualbertalaw.typepad.com/faculty/2008/08/the-lawyers-of.html>.

27. For an argument that this confrontation could doom the present era of globalization, as happened in the early twentieth century amid the rivalry between Britain and Germany in the First and Second World War periods, see Markus Brunnermeier et al., *Beijing’s Bismarckian Ghosts: How Great Powers Compete Economically*, 41 WASHINGTON Q. 161 (2018); Martin Wolf, *China-U.S. Rivalry and Threats to Globalisation Recall Ominous Past*, FIN. TIMES (May 26, 2020), <https://www.ft.com/content/5887ec6c-9d97-11ea-b65d-489c67b0d85d>. One consequence for this end is the length of time needed to restore robust cross-border commercial relations. Measured in terms of economic integration relative to global output, it took sixty years after 1913 to return to the levels of 1913. See Maurice Obstfeld, *Globalization and Nationalism: Retrospect and Prospect* (Italian Econ. Ass’n Ann. Meeting, Palermo, It., Oct. 24, 2019), <https://static1.squarespace.com/static/5d0ed7795d764000017ccc00/t/5dbb192d3c4c5e7eaf8eec3/1572542772111/Globalization+and+Nationalism.pdf>.

28. For discussion of the evolution of the meaning of the term “fascism,” see Jennifer Szalai, *The Debate over the Word Fascism Takes a New Turn*, N.Y. TIMES (June 19, 2020), www.nytimes.com/2020/06/10/books/fascism-debate-donald-trump.html.

spawns prejudice. My answer bespeaks the bias of a teacher because a key remedy is education.

To be sure, nationalist sentiments may spring from repeated unpleasant experiences with the “other.” It may be precisely because one has been exposed to Muslims and internationalists that one draws perverse inferences and develops pejorative stereotypes about them. Yet, exposure is a tonic (i.e., less ignorant); less prejudicial views are more likely when one actually has come to know the “other.” Thus, for a law teacher, an empathetic approach is to sponsor experiential learning whereby law students can interact with Sunni and Shia counterparts, and with constituents served by international and nongovernmental organizations. Greater engagement may well build greater tolerance and respect.

But creating and expanding such opportunities are generally the province of externship and internship coordinators, clinicians, and the career services officer—not the law teacher. Law teachers can (and should) make available their connection networks to their students, but their primary focus is on classroom curriculum. For the law teacher, the primary means to sever the link from ignorance to prejudice, and onward to nationalism, is to build empathy through curricular adjustments. My suggestion here, however, is nonexclusive. Diversity, not orthodoxy, is needed, for it would be ironic indeed to attempt to counter nationalism—a perverse kind of orthodoxy—with an intransigent academic ideology manifested in revised syllabi.

III. CURRICULAR APPROACH TO IRAN’S CONSTITUTION

A. *Disclaimer*

To be clear at the outset, in no way do I put forth the option of studying Iran’s Constitution to minimize the actual or potential national security threat that Iran’s alleged nuclear weapons program, its ballistic missile stockpile, and its support for foreign terrorist organizations (FTOs) pose to the United States. (I have chronicled these threats elsewhere.²⁹) Iran’s breaches of the July 2015 Joint Comprehensive Plan of Action (JCPOA),³⁰ albeit calibrated and reversible, are troubling,³¹ as is its failure to disclose fully its previous military-related nuclear research.³² Indeed, Iran has the

29. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 515–39; Raj Bhala, *Chapter 22, in INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK* (6th ed., forthcoming).

30. The full text of the JCPOA and its five annexes, plus related statements, is posted at *Joint Comprehensive Plan of Action*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/e/eb/tfs/spi/iran/jcpoa/index.htm>.

31. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 515–39; Bhala, *supra* note 29.

32. Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran—Report of the Director General*, at ¶¶ 27, 39–45, 52–54, IAEA Doc. GOV/2011/65 (Nov. 8, 2011), www.iaea.org/sites/default/files/gov2011-65.pdf.

largest stockpile of nonnuclear missiles in the Middle East,³³ and in December 2017 I stared from the Golan Heights at some of its missile positions in Lebanon. They were in the hands of Hezbollah, which America designated an FTO in October 1997.³⁴

I also do not seek to exaggerate the threats Iran poses. I have made clear my view—like that of most of America’s defense and diplomatic establishment—that the May 2018 withdrawal by the United States from the Iran nuclear deal was an epic mistake.³⁵ There will be regime change, thanks in part to demography. As Michael Rubin, resident scholar at the American Enterprise Institute and senior lecturer at the Naval Postgraduate School, explains:

[S]imple demography is as important [as are “the setbacks Iran has recently suffered—the killing of Qassem Soleimani, the Israeli bombings of its forces and proxies in Syria, popular unrest and low turnout in February’s election, the coronavirus outbreak”], even though it’s not a sexy subject. When Ayatollah Ruhollah Khomeini led the Islamic Revolution of 1979, he promoted huge families—a mother, a father and seven children. Economists warned him that Iran couldn’t take the baby boom coupled with the disruption of war and revolution. He used to wave them off, quipping, “We didn’t have a revolution over the price of a watermelon”—until he began to fear in the late 1980s that Iran could. He then encouraged smaller families—a mother, a father and a child. Long story short, Iran’s birth rate is only about half of what it was in the 1980s. Put another way, during the war of the 1980s [*i.e.*, 1980-88 Iran-Iraq War], Iran had a quantitative military edge over Iraq. Iraq had better equipment, but Iran had a seemingly endless supply of 14- and 15-year-olds which it could send sweeping across minefields. Today, with an aging population and a different demographic profile than many Arab states that have youth bulges, Iranian leaders seek a qualitative military edge in order to make up for in technology what they no longer can in sheer numbers.

. . . .

33. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 515–39; Bhala, *supra* note 29.

34. See Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52, 650–51 (Oct. 8, 1997), www.govinfo.gov/content/pkg/FR-1997-10-08/pdf/97-27030.pdf.

35. See Raj Bhala, *Why the U.S. Should Not Go to War with Iran, Yet*, BLOOMBERGQUINT (June 4, 2019), www.bloombergquint.com/opinion/why-the-us-should-not-to-go-war-with-iran-yet; Raj Bhala, *What Trump Can Learn from Nixon About Iran*, BLOOMBERGQUINT (May 4, 2018), www.bloombergquint.com/opinion/2018/05/04/what-trump-can-learn-from-nixon-about-iran; Raj Bhala, *Iran: Why This Time Is Different, and What’s Next*, BLOOMBERGQUINT (Jan. 9, 2018), www.bloombergquint.com/opinion/2018/01/09/iran-why-this-time-is-different-and-what-next; Raj Bhala, *What America Can Learn from India About Iran*, BLOOMBERGQUINT (June 14, 2017), www.bloombergquint.com/opinion/2017/06/14/what-america-can-learn-from-india-about-iran.

. . . [R]egime change is coming to Iran and it won't have anything to do with the U.S. Supreme Leader Ali Khamenei is 80 years old, has acknowledged having had cancer, and is partially paralyzed from a 1981 assassination attempt. A lot of the old guard have died, and speculation is rampant in Iran about who or what might come next. . . .

. . . .

This may sound fluffy, especially coming from a conservative, but I really do think the U.S. has neglected soft power. The key to any positive change in Iran is to fracture and temper the Revolutionary Guards. There are a number of nonviolent, soft-power strategies we could take in order to diminish their stranglehold. Supporting independent trade unions would be one. Every dollar the Revolutionary Guards have to spend on workers' back wages or to improve working conditions is one dollar they can't invest in a centrifuge or missile.³⁶

Regime change also may come about for economic reasons. America's so-called "maximum pressure" campaign of sanctions, which the US applies in a secondary sense (i.e., to third-party countries, mandating that they do not do business with Iran), has wrecked Iran's economy. Persistent high unemployment and inflation rates, as well as endemic corruption, have triggered waves of violent protests.³⁷

But, as of May 2020, two years into this maximum pressure campaign, the US had won few converts.³⁸ US Secretary of State Mike Pompeo boasted:

Two years ago, President Trump announced the bold decision to protect the world from Iran's violence and the nuclear threats it poses by exiting from the flawed *Iran Deal* and its façade of security. Since that time, we have built the strongest sanctions in history and prevented Iran from funding and equipping terrorists with many billions of dollars. Today, the American people are safer, and the Middle East is more peaceful than if we had stayed in the *JCPOA*.

Seventy-five years ago, the United States and our allies stood together to rid the world of the *Nazis and their hateful ideology*. Today, we face a grave challenge to regional peace from *another rogue regime*, and we again call on the international community to join us to stop the world's leading state sponsor of anti-Semitism.

36. Tobin Harshaw, *The Big Iran Threat Is Nukes, Not Coronavirus*, BLOOMBERG (Mar. 8, 2020), www.bloomberg.com/opinion/articles/2020-03-08/iran-and-coronavirus-nuclear-weapons-are-the-bigger-threat.

37. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 515–39; Bhala, *supra* note 29.

38. See Bobby Ghosh, *Empty Chest-Thumping Won't Win U.S. Allies on Iran*, BLOOMBERG (May 13, 2020), www.bloomberg.com/opinion/articles/2020-05-13/pompeo-s-promise-to-lead-the-world-against-iran-is-hollow.

The United States will exercise all diplomatic options to ensure the U.N. arms embargo is extended. We will not accept their *status quo* level of violence and terror. And we will never allow Iran to have a nuclear weapon.³⁹

The analogy of Iran and its Islamic republic to Germany and Nazism was striking, and the reference to anti-Semitism concerning. But is today's Iran the same as yesterday's Germany?

Even by the standards of hyperbole set by the administration of President Donald Trump, Secretary of State Michael Pompeo's contention that the U.S. is "Leading the World Against Iran's Threats" is a doozy. That chest-thumper is the title of a statement [quoted above] issued on the second anniversary of the American withdrawal from the *Iran Nuclear Deal*. As an accounting of the Administration's strategy to contain the Islamic Republic since then, the statement completely disregards the cost to relations with U.S. allies.

There is no gainsaying the claim that Trump's tough economic sanctions have "prevented Iran from funding and equipping terrorists with many billions of dollars." The region would have been even more unstable if the regime in Tehran was unhindered by the sanctions. The recent belligerence by Iran and its proxies can be attributed to their growing frustration at being shackled. So, the contention that "the Middle East is more peaceful than if we had stayed [in the deal]" just about passes muster.

But Pompeo can hardly boast of "leading the world" against Iran when few other nations are inclined to follow. That the U.S. finds itself standing all but alone against a blood-soaked regime, a menace to its neighbors and a threat to the world, must rank as one of the Administration's—and the Secretary's—greatest failures.

Two years after Trump's withdrawal from the Joint Comprehensive Plan of Action, none of the other signatories—China, Russia, Germany, France, Britain and the European Unions—has joined the American "maximum-pressure" campaign against Iran. On the contrary, they maintain the fiction that the deal is alive, even though the regime in Tehran is now in breach of its restrictions on uranium enrichment.

Worse, Pompeo can't count on their support for his next task: making sure the Iranians don't get their hands on sophisticated new weapons systems. The other *JCPOA* signatories are resisting the Trump administration's plan to extend a United Nations embargo on arms sales to Iran, which is due to expire this fall, by triggering a "snapback" of pre-deal U.N. sanctions.

39. Press Statement, Michael R. Pompeo, Secretary of State, U.S. Dep't of State, *Leading the World Against Iran's Threats* (May 9, 2020), <https://ge.usembassy.gov/leading-the-world-against-irans-threats-may-9> (emphasis added).

Perhaps the other signatories' lingering resentment over the peremptory manner in which Trump treated them was inevitable. The President, plainly obsessed with dismantling the legacy of his predecessor, tore up the deal with scant consideration for their objections.⁴⁰

Why the lack of converts? Why has America not won over its traditional allies? Arguably, one reason is the US fails to appreciate their understanding of how the Islamic Republic works, or does not work, and what their interests are with respect to Iran. Here, again, a bit of empathy might help de-escalate tensions—with the allies, and, in turn, Iran.

What will come next, in respect of Iran's leadership, remains uncertain. The most powerful force in Iran is the Islamic Revolutionary Guard Corps (IRGC): it dominates the economy, derives revenues from the enterprises it controls, and cross-subsidizes activities adverse to America's interests. Will the Guards crumble from fissures from within? Will the Iranian people somehow cast the Guards aside? In turn, will the next regime see the wisdom of reentering a renegotiated JCPOA?

Squarely addressing these questions is for another time. The focus here and now is on an issue that underlies all of them: what can legal educators do to help put students in the best possible position to answer these questions? This approach certainly is better than what I experienced as a high school senior at the University School of Milwaukee during the 1978–79 Islamic Revolution and 444-day-long hostage crisis. At no time then or thereafter—as a college student at Duke, a graduate student at the London School of Economics and Oxford, or a law student at Harvard—did I observe systematic curricular shifts to help students understand the cataclysm that still reverberates across the Middle East. There were episodic courses or portions of courses about Middle East politics and religion, often taught by area specialists predisposed to cover recent developments in Iran. Fast forward to 2010–19, when I was humbled to teach Islamic law at the Command and General Staff College of Fort Leavenworth to US Special Operations Forces: these remarkable women and men made clear they had not been taught the difference between Sunnite and Shiite Islam, nor studied much about contemporary Iran.

My answer is simple, perhaps simplistic, and probably insufficient. Yet, it is a start: study the Constitution of Iran. Understanding the structure and governance of any country starts with understanding its constitution and doing so in a comparative sense—perhaps in a regular US Constitution course, not unlike some contracts courses that discuss the United Nations Convention on Contracts for the International Sale of Goods (CISG)—is fruitful in understanding how and why Iran's Islamic revolutionary regime thinks and operates. Empathy (as distinct from sympathy) is necessary, but

40. Ghosh, *supra* note 38.

not sufficient, to understanding Iran's past, present, and future; managing change; and avoiding miscalculations and violent confrontations. Exposure to Iran's Constitution is an exercise in empathy—in seeing America through official Iranian eyes—and thus a step toward conflict reduction. Consider the alternative: continued demonizing of Iran, as Iran has of America as the “Great Satan,” which across four decades has gotten both sides nowhere.

B. *Golden Rule Methodology*

Particularly with respect to an adversary, it is easy to read the constitution of another country through the prism of conflict. That is all the more true when those readers seek regime change, as many American officials and analysts do, in one way or another, in Iran.⁴¹ A specific temptation is to see hypocrisy in the foundational document of an unfriendly foreign government, that is, to see a disconnect between, on the one hand, noble principles the document manifests in certain textual provisions and, on the other hand, dastardly practices the country perpetrates on its own soil and overseas. Reading Iran's Constitution perfectly illustrates this temptation:

The current Iranian government is an Islamic theocracy with global intentions. *Numerous constitutional provisions, particularly Article 4, make all Iranian law subordinate to its Islamic interpretation, which may explain why despite its constitution prohibiting torture or upholding civil rights and the dignity of man, Iran's human rights record has been described as “abysmal” by the [United States] State Department, and also Iran's justification for its well-known campaign of assassinating its political opponents overseas. . . . If Iran sees an Islamic imperative, its constitution and legislation will be interpreted or superseded to allow for such actions.*

Iran is clear about its global intentions. Its constitution's preamble states that the constitution “provides the necessary basis for

41. See, e.g., Eric Edelman & Ray Takeyh, *The Next Iranian Revolution—Why Washington Should Seek Regime Change in Tehran*, 99 FOREIGN AFFS. 131, 145 (2020) (arguing the U.S. should seek regime change in Iran, even though it “would not be pretty,” and that America “should at the very least attempt to empower the Iranian people to get the kind of government they deserve,” “[o]therwise, Washington is doomed to repeat its past mistakes: pretending that it is possible to negotiate with the *mullahs* and blindly expecting that a theocratic revolutionary movement will somehow produce ‘moderates’ willing to steer the regime away from its recklessness—or naively hoping that a popular revolt will succeed without any support from the outside.”).

For an excellent review of contemporary Iran and where the Islamic Revolution may be headed, see Dexter Filkins, *The Twilight of the Iranian Revolution*, NEW YORKER (May 25, 2020), www.newyorker.com/magazine/2020/05/25/the-twilight-of-the-iranian-revolution (arguing that although Iran's leaders for decades have railed against the United States, the greatest threats to their regime are from within Iran, in part because of their mismanagement of the economy under pressure from American sanctions, and their failure to contain the COVID-19 pandemic, resulting in a theocracy that is at once deeply unpopular but also incapable of reforming itself to meet the country's challenges).

ensuring the continuation of the [Islamic] Revolution at home and abroad” and that one of the goals of its army and Revolutionary Guards is to “fulfill[ing] the ideological mission of *jihād* in God’s way; that is, extending the sovereignty of God’s law throughout the world.”

The constitution also makes clear that Iran is on a mission to rid the world of foreign domination and oppression. Most disturbing therefore is Article 154 of its constitution: “The Islamic Republic of Iran has as its ideal human felicity throughout human society, and considers the attainment of independence, freedom, and rule of justice and truth to be the right of all people of the world. Accordingly, while scrupulously refraining from all forms of interference in the internal affairs of other nations, it supports the just struggles of the *mustad’afun* [oppressed] against the *mustakbirun* [tyrants] in every corner of the globe.”

This allows Iran to make its often-repeated claim that it has never executed an offensive attack on foreign soil—when in fact it does so through proxies, whether the bombing of the marine barracks in 1983 or killing Americans today in Iraq.⁴²

Each of these provisions is discussed *infra* in part IV, but here it is worth noting that the above-quoted perspective is not unmerited, and from an American perspective, entirely understandable.

Indeed, this stance underlies a superbly rich and detailed analysis by Asghar Schirazi of the Free University of Berlin, *The Constitution of Iran—Politics and the State in the Islamic Republic*.⁴³ Dr. Schirazi’s analysis (translated into English from the original German) carefully sifts through the drafting history of Iran’s Constitution and shows how several of its key provisions were betrayed in the decade following its implementation. His core—and compelling—argument is that Iran’s Constitution “is full of contradictions” that “reflect the extraordinary range of political forces involved in the Iranian revolution and the particular constellation of power that existed between these forces” from early 1978, when the first draft was produced in Paris, until November 15, 1979, when the Assembly of Experts

42. Richard Horowitz, *A Detailed Analysis of Iran’s Constitution*, BROADEN (Oct. 12, 2010), <https://broadenimpact.com/2010/10/a-detailed-analysis-of-irans-constitution> (emphasis added) (citing IRAN HUMAN RIGHTS DOCUMENTATION CENTER, NO SAFE HAVEN: IRAN’S GLOBAL ASSASSINATION CAMPAIGN, MURDER AT MYKONOS: ANATOMY OF A POLITICAL ASSASSINATION (Sep. 1, 2008), <https://www.iranrights.org/library/document/2647>; IRAN HUMAN RIGHTS DOCUMENTATION CENTER, CONDEMNED BY LAW: ASSASSINATION OF POLITICAL DISSIDENTS ABROAD (Feb. 3, 2011), <https://iranhrdc.org/condemned-by-law-assassination-of-political-dissidents-abroad/>).

43. ASGHAR SCHIRAZI, *THE CONSTITUTION OF IRAN—POLITICS AND STATE IN THE ISLAMIC REPUBLIC 1* (John O’Kane trans., 1997).

(known in Farsi as the *Majles-e Khobregān*)⁴⁴ in Iran approved the final version.⁴⁵ Two contradictions are

fundamental and have had a decisive impact on the development of the Iranian state since the revolution. The first is the contradiction between the Constitution's Islamic legalist and non-Islamic secular elements which flows largely from the claim that a state set up on the basis of *Shī'ī* law and ruled by Islamic jurists (*fukahā'*) is capable of offering solutions to all problems, not only in Iran, but throughout the world, even though the Constitution itself incorporates many non-Islamic and non-legalist elements. The second is the contradiction between its democratic and anti-democratic elements, arising chiefly from the conflict between the two notions of sovereignty embodied in the document: the sovereignty of the people on the one and of the Islamic jurists on the other, a sovereignty the jurists exercise as God's deputies.⁴⁶

Indubitably, there are many events in the period since Dr. Schirazi's text was published in 1997 to the present that reinforce his thesis that, in a sense, the project of a seamlessly smooth, well-integrated Islamic document was doomed almost since its inception.⁴⁷

But reinforcing Dr. Schirazi's thesis is not the point here. Rather, the point is to reinforce empathy, and hence to fight against the temptation to read Iran's Constitution as chock-full of provisions that Iran's leaders betrayed to the chagrin of many (if not most) Iranians and Americans. As Professor Ramazani put it in 1980,

This is no place to indicate the profound philosophical, historical, political, ideological, social and psychological underpinnings of this constitutional debate. But like all such debates in all God or Man oriented societies, including Iran, the real life of a constitution unfolds in human experience. . . . The life-experience of the new Constitution has already begun, and this unique experience in the world of Islam bears close watching.⁴⁸

Simply put, the discussion below is "close watching," not a guerrilla raid into the Constitution of an adversary to find provisions to attack. Rather, it is a first reading of the plain meaning of that text and its implications; thereafter, as necessary, the incongruities between words and actions

44. See Janet Afary, *Iranian Revolution (1978–1979)*, ENCYCLOPAEDIA BRITANNICA, www.britannica.com/event/Iranian-Revolution/Aftermath. This Assembly itself—consisting of approximately seventy-five persons—was elected on August 3–4, 1979; began debating the draft Constitution on August 19; and approved it by at least two-thirds of its total membership on November 15. See Rouhollah K. Ramazani, *Constitution of the Islamic Republic of Iran*, 34 MIDDLE E. J. 181, 181–82 (1980).

45. SCHIRAZI, *supra* note 43, at 1.

46. *Id.*

47. They are chronicled in Raj Bhala, *Chapters 20–22*, in INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK (6th ed., forthcoming).

48. Ramazani, *supra* note 44, at 183.

can be stressed, and stressed with greater credibility and insight, precisely because the first reading was as neutral as possible despite over four decades of a fraught Iranian-American relationship.

If the ultimate strategic objective is to bring about consistency—sustained change in foreign governmental behavior to match the best of that country’s constitutional values—then empathy ought to infuse the initial inquiry. There ought to be no fear in this inquiry that resisting the temptation of self-interested, nationalistic bias—and simply reading the text for what it says—will result in sympathy for malevolent official acts that are, objectively, at variance with that foreign constitution. To empathize is not to sympathize. To view Iran’s domestic and foreign policy challenges from the perspectives of leaders in Tehran and Qom is not to identify with, much less express compassion for, those perspectives. Rather, it is to seek to understand what motivates these leaders’ controversial behavior, perhaps with a view toward altering it in the future. To gain this insight, clear-eyed reading glasses are needed.

Besides, what constitution can withstand the scrutiny of having its noble principles compared to the country’s actions throughout history toward its people and foreigners? Certainly not that of the United States:

Generations of American school children have memorized the words of Jefferson’s Declaration of Independence. Its evangelical spirit was echoed in Lincoln’s Gettysburg Address and scores of other presidential addresses. Perhaps partly on that account, numerous Americans, perhaps especially American lawyers, have since the 1780s presumed to tell other people how to govern themselves. . . .

. . . .

Many years before Jefferson wrote the Declaration, the poet John Milton, reacting to the imperial impulse of his colleagues in the English Parliament, told them that not words, nor money, nor arms, but example, was the one effective means to export English ideas and values to distant peoples. . . . *Professor Woodrow Wilson* observed in 1908 that Americans ought to know that truth more clearly than anyone as a result of our national experiences in failed efforts to transform indigenous cultures or to reconstruct the South after the Civil War. But, as President, the former professor Wilson forgot his own insight. His proclamation that “the world must be made safe for democracy” proved, as many foresaw, to be a disservice to the cause it proclaimed.

. . . Milton and Professor Wilson were correct, and President Wilson was wrong to broadcast the contrary notion that democracy is just waiting to happen if only a benign army would release it from an oppressive force preventing its emergence. Constitutions work to provide political stability if they reflect the enculturated notions of those they govern, but not otherwise. This has,

as Professor Wilson observed a century ago, been a hard lesson for Americans to learn.⁴⁹

Indeed, the United States Supreme Court would have little to do if American constitutional expressions like equal protection and due process, and freedom of speech and religion, were enacted by Congress and enforced by the president without controversy or inconsistency. Debates about exporting American constitutional values would be moot without troubling United States military interventions in (for example) Central America and Southeast Asia in the twentieth century, and the Middle East in the twenty-first century. Simply put, to regard from the outset other constitutions as defective relative to the US Constitution is an indicium of nationalism—an exaltation of one country over others that, thanks to its unreflective view of American history, is hypocritical.

The universal “Golden Rule,” then, ought to be the lens through which to begin work with a foreign constitution: study Iran’s founding document as America would wish Iran to study that of the United States.⁵⁰ To practice this rule is to be empathetic in constitutional interpretation. Once the principles and specific articles are carefully considered on their own merits, a sharp analysis about hypocrisy may be merited, and if so, will be all the more credible because assault was not the starting point.⁵¹ Similarly, what may be needed is constitutional revision—that is, redrafting selected provisions—or even drafting a new foundational document.⁵²

49. Paul D. Carrington, *Writing Other Peoples’ Constitutions*, 33 N.C. J. INT’L L. 167, 167–69 (2007) (emphasis in original).

50. It is important not to conflate the Golden Rule with the Second Great Commandment (discussed earlier). The Golden Rule is found in the Gospels of Matthew and Luke, as well as in the Old Testament, in Leviticus, Tobit, and Sirach. See Catholic Study Bible, *supra* note 13, at *Matthew* 7:12, *Luke* 6:31, *Leviticus* 19:18, *Tobit* 4:15, and *Sirach* 31:15. Of course, the two principles are related: to treat others as one would wish to be treated (the Golden Rule) is consistent with loving one’s neighbor as oneself (the Second Great Commandment). However, read literally, the Golden Rule does not mandate that treatment be loving—that is, it is potentially relativistic in its self-reference, whereas the Second Great Commandment explicitly sets love as the benchmark. For an analysis of their relationship, see Keith D. Stanglin, *The Historical Connection Between the Golden Rule and the Second Greatest Love Command*, 33 J. RELIGIOUS ETHICS 357 (2005).

51. Ideally, this Golden Rule methodology is practiced in the large and growing field of comparative constitutional law. An honest evaluation of similarities and differences among two or more constitutions is undermined by a predetermined hunt for what constitutes better or worse principles and provisions. Indeed, that evaluation can lead to discovery of consensus on core values that might otherwise be overlooked because they are manifested in different ways. See, e.g., Adeno Addis, *Human Dignity in Comparative Constitutional Context: In Search of An Overlapping Consensus*, 2 J. INT’L & COMP. L. 1, 1 (2015) (arguing “the best way to understand the scope and content of human dignity [and its “prominent place in numerous national constitutions and international conventions”] is to engage in a bottom-up inquiry, carefully describing the choices communities make in the name of human dignity,” and finding across dozens of constitutions that “there are in fact patterns of usage that suggest the existence of a consensus on specific understandings of dignity”).

52. Among the leading scholars on writing constitutions in the Middle East is Haider Ala Hamoudi, Vice Dean and Professor, University of Pittsburgh School of Law. Not only does empathy permeate his scholarship, but also experience, namely, his experience in 2009 in Baghdad

C. Structure and Preamble

The present-day Constitution of Iran was approved in the aftermath of the 1978–79 Islamic Revolution.⁵³ On April 1, 1979, the Islamic Republic of Iran was born.⁵⁴ On December 2–3, 1979, 98.2 percent of eligible Iranian voters ratified the new constitution (which, as noted *infra* in note 55, the Assembly of Experts had approved the previous month) via a plebiscite.⁵⁵ Thus ended the reign of the prior constitution, which dated from 1906 and

advising the Constitutional Review Committee of the Iraqi legislature. *See, e.g.*, Haider Ala Hamoudi, *NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ* (2013) (analyzing amendments to the Iraqi Constitution with a view to promoting national reconciliation, and also implicating Iraqi laws on antitrust, hydrocarbons, and revenue management); Haider Ala Hamoudi, *Notes in Defense of the Iraqi Constitution*, 32 U. PA. J. INT'L L. 1277, 1277 (2011) (arguing “the language used in . . . [Iraq’s Constitution] was wisely designed to allow some level of flexibility, such that highly divided political forces could find incremental solutions to the deep rooted sources of division that have plagued Iraqi society since its inception,” and “[t]hat Iraq has found itself in such dreadful political circumstances since constitutional ratification is therefore not a function of the open ended constitutional bargain, but rather of the failure of Iraqi legal and political elites to make use of the space that the constitution provided them to develop such incremental resolutions”).

53. *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], translated in Islamic Republic of Iran’s Constitution of 1979 with Amendments Through 1989, CONSTITUTE PROJECT, www.constituteproject.org/constitution/Iran_1989 [hereinafter 1979 IRANIAN CONSTITUTION]. Unless otherwise noted, all quotations from the 1979 Iranian Constitution are from this document. Iran’s Constitution also is available—in Persian (*Farsi*) and English—at the Iran Data Portal (Syracuse and Princeton Universities): *The Constitution of The Islamic Republic of Iran*, IRAN DATA PORTAL, <https://irandataportal.syr.edu/wp-content/uploads/constitution-english-1368.pdf>.

For a version produced shortly after its adoption, which also discusses difficulties in translation from the original *Farsi* (Persian), see Ramazani, *supra* note 44, at 184–204 (reproducing the Iranian Constitution).

54. *See* Afary, *supra* note 44.

55. *See* 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 1; Aylin Ünver Noi & Hooshang Amiraahmadi, *Arab Spring and Iran*, in *ISLAM AND DEMOCRACY: PERSPECTIVES ON THE ARAB SPRING* 203, 211 (Aylin Ünver Noi ed., 2013); Ramazani, *supra* note 44, at 182. Interestingly, the initial plan, with which *Āyatollah* Khomeini agreed, was for approval of the Constitution by a 300-person Constituent Assembly (*Majles-i Muasisdān*). *See* Ramazani, *supra* note 44, at 181. But:

Government authorities justified the change on the ground that the “provisional, unstable, and disorderly” conditions of the country did not permit prolonged debate on the draft constitution by a large assembly, and the “national interest” required rapid termination of these conditions.

Ramazani, *supra* note 44, at 181–82 (quoting statements by Iranian governmental ministry officials in June 1979, and also observing that “[t]he discontent with a hasty election of an assembly of experts instead of a constituent assembly, as originally envisaged, ranged from mere expression of dissatisfaction to the boycott of elections”).

had been amended four times, in 1907, 1925, 1949, and 1956.⁵⁶ This 1979 constitution has been amended once, in July 1989.⁵⁷

The 1979 constitution (as amended) contains a preamble and 177 articles organized into fourteen chapters spanning roughly forty-three pages (plus a four-page index). There is no doubt the constitution establishes a “theocracy,”⁵⁸ as in the lexicographic meaning of this term: “[G]overnment by divine guidance or by officials who are regarded as divinely guided. In many theocracies, government leaders are members of the clergy, and the state’s legal system is based on religious law.”⁵⁹

56. See *Constitutions and Constitutional Debates*, IRAN DATA PORTAL, <https://irandataportal.syr.edu/constitutions-and-constitutional-debates> [hereinafter *Constitutions*, IRAN DATA PORTAL]. For an analysis of the juristic foundations, specifically fatwas (religious edicts) that religious leaders issued to support the 1905 Constitutional Revolution in Iran, see AMIRHASAN BOOZARI, *SHI’I JURISPRUDENCE AND CONSTITUTION—REVOLUTION IN IRAN* (2011). For an analysis of the 1907 Constitution, see Eric Massie & Janet Afary, *Iran’s 1907 Constitution and Its Sources*, 46 BRIT. J. MIDDLE E. STUD. 464 (2019).

57. *Constitutions*, IRAN DATA PORTAL, *supra* note 56. On the question of whether opponents of Iran’s current regime might be successful in pursuing a new constitution, see Ilan Berman, *The Quest for a New Iranian Constitution*, NAT’L INT. (Jan. 2, 2020), <https://nationalinterest.org/blog/middle-east-watch/quest-new-iranian-constitution-110271>.

58. Richard Horowitz summarizes the key constitutional provisions supporting this conclusion:

The Iranian Constitution established an Islamic theocracy. Article 1 states “The form of government of Iran is that of an Islamic Republic,” while Article 2 explains this to mean, among other things, “the necessity of submission [to Allāh] and the “fundamental role” of “divine revelation” in “setting forth the laws.” Iran’s flag must contain the phrase “*Allāhu Akbar*” (Article 18) and “Absolute sovereignty over the world and man belongs to God” (Article 56). Articles 5 and 107 establish the position of Supreme Leader, . . . whose “duties and power” are enumerated in Article 110. Article 91 establishes a Guardian Council “in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam” and “The authority of the interpretation of the Constitution is vested with the Guardian Council (Article 98).

Irrespective of the constitution’s ostensibly appropriate provisions—“All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria” (Article 4) and judges “are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws or the norms of Islam” (Article 170).

. . .

Moreover, numerous Constitutional provisions are required to be “in conformity with Islamic criteria” or not “detrimental to the principles of Islam” – human rights and equal protection of the law (Article 20); the formation of political and professional associations (Article 26); public gatherings (Article 27); the right to choose an occupation (Article 28); the confiscation of property (Article 49); the definition of political offenses (Article 168); and “the freedom of expression and dissemination thoughts” on Iranian radio and television (Article 175).

The Constitution allows the press to have freedom of expression “except when it is detrimental to the fundamental principles of Islam” and further delineates that “the details of this exception will be specified by law” (Article 24).

Horowitz, *supra* note 42, at introductory section. Each of the aforementioned articles is discussed below.

59. *Theocracy*, ENCYCLOPAEDIA BRITANNICA (last updated Apr. 28, 2020), www.britannica.com/topic/theocracy. See also *theocracy*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/theocracy (defining “theocracy” as “government of a state by immediate divine guidance or by officials who are regarded as divinely guided”).

As to Divine, the constitution cites the Holy Qur'ān fourteen times,⁶⁰ plus the hadith of the Prophet Muhammad (PBUH) twice.⁶¹ As to the ultimate authority of religious law (i.e., sharia (Islamic law)) and the clergy, there are forty-four pertinent provisions (five in the preamble plus thirty-nine articles).⁶² And the constitution references on eleven occasions (four in the preamble plus in seven articles) the objective of promoting Islam around

60. See Horowitz, *supra* note 42, at introductory section. The Qur'ānic references are as follows:

- (1), (2) *Preamble* (The Form of Government in Islam), and Article 11, 21:92 –
“This your community is a single community, and I am your Lord, so worship me.”
- (3) *Preamble* (The Form of Government in Islam), 7:157 –
“He removes from them their burdens and the fetters that were upon them.”
- (4) *Preamble* (The Form of Government in Islam), 21:105 –
“Verily My righteous servants shall inherit the earth.”
- (5) *Preamble* (The Form of Government in Islam) 3:28 –
“And toward God is the journeying[.]”
- (6) *Preamble* (The Form of Government in Islam), 28:5 –
“And we wish to show favor to those who have been oppressed upon earth, and to makethem leaders and the inheritors.”
- (7) *Preamble* (An Ideological Army), 8:60 –
“Prepare against them whatever force you are able to muster, and strings of horses, striking fear into the enemy of God and your enemy, and others besides them.”
- (8) *Preamble* (The Judiciary in the Constitution), 4:58 –
“When you judge among the people, judge with justice.”
- (9) *Preamble* (Mass Communication Media), 2:143 –
“Thus We made you a median community, that you might be witnesses to all men.”
- (10) Chapter I (General Principles), Article 7, 42:38 –
“Their affairs are by consultations among them.”
- (11) Chapter I (General Principles), Article 7, 3:159 –
“Consult them in affairs.”
- (12) Chapter I (General Principles), Article 11, 21:92 –
“This your community is a single community, and I am our Lord, so worship Me.”
- (13) Chapter I (General Principles), Article 14, 60:8 –
“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.”
- (14) Chapter IX (The Executive Power), Section 3 (The Army and the Islamic Revolutionary Guard Corps), Article 151, 8:60 –
“Prepare against them whatever force you are able to muster, and horses ready for battle, striking fear into God's enemy and your enemy, and others beyond them unknown to you but known to God.”

1979 IRANIAN CONSTITUTION, *supra* note 53.

61. These *Hadīth* are as follows:

- (1) *Preamble* (The Form of Government in Islam, citing only “S”) –
“Mold yourselves according to the Divine morality.”
- (2) *Preamble* (The Wilayah of the Just Faqih, citing *Tuhaf al-'uqul*, page 76) –
“The direction of [public] affairs is in the hands of those who are learned concerning God and are trustworthy in matters pertaining to what He permits and forbids.”

1979 IRANIAN CONSTITUTION, *supra* note 53.

62. This estimate is a conservative one based on direct references to Islamic governance. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb., The Form of Government in Islam; pmb., The Wilayah of the Just Faqih; pmb., An Ideological Army; pmb., The Judiciary in the Constitution; pmb., Executive Power; arts. 1–5, 12, 43–44, 56–57, 61, 67, 91, 94, 96, 99–100, 105, 107–12, 115, 121–22, 130–31, 143–44, 150–51, 157, 163, 167, 170, and 175–76. All of these provisions are discussed below.

the world (including by championing downtrodden peoples).⁶³ Thus, Ayatollah Ruhollah Khomeini (1902–89) declared that April 1, 1979, marked not only the end of 2,500 years of monarchy (symbolized by the “Peacock Throne”⁶⁴) but also “the first day of a Government of God.”⁶⁵ He opened the Assembly of Experts debate about the draft Constitution on August 19, 1979, with a clearly theocratic injunction: “the Constitution and other laws in this Republic must be based 100 percent on Islam.”⁶⁶

Also indubitable is the embrace of the doctrine of *velayet-e-faqih* as developed in Ayatollah Khomeini’s 1970 book *Governance of the Jurist*.⁶⁷ Principles of Islamic government (*wilāyat al-’amr*) mandate a perpetual leadership (*imāmah*) by officials (namely, jurists (*faqih*)) who are qualified, i.e., who possess “the necessary qualifications” (*jami’ al-shara’it*), and are “recognized as leader[s] by the people.”⁶⁸ Only such officials can prevent “deviation” by the government from its “essential Islamic duties.”⁶⁹ Ayatollah Khomeini developed this doctrine at the height of the shah’s repressive regime, and Muslims unified around it to overthrow that regime.⁷⁰ Moreover, the Constitution expressly states that to fulfill the “mission” (which is “theomorphic”—that is, progressing toward Allāh by molding oneself according to divine morality, as discussed below) of the Revolutionary Is-

63. This estimate is a conservative one based on direct references to support for such causes (including *jihād*), particularly overseas. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., The Form of Government in Islam; pmb1., An Ideological Army; pmb1., MassCommunication Media; pmb1., Representatives; arts. 2–3, 11, 147, 150, 152, and 154. All of these provisions are discussed below.

64. See *Peacock Throne*, ENCYCLOPAEDIA BRITANNICA, www.britannica.com/topic/Peacock-Throne. For a first-hand, insider account of the overthrow of the Pahlavi dynasty and end to the Peacock Throne, see, for example, MINOU REEVES, *BEHIND THE PEACOCK THRONE* (1986).

65. Ramazani, *supra* note 44, at 181.

66. *Id.* at 181–82.

67. ĀYATOLLĀH KHOMEINI, *GOVERNANCE OF THE JURIST* (1970). The doctrine of *velayet-e-faqih* was the most significant substantive issue in the August 19–November 15, 1979 debate in the Assembly of Experts about the draft Constitution. This issue

centered around the concept of “Vilāyat-i Faqīh” and especially the related powers. Although the concept as such was not mentioned in the [draft] Constitution, it was in effect provided for in Principle 5 [now Article 5], which states that in His absence, the Twelfth Imām will be represented by a qualified religious leader who enjoys the confidence of the majority of the people. More strikingly, Principle 110 [now Article 110] placed the most extensive powers at the disposal of such a leader.

Ramazani, *supra* note 44, at 182–83 (also noting that a draft Constitution inadvertently published on June 16, 1979, “represented a very different document as contrasted with the Constitution that was finally adopted,” because (*inter alia*) “[i]t provided for an all-powerful legislature and a strong President,” yet “was criticized by even some lay experts for placing too much power in the office of the President” and for “its surprising lack of clerical influence”). Manifestly, the negotiating history of the early drafts of Iran’s Constitution with respect to the powers of the supreme leader relative to those of the conventional branches of government, which involved officials in Paris, Tehran, and Qom discussing how and the extent to which to implement the *velayet-e-faqih* doctrine, is both fascinating and significant.

68. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., The Wilayah of the Just Faqih.

69. *Id.*

70. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., Islamic Government.

lamic government, only the “righteous” shall be responsible for governance and administration, and legislation “will revolve around the Qur’ān and *Sunnah*.” In turn, to ensure officials are righteous and legislation comports with the Qurān and Sunna, “meticulous and earnest supervision” by the *al fukahā’ al ‘udul* (the just, pious, and committed scholars of Islamic jurisprudence) is an “absolute necessity.”⁷¹

However, the Constitution leaves open the relative importance and sequencing of qualifications and recognition. Must a prospective leader be recognized, even if that leader has the necessary qualifications? Asked differently, does a qualified leader need popular recognition to be legitimate (evidenced, for example, by turnout and results in a free, fair election)?⁷² Or are those qualifications to be recognized per se, and thus are the source of legitimacy (without democratic ratification)?

Manifestly, the preamble is the key to unlocking—that is, identifying the themes in—the 1979 Constitution. At first glance, it reads almost like an angry tirade against the United States, and an uncritical rapture in praise of Shiite Islam. For instance, it speaks of the “intense rage” of the Iranian

71. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., The Form of Government in Islam.

72. If legitimacy through the ballot box matters, then so must voter turnout. In the February 2020 elections, voter turnout hit its lowest level since the 1979 Islamic Revolution, just 42.5 percent. Golnar Motevalli, *Iran’s Election Turns Back the Clock on Reconciliation with West*, BLOOMBERG (Feb. 23, 2020), www.bloomberg.com/news/articles/2020-02-23/iran-s-election-turns-back-the-clock-on-reconciliation-with-west. Iran’s leaders were not pleased with this low figure. They seemed to sense the threat to the legitimacy of their favored (*i.e.*, hardliner) candidates from the low numbers of Iranians who actually showed up to the polls. See Parisa Hafezi, *Hardline Guards Make Early Gains in Restricted Iran Election*, REUTERS (Feb. 22, 2020), www.reuters.com/article/us-iran-election/hardline-guards-make-early-gains-in-restricted-iran-election-idUSKCN20G08A [hereinafter *Hardline Guards*].

Alas, with the Guardian Council striking moderate candidates (discussed *infra*), reform-minded citizens protested by staying home from the polls. In contrast, “[t]urnout in the 2016 election, which was dominated by reformers and moderates who supported [President Hassan] Rouhani and the [July 2015] nuclear deal [*i.e.*, JCPOA] with global powers, was almost 62%.” Arsalan Shahla & Golnar Motevalli, *Iran’s Hardliners Win Election by Large Margin, Mehr Says*, BLOOMBERG (Feb. 23, 2020), www.bloomberg.com/news/articles/2020-02-23/iran-s-hardliners-win-election-with-large-majority-mehr-says [hereinafter *Iran’s Hardliners Win*].

Scrambling to explain the low turnout, the *Āyatollah*, who said voting was “a religious duty,” blamed Iran’s enemies (presumably including the U.S.) for spreading fake news about the severity of the coronavirus, which thereby discouraged voters from going to polling stations. See Parisa Hafezi, *Iran Announces Low Poll Turnout, Blames Coronavirus “Propaganda,”* REUTERS (Feb. 23, 2020), www.reuters.com/article/us-iran-election-khamenei/iran-announces-low-poll-turnout-blames-coronavirus-propaganda-idUSKCN20H09Z (“The turnout across the country was 42.57% . . . In Tehran, it was around 25%. Across Iran, over 24 million people voted,” Interior Minister Abdolreza Rahmani Fazli told a televised news conference. Turnout was 62% in the 2016 parliamentary vote and 66% of voters cast ballots in 2012.”) [hereinafter *Iran Announces Low Poll*]; *Iran Elections: Record Low Turnout but Hardliners Set for Win*, BBC NEWS (Feb. 23, 2020), www.bbc.com/news/world-middle-east-51605942 (noting that “[t]he poll is the first since the US renewed sanctions over Iran’s nuclear programme, battering its economy”). Whether citizens accepted that explanation was unclear. The coronavirus had spread to Iran and infected and killed scores, yet the government allegedly underreported the true health statistics.

people “caused by the constantly increasing repression” of the shah’s regime exposed by the “*ulema* and militant students.”⁷³ It recalls the watershed events of January 7, 1978, when publication by the shah’s regime of an “outrageous” article against the *ulema* and Imam Khomeini accelerated the revolution. The regime’s violent crackdown “to quell the volcano of the people’s anger” spilled the “blood” of “martyrs,” thus turning the protests into a “popular movement . . . to overthrow the tyrannical regime.”⁷⁴

But that would be a misreading. History matters in this struggle every bit as much as it matters to Americans who recall their revolution. The fourteen sections of the Iranian preamble are broad and deep in their coverage of topics that, taken together, explain how the Islamic Republic came into being, and where it—and the rest of the world—is headed.

The first five sections of the preamble chronicle the history of the 1978–79 Islamic Revolution. The sense of injustice perpetrated by the previous monarchical regime of the shah, founded on tyranny and foreign domination, is palpable. The White Revolution (January 1963 through November 1979) was an “American conspiracy”: under the guise of modernization (e.g., land reform), the shah of Iran reinforced his “despotic rule” and the cultural, economic, and political dependence of Iran on “world imperialism,” and the shah gave American advisers legal immunity for their nefarious activities.⁷⁵ The regime tried to suppress the Islamic movement—led by

73. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., Islamic Government.

74. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., The Wrath of the People. The crackdown indeed was violent, and the legacy of repression grim. Interestingly, in 2020, a *Financial Times* journalist, Jamil Anderlini, reported on the unrepentant nature of one of the shah’s officials associated with that legacy, and the inference the Chinese Communist Party drew from it: A couple of years ago I interviewed a former leader of the Savak—the Shah of Iran’s feared secret police—in the US, where he still lives in hiding at an undisclosed location, with a price on his head. He remains certain that if the Shah had taken his advice and resolutely crushed the 1978 uprising in its early stages, the Iranian revolution would not have succeeded. Mr. Xi [*i.e.*, China’s President Xi Jinping] seems to have taken that lesson to heart: whatever else you say about him, he cannot be accused of being irresolute on quashing dissent.

Jamil Anderlini, *China’s Communist Party Will Survive COVID-19*, FIN. TIMES (May 21, 2020), www.ft.com/content/6075d728-99ae-11ea-8b5b-63f7c5c86bef?shareType=N%ngift.

75. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pmb1., The Dawn of the Movement. The White Revolution was a series of modernization initiatives, particularly land reform, whereby the Shah sought to cultivate the support of peasants and working class, weaken the power of landlords and city-based aristocrats, and offset hostility from the rising middle class. Other initiatives included large-scale infrastructure projects (e.g., air, rail, and road networks; dams and irrigation), education and public health improvements (including literacy promotion and malaria eradication), privatization of state-owned enterprises and support for market-based industrialization with profit-sharing schemes for workers, empowerment of women (e.g., enfranchisement), and environmental protection (e.g., nationalizing forests). See James A. Bill, *Modernization and Reform from Above: The Case of Iran*, 32 J. POL. 19, 33 (1970); Talinn Grigor, *Tehran: A Revolution in Making*, in POLITICAL LANDSCAPES OF CAPITAL CITIES 347, 360 (Jessica Joyce Christi et al. eds., 2016).

However, this bloodless Revolution (hence the color adjective, “White”) did not include significant political liberalization, and it sparked social tensions (as between newly independent farmers and landed elites, who opposed land redistribution). The *ulema*, too, opposed this Revolution. Thus, ironically, though “[t]he White Revolution had been designed to pre-empt a Red [*i.e.*,

Imam Khomeini and “the strongholds of the mosques, centers of religious teaching, and universities”—with “barbaric attacks” on those institutions and “the most savage and brutal measures,” including “firing squads” and “medieval tortures.”⁷⁶ Though the “revolutionary and fertile teachings prevailed”⁷⁷ and the Islamic Republic of Iran was established, the price of freedom, independence, and an authentically Islamic government included sixty thousand martyrs.⁷⁸

Arguably the most important term of art in these sections is *taghuti*, which means unjust, in the sense of worshipping false gods rather than the one true God, Allāh. That regime was a *taghuti* order. The revolution swept it away, and the people overwhelmingly approved its replacement with an Islamic republic and a new Constitution.⁷⁹

Also, arguably the most important point in these early sections of the preamble is how different the Islamic Revolution was from previous struggles against tyranny. The Constitution is the foundation for the cultural, economic, political, and social institution of Iran. Its bases are “Islamic principles and norms, which represent the earnest aspiration of the Islamic *Ummah*.”⁸⁰ The “basic characteristic” of the revolution that led to the Constitution “is its ideological and Islamic nature.”⁸¹ To be sure, there were previous efforts that were “anti-despotic constitutional . . . and anti-colonialist,” most notably under Mohammad Mosaddegh, who was prime minister from 1951 to 1953.⁸² Yet his efforts “centered on the nationalization of the oil industry,” and he was toppled in a coup d’état backed by the Central Intelligence Agency and Britain’s MI6.⁸³ The underlying cause of this failure (and others) was the lack of an “ideological basis” for the struggle.⁸⁴ That void was filled by the “eminent” *marja* ‘*at-taqlid*’ (reference point for, or source of, emulation) that was Ayatollah Imam Khomeini.⁸⁵ Beginning in 1962, he “awakened [the] conscience of the nation” by “pursuing an authentically Islamic and ideological line” in leading the struggle against the shah’s regime.⁸⁶

Soviet-backed Communist] Revolution, . . . “it paved the way for an Islamic Revolution.” ERVAND ABRAHAMIAN, *A HISTORY OF MODERN IRAN* 140 (1st ed. 2008).

76. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml., *The Dawn of the Movement*.

77. *Id.*

78. *Id.* at pml., *The Price the Nation Paid*.

79. *Id.* at art. 1.

80. *Id.* at pml.

81. *Id.*

82. See Homa Katouzian, *Mossaddeq’s Government in Iranian History: Arbitrary Rule, Democracy, and the 1953 Coup*, in MOHAMMAD MOSADDEQ AND THE 1953 COUP IN IRAN 1, 2 (Mark J. Gasiorowski & Malcolm Byrne eds., 2004).

83. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml. See also ERVAND ABRAHAMIAN, *THE COUP: 1953, THE CIA, AND THE ROOTS OF MODERN IRAN* (2013) (discussing oil nationalization, Anglo-Iranian negotiations, the coup, and its legacy).

84. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml.

85. *Id.*

86. *Id.*

These early sections connect directly to the last sentence of the preamble, which expresses “the hope that this century will witness the establishment of a universal government of the *mustad’afun* [oppressed] and downfall of all the *mustakbirun* [oppressors].”⁸⁷ This expression reflects directly a statement of Ayatollah Khomeini early in *Governance of the Jurist* (1970) that “one of the responsibilities of the jurist who governs is to ‘foreshorten the arms of the transgressors who would encroach on the rights of the oppressed’ ”⁸⁸ and what he wrote at the start of the closing paragraph of the book: “O God, foreshorten the arms of the oppressors that are stretched out against the lands of the Muslims.”⁸⁹ One inference to draw from the end of the preamble is that Iran cannot “be dealt with as if it functions according to Western norms.”⁹⁰

The preamble identifies three separate branches of government—executive, judicial, and legislative—but shows there is no separation of these powers from the power of God. All three branches are to focus on the ultimate goal of life, which is true religious worship, not secular.⁹¹ They are to build an ideal Islamic society governed by Islamic law that reflects the interests of *mustai’afun* (the downtrodden) and is a model for the world.⁹² Officials must be *mu’min* (believing). Likewise, the military, and especially the Islamic Revolutionary Guard Corps (IRGC), must promote Jihad worldwide.⁹³ In contrast, the US and other western democracies are *taghuti* forms of government: they are oriented to the worship of false gods. Also, these democracies are, and are run by, *mustakbirun* (tyrants, oppressors).⁹⁴ Accordingly, the media are not an independent check on government but rather an instrument of government in service of creating a perfect Islamic society that bears witness to all people.⁹⁵

The purpose of Iran’s Revolutionary government, as an authentically Islamic one, is laid out in terms akin to a conflict of good versus evil. Five of the fourteen quotations from the Holy Qur’ān are found in the four preambular paragraphs on the form of government. The Constitution thus plants itself squarely on the side of Allāh, and against the ungodly, oppressive, corrupt, and foreign-influenced past regimes. The government’s “mission” is to liberate people so they can evolve in a society based on Islamic norms and thereby proceed “towards the final goal,” which is “movement

87. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml., Representatives (translations added).

88. KHOMEINI, *supra* note 67, at 27.

89. *Id.* at 94.

90. HOROWITZ, *supra* note 42, at *Implications* (quoting Ayatollah Khomeini).

91. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml., Islamic Government, The Form of Government in Islam, The Judiciary and the Constitution, Executive Power, Representatives.

92. *Id.* at pml., Representatives.

93. *Id.* at pml., An Ideological Army.

94. *Id.* at pml., Executive Power, Representatives.

95. *Id.* at pml., MassCommunication Media.

towards Allāh.”⁹⁶ Simply put, that “mission” is to help people realize God, and it extends overseas. The Constitution is the basis for continuing the Islamic Revolution overseas, striving with other Muslim and popular movements toward a “single world community,” an *ummah*.⁹⁷

The choice of candidates for governmental office, specifically their vetting by the Guardian Council to ensure each is a *mu'min* (believer, faithful Muslim),⁹⁸ has generated controversy. That is because the council—in the view of its reformist critics—routinely strikes moderate candidates.⁹⁹ At issue is whether the council conflates religious devoutness with political support for the ayatollah, and if so, whether this overlap and its effect on ruling in, or out, individual candidates is in keeping with a true application of the *velayet e faqih* principle (as distinct from personal loyalties).

In its economic discussion, the preamble makes clear that Islam offers a third way, neither capitalist nor communist. Both mistakenly are materialist, viewing the economy as an end in itself, and putting men and women in service of the economy. Islam holds that people have a more profound ultimate goal than to maximize profit and aggregate wealth, namely, to do their best to discern and submit to the will of Allāh. Thus, it is the obligation of Iran’s government to provide “all citizens with equal and appropriate opportunities” so they can meet their material needs and, in turn, achieve their religious purpose.¹⁰⁰ In this indirect sense, the preamble deals with the controversial topic of religious minorities.

Another controversial topic in contemporary Iranian society under its 1979 Constitution concerns women. The preamble proclaims that Islam ac-

96. *Id.* at pml., The Form of Government in Islam.

97. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml., The Form of Government in Islam.

98. *Id.* at pml., MassCommunication Media.

99. *See Iran’s Hardliners Win*, *supra* note 72 (reporting that approximately “7,200 candidates vied for seats”; “[a]bout 75 current lawmakers were barred from running again by the powerful Guardian Council, tipping the field heavily in favor of conservatives wedded to the theocratic ideals of Iran’s 1979 Islamic revolution”; “more than 220 out of 290 members of parliament will be hardliners and conservatives”; “[h]ardliners and conservatives won all 30 seats in Tehran, the largest and most influential constituency”; and “[t]hey also dominated in Esfahan, Khuzestan, Mazandaran and several other provinces”); *Hardline Guards*, *supra* note 72 (reporting that “[t]he Guardian Council, a hardline vetting body, disqualified 6,850 hopefuls out of 14,000, ranging from moderates to conservatives, from contesting parliament polls”); *Iran Announces Low Poll*, *supra* note 72 (reporting that “[t]he hardline Guardian Council, which must approve candidates, removed thousands of moderates and leading conservatives from the race by barring about 6,850 hopefuls from [sic] in favor of hardliners from among 14,000 applicants”); *Iran Elections: Hardliners Set to Sweep Parliamentary Polls*, BBC NEWS (Feb. 21, 2020), www.bbc.com/news/world-middle-east-51570725 (reporting somewhat different figures, but nonetheless that “[t]housands of moderate would-be candidates were barred from running for not meeting strict election criteria,” and “[m]ore than 16,000 contenders—including 90 mostly reformist members of the current Majlis—were disqualified from standing by the Guardian Council, a vetting committee loyal to Mr[.] [Āyatollah] Khamenei”).

100. 1979 IRANIAN CONSTITUTION, *supra* note 53, at pml., The Economy Is a Means Not an End.

cords women “great value and nobility,”¹⁰¹ whereas they were oppressed and commercially exploited under the shah’s regime and are so in non-Islamic countries, and Islam protects all of the world’s religions.¹⁰² The preamble specifically highlights “the essential and decisive role” women played in the struggle against the shah’s regime.¹⁰³

D. Thematic Examination

It is helpful to take an empathetic, Golden Rule approach to the Constitution of the Islamic Republic of Iran, by understanding it in terms of the themes it embodies. The preamble (discussed above) identifies them, and the subsequent fourteen chapters and 177 articles elaborate on them. Put differently, because of the considerable number of provisions (several with subsections), organizing them thematically facilitates an analysis, at both macro and micro levels, of the document, whereas plodding through each provision seriatim risks missing the linkages between these levels, and between them and the overall project that the Islamic Revolution sought to accomplish through this Constitution.

Nine themes may be identified, though by no means is there a “correct” number; different appraisals may find in the Constitution more, or fewer, themes than those discussed below. But, regardless of how the document is viewed thematically, there are three points upon which most readers would agree.

First, Iran’s Constitution contains passages that are vague (i.e., where more than one inference may be drawn from its terms) or ambiguous (i.e., where no single inference may be drawn). That is not a flaw (if it is a “flaw” at all) unique to Iran’s Constitution. Rather, it “afflicts” most constitutive documents. A constitution is not a statute, which, if well crafted, defines its terms with precision. America’s Constitution speaks of “equal protection,” but does not define this term. It is for the federal legislature and judiciary to identify the boundaries of the term. So too it is with Iran’s Constitution: the *Majlis* (i.e., parliament) and Islamic courts are called upon to decide what vague or ambiguous terms mean.

Second, despite all its theology, which makes it radically different from the US or Chinese Constitution, Iran’s Constitution shares some similarities with most other constitutive frameworks. The foundational document of any country, if the document is to have any practical value, must address some of the following questions: What is the relationship of the individual to the government—that is, what duties does the individual owe to the government? Conversely, what is the relationship of the government to the individual—that is, what duties does the government owe to the indi-

101. *Id.* at pmb., Woman in the Constitution.

102. *Id.*

103. *Id.* at pmb., The Wrath of the People.

vidual? How is the government to be selected—that is, by what means are leaders chosen? How is the government to be structured—that is, in terms of branches? Indeed, the list of such questions is longer than suggested above. India’s Constitution (originally with 395 articles, the longest in the world, and thirty times longer than America’s¹⁰⁴) is proof positive of a basic document that addresses a vast number of topics.

Third, as discussed earlier in the context of Dr. Schirazi’s 1997 study, Iran’s Constitution contains inherent inconsistencies. For example, provisions that exalt human dignity and freedom may not easily be squared with those that assert the primacy of Islam itself. It may be vouchsafed that human dignity and freedom reach their fullest expression within the framework of Islam. It may be objected that freedom without the right to dissent (for example, through agnosticism or atheism) is inauthentic. Here too Iran’s Constitution is not alone. Potential contradictions are explicit or implicit in many foundational documents. The Constitution of the People’s Republic of China permits freedom of worship.¹⁰⁵ Yet it accords to the Chinese Communist Party a monopoly on all aspects of life. Again, the legislative and judicial branches are to work out contradictions, particularly with a view to minimizing trade-offs and maximizing the realization of as many constitutional values as possible.

IV. THEMES FOR CURRICULAR STUDY OF IRAN’S CONSTITUTION

A. *Theme 1: Islamicization*

- **Sharia Governance**

Iran is governed by the Sharia. Chapter I of the Constitution plainly lays out the theological foundations of the Islamic Republic. Article 2(1)–(3) identifies the core principles of faith—monotheism (*tawhid*), God’s intervention in human history (i.e., divine revelation (*wahy*) to provide sacred law), and Day of Judgment (Resurrection) with a view to returning to God. The Constitution, then, is squarely in the natural law tradition: law comes from God. God holds “exclusive sovereignty,” and only He has the “right to legislate;”¹⁰⁶ “He set[s] forth the laws”¹⁰⁷ so that through “submission to His commands,”¹⁰⁸ people can “return to God in the

104. Ananya Bhattacharya, *India’s Constitution Is 30 Times Longer than America’s—and Still Growing*, WORLD ECON. F. (Oct. 2, 2019), www.weforum.org/agenda/2019/10/india-constitution-over-30-times-long-us. Owing to 100 amendments, India’s Constitution now has 448 articles, and whereas India has amended its Constitution 103 times, the U.S. has done so on just 27 occasions. *See id.*

105. *See* Raj Bhala, *China At 70: The Chinese Communist Party’s Ideological Contradictions*, BLOOMBERGQUINT (India) (Sept. 9, 2019), www.bloombergquint.com/opinion/china-at-70-the-chinese-communist-partys-ideological-contradictions.

106. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 2(1).

107. *Id.* at art. 2(2).

108. *Id.* at art. 2(1).

Hereafter.”¹⁰⁹ These points are symbolically represented in Iran’s flag. Article 18 declares that the “official” flag is green, white, and red, with the “special emblem of the Islamic Republic” and “the motto *Allāhu Akbar*” (God is greatest).

Thus, the Islamic Republic is based on “the justice of God in creation and legislation.”¹¹⁰ Article 4 states as an “absolute[] and general[]” principle that all of Iran’s laws and regulations (administrative, civil, cultural, economic, financial, military, political, and otherwise), and the Constitution itself, “*must be based on Islamic criteria.*”¹¹¹ This principle is immutable. The final provision of the Constitution, Article 177, mandates that the Islamic nature of Iran’s Constitution not be changed:

The contents of the . . . Constitution related to the Islamic character of the political system; the basis of all the rules and regulations [being] according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the *wilāyat al ‘amr (Shī’ite* principles of governance); the Imāmate of [the] *Ummah*; and the administration of the country based on national referenda, official religion of Iran (Islam), and the School (Twelver *Ja’fari*), are unalterable.

To be sure, Article 177 creates the exclusive mechanism (discussed below, under Theme 2) for amending the Constitution in all other respects, “whenever needed by the circumstances.” But with respect to Sharia governance, as it emanates from the Divine, from Allāh, it is only He who can make alterations.

Consider, then, one author’s criticism of Iran’s Constitution:

[T]he essence of Constitutional rights is that they are not subordinate to legislation or theology; Iran’s Constitutional provisions purporting to protect civil rights however are subject to three qualifications. First, numerous articles require them to be “in conformity” with or not “detrimental to the principles of Islam” or state they apply “except in cases provided by law.” Sec-

109. *Id.* at art. 2(3).

110. *Id.* at art. 2(4).

111. *Id.* at art. 4 (emphasis added). Notably, Article 4 of Iran’s Constitution has found its way into the annals of American jurisprudence:

A federal district court in Missouri in 1984 dealt with a dispute between The McDonnell Douglas Corporation and Iran regarding a contract that was signed in 1975, during the time of the Shah. Iran argued that this matter should be adjudicated in its courts. In concluding that “the Islamic revolution and[] subsequent rise to power of clerics in Iran has so thoroughly affected” Iran’s legal system that it would be “unreasonable” to require McDonnell Douglas to stand before an Iranian court, the U.S. court, among other evidence, specifically cited Article 4 of the Iranian Constitution, that all Iranian law must be based on Islamic standards (McDonnell Douglas Corp. v. Islamic Republic of Iran, Ministry of Defense of the Islamic Republic of Iran, and Islamic Republic of Iran Air Force).

Horowitz, *supra* note 42, at *The Iranian Constitution in U.S. Courts.*

ond, Article 4 states that all laws must be based on Islamic criteria, and third, the constitutionally established Guardian Council “examines the compatibility” of parliamentary legislation with Iran’s Islamic standards.¹¹²

That proposition presumes the Constitution is grounded on secular principles and serves as the framework for a secular legal system. It is applicable to the constitutions of America and India—but not of Iran. And it is born of a bias manifest in comparative constitutional law, namely, to focus on secular, western-inspired founding documents.¹¹³ The underlying philosophy of Iran’s Constitution is theology; the relationship of government to the people is about the relationship of both to God.

The obvious next two questions are (1) what are the specific sources of Islamic criteria, and (2) who judges whether a law, regulation, or constitutional provision conforms with them? The Constitution addresses both topics. Article 2(a) lists the top two sources of Islamic law—the Qur’ān and *Sunnah*—plus a secondary source, all of which are distinctly Shiite. Article 16 bespeaks the importance of the Qur’ān. Article 16 mandates that Arabic be taught at the elementary and secondary school levels, in all fields, because it is the language of the Qur’ān (and because it “permeate[s]” Persian literature). Article 17 intimates the importance of the Sunna. It declares as the “official” calendar of Iran the lunar (A.H.) Islamic calendar, which commences with the *Hijra* of the Prophet Muhammad.

Significant is the reference to the Sunna in Article 2(a) to that “of the *Ma’šūmun*” (infallible), with the follow-on respectful blessing “upon all of whom be peace.” This reference is pluralized; hence it encompasses not only the Prophet Muhammad himself but also all prophets who are secure from error. It further conjures up the tradition of Alī and perhaps all Twelve *Imāms*.¹¹⁴ This broad reference bespeaks a Shiite view of legitimate Islamic tradition. Even more emblematic of the Shiite perspective is the express reference in Article 2(a) to key supplementary sources of Islamic law, namely, the “continuous *ijtihād* of the *fukahā*’.” This source stands against any and all claims, characteristic in (parts of) the Sunnite world, that the door (or gate) to *ijtihād* was closed around 900–1000 A.D. (as a separate chapter discusses).

112. Horowitz, *supra* note 42, at *Implications* (emphasis added).

113. See, e.g., S.E. FINER ET AL., *COMPARING CONSTITUTIONS* (S.E. Finer et al. eds., 1995). Most of the work by these Oxford scholars reprints the texts of the constitutions of the U.S., Germany, France, and the Russian Federation (102–295); part of it reprints European Conventions and Treaties (296–369); some of it discusses the unwritten British Constitution (40–101); a bit of it discusses whether constitutions matter (1–5); but none of it—not even the portion on the varieties of constitutions (6–39)—mentions the constitutions in sacred legal traditions, such as that of Iran.

114. See generally 1 MAHMOUD M. AYOUB, *THE QUR’ĀN AND ITS INTERPRETERS* 185 (1984) (concerning interpretation of *Surah al-Baqarah*, the second and longest chapter of the Qur’ān, *ayah* 177, which was revealed, according to *Shī’ite* commentators, with reference to Alī, the first *Imām*, and its reference to prophets who are protected from error).

The legalization of the Islamic character of Iran is manifest in several provisions of its Constitution. For example, the way in which the Constitution frames the branches of government (discussed in Theme 9) is a reminder of the sacred nature of Iran's legal system. Article 56 affirms that "[a]bsolute sovereignty over the world and man belongs to God," and that God "made man master of his own social destiny." Man enjoys the exercise of this "Divine right" to forge his destiny, ideally with a view toward God. This right is inalienable. No person can deprive man of it, and it cannot be "subordinat[ed] . . . to the vested interests of a particular individual or group."

As another illustration, Article 72 charges the Guardian Council (discussed below and in Theme 9) with the responsibility of discerning whether the Islamic Consultative Assembly (discussed in Theme 9) has enacted a law "contrary to the *uṣūl* [roots, as in *uṣūl al-fiqh*, of the jurisprudence] and *aḥkam* [Islamic commandments] of the official religion of the country [which, as explained in Theme 3, is Twelver Shiism] or to the Constitution." The plain, unequivocal language in the duties to which the president and members of the Islamic Consultative Assembly take an oath, set forth in Articles 67 and 121 (discussed below under Theme 9), respectively, is a further example of Islamicization.

Not surprisingly, Islamicization is manifest in eligibility for elected office. With respect to the presidency, for example, Article 115 states that to qualify for the presidency, a person must (1) be a "religious" or "political" person of Iranian origin and nationality, (2) be administratively resourceful, (3) have a good past record, (4) be trustworthy and pious, and (5) hold a "convinced belief in the fundamental principles of the Islamic Republic of Iran and the official *madhhab* [school of Islamic jurisprudence] of the country [namely, the Twelver *Ja'farī* school of Shiism]." Plainly, the fifth criterion (and arguably the fourth, too, because of its reference to piety) is a religious test to become Iran's president.¹¹⁵

Islamicization also is apparent in several constitutional provisions about the judiciary. Under Article 157, the supreme leader is charged with selecting the head of the judicial power (discussed below, under Theme 9). This head must be a "just *mujtahid*"—an educated Muslim who is competent to interpret Islamic law in practical contexts, possibly through the use of *ijtihād* (independent reasoning), and arrive at rulings that are binding—"well versed in judiciary affairs and possessing prudence and administrative

115. See Horowitz, *supra* note 42, at introductory section (also observing that "while Article 6 of the U.S. Constitution states, 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,' the Iranian Constitution requires its president to swear that he will 'dedicate [himself] to the propagation of religion and morality' (Article 121) and requires the members of Iran's Islamic Consultative Assembly [Parliament] to swear 'to protect the sanctity of Islam' (Article 67)"). The Article 67 and 121 oaths are discussed below.

abilities.”¹¹⁶ Likewise, the Supreme Court is led by a chief judge who under Article 162 must be a “just mujtahid well versed in judicial matters.”¹¹⁷ The prosecutor-general, the senior-most prosecuting official, also must meet this qualification.¹¹⁸ And the criteria for qualification as a judge in any of Iran’s courts must derive from the *fiqh* (Islamic jurisprudence).¹¹⁹ All the judges are bound to apply “the codified law,”¹²⁰ i.e., Iran’s civil code, which (of course) comports with the Sharia.¹²¹ If no provision of that code resolves the legal issue at hand, then the judge must “deliver his judgment on the basis of authoritative Islamic sources and authentic fatwa.”¹²² And every judge must “refrain from executing statutes and regulations of the government that are in conflict with the laws or . . . norms of Islam.”¹²³ In effect, other than the supreme leader, it is the judiciary that is the final line of defense against un-Islamic secularization of Iran’s legal system.

Sharia governance also is apparent in the unique system of subcentral governance through councils that Chapter VII (Articles 100–06) establishes. Below the executive, legislative, and judicial branches, and military, and of course under the supreme leader, Iran is structured—that is, divided, in descending order—into provinces, municipalities, cities, divisions, and villages. So, Article 100 establishes provincial councils, municipal councils, city councils, division councils, and village councils. The councils are to expedite the cultural, economic, educational, and social development of Iran, and promote its public health and welfare. Article 103 obliges provincial governors, city governors, and divisional governors to “abide by all decisions taken by the Councils within their jurisdictions.”

To oversee all these councils, Article 101 establishes a Supreme Council of the Provinces. This Supreme Council is charged with ensuring there is no discrimination in favor of, or against, certain councils; coordinating the implementation of programs for the development and welfare of the provinces; and securing the cooperation of the people in such programs. This apex council, per Article 102, is empowered to draft and present (directly, or through the executive branch) bills to the Islamic Consultative Assembly, which must examine any such proposals.

The council system manifests Islamic law in three respects. First, Article 105 requires that “[d]ecisions taken by the Councils must not be contrary to the criteria of Islam.”¹²⁴ Because the councils operate horizontally across the country, and vertically from the provincial to the village level,

116. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 157.

117. *Id.* at art. 162.

118. *Id.*

119. *Id.* at art. 163.

120. *Id.* at art. 167.

121. An analysis of Iran’s Civil Code is beyond the scope of the present work.

122. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 167.

123. *Id.* at art. 170.

124. *Id.* at art. 105.

they can infuse Sharia concepts broadly and deeply in Iran. Moreover, Article 106 allows for the dissolution of councils if they “deviate from their legal duties.”¹²⁵ Put bluntly, governance in accordance with Islamic law is not left to remote officials in Tehran, but rather brought into every part of the country through the councils, and the Supreme Council of the Provinces is the institutional coordinating link.

Second, under Article 100, council members are chosen through elections by the people in the locality of the council. Qualifications for candidates to the councils, as well as the mode of election, functions, powers, and jurisdiction of the council, and the hierarchy among the councils, are “determined by law” in accordance with “the system of the Islamic Republic,” and in a way that preserves the national unity and territorial integrity of Iran, and the sovereignty of the central government.¹²⁶ Reference to “the system of the Islamic Republic” surely is to Islamic legal principles.

Third, councils can promote consultation and consensus-based decision-making. Indeed, Article 104 specifically invokes “Islamic equity and cooperation” and calls for “harmonious progress of all units of production.” This provision establishes councils of workers, peasants, and managers across the industrial and agricultural sectors, at the level of administrative, educational, and service units. Their formation, operation, scope, and functions are unmentioned, but left to specification in law. But the impulse to reduce socioeconomic stratification within the *ummah*, as all are equal in the eyes of God, is apparent.

Distinct from, and even more powerful than, the president’s Council of Ministers from Article 87, or the thirty-one-member Supreme Council of the Provinces established under Article 101, is the Supreme Council for National Security, created under Article 176.¹²⁷ It is charged not only with protecting Iran’s “national interests, . . . territorial integrity, and national sovereignty” but also with “preserving the Islamic Revolution.”¹²⁸ The

125. *Id.* at art. 106.

126. *Id.* at art. 100.

127. This Supreme Council is not (at least per the text of the Iranian Constitution) more powerful than either the twelve-member Guardian Council (under Article 91) or the Nation’s Exigency Council (Expediency Council) (under the 1989 amendments to the Constitution). These other councils are discussed above.

128. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 176. The importance of the Supreme Council for National Security is evident from its record:

Among its key foreign policy decisions, the Council was pivotal throughout the 2013–2015 negotiations with the world’s six major powers that produced the 2015 nuclear deal. On domestic policy, the SNSC [Supreme Council for National Security] demonstrated its influence in December 2017 by blocking several foreign websites and apps, including Telegram and Instagram, during nationwide protests fueled by economic grievances. In April 2018, the SNSC responded to the U.S. designation of the Islamic Revolutionary Guard Corps (IRGC) as a terrorist organization by labeling U.S. Central Command forces as terrorists and the U.S. as a “sponsor of terrorism.”

Supreme National Security Council of Iran, U.S. INST. OF PEACE: THE IRAN PRIMER (updated July 15, 2020), <https://iranprimer.usip.org/blog/2019/apr/01/supreme-national-security-council-iran> [hereinafter *Supreme National Security Council*, U.S. INST. OF PEACE: THE IRAN PRIMER].

composition of the Supreme Council for National Security bespeaks its importance in safeguarding Iran's Islamic character:

- Two representatives selected by the supreme leader
- President
- Speaker of the Islamic Consultative Assembly
- Head of the judiciary
- Minister of foreign affairs
- Minister of the interior
- Minister of information
- Senior-most government official in charge of budget and planning
- Chief of the Supreme Command Council of the Armed Forces
- Highest ranking official from the armed forces
- Highest ranking official from the IRGC¹²⁹

And in addition to these twelve members, a thirteenth membership position may “be filled by a minister relevant to a topic under debate,” i.e., one with a portfolio relevant to national security in relation to the topic at hand.¹³⁰ Simply put, the top officials in all the branches of Iran's government, and all the services in its military, sit on this council, two of whom are agents of the supreme leader.¹³¹

Another notable feature of this composition is pertinent to its role in Islamicization—namely, its blend of formal and informal voices with the loudest being traditional in respect of Islamic values. The Supreme Council “has both *clerics* and lay politicians from across Iran's *limited* political spectrum. It has reformists, centrists, and hardliners, sometimes intentionally designed to reflect diverse trends. . . . *The balance is held by conservatives* with ties to both the centrist and the hardliner camps.”¹³² In other words, although “Iran's national security policymaking is an opaque process involving both official branches of government and informal influence networks,” the council is “[t]he one formal body that *brings most of those influencers together*.”¹³³

- **Role of Military**

129. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 176.

130. *Supreme National Security Council*, U.S. INST. OF PEACE: THE IRAN PRIMER, *supra* note 128.

131. *Id.* Though this council is a veritable “who's who of top national security decision-makers, . . . several senior officials are not included.” *Id.* Most notably, Qassem Soleimani, the Commander of the IRGC Quds Force who was assassinated on January 3, 2020, by an American drone strike, was not on the council. Yet, because his influence was so broad and deep across Iran and the Middle East, and because he was so close to *Āyatollāh* Alī Khamenei, a seat on the council for him was unnecessary. See Holly Dagnes, *The Qasem Soleimani assassination feels like ages ago—but Iran hasn't forgotten*, ATLANTIC COUNCIL (Jan. 1, 2021), <https://www.atlanticcouncil.org/blogs/iransource/the-qasem-soleimani-assassination-feels-like-ages-ago-but-iran-hasnt-forgotten/>.

132. *Supreme National Security Council*, U.S. INST. OF PEACE: THE IRAN PRIMER, *supra* note 128 (emphasis added).

133. *Id.*

The Islamic legal character of Iran is evident from five provisions in the Constitution concerning the military. They are testament to the ideological nature of Iran's army and IRGC. Of course, it is to be expected that a nation's military support and defend the Constitution under which it is organized. These provisions, however, make plain that the military is part of Iran's theocracy. It is the practical force behind religious governance.

First, Article 143 assigns to the army more than just the customarily expected role of "guarding the independence and territorial integrity of the country." Article 143 also put the army in charge of protecting "the order of the Islamic Republic." Read expansively, "order" connotes not only law and order (i.e., quelling civil unrest) but also the Islamic Revolutionary character of the republic.

This expansive interpretation is reinforced by a second and third provision. The second, Article 144, demands that the army "be an Islamic Army."¹³⁴ Recruits must be persons "who have faith in the objectives of the Islamic Revolution and are devoted to . . . realizing its goals."¹³⁵ The third provision, Article 147, sets the agenda for the army during peacetime. While "fully observing the criteria of Islamic justice," and without undermining "combat-readiness," the government must utilize the army for "relief operations, . . . educational and productive ends, and the Construction *Jihād*."¹³⁶ This Jihad (struggle) appears to refer to participation in infrastructure development for the benefit of the *ummah*.

A fourth constitutional provision that adduces the prominent role of the army in Islamicization, Article 151, is about mandatory service. It calls for universal male military training "in accordance with Islamic criteria," so that "all citizens will always be able to engage in the armed defence [sic] of the Islamic Republic."¹³⁷ This mandate is based on *surah* 8, *ayah* 60 of the Qur'ān, which Article 151 expressly invokes: "Prepare against them whatever force you are able to muster, and horses ready for battle, striking fear into God's enemy and your enemy, and others beyond them unknown to you but known to God."¹³⁸

Finally, the fifth constitutional provision that intertwines the military and Sharia governance is Article 150, which pertains to the IRGC. As Arti-

134. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 176. This article also complements the provision of the preamble that makes the army and IRGC "responsible . . . for fulfilling the ideological mission of *jihād* in God's way; that is, extending the sovereignty of God's law *throughout the world*," in accordance with *surah* 8, *ayah* 60 of the Qurān ("*Prepare against them whatever force you are able to muster, and strings of horses, striking fear into the enemy of God and your enemy, and others besides them.*") (alteration in original). See Horowitz, *supra* note 42, at introductory section.

135. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 144.

136. *Id.* at art. 147.

137. *Id.* at art. 151.

138. There is no right to bear arms; to the contrary, Article 151 conditions the "possession of arms" on "permission by the competent authorities." *Id.*

cle 150 recounts, the IRGC was established “in the early days of the triumph of the Revolution.” Article 150 enshrines this institution in the Constitution, declaring the IRGC shall be “maintained so that it may continue in its role of guarding the Revolution and its achievements.” Significantly, the article does not delineate with precision the scope and nature of the IRGC’s duties in fulfillment of this role. They are left to “be determined by law, with emphasis on brotherly cooperation and harmony among them.” To be sure, there is a check on IRGC behavior (and that of the army, Gendarmerie, i.e., a military force with law enforcement responsibilities, and police), namely Article 172. This provision states that military courts are responsible for investigating crimes allegedly committed by individuals in the IRGC (or other military or law enforcement entities).¹³⁹ However, in practice, because of the special relationship the IRGC has to the supreme leader—it is answerable (in practice if not in theory) directly to him¹⁴⁰—these duties are as expansive as the leader wishes.

- **Consensus**

As Article 104 (discussed above) intimates, Islamicization is about more than the substantive nature of rules. It concerns the process by which those rules are formed. Consensus-based decision-making is essential. In that respect, and in ways unfamiliar to contemporary western constitutional cultures that view Islamic legal systems as inherently authoritarian, Islamic governance can—at least in theory—be democratic.¹⁴¹ Indeed, legitimacy in the eyes of the *ummah* is undermined if it is wholly undemocratic.

Requirements to seek consensus are found in various, sometimes technically detailed, provisions of the Constitution. For example, Article 85 says the assembly cannot delegate its power to legislate to any one individual or committee. That prohibition is a rule against one person, or a cabal, effectively dominating the legislative process and undermining Islamic consensus-based governance. Per Article 85, in a “necessary” circumstance, the assembly can delegate its legislative power to a committee in accordance with Article 72, though any law passed by such a committee will be implemented on a temporary basis, and final approval remains with the full assembly. The assembly also may delegate to a committee the responsibility to approve articles of association for a company, organization, or government institution.¹⁴² But such approvals “must not be inconsistent with the

139. If the offense is a common crime, then it is tried in a public court. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 172. By implication, military court proceedings may be held in secret. Also, military courts and the Office of the Military Prosecutor are part of, and subject to the same rules as, the judiciary. See *id.*

140. See FREDERIC WEHREY ET AL., *The IRGC in Politics*, in THE RISE OF THE PASDARAN: ASSESSING THE DOMESTIC ROLES OF IRAN’S ISLAMIC REVOLUTIONARY GUARDS CORPS 77, 77 (2009), www.jstor.org/stable/10.7249/mg821osd.13?seq=1#metadata_info_tab_contents.

141. See JOHN L. ESPOSITO & JOHN O. VOLL, ISLAM AND DEMOCRACY (1996).

142. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 85.

principles and commandments of the official religion” of Iran.¹⁴³ Whether they are is a matter ultimately to be decided by the Guardian Council in accordance with Article 96.¹⁴⁴ And the Speaker of the Assembly must “study and indicat[e]” whether such approvals satisfy these principles and commandments.¹⁴⁵

Another illustration of the expression of the voice of the assembly as representative of the public lies in Article 87. This provision develops the relationship between two distinct branches of Iran’s government, the executive and legislative (both discussed below). The president of Iran must obtain a “vote of confidence from the Assembly” for his “Council of Ministers.”¹⁴⁶ This approval must be obtained after the president forms his council, but before it begins its work.¹⁴⁷ And during his term, the president can seek from the assembly “a vote of confidence” for his council “on important and controversial issues.”¹⁴⁸

• Guardian Council

The most obvious institutional expression of Islamicization, save for the office of the supreme leader, is the Guardian Council. It plays two major roles: supervisory and juridical. As to the first, under Article 99, the council is responsible for overseeing Iranian democracy. The council supervises elections for (1) the Assembly of Experts, which picks the supreme leader (discussed in Theme 2, below), (2) the president (discussed under Theme 9, below), (3) the Islamic Consultative Assembly (i.e., the legislature, discussed under Theme 9, below), and (4) popular referenda (i.e., “direct recourse to popular opinion,” discussed under Theme 6, below).¹⁴⁹

As to the second, the council is akin to a constitutional court. Article 91 establishes the Guardian Council and its mandate—namely, “to safeguard the Islamic ordinances and the Constitution . . . [and] examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam.” The council consists of twelve individuals, six ‘*adl fukahā*’, who are “conscious of the present needs and the issues of the day,” plus six Muslim jurists who specialize in different legal fields.¹⁵⁰ The six ‘*adl fukahā*’ are chosen by the supreme leader.¹⁵¹ The six jurists are nominated by the head of the judiciary (also discussed under Theme 9, below)

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at art. 87.

147. *Id.*

148. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 87.

149. *Id.* at art. 99.

150. *Id.* at art. 91.

151. *Id.*

and elected by the assembly.¹⁵² Article 92 specifies that all twelve serve for a six-year period.¹⁵³

The Constitution does not spell out the distinction between the two types of Guardian Council members. Based on *Shī'ite* tradition, it would appear that the six '*adl fukahā*' are considered "*mujtahid mutlaq*" (unrestricted jurist-scholars)—that is, Islamic legal scholars who have satisfied all the conditions for independent reasoning (*ijtihad*) and, therefore, are among the most prominent of scholars.¹⁵⁴ The other six jurists, while no doubt highly respected, might be among the "*mujtahid muqayyad*" (restricted jurist-scholars), meaning they have mastered the methodology of a particular school of law (*madhhab*) and can apply it to reach the traditional rulings of that school, and to pass new rulings within that school or within their area of legal specialty.

The assembly derives its constitutional authority from the Guardian Council. Article 93 states that without the council, the assembly has no legal status other than to approve the credentials of the council members and select the six jurists. Pursuant to Article 94, all legislation the assembly passes—not merely one piece selected for constitutional challenge by an interested party, but rather every legislative enactment—must be sent to, and reviewed by, the council within ten days. If ten days are "inadequate" to finish the review and provide a "definite opinion," then the assembly can grant an extension under Article 95. In studying every assembly enactment as required by Article 94, the council must check to "ensure[] its compatibility with the criteria of Islam and the Constitution." Only compatible legislation is enforceable.¹⁵⁵ The council must return any incompatible legislation to the "Assembly for review."¹⁵⁶

Read literally, this language would allow for the assembly to "review" an enactment yet insist on its legislative position or, in other words, disagree with the council's view that the enactment violated Islamic legal principles or the Constitution. If the assembly exercises this power, a crisis could ensue. But, subject to the supreme leader, the ultimate say rests with the council. Article 96 highlights the distinction between the two types of council members. To decide whether legislation is compatible with "the laws of Islam," a majority vote of the *fukahā* is taken.¹⁵⁷ The other six members are not sufficiently qualified to make this determination.¹⁵⁸ However, to determine whether legislation is compatible with the Constitution,

152. *Id.*

153. Half of the first Guardian Council changed over by lots after three years. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 92.

154. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHARĪ'A*) 1298, 1334 (2d ed. 2016) [hereinafter BHALA ISLAMIC LAW TEXTBOOK].

155. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 94.

156. *Id.*

157. *Id.* at art. 96.

158. *Id.*

all twelve members vote, with affirmance requiring a majority thereof.¹⁵⁹ Similarly, Article 98 “vest[s]” the authority to interpret the Constitution with the council, which exercises interpretative authority by “consent of three-fourths of its members.” So, hypothetically, a majority of council members could determine that legislation passed by the assembly is unconstitutional and then, by a three-fourths majority, could render an interpretation of the Constitution. To assist in their work, council members per Article 97 can listen in person to the assembly and must do so and “make their views known” if a proposed bill is “urgent.”

It is worth commenting that the Article 96 and 98 voting rules do not undermine the sacred character of Iran’s legal system in the way that it might appear to legal realists, critical legal studies adherents, and jurists opposed to natural law, such as American Supreme Court Justice Oliver Wendell Holmes Jr. Justice Holmes avowed that the law is whatever a majority says it is.¹⁶⁰ He refused to accept law as divinely sourced and put down those who did with the aphorism “[c]ertainty is not the test of certainty.”¹⁶¹ Holmes and his modern-day devotees might think majority and three-fourths voting under Articles 96 and 98 are tantamount to a confession that there are no absolutes. “To the contrary,” Iranian legal scholars and practitioners would say. They do not necessarily claim 100 percent certainty on all points. There are absolutes, but the scholars and practitioners may not know for sure what, exactly, they are. So, the Guardian Council voting rules adduce that jurists are to strive to learn, understand, interpret, and apply the will of God, and that in this struggle (Jihad), reasonable minds may differ.

B. Theme 2: Velayat-e-Faqih and Reappearance of Walī al ‘Aṣr

• Guardianship and Leadership

Under the *velayat-e-faqih* doctrine Ayatollah Khomeini promulgates in his 1970 book *Governance of the Jurist*, “[i]t is the jurist, or Islamic scholar[,] who should rule an Islamic state; this is the source for Iran’s Supreme Leader.”¹⁶² Thus, he writes:

“Islam proclaims monarchy and hereditary succession wrong and invalid.” (p. 10) . . . [“]After the death of the Most Noble Messenger, the obstinate enemies of the faith, the *Umayyads* (God’s curses be upon them), did not permit the Islamic state to attain stability with the rule of Alī . . . The form of government of the *Umayyads* and the *Abbasids*, the political and administrative poli-

159. *Id.*

160. See Oliver Wendell Holmes, Jr., *Natural Law*, in 2 THE AMERICAN INTELLECTUAL TRADITION: 1865 TO THE PRESENT 211, 212 (David A. Hollinger & Charles Capper eds., 7th ed. 2017).

161. *Id.*

162. HOFOWITZ, *supra* note 42, at *The Iranian Constitution and Ayatollah Khomeini* (citing IMAM KHOMEINI, VELAYAT-E FAQEEH [GOVERNANCE OF THE JURIST] (Hamid Algar trans., 2005)).

cies they pursued, were anti-Islamic. The form of government was thoroughly perverted by being transformed into a monarchy, like those of the kings of Iran, the emperors of Rome, and the pharaohs of Egypt” (p. 23).

. . . “This slogan of the separation of religion from politics and the demand that Islamic scholars should not intervene in social and political affairs have been formulated and propagated by the imperialists; it is only the irreligious who repeat them. Were religion and politics separate in the time of the Prophet?” (p. 16).¹⁶³

The essential logic is that separating mosque from state is un-Islamic. To be authentically Islamic is to reject the secularist western separation of God from law.

So, as explored above, Article 4 entrusts the *fukahā*’ of the Guardian Council with the vital function of ensuring that Iran’s legal system is, indeed, authentically Islamic. They are the “judges” in all questions concerning whether any law or regulation, or any article of the Constitution, is “based on Islamic criteria.”¹⁶⁴ Here, then, is a clear manifestation of the *velayat e-faqih* doctrine.¹⁶⁵ Article 5 states the guardianship (*wilāyah*) and leadership of the Muslim community (*ummah*) “devolve[s] upon the just [‘*adl*] and pious [*muttaqi*] *faqih*.” Per Article 5, this individual—the supreme leader—is “aware of the circumstances” of their times, “courageous,” “resourceful,” and administratively skilled.

In their role to ensure the Islamic quality of Iran’s legal system, the *fukahā*’ of the Guardian Council, the council itself, and the supreme leader—indeed, all of Iran—are mindful of an axiom of Twelver Shiite belief: the doctrine of the Hidden Imam. Article 5 expressly invokes it, saying the responsibilities of the supreme leader laid out in Article 107 (as discussed below) are pertinent “[d]uring the Occulation of the *Walī al ‘Aṣr*”¹⁶⁶—that is, the *Māhdī*, the Twelfth Imam, who entered the mystical sequestration in 940 AD.¹⁶⁷ Article 5 expresses the desire for his return: “may Allāh hasten his reappearance.”

“*Walī*” means “guardian.”¹⁶⁸ But the “*Walī al ‘Aṣr*” is no ordinary guardian. The meaning of “*al-‘aṣr*” is profound, and profoundly important

163. *Id.* (quoting Ayatollah Khomeini). For a treatment of the *Umayyad* and the *Abbasid* Caliphates, which lasted from 661 to 750 A.D. and 750 to 1258 A.D., see BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 123–52 (chs. 5–6).

164. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 4.

165. This expression is *Farsi* (Persian); the Arabic version is “*wilāyat al-faqih*.” See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 1358.

166. ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] art. 5, translated in Islamic Republic of Iran’s Constitution of 1979 with Amendments Through 1989, CONSTITUTE PROJECT, www.constituteproject.org/constitution/Iran_1989 [hereinafter 1989 AMENDMENT TO THE IRANIAN CONSTITUTION].

167. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 169–214 (chs. 8–9).

168. *Id.* at 1357.

to understand this title. Literally, “*al-‘aṣr*” means to press or squeeze.¹⁶⁹ Metaphorically, it refers to time, as in the period from the creation of the world until the Day of Judgment, or the period during the life of the Prophet Muhammad, or the period of the day of the late afternoon (as in the last hour of the afternoon).¹⁷⁰ The period nearing the end of day, in turn, symbolizes the drawing to a close of time itself—the nearing of the end of time and the approaching of the Day of Judgment.¹⁷¹ That is when the return (emergence from Occulation) of the *Walī al ‘Aṣr* is expected. When it occurs, the *Walī al ‘Aṣr* will establish a period of peace and justice, plus win the conversion of humankind to Islam.¹⁷²

• **Supreme Leader and Assembly of Experts**

Perhaps no aspect of Iran’s Islamic Republic is more fascinating, and vexing, to outside observers than the concept, institution, and persona of the “supreme leader.” Not only does he “run” Iran as the ultimate governmental authority and is he perched atop the media (by virtue of his power to appoint and dismiss, under Article 175, the head of the radio and television network),¹⁷³ but he also, under Article 177, catalyzes constitutional amendments and has a comparatively outsized and final say in them.¹⁷⁴ Moreover, and far more importantly, the supreme leader is responsible for Islamic gov-

169. See 20 AL ISLAM.ORG, *Surah Asr, Chapter 103*, in AN ENLIGHTENING COMMENTARY INTO THE LIGHT OF THE HOLY QUR’AN, www.al-islam.org/enlightening-commentary-light-holy-quran-vol-20/surah-asr-chapter-103.

170. See Abu Abdis Salaam, *Benefits from Surah al-‘Aṣr*, ISLAMWAY (Jan. 6, 2014), <https://en.islamway.net/article/20359/benefits-from-surah-al-asr>; 11 *Different English Tafsir’s of Surah al-Asr (The Declining Day)*, MEDIUM (Feb. 9, 2018), <https://medium.com/adventure-of-the-quran/tafsir-of-surah-al-asr-the-declining-day-d8035335c3c8>.

171. See *Tafsir: Surah Al-Asr*, HIZB UT-TAHRIR BRITAIN (Jan. 1, 2018), www.hizb.org.uk/islamic-culture/tafsir-surah-al-asr.

172. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 169–214 (chs. 8–9).

173. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 175.

174. As per Article 177, the Constitution of the Islamic Republic of Iran may be revised (albeit not as to its Islamic character, as discussed in Theme 1) “whenever needed by the circumstances.” *Id.* at art. 177.

The following procedures must be used for such changes:

(1) The supreme leader consults with the nation’s Exigency Council (Expediency Council) about a constitutional amendment.

(2) The supreme leader “issues an edict to the President” about the amendment.

(3) The amendment is prepared by the Council for the Revision of the Constitution. This council consists of the following:

—All twelve members of the Guardian Council.

—President

—Speaker of the Islamic Consultative Assembly

—Head of the judiciary

—Permanent members of the nation’s Exigency Council (Expediency Council)

—Five members from the Assembly of Experts

—Ten representatives selected by the supreme leader

—Three representatives from the Council of Ministers

—Three representatives from the judiciary

—Ten representatives from the Islamic Consultative Assembly

—Three university professors

ernance until the return of the *Walī al ‘Aṣr* (discussed above). In short, the occupant of this office is more than an economic, political, judicial, and military leader. He is also a religious leader—the religious leader, until the reemergence of the Hidden Imām.

The first supreme leader was, of course, *Āyatollāh* Ruhollah Khomeini.¹⁷⁵ Upon his death in 1989, *Āyatollāh* Alī Khameini (1939–present) succeeded him. That *Āyatollāh* Khameini would be the first one never was in doubt. Article 107 identifies him as “the eminent *marjī ‘al-taqlīd* and great leader of the universal Islamic Revolution, and founder of the Islamic Republic of Iran, . . . who was recognized and accepted as *marjī* and leader by a decisive majority of the people.”¹⁷⁶ That *Āyatollāh* Khameini would succeed him was not automatic. Rather, the “demise” of *Āyatollāh* Khomeini was foreseen in Article 107. Hence, Article 107 establishes an institutional mechanism for succession of Iran’s most important office.

That institution is the Assembly of Experts. Article 107 creates it for “the task of appointing” the successor to *Imām* Khomeini.¹⁷⁷ This assembly consists of “experts elected by the people,” though their electoral process is not specified.¹⁷⁸ To select the new supreme leader (and all subsequent ones), the Assembly of Experts must “review and consult among themselves” to see if there are any *fukahā’* who possess the qualifications that Articles 5 and 109 specify.¹⁷⁹

With respect to points (1)–(3), note there are, in total, forty-nine members of this Council for the Revision of the Constitution, excluding the Expediency Council officials.

(4) The supreme leader confirms (and signs) any decision taken by the Council for the Revision of the Constitution.

(5) No Council decision confirmed (and signed) by the supreme leader is “valid” unless “approved by an absolute majority vote in a national referendum.” (The Article 59 rule that the Islamic Consultative Assembly must approve by two-thirds majority any “direct recourse to public opinion” does not apply to an Article 177 Revision of the Constitution vote.) *Id.*

The fifth point also is noteworthy. It is, perhaps, the only instance in the Constitution in which the supreme leader’s will might be subject to a different authority—the people. This point seems to reflect the need to balance top-down hierarchical authority against bottom-up decentralized legitimacy. Put directly, the word “*Āyatollāh*” literally means “sign of God”—not tyrannical dictator. That sign is put on a person whose virtues allow him to be a guide for the *ummah*, until the return of the Hidden *Imām*. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154 at 1303.

175. For a superb, brief account of his life, see Richard Pearson, *Ayatollah Ruhollah Khomeini: The Mullah Who Transformed Iran*, THE WASHINGTON POST (June 5, 1989), www.washingtonpost.com/archive/politics/1989/06/05/ayatollah-ruhollah-khomeini-the-mullah-who-transformed-iran/6aaea9ff-84bd-406c-a0d9-8d8b4851e3bf.

176. 1989 AMENDMENT TO THE IRANIAN CONSTITUTION, *supra* note 166, at art. 107.

177. *Id.*

178. Article 108 charged the *fukahā’* members of the first Guardian Council with setting out the number and qualifications of the experts in the Assembly of Experts, as well as the mode of their election and their code of procedure, all based on a majority vote of these members, and “approved by the Leader of the Revolution [*i.e.*, *Āyatollāh* Khomeini].” Thereafter, the power to modify their rules is vested in themselves. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 108.

179. 1989 AMENDMENT TO THE IRANIAN CONSTITUTION, *supra* note 166, at art. 107.

Under Article 107, if the assembly finds one such *fukahā* “better versed in Islamic regulations, the subjects of the *fiqh* [jurisprudence], or in political and social issues, or possessing general popularity or special prominence” with respect to any of the credentials Article 109 lists, then the assembly “shall elect him as the Leader.”¹⁸⁰ If there is no such superior candidate from among the *fukahā*, then, per Article 107, the Assembly of Experts “shall elect and declare one of them as the Leader.”¹⁸¹ That is, the assembly shall pick one of its own assembly members as the leader. Also, under Article 107, the new leader “shall assume all the powers of the [*wilāyat al ‘amr* principles of governance] and all the responsibilities arising therefrom.”¹⁸² However, Article 107 makes clear that “the Leader is equal with the rest of the people . . . in the eyes of the law.”¹⁸³

There are three “essential qualifications and conditions” to be supreme leader, which Article 109 sets out:

- (1) [S]cholarship, as required for performing the functions of muftī [i.e., an Islamic law specialist accredited, by virtue of outstanding scholarly reputation, personal piety, governmental authority, or all three, to issue an authoritative legal opinion] in different fields of *fiqh*.
- (2) Justice and piety, as required for leadership of the Islamic Ummah.
- (3) [Right] political and social perspicacity, prudence, courage, administrative facilities, and adequate capability for leadership.¹⁸⁴

If more than one person fulfils these criteria, then the individual who possesses “the better jurisprudential and political perspicacity [i.e., criteria (1) and (3)] will be given preference” to be the new leader.¹⁸⁵ In other words, a sense of justice and personal piety are relegated to scholarship and political savviness.

The “duties and powers” of the supreme leader are enormous. Article 110 lists eleven of them, which encompass all aspects of Iranian life. The supreme leader is responsible for the following:

- (1) Delineating “the general policies of the Islamic Republic,” in “consultation with” the nation’s Exigency Council (i.e., Expediency Council)
- (2) Supervising the “proper execution of the general policies”
- (3) Issuing a decree for a national referendum
- (4) Assuming supreme command of the armed forces
- (5) Declaring war and mobilizing the armed forces

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at art. 109.

185. 1989 AMENDMENT TO THE IRANIAN CONSTITUTION, *supra* note 166, at art. 109.

- (6) Appointing and dismissing (a) the fukahā' on the Guardian Council, (b) the supreme judicial authority, (c) the head of the radio and TV network, (d) the Chief of the Joint Staff, (e) the IRGC chief commander, and (f) the supreme commanders of the armed forces
- (7) Resolving differences among the army, navy, and air force
- (8) Resolving a problem that "cannot be solved by conventional methods" by recourse to the nation's Exigency Council
- (9) Signing a decree for the election of the president, after the Guardian Council has confirmed the "suitability of candidates for the Presidency"
- (10) Dismissing the president, after (as per Article 89) the Islamic Consultative Assembly has voted that he is incompetent, or the Supreme Court has found him guilty of violating his constitutional duties
- (11) Pardoning or reducing the sentence of a convict, "within the framework of Islamic criteria," upon a recommendation from the head of the judiciary¹⁸⁶

Only the eleventh duty and power may be delegated by the supreme leader "to another person."¹⁸⁷ Even this list is understated. For instance, Article 131 (discussed below) empowers the supreme leader to make decisions about the first deputy to the president.

Save for Article 111, these responsibilities are essentially unchecked. Article 111 contemplates the possibilities that the supreme leader may become incapable of fulfilling his duties under Article 110, he may lose one of the qualifications under Articles 5 and 109, or it may become known he never possessed one or more of the qualifications.¹⁸⁸ In that case, the Assembly of Experts, which is authorized to determine that one of these eventualities has, in fact, occurred, will dismiss the leader. Article 111 is clear: "he will be dismissed."¹⁸⁹ Of course, the prospect of the assembly that chose the leader dismissing him is foreseeably dim except in the most egregious of circumstances.

• **Supreme Leader, Nation's Exigency Council, and Supreme Council for National Security**

What happens if the Assembly of Experts dismisses the supreme leader, or if he dies or resigns? Then, following Article 111, the assembly "shall take steps within the shortest possible time for the appointment of the new Leader."¹⁹⁰ Until a new leader is appointed, and following a decision of the nation's Exigency Council (i.e., the Expediency Council), a three-

186. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 110.

187. *Id.*

188. 1989 AMENDMENT TO THE IRANIAN CONSTITUTION, *supra* note 166, at art. 111.

189. *Id.*

190. *Id.*

person transitional council shall be constituted to take over his duties.¹⁹¹ This council shall consist of the president, the head of the judiciary, and one *faqīh* from the Guardian Council.¹⁹² With the approval of three-fourths of the members of the nation’s Exigency Council, the three-person transitional council “shall take action” on the duties and powers identified in Article 110(1), (3), (5), (6) (but only with respect to the military officials, i.e., Chief of the Joint Staff, IRGC chief commander, and supreme commanders of the armed forces), and (10).¹⁹³ If the supreme leader is temporarily incapacitated, due to illness “or any other incident,” then the three-person transitional council “shall assume his duties.”¹⁹⁴

Manifestly, the nation’s Exigency Council plays an important role as a body with which the supreme leader must consult under Article 110(1), and in directing and managing a transition from one such leader to his successor under Article 111. As to its origins and roles:

[T]he Expediency Council . . . was established in 1988 by decree of *Āyatollāh* Khomeini, the Supreme Leader at the time. When the Constitution was changed in 1989, the Council was integrated into the Constitution. It has two functions: first, it functions as an expert council advising the Supreme Leader in all policy areas; . . . [the second function is discussed below].¹⁹⁵

Note, then, that the Constitution is murky as to how the Exigency Council is selected. By inference from its origins as a creation of the Ayatollah Khomeini, and its first function as an advisory body to the supreme leader, the leader picks its members. Presumably, it also is up to the leader to decide the number of council members, whether they are term-limited (and if so, for how long), and whether to dismiss a member.¹⁹⁶ Put in colloquial American English terms, the council is the “cabinet” of the supreme leader.

The role of the Expediency Council is equally vital in preserving Iran’s Islamic character. Under Article 112, this council meets “upon the order of the Leader” whenever “the Guardian Council judges a proposed bill of the Islamic Consultative Assembly to be against the principles of *Sharī’a* . . .

191. *Id.*

192. *Id.*

193. As to the officials identified in Article 110(a)–(c), that is, the *fukahā’* on the Guardian Council, the supreme judicial authority, and the head of the radio and TV network, the transitional Council is not empowered to take action. Presumably, then, the nation’s Exigency Council would be in control of appointments and dismissals to these offices. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 110.

194. 1989 AMENDMENT TO THE IRANIAN CONSTITUTION, *supra* note 166, at art. 111.

195. *The Expediency Council*, IRAN DATA PORTAL, <https://irandataportal.syr.edu/political-institutions/the-expediency-council> [hereinafter *The Expediency Council*, IRAN DATA PORTAL].

196. Reference in Article 177 to “permanent” members of the nation’s Exigency Council indicates there are term-limited ones. As Article 177 indicates, only the permanent members of that council serve on the Council for Revision of the Constitution. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 177.

and the Assembly is unable to meet the expectations of the Guardian Council.”¹⁹⁷ In such instances, the council performs the second of its two functions:

[I]t may function as a legislative body in the following manner: after the Guardian Council (which screens all legislation with regard to its constitutionality and its congruence with Islamic law per Art. 4) has vetoed a piece of legislation, the Parliament (*Majles*) may decide with a 2/3 majority to send the legislative draft to the Expediency Council. The Council may then decide to pass the law in the version as forwarded by the *Majles*, or with the changes demanded by the Guardian Council, or in yet another version.¹⁹⁸

In effect, Article 112 envisions the possibility of a constitutional crisis whereby the assembly, perhaps backed by popular demand, insists a proposed piece of legislation complies with Islamic law, whereas the Guardian Council steadfastly disagrees. Who has final say?

Article 112 does not give the final say to the Supreme Court, or even to the *fukahā'* on the Guardian Council. Rather, this provision gives final say over whether a bill is, or is not, in keeping with the Sharia to the Exigency Council. Yet, in practice, that means final say is with the supreme leader. The reason is the tight nexus between the supreme leader and the nation's Exigency Council. Article 112 empowers the leader with appointing the members of this council (some of whom are permanent, and others of whom are changeable), and has final say over the rules of the council that its members formulate.¹⁹⁹

Finally, the extent to which power and influence is centralized under the *velayat e faqih* doctrine in the persona of the supreme leader is apparent from three features of Article 176. First, this provision makes clear that of the twelve permanent members of the Supreme Council for National Security, ten are from governmental or military positions, but two are the “representatives” of the supreme leader, whom he “nominate[s].”²⁰⁰ Second, by custom, one of the leader's two representatives serves as “Secretary” for the council.²⁰¹ Third, no decision of the Supreme Council takes effect until it is confirmed by the supreme leader.²⁰²

- **Religious Development**

Supplementary sources of Islamic law, specifically, independent reasoning in the hands of jurists, are guided from the top by the supreme

197. *Id.* at art. 112.

198. *The Expediency Council*, IRAN DATA PORTAL, *supra* note 195.

199. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 112.

200. *Id.* at art. 176.

201. *Supreme National Security Council*, U.S. INST. OF PEACE: THE IRAN PRIMER, *supra* note 128.

202. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 176.

leader.²⁰³ Such guidance raises two questions. What are the powers of the supreme leader? And to what end is the supreme leader to exercise those powers? The first question is discussed above (Theme 1).

As to the second question, how the supreme leader must use his powers, in the most basic sense, the answer is for the religious development of the people. That development is a, if not the, core constitutional value:

[The Constitution] makes clear its objective to promote Islam worldwide. Its Preamble states that “the mission of the Constitution” is “to create conditions conducive to the development of man in accordance with the noble and universal values of Islam” and that “the aim of government is to foster the growth of man in such a way that he progresses towards the establishment of a Divine order (in accordance with the Qurānic phrase *’And toward God is the journeying’* [3:28]).”²⁰⁴

With the supreme leader, the preeminent duty of Iran’s government, listed in Article 3(1), is to “creat[e] a favorable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption.”²⁰⁵

C. Theme 3: Bounded Religious Freedom

• “Official” Religion

From the first three constitutional themes, a fourth one may be inferred: religious freedom in the Islamic Republic is circumscribed. Chapter I, Articles 11–14 confirm this inference. They aggregate to discrimination in favor of the Twelver (*Ja’fari*) school of Shiism, and against all other faiths, in the following rank order (from least to most discrimination) after the Twelvers:

(1) The four Sunnite schools, *Hanafī*, *Mālikī*, *Shāfi’ī*, and *Ḥanbalī*, and Fiver Shiites, the *Zaydī* school²⁰⁶

(2) Judaism, Christianity, and Zoroastrianism²⁰⁷

(3) All other religions (e.g., Buddhism, Hinduism, Jainism, Sikhism), plus agnosticism and atheism

Is this ordering incongruous with the Article 19 declaration of “equal rights” for “[a]ll” people of Iran?²⁰⁸

203. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 169–214 (chs. 8–9).

204. Horowitz, *supra* note 42, at introductory section.

205. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 3(1).

206. *Id.* at art. 12.

207. *Id.* at art. 13.

208. Horowitz suggests Articles 12 and 19 are inconsistent. Horowitz, *supra* note 42, at introductory section (“Still, while the Constitution states it protects the equal rights of ‘All people of Iran,’—’Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities’ (Article 13).”).

On the one hand, the conflict between (1) the ordering of religious groups that Articles 11–14 create and (2) the equal protection Article 19 guarantees seems *prima facie*. A hierarchy of groups that enjoy equal status under law is not a legal hierarchy in any meaningful sense.

On the other hand, a scrupulous textual analysis suggests there is no conflict between the ordering of religious groups via Articles 11–14 and the equal protection guarantee in Article 19. The first clause of Article 19 does not specifically list religious groups among the cohorts. It lists—“equal rights” applies regardless of “the ethnic group or tribe”—and the second clause, says “the color, race, language, and the like, do not bestow any privilege.” Thus, even if “and the like” were read to refer to religious groups, under the principle of *ejusdem generis* (of the same kind), that listing is relevant to “privileges,” not “equal rights.” It might be ventured that not bestowing “privileges” is essentially the same as affording “equal rights.” But that interpretation would treat one of those two terms as redundant and thereby conflate the two clauses. Presumably, the drafters of Iran’s Constitution used different terms with a reason and sought to avoid superfluties.

Additionally, recourse to Article 57 indicates there is no conflict. Article 57 relegates the three branches of Iran’s government that otherwise would protect every citizen’s legal rights to a theocratic power. This provision states that the legislature, judiciary, and executive are to “function[] under the supervision of the absolute *wilāyat al ‘amr* [i.e., supreme leader] and the leadership of the *Ummah*.”²⁰⁹ Put crudely, the Article 19 declaration about equality is not an overarching secular leveling of Iranian society; rather, principles held to be sacred allow for discrimination within Iran’s diverse population.

Further evidence that Article 19 takes subject to, and is not inconsistent with, the hierarchical ordering of religions comes from Article 12. Article 12 declares as Iran’s “official religion . . . Islam and the Twelver (*Ja’fari*) school [of Shiism]” with respect to *uṣūl al-Dīn* (roots of faith, theology) and *fiqh* (jurisprudence) “and [that] this principle will remain eternally immutable.”²¹⁰ There are five roots of Twelver Shiism:²¹¹

- (1) Oneness of God (Allāh), monotheism (*tawhid*)
- (2) Prophethood of Muhammad (i.e., *Nubuwwat*)
- (3) Resurrection (i.e., Day of Judgment)
- (4) Justice of God (*‘adl*)
- (5) The *Imāmate*

209. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 57.

210. *Id.* at art. 12.

211. BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 73–114 (ch. 3), 169–214 (chs. 8–9).

The first three roots are common to all Muslims, while the latter two are foundations of Twelver Shiism.²¹² Because Sunnis (i.e., *Hanafīs*, *Mālikīs*, *Shāfi'īs*, and *Hanbalīs*) do not adhere to the fourth and fifth roots, and because Fiver Shiites believe in a different *Imāmate* line subsequent to the fifth Imam,²¹³ these schools of Islam are not accorded the highest constitutional status.

Yet, because the four Sunnite schools and Fiver Shiites share with Twelvers a common faith in the first three roots, they have “official status” in two areas: (1) religious education and (2) one *fiqh* dimension—namely, personal status law (which encompasses family law, wills, and inheritance law).²¹⁴ And wherever one of the *Sunnite* schools, or the Fivers, are demographically predominant in Iran, local regulations are to be consistent with that school.²¹⁵ But in no instance may those regulations derogate from the local council (which, presumably, adheres to a Twelver line, or may be obliged to do so), nor may they infringe on the rights of any other school (which, of course, includes Twelvers).²¹⁶

- **“Recognized” Religions**

Next come Jews, Christians, and Zoroastrians. They lack “official status,” as per Article 13, but are “recognized.”²¹⁷ They must behave “within the limits of the law”²¹⁸—surely meaning the Sharia as interpreted according to the Twelver (*Ja'farī*) Shiite school. Within that boundary, they can proceed with their ceremonies and practice their teachings with respect to religious education and personal status. In effect, they are protected persons (*dhimmīs*) who have been conquered and operate under a treaty of surrender.

- **No Status**

What about the world’s roughly 1.1 billion Hindus, 0.5 billion Buddhists, millions of Sikhs, and 1.2 billion unaffiliated persons?²¹⁹ For purposes of Article 13, they do not exist. That is, they receive no constitutional recognition. However, the government of Iran, and all Muslims, are obligated to treat all non-Muslims in an ethical manner, in accordance with “the principles of Islamic justice and equity, and to respect their human

212. *Id.* at 169–214 (chs. 8–9), 257–316 (chs. 12–14).

213. *Id.*

214. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 12.

215. *Id.*

216. *Id.*

217. *Id.* at art. 13.

218. *Id.*

219. See Conrad Hackett & David McClendon, *Christians Remain World's Largest Religious Group, but They Are Declining in Europe*, PEW RSCH. FOUND.: FACTTANK (Apr. 5, 2017), www.pewresearch.org/fact-tank/2017/04/05/christians-remain-worlds-largest-religious-group-but-they-are-declining-in-europe (for all categories except Sikhs, 2015 data); Amber Pariona, *Countries with the Largest Sikh Populations*, WORLD ATLAS (Mar. 23, 2018), <https://www.worldatlas.com/articles/countries-with-the-largest-sikh-populations.html> (for Sikhs, 2018 data).

rights.”²²⁰ However, this duty applies only to those non-Muslims “who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.”²²¹

In sum, read from a nontheological perspective—in particular, a deconstructionist interpretative perspective²²²—Articles 11–14 are at war with themselves. They give, but they take away. They speak of religious freedom, but they bless only certain among the devout.

D. Theme 4: Bounded Civil Rights

• Harm Principle Boundary

Chapter III (Articles 19–42) contains a list of socioeconomic and procedural civil liberties, and human rights, the government must guarantee to each citizen.²²³ These civil liberties and rights are subject to certain in-built limitations—that is, they are circumscribed by textual words and phrases. They also are subject to the general Article 40 rule, which is redolent of the utilitarian “harm principle” of John Stuart Mill (1806–1873) that no person may exercise a right in a way that injures another or is detrimental to the public interest.²²⁴

• Equal Rights

Most notably, as with respect to religious freedom (Theme 3), in respect of civil liberties, the pertinent constitutional provisions lay out rights within an Islamic framework. No right is unbounded; each right must conform with Islamic criteria. Thus, again, from a nontheological perspective, the text is at war with itself: it promises freedom, but then subordinates liberty to religion. Article 22 sets this incongruous framework. It declares ambitiously the “dignity, life, property, rights, residence, and occupation of the individual” to be “inviolable,” but then cuts back on this promise with an exception that potentially destroys the ambition: “except in cases sanctioned by law.”²²⁵ Nothing, then, is inalienable; all civil liberties, and human dignity and life themselves, are contingent.

220. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 14. This duty is based in the Holy Qur’ān, *surah* 60, *ayah* 8.

221. *Id.*

222. On deconstructionism and other literary schools of textual interpretation, see Bhala & Witmer, *supra* note 2, at 58–126.

223. Articles 41–42 address eligibility for Iranian citizenship by birth and naturalization, respectively, as well as its loss. Article 41 states that “Iranian citizenship is the indisputable right of every Iranian.” The government cannot withdraw citizenship unless the citizen so requests (*i.e.*, renounces citizenship), or the citizen acquires the citizenship of another country (*i.e.*, dual nationality is not permitted). Article 42 holds that a foreign national may obtain Iranian citizenship as prescribed by law, but such citizenship may be withdrawn upon request, or if that national acquires the citizenship of another state. 1979 IRANIAN CONSTITUTION, *supra* note 53, at arts. 41–42.

224. See David Brink, *Mill’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 21, 2018), <https://plato.stanford.edu/entries/mill-moral-political>.

225. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 22.

Article 19 is “laudable”²²⁶ in its guarantee that “[a]ll people of Iran . . . enjoy equal rights.”²²⁷ But this guarantee is restricted by ethnicity, tribal status, “color, race, language, and the like.”²²⁸ Notwithstanding the word “all” at the start of Article 19, the subsequently listed categories do not appear to cover women, disabled individuals, or LGBTQ+ persons. Arguably, they would come within the phrase “and the like.” But, if this phrase is interpreted according to the statutory canon of *ejusdem generis* (of the same kind), then query whether that phrase indeed would include them.

Likewise, Article 20 contains an ambitious guarantee: “All citizens, . . . both men and women, enjoy the protection of the law, and enjoy all human, political, economic, social, and cultural rights.”²²⁹ However, this enjoyment—akin to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution²³⁰—must be “in conformity with Islamic criteria.”²³¹ Thus, to the extent the Sharia is interpreted as permitting, even requiring, disparate treatment for certain persons, men or women, derogations from equal protection may occur.

This same boundary is set in Article 21, which is dedicated to the rights of women. This provision identifies five rights the government of Iran “must ensure . . . and accomplish,” but only in “conformity with Islamic criteria”:²³²

- (1) [C]reate a favorable environment for the growth of [each] woman’s personality . . . both . . . material and intellectual[]
- (2) [P]rotect [] . . . mothers, particularly during pregnancy and childrearing[]
- (3) [E]stablish[] competent courts to protect . . . the family[]
- (4) [Provide] special insurance for widows, and aged women
- (5) [A]ward[] guardianship to worthy mothers . . . to protect the interests of children[]²³³

Of these five rights, the third, fourth, and fifth are about the family, widows and the aged, and children—not about women per se. The second right focuses on the traditional role of women as child bearers. Most disappointingly, the first right treats the growth of women as somehow different from that of other persons and fails to guarantee their rights in economic and political realms, where they can—if given the opportunity—compete effectively with men. Overall, it might be said that Article 21 singles out women in the most traditional, unimaginative way imaginable.

- **Freedom of Conscience and Speech**

226. Horowitz, *supra* note 42, at introductory section.

227. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 19.

228. *Id.*

229. *Id.* at art. 20.

230. *See* U.S. CONST. amend. XIV.

231. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 20.

232. *Id.* at art. 21.

233. *Id.*

Articles 23–25 address arguably the most fundamental of all freedoms: freedom of conscience (i.e., belief, opinion, and thought) and speech (i.e., expression). Without freedom of conscience, the good life (as Socrates defines it) cannot be lived, and the individual is confined to adhere to whatever an extrinsic and potentially heinous authority decides is Truth. Without freedom of speech, freedom of conscience is impossible (because to hold a belief, opinion, or thought about something is to express oneself in verbal and nonverbal ways), and the individual is rendered a slave to a monstrous authority. Like Article 21, Articles 23–25 articulate impressive civil liberty guarantees. Article 23 is “laudable”²³⁴ in forbidding the investigation of the beliefs of an individual, and the “molest[ation] . . . or tak[ing] to task” of anyone “simply for holding a certain belief.”²³⁵ Yet the word “simply” presents a worrisome limitation on freedom of conscience: imposing a restriction on a “certain belief” under the guise of the purported effect of that belief. For instance, might a person be detained for regarding Islamic legal rules about drinking alcohol, as more flexible than the classical theory of the Sharia says, thereby arousing fear among authorities that Islamic morality will be undermined?

The limitations on freedom of expression are even more obvious. Article 24 guarantees that “publications and the press have freedom of expression, except when it is detrimental to the fundamental principles of Islam or the rights of the public.”²³⁶ Article 25 promises that “all forms of covert investigation are forbidden,” including inspecting or failing to deliver letters, recording or disclosing telephone conversations, disclosing telex communications, and eavesdropping, “except as provided by law.”²³⁷ The “except” clauses in these articles are an invitation for authorities to cut back or snuff out any expression they deem a threat to any interest they judge important.

Similarly, Article 84 declares each member of the Islamic Consultative Assembly “has the right to express his views on all internal and external affairs of the country.”²³⁸ Article 86 grants immunity to legislators: members “are completely free in expressing their views and casting their votes . . . and cannot be prosecuted or arrested for opinions expressed in the Assembly or votes cast.”²³⁹ However, Article 84 reminds all members they are “responsible to the entire nation.”²⁴⁰ That could be interpreted as a reference to the basic Islamic principles on which Iran’s Constitution is premised, i.e., they must not cast doubt on, nor vote against those principles.

234. Horowitz, *supra* note 42, at introductory section.

235. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 23.

236. *Id.* at art. 24.

237. *Id.* at art. 25.

238. *Id.* at art. 84.

239. *Id.* at art. 86.

240. *Id.* at art. 84.

Thus, the specter looms that the reminder potentially negates the plain meaning of the text, whereby free speech is chilled.

Expression often occurs in groups outside the assembly (i.e., non-parliamentarians), and Articles 25–26 address that context. Article 25 guarantees freedom of association, including the right to join trade unions and political parties, and prohibits either preventing or compelling participation in them.²⁴¹ But Article 25 contains two large limits. First, no such group can “violate the . . . independence, freedom, national unity, criteria of Islam, or the basis of the Islamic Republic.”²⁴² Second, with respect to “religious societies,” the freedom is only for those faith-based groups that are “Islamic or pertaining to one of the recognized religious minorities.”²⁴³ Non-recognized faiths, because they lack status (as discussed above), have no right to organize. As for the Article 27 enshrinement of freedom of assembly, there also are two limitations: public gatherings and marches are forbidden if “arms” are “carried,” or if they are “detrimental to the fundamental principles of Islam.”²⁴⁴ Would an iPhone be a “weapon” if used to record a demonstration against official corruption, from which the video clip could be uploaded to social media and undermine a fundamental Islamic precept, such as in the *Imāmate* (or, more poignantly, the *Imāmate* projected by Iran’s government)?

Finally, Article 175 makes plain that freedom of speech is bounded. It states that “freedom of expression and dissemination of thoughts” through Iran’s radio and television network “must be guaranteed,” but then adds that this freedom “must be . . . in keeping with . . . Islamic criteria and the best interests of the country.”²⁴⁵ So, any expression deemed un-Islamic or contrary to the nation is suppressible. Moreover, the network hardly is free from political interference. The supreme leader chooses the network’s head, and the network is supervised by a council, consisting of two representatives each from the president, Islamic Consultative Assembly, and judiciary.²⁴⁶ Thus, the path to curtail freedom of the press is wide.

- **Right to Shelter**

Iranians have a right to shelter. Article 31 affords each Iranian “individual and family” the “right . . . to possess housing commensurate with his needs.”²⁴⁷ That qualification leaves considerable room as to the type of housing and does not guarantee ownership. Yet, even if read narrowly, it would create a perhaps impossible burden on the government. Thus, Article 31—though obliging the government to make land available to individuals

241. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 25.

242. *Id.*

243. *Id.*

244. *Id.* at art. 27.

245. *Id.* at art. 175.

246. *Id.*

247. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 31.

and families so they can realize this right, authorizes the government to prioritize persons with the greatest needs. Those persons are “the rural population and the workers.”²⁴⁸ Article 33 complements the right to shelter with freedom of choice as to the location of shelter: no person may be banished from his place of residence, prevented from residing in his place of choice, or compelled to reside in a locality, “except in cases provided by law.”²⁴⁹

• **Civil Liberties and Human Rights**

Articles 32 and 34–37 speak to rights associated with criminal and civil cases. Article 32 protects Iranians from unjustified restraint. No one may be arrested without an “order.”²⁵⁰ In the event of arrest, the accused must be presented in writing, and without delay, the charges and reasons for them.²⁵¹ A “provisional dossier” must be sent to the competent judicial authority “within a maximum of twenty-four [24] hours” of the arrest so that preliminary arrangements for trial are made “as swiftly as possible.”²⁵² Failure to comply with these guarantees is itself a punishable offense.

Article 34 opens the courthouse doors, as it were, to every Iranian. It is the “indisputable right” of every citizen “to seek justice by recourse to” a competent court; every citizen has a right of access to the judiciary.²⁵³ This “right” is “familiar”²⁵⁴ across constitutions. Article 35 offers another “familiar”²⁵⁵ guarantee: each citizen has the right to counsel of one’s choice (not unlike the right to counsel guaranteed by the Sixth Amendment to America’s Constitution²⁵⁶), and (presumably for those unable to afford an attorney) the article obliges the government to provide a lawyer (albeit with no specification as to the quality of representation).²⁵⁷ Article 36 forbids punishment except by a “competent court and in accordance with law.”²⁵⁸ And, as per Article 37, an accused is presumed innocent until proven guilty by a competent court²⁵⁹—another “familiar”²⁶⁰ right.

Articles 38 and 39 provide three human rights guarantees against cruel treatment. They, too, are “familiar”²⁶¹ in diverse constitutional contexts.

248. *Id.*

249. *Id.* at art. 33.

250. *Id.* at art. 32.

251. *Id.*

252. *Id.*

253. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 34.

254. Horowitz, *supra* note 42, at introductory section.

255. *Id.*

256. U.S. CONST. amend. VI.

257. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 35.

258. *Id.* at art. 36.

259. *Id.* at art. 37.

260. Horowitz, *supra* note 42, at introductory section.

261. *Id.*

- (1) Under Article 38, cruel treatment, including “[a]ll forms of torture for the purposes of extracting a confession or acquiring information,” is “forbidden.”²⁶²
- (2) Also, under Article 38, compulsion of testimony, confessions, or oaths is impermissible. Any confession, testimony, or oath “obtained under duress is devoid of value and credence.”²⁶³
- (3) Under Article 39, any affront to the “dignity and repute of [a] person[] arrested, detained, imprisoned, or banished in accordance with the law” is “forbidden.” Failure to comply with this additional prohibition against cruel treatment is itself a punishable offense.²⁶⁴

According to international human rights organizations, these guarantees are breached in Iran.²⁶⁵ Notably, such breaches (specifically, those of Article 38) are themselves punishable offenses.

Yet, under the *velayet-e-faqih* doctrine (discussed above), Ayatollah Khomeini steadfastly defends a criminal law scheme that attracts condemnation for operating at variance with Articles 38 and 39:

Having established the Qurānic and ideological basis for governance by a jurist, Khomeini indicates how this governance will be applied.

“But when Islam wishes to prevent the consumption of alcohol—one of the major evils—stipulating that the drinker should receive eighty lashes, or sexual vice, decreeing that the fornicator be given one hundred lashes (and the married man or woman be stoned), then they start wailing and lamenting: ‘What a harsh law that is, reflecting the harshness of the Arabs.’ Why should it be regarded as harsh if Islam stipulates that an offender must be publicly flogged in order to protect the younger generation from corruption?” (p. 12 [of *Governance of the Jurist*]).

Khomeini was also a proponent of amputations: “After the Commander of the Faithful [Ali] had cut off the hands of two thieves, he showed such love and concern in treating them and attending to their needs that they became his enthusiastic supporters” (p. 53). The Islamic jurist as ruler must be able to say “‘If you do not pay back this loan, you will be the first woman of the Bani Hāshim [tribe] to have her hand cut off.’ That is the kind of ruler and leader we want, a leader who will put the law into practice instead of his personal desires and inclinations . . . who will place his own family on an equal footing with the rest of the peo-

262. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 38.

263. *Id.*

264. *Id.* at art. 39.

265. See, e.g., *Iran*, AMNESTY INT’L, www.amnesty.org/en/countries/middle-east-and-north-africa/iran; *Iran 2020*, AMNESTY INT’L, www.amnesty.org/en/countries/middle-east-and-north-africa/iran/report-iran (both chronicling news, commentary, and research about human rights issues in Iran).

ple; who will cut off the hand of his own son if he commits a theft; who will execute his own brother and sister if they sell heroin" (p. 80).²⁶⁶

In effect, the constitutional theory that justifies harshness is God's law: *ḥaqq Allāh* (claims of God) offenses require *ḥadd* (limit) punishments.²⁶⁷

E. Theme 5: Rejection of Foreign Oppression

• Global Commitment to Support the Oppressed

Iran's Constitution is unabashed about worldwide religious evangelization:

Article 11 states[,] "All Muslims form a single nation," [and] the Preamble states that the constitution "provides the necessary basis for ensuring the continuation of the Revolution *at home and abroad*" [emphasis added] and "will strive with other Islamic and popular movements to prepare the way for the formation of a single world community (in accordance with the Qurānic verse '*This your community is a single community, and I am your Lord, so worship Me*' [21:92])."²⁶⁸

The constitutional promotion of, specifically, Twelver Shiism is inextricably linked to the constitutional provisions concerning Iran's prerevolutionary history with the shah and western colonialism.

Chapter I, Article 2(c), of the Constitution pits the Islamic Republic against "all forms of oppression . . . and . . . dominance."²⁶⁹ Article 3(5) demands the "complete elimination of imperialism and . . . prevention of foreign influence."²⁷⁰ This revolution is conducted in solidarity with the worldwide *ummah*. Article 3(15) commits Iran's government to the "expansion and strengthening of Islamic brotherhood."²⁷¹ Even more importantly, Article 3(16) requires it to frame a foreign policy "on the basis of Islamic criteria, fraternal commitment to all Muslims, and unsparing support to the *mustad'afun* of the world."²⁷² The first two clauses, along with the preceding provision, invoke Islam. The third clause puts Iran on the side of the oppressed.

Article 11 reinforces these provisions. All Muslims form one *ummah*. The government of Iran is duty-bound to cultivate the cultural, economic, and political unity of Muslims around the world.²⁷³ This duty is grounded in the Qur'ān, *surah* 60, *ayah* 8, which Article 11 invokes. Yet, the most

266. Horowitz, *supra* note 42, at *The Iranian Constitution and Ayatollah Khomeini* (citing IMAM KHOMEINI, *VELAYAT-E FAQEEH* [GOVERNANCE OF THE JURIST] (Hamid Algar trans., 2005)).

267. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 1075–190 (chs. 43–46).

268. Horowitz, *supra* note 42, at introductory section.

269. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 2(c).

270. *Id.* at art. 3(5).

271. *Id.* at art. 3(15).

272. *Id.* at art. 3(16).

273. *Id.* at art. 11.

obvious textual manifestation of Iran's unbounded commitment to fight for the underdog, as it were, is in Articles 152 and 153.

Article 152 declares as a pillar of Iranian foreign policy “the defence of the rights of all Muslims.”²⁷⁴ Note here the lack of a qualification in favor of Twelver Shiite Muslims, even though there is a long-standing Shi-ite narrative that Shia have been oppressed by Sunni since nearly the earliest days of Islam.²⁷⁵ The Article 152 commitment envisions a global *ummah*.

Article 154 is (from a deconstructionist interpretative perspective²⁷⁶) a text at war with itself. On the one hand, Article 154 posits as the “ideal” of Iran's Islamic Republic “human felicity throughout human society.”²⁷⁷ In this sense, the provision affirms the international legal principle of the right of every nation to self-determination. Article 154 identifies “the attainment of independence, freedom, and [the] rule of justice and truth” as “the right of all people in the world.”²⁷⁸ Therefore, in its foreign policy, Iran “scrupulously refrain[s] from all forms of interference in the internal affairs of other nations.”²⁷⁹

On the other hand, Article 154 commits Iran to “support[ing] the just struggles of the *mustad'afun* [downtrodden persons] against the *mus-takbirun* [oppressors] in every corner of the globe.”²⁸⁰ This commitment is potentially unbounded. If Iran identifies a “struggle” as “just” and determines the claimant is oppressed by a tyrant, then Iran will “support” that claimant. The text creates plenty of space for Iran to pick and choose whom to support, and to decide what kind of “support” to offer. Its foreign policy across the Middle East, providing armed assistance to fighters in Lebanon, Iraq, Syria, and Yemen, is—from Iran's perspective²⁸¹—entirely consistent with Article 154. From America's standpoint, however, Iran has allowed this part of Article 154 to swallow the general tenor of the rest of the text,

274. *Id.* at art. 152.

275. See BHALA ISLAMIC LAW TEXTBOOK, *supra* note 154, at 169–90 (ch. 8).

276. On this methodology of textual interpretation, see Bhala & Witmer, *supra* note 2, at 58–126.

277. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 154.

278. *Id.*

279. *Id.*

280. *Id.*

281. See also Daniel L. Byman, *How Terrorism Helps—and Hurts—Iran*, THE BROOKINGS INST. (Jan. 6, 2020), www.brookings.edu/blog/order-from-chaos/2020/01/06/how-terrorism-helps-and-hurts-iran (arguing that “[s]upport for such groups has been an important part of Iran's foreign policy since the 1979 Islamic Revolution,” and that “[s]uch relationships have advanced numerous Iranian interests, undermined its enemies, helped Iran deter adversaries and made the country a global player”). But, for a treatment of Iran's expansionist networks from the perspective of the Combating Terrorism Center at the United States Military Academy at West Point, see Colin Clarke & Phillip Smyth, *The Implications of Iran's Expanding Shi'a Foreign Fighter Network*, CTC SENTINEL, Nov. 2017, at 14, <https://ctc.usma.edu/the-implications-of-irans-expanding-shia-foreign-fighter-network>.

and that of Article 152, which eschews expansionism and embraces nonalignment and nonintervention.

• **International Respect for Iran**

Article 78 forbids any change to the boundaries of Iran. The exception it allows is indicative of how the Constitution embeds a desire for international respect. A boundary amendment is permissible, but only if it is in “the interests of the country,” is “not unilateral,” does not “encroach” on Iran’s “independence and territorial integrity,” and receives the approval of four-fifths of the total membership of the Islamic Consultative Assembly.²⁸² Put differently, there can be no capitulation to, no humiliation at the hands of, a foreign power with respect to boundaries. Note, too, the supermajority required for such change, and more generally the requirement under Article 77 that any international treaty or other agreement must be ratified by the assembly.

Similarly, the Islamic Consultative Assembly must approve under Article 80 any sovereign debt incurred by Iran (such as a bailout loan from the International Monetary Fund, which Iran sought in April 2020 in the amount of US \$5 billion amid the COVID-19 pandemic²⁸³) and any employment of foreign experts (which “is forbidden, except in cases of necessity,” per Article 82). Significantly, and almost assuredly because of Iran’s sense of exploitation in the early and mid-twentieth century by the Anglo-Iranian Oil Company,²⁸⁴ “granting of concessions to foreigners for the formation of companies or institutions dealing with commerce, industry, agriculture, services, or mineral extraction is absolutely forbidden.”²⁸⁵ This bar, in Article 81, allows no exception.²⁸⁶

The same concern about foreign dominance lurks in Article 139. This provision states that settlement of claims involving public or state property and referral of such claims to arbitration require approval of the Council of Ministers, which must inform the Islamic Consultative Assembly.²⁸⁷ But if a foreigner is a party to the dispute (or if the claim is “important”), then the

282. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 78.

283. See *Coronavirus: Iran Appeals for \$5bn IMF Loan as Deaths Near 4,000*, BBC NEWS (Apr. 9, 2020), www.bbc.com/news/world-middle-east-52217600.

284. On that history, see, for example, Stephen Kinzer, *BP and Iran: The Forgotten History*, CBS NEWS (June 20, 2010), www.cbsnews.com/news/bp-and-iran-the-forgotten-history (observing that “[f]rom the 1920s into the 1940s, Britain’s standard of living was supported by oil from Iran,” but that “[i]n Iran, nationalism meant one thing: we’ve got to take back our oil,” so “[d]riven by this passion, Parliament voted on April 28, 1951, to choose its most passionate champion of oil nationalization, Mohammad Mossadegh, as prime minister,” and “[d]ays later, it unanimously approved his bill nationalizing the oil company”; further observing that “Mossadegh promised that, henceforth, oil profits would be used to develop Iran, not enrich Britain”).

285. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 81.

286. In like fashion, Article 83 prohibits the transfer of Iran’s national heritage, specifically, government buildings and properties, as well as “irreplaceable treasures.” *Id.* at art. 83. However, the Assembly can approve such transfers.

287. *Id.* at art. 139.

assembly must approve any settlement or referral to arbitration.²⁸⁸ Thus, for instance, claims by American or other non-Iranian businesses for expropriation or nationalization, or even recourse of them to an arbitral panel, require legislative consent.

In an obvious manner, two constitutional provisions concerning the military manifest Iran's determination to avoid foreign domination. Article 145 forbids any foreigner from serving in the army.²⁸⁹ And, because Articles 41 and 42 prohibit dual citizenship, only "pure" Iranian citizens may engage in military service. Article 146 strictly prohibits the establishment of any foreign military base, even for peaceful purposes, within Iran.²⁹⁰

Likewise, two other constitutional provisions concerning Iran's foreign policy reject foreign domination. Article 152 sets the foundation of Iran's foreign policy as "the rejection of all forms of domination, both the exertion of it and submission to it," preserving the country's independence and territorial integrity, "non-alignment with respect to the hegemonist superpowers," and "peaceful relations with all non-belligerent states."²⁹¹ Article 153 forbids any "foreign control" over Iran's "natural resources," as well as over its "economy," "army," or "culture."²⁹² It works in tandem with Article 81 (discussed above), which forbids granting concessions to foreigners to form any kind of commercial entity, including for minerals extraction.²⁹³

Aside from the supreme leader himself, the ultimate authority charged with securing Iran's international respect is the Supreme Council for National Security. That is, another example of the constitutional emphasis on keeping Iran free from foreign domination, either directly or through internal agents of foreign powers, is evident from the work Article 176 assigns to this Supreme Council. In its mission to protect Iran's borders and preserve its sovereignty, this council must (1) set Iran's "defense and national security policies within the framework of general policies determined by the [Supreme] Leader," (2) coordinate Iran's cultural, economic, intelligence, political, and social activities with a view to "general defense and security policies," and (3) synthesize Iran's material and intellectual resources to "fac[e] . . . internal and external threats."²⁹⁴ The fact that the council consists (as discussed under Theme 2) of Iran's top ten government

288. *Id.*

289. *Id.* at art. 145.

290. *Id.* at art. 146.

291. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 152.

292. *Id.* at art. 153. Indirectly, Article 155 suggests Iran is a possible home to persons resisting foreign domination. *See Id.* at art. 155. This provision empowers the government to grant political asylum (unless it regards the individual concerned as a traitor or saboteur).

293. *Id.* at art. 81.

294. Article 176 envisions the creation of subcouncils: "Commensurate with its duties, the Supreme Council for National Security shall form sub councils such as Defense Sub-council and National Security Sub-council. Each Sub council will be presided over by the President or a member of the Supreme Council for National Security appointed by the President." *Id.* at art. 176.

officials, plus two representatives of the supreme leader, in itself further testifies to the importance Iran places on self-determination.

F. Theme 6: Rejection of Despotism

• **Martial Law**

One obvious instance of the constitutional theme to break with the despotism of the shah's regime lies in Article 79. This provision forbids the government of the Islamic Republic from declaring martial law.²⁹⁵ The exception allowed is narrow. The government can make such a declaration, but only in the case of "war or emergency conditions akin to war."²⁹⁶ Even if the government were to interpret the latter phrase (concerning warlike conditions) broadly, its declaration must be temporary, and in no case longer than thirty days, and the restrictions must be "necessary."²⁹⁷ Most importantly, there is a check against unilateral action by the executive branch: a declaration of martial law would be invalid without the "agreement" of the assembly, and likewise, if the government seeks an extension of a declaration beyond thirty days, it must obtain a "new authorization" from the assembly.²⁹⁸

Another instance in which Iran's Constitution evinces a concern about despotism, or more specifically, conflicts of interest that could lead to insider dealing and other corrupt behavior, is in Article 141. This article prohibits the president, deputies, ministers, and government employees from holding more than one government position simultaneously. They are enjoined from being a representative in the Islamic Consultative Assembly, practicing law, or working in a public institution or institution all or part of the capital of which belongs to the state.²⁹⁹ They also are banned from serving as president, managing director, or as a board of directors member of any private company (though they may hold these posts in a cooperative company affiliated with the government).³⁰⁰ Interestingly, there is no bar on them holding a teaching position in a university or research institution.

Still another example of constitutional concern relating to despotism—namely, that a senior-most government official might abuse his power for personal gain—is in Article 142. This provision mandates that the head of the judiciary "examine" the assets of the supreme leader, president, deputies, and ministers, and "their spouses and offspring, . . . before and after their term of office . . . to ensure [the assets] have not increased in a fashion contrary to law."³⁰¹ Read in common-sense terms, Article 142 demands a

295. *Id.* at art. 79.

296. *Id.*

297. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 79.

298. *Id.*

299. *Id.* at art. 141.

300. *Id.*

301. *Id.* at art. 142.

complete financial accounting of the assets and liabilities of all top officials, even the supreme leader, and their immediate family members, to ensure none of them have profited from high office. To be sure, in a practical sense, Article 142 could be circumvented if the head of the judiciary is himself not serious about its enforcement, perhaps because he is beholden to the supreme leader, or one of the executive branch officials, and thus either does not check carefully their before-and-after asset position or turns a blind eye to any increase that occurred through illegal means.

There also are checks against abuse of power by the judiciary. For example, Article 171 considers instances in which, because of “a default or error of” a judge, a person “suffers moral or material loss;” in this case, the judge at fault must “stand surety for the reparation of that loss in accordance with Islamic criteria.”³⁰² As a surety, the judge, along with the government, would be primarily liable for providing compensation; in instances where the judge is not at fault, the government will provide compensation.³⁰³ In all cases, “the repute and good standing of the accused will be restored.”³⁰⁴

Finally, constitutional provisions concerning the military also address the matter of despotic hierarchies within the armed services. Article 148 forbids personal use of military equipment, including vehicles, and of army personnel, such as servants or chauffeurs.³⁰⁵ Article 149 mandates that promotions be “in accordance with the law.”³⁰⁶ In essence, the military is supposed to be a professional organization, not one in service of the personal preferences of active-duty commanders.

• Public Opinion Counts

Chapter I, Article 3(6), of the Constitution obliges Iran’s government to “eliminat[e] . . . all forms of despotism and autocracy” and “all attempts to monopolize power.”³⁰⁷ Accordingly, public opinion, consultation, and reciprocal right-duty correlations between the government and people matter. Governance must be legitimate—that is, it must be acknowledged, accepted, and approved by the people as genuine, proper, and true. That is clear from two Qur’anic provisions quoted in Article 7, namely, *surah* 42, *ayah* 38 (which calls for managing affairs through consultations) and *surah* 3, *ayah* 159 (which calls on leaders to consult people on governance).³⁰⁸

Accordingly, the legitimacy of administration of affairs in the Islamic Republic, as per Article 6, is through elections in which public opinion is expressed. Elections must be held for the president and members of the

302. *Id.* at art. 171.

303. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 171.

304. *Id.*

305. *Id.* at art. 148.

306. *Id.* at art. 149.

307. *Id.* at art. 3(6).

308. *See id.* at art. 7.

Consultative Assembly (*Majlis*, or Parliament) and councils.³⁰⁹ Note, however, that the supreme leader is not subject to popular election, nor to a referendum (which, in certain instances, is contemplated by the Constitution). Also, in respect of legitimacy, the decision-making and administrative organs of government, with progressively decentralized jurisdiction, are the Islamic Consultative Assembly and provincial, city, regional, district, and village councils.³¹⁰

Article 90 presents another illustration of the importance of public opinion in Iran's constitutional structure. "Whoever" has a complaint about the "work of the Assembly, . . . Executive power, or . . . Judicial power" may forward a written complaint to the assembly.³¹¹ Read literally, the article means that the complaining party could be any individual or group (though presumably not a noncitizen, in view of other provisions addressing historical asymmetries of foreign influence and dominance). The assembly must "investigate" the complaint and provide a "satisfactory reply," including an "adequate explanation" from the executive or judiciary if the complaint pertains to these branches.³¹² Results of the investigation must be announced "within a reasonable time," and if the complaint is "of public interest," then "the reply [i.e., from the assembly, executive, or judiciary] must be made public."³¹³

• **Media Regulation**

The duty of Iran's government to eradicate these evils, however, is incongruous with another duty—namely, the duty under Article 3(2) to elevate the "level of public awareness in all areas" by the "proper use of the press, mass media, and other means."³¹⁴ These phrases are invitations to infringe on press freedoms and abuse the media as a tool for government propaganda. And Article 9 exacerbates such concerns.

Understandably, Article 9 declares as the "duty" of the government of Iran, and each citizen, to preserve the "freedom, independence, unity, and territorial integrity" of Iran. Yet, on the one hand, this provision says "no authority has the right to abrogate legitimate freedoms . . . under the pretext of preserving" Iran's independence in these respects.³¹⁵ On the other hand, "[n]o individual . . . has the right to infringe in the slightest way" on the "political, cultural, economic, and military independence, or the territorial integrity, of Iran under the pretext of exercising freedom."³¹⁶ These sentences are not easily reconciled, except to say that despotism is not

309. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 6.

310. *Id.* at art. 7.

311. *Id.* at art. 90.

312. *Id.*

313. *Id.*

314. *Id.* at art. 3(2).

315. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 9.

316. *Id.*

firmly rejected. If despotism is necessary to avoid the “slightest infringement,” then so be it—the “legitimate freedoms” of the individual are susceptible to sacrifice.

G. Theme 7: Human and Social Capital Development

• Human Dignity

Though the Constitution nowhere uses the neoclassical economic terms “human capital” or “social capital,” it speaks of them often. Chapter I, Article 2(6), affirms the “exalted dignity and value of man,” and Article 2(1) call for securing “equity and justice,” “national solidarity,” and “political, economic, social, and cultural independence” through recourse to the “most advanced results of human experience” in “sciences and arts.”³¹⁷ Article 3(3) tasks the government with providing “free education[] and physical training” and “expan[ding] higher education” for all persons, and Article 3(7) tasks it with “ensuring political and social freedoms.”³¹⁸ This Article also charges the government with “strengthening the spirit of inquiry” in all forms of endeavor—“science, technology, and culture, as well as Islamic studies.”³¹⁹ Indeed, Article 3(4) directs the government to “establish[] research centers and encourage[] researchers.”³²⁰

More generally, as Article 3(8) indicates, “the entire people” are to enjoy “participation . . . in determining their political, social, and cultural destiny.”³²¹ Iran’s government is tasked under Article 3(9) with “the abolition of all forms of undesirable discrimination” and providing “equitable opportunities for all, in both . . . material and intellectual spheres.”³²² Women are included in these lofty provisions. Article 3(14) expressly assigns to Iran’s government the goal of “securing the multifarious rights of all citizens, both women and men,” and ensuring they enjoy “legal protection . . . and equality before the law.”³²³

• Freedom Under God

Promotion of human and social capital is within an Islamic framework, which—depending on administration by the government, and the perspective of the individual—may be liberating or constraining. The “freedom” that people have is “coupled with responsibility before God.”³²⁴ Moreover, while Article 3(7) obligates Iran’s government to “ensur[e] political and social freedoms,” these freedoms must be “within the framework of the

317. *Id.* at art. 2.

318. *Id.* at art. 3.

319. *Id.*

320. *Id.*

321. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 3.

322. *Id.*

323. *Id.*

324. *Id.* at art. 2(6).

law.”³²⁵ Thus, tensions are inevitable in this framework. Article 3(1) commits Iran’s government to promoting faith-based moral virtues and combating vice.

What, then, if top-notch scientific or artistic inquiries prove politically, economically, or socially polarizing, thus undermining national solidarity? Are educational opportunities contingent on one’s theological disposition? Are scientific or cultural investigations and innovations permissible if they challenge, even ostensibly, Islamic morality? Likewise, with respect to Article 3(7) (also quoted above), legal strictures may ringfence sociopolitical liberation, and even be concocted to do so with a view to maintaining a monopoly on power (in contravention, ironically, of Articles 2(c) and 3(6), quoted above).

- **Traditional Family Unit and Occupational Choices**

Article 10 intimates that “the entire people” means traditional heterosexuals. This provision declares the “family” is the “fundamental unit of Islamic society.” Thus, “all laws” must support family “formation,” “safeguarding its sanctity . . . and stability . . . on the basis of the law and ethics of Islam.”³²⁶ For “LGBTQ+” individuals, these words spell doom. That is, the traditional (monstrous) *hadd* punishments for what the classical theory of the Sharia regards as *haqq Allāh* offense for unlawful sexual intercourse (*zinā*) apply in “modern” Iran.

The interventionist nature of Iran’s government in the economy (Theme 8, below) is foretold by two socioeconomic provisions that appear in Chapter III. Article 28 suggests that Iran’s labor market is free, in that each citizen has the right to choose an occupation.³²⁷ But that freedom is regulated: the occupation must not be “contrary to Islam” or “the public interests,” or an “infringe[ment] [on] the rights of others.”³²⁸ Thus, bartending or sex work is unlawful, as contrary to the Sharia. So, too, would be work involving narcotics—growing poppy seed for opium production and distribution, for example. (These occupations would also violate Islamic criminal law, discussed in separate chapters.) Article 28 also commits the government to a full-employment economy; that is, the government has the obligation to provide “every citizen with the opportunity to work, and to create equal conditions for obtaining it.”³²⁹ Consequently, the government is supposed to use fiscal and monetary policies to generate work for its citizens—not leave employment levels to the mercy of private markets.

- **Health Care and Education as Universal Rights**

Health care is “a universal right” as per Article 29. The government of Iran has the duty of providing and funding it, as well as providing and

325. *Id.* at art. 3(7).

326. *Id.* at art. 10.

327. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 28.

328. *Id.*

329. *Id.*

funding social security for retirement, and benefits in the event of unemployment, disability, or accidents, for every citizen, by “drawing, in accordance with the law, on the national revenues and funds through public contributions.”³³⁰ These Article 29 obligations essentially forbid the government from leaving it to the private sector to supply a broad-based social safety net. They also preclude citizens from choosing, based on price, quality, need, and desire, what level of protection to obtain. Rather, the government is the market: it supplies to all citizens these social services and it uses “national revenues and funds obtained through public contributions,”³³¹ which (presumably) include, respectively, oil export revenues and tax collections.

Similarly, though not declared as such in Article 30, free education up to—but not explicitly including—secondary education, is a universal right. The government must provide it, and also must “expand free higher education,” to help Iran “attain[] self-sufficiency.”³³² The emphasis on “self-sufficiency” is curious in two respects. First, it is not knowledge *per se* that matters; rather, it is developing human capital to be free of dependence on foreign scholars that matters. Second, query whether that goal—intellectual autarky—is achievable, by any country in any era. Is it not through interaction with foreign teachers and researchers that higher education is enhanced?

H. Theme 8: Mixed Economy

- **Rejection of Capitalism and Socialism**

Chapter I, Article 2(c), states that the Islamic Republic is based on negating “all forms of oppression . . . and dominance,” which encompasses economic control from abroad.³³³ Article 3(13) creates a duty for the government to “attain[] self-sufficiency in scientific, technological, industrial, agricultural, and military domains, and other similar spheres.”³³⁴ And Article 3(12) obliges the government with “planning . . . a correct and just economic system, in accordance with Islamic criteria,” so as to meet specific goals—namely, to “create welfare, eliminate poverty, and abolish all forms of deprivation with respect to food, housing, work, health care, and . . . social insurance.”³³⁵ It also, per Article 3(10), is to eliminate “superfluous government organizations.”³³⁶

These provisions manifest a confusion about economic structure and policy. What do these provisions amount to? They reject both capitalist and

330. *Id.* at art. 29.

331. *Id.*

332. *Id.* at art. 30.

333. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 2(c).

334. *Id.* at art. 3(13).

335. *Id.* at art. 3(12).

336. *Id.* at art. 3(10).

socialist models of economic growth: the Islamic Republic is not to create laissez-faire American-style free markets, nor regulate all factors of production (land, labor, human capital, physical capital, and technology), as occurs under socialism. These provisions call for implementation of Islamic economic principles. But what are those principles? That is, how are they evident, not in the abstract, but in the day-to-day realities of negotiating and implementing business deals and generating transactional activity?

Those Islamic principles (as manifest in property, contract, and business associations law, discussed in separate chapters) are decidedly non-interventionist, and rather free market in orientation. Even when they appear unique (as in banking law, with rules against *gharar* and *riba*), in pursuit of justice, the difference (with respect to risk-taking and interest) from conventional non-Muslim finance may be less pronounced than sometimes thought. Worse yet, the specific economic policy targets are incoherent, impossible, or both.

- **Self-Sufficiency and Other Unachievable Policy Targets**

Article 3(13) essentially calls for autarky, when in reality no nation can be self-sufficient in all walks of life. Since 1979, Iran has had the opportunity to be self-sufficient under the broadest, deepest sanctions regimes in human history—namely, those led by the United States to block Iran from acquiring a nuclear weapon.³³⁷ Iran has failed to do so. That is, the calls from *Āyatollāh* Ali Khomeini, successor to *Āyatollāh Imām* Khomeini, for a “resistance economy” have been unsuccessful. And they have pointed up the inherent contradiction in the economic provisions of Iran’s Constitution: Resistance economics means greater reliance on China, Russia, and countries other than the United States or those of the European Union. It does not mean self-sufficiency.

Likewise, the economic policy targets in Article 3(12) range from the woolly headed to the unachievable. Read literally, that article says that the Iranian government is to “create welfare,”³³⁸ whereas Islamic economic principles would call more precisely for wealth generation to benefit the *ummah*. As for eliminating poverty and abolishing all forms of deprivation, that is impossible for none other than conceptual reasons. Poverty and deprivation are relative concepts—one is poor and deprived, or rich and fulfilled, only in comparison to another. Only in a perfectly communist system of complete equality would relative differences shrink to de minimis levels. Yet, where that has been tried—in current times, North Korea—the results speak for themselves: there exist privileged elites with a monopoly on power that oppress the majority of people, inflicting on them shortages of food, housing, work, and health care. Those results, and the means by which they are achieved, are orthogonal to Article 3(12).

337. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 439–518.

338. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 3(12).

• **Four Goals and Nine Metrics**

Chapter IV (Articles 43–55) of the Constitution contains the core provisions concerning Iran’s economy. The starting point—Article 43—lays out Iran’s four economic goals:

- (1) “[A]chiev[e] economic independence,” i.e., self-sufficiency
- (2) “[U]proot[] poverty and deprivation,” i.e., poverty alleviation
- (3) “[F]ulfil[] human needs in the process of development,” i.e., human development
- (4) Preserve “human liberty,” i.e., freedom³³⁹

The first aim implicates at least some degree of self-sufficiency. “Independence” does not mean “autarky,” but the intention appears to be to minimize reliance on importation and foreign direct investment. That intention conflicts with Iran’s need to export that in which it holds a comparative advantage—hydrocarbons. This first aim seems to suggest Iran ought to export oil and natural gas, invest its export earnings so as to diversify its economy, and thus be free of the need to import most merchandise. Yet is it realistic to suggest Iran can achieve self-sufficiency in large civil aircraft or pharmaceuticals?

The second goal, though laudable, cannot be read in a literal sense. That is because poverty is a relative concept.³⁴⁰ Regardless of Iran’s per capita gross domestic product, and unless its Gini coefficient were zero (i.e., perfect equality), there would be segments of the citizenry who would be worse off compared to others at higher rungs. The third goal, though vague, is imbued with content when read in conjunction with the socioeconomic and legal rights set out in Chapter III (Articles 19–42, discussed above). The fourth goal again bespeaks how the Constitution is a text at war with itself: human liberty is to be preserved, yet, as per Article 44 et seq., the government—not to mention the IRGC—is highly interventionist.

Article 43 does more than articulate four economic aims. It also establishes nine metrics by which the Islamic Republic must judge its success, and therefore by which it may be judged by Iranians and non-Iranians alike. These metrics, called “criteria,” are what Iran’s economy is “based on.”³⁴¹ In effect, they are a combination of duties incumbent on the government, corresponding rights for the people, and guiding principles for the country:

(1) Right to Basic Necessities:

The government must provide basic necessities for all citizens—namely, food, clothing, housing, education, health (hy-

339. *Id.* at art. 43.

340. See 4 BHALA TRADE TEXTBOOK, *supra* note 10, at 283–98.

341. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 43.

giene and medical treatment), and “the necessary facilities for the establishment of a family.”³⁴²

(2) Right to Work:

The government’s economic planning must ensure employment opportunities for all citizens, “with a view to full employment,” including for individuals who are able to work “but lack the means,” through (a) “cooperatives,” (b) “granting interest-free loans,” or (c) any other “legitimate means” that neither leads to the concentration of wealth nor to the government becoming “a major absolute employer,” while preserving the role of the government in “general economic planning.”³⁴³

(3) Economic Planning and Development:

The government’s economic planning also must provide for the all-around development of every individual, and thus must ensure that for each individual, the “form, content, and hours of work . . . allow for sufficient leisure and energy to engage, beyond . . . professional endeavor[s], in intellectual, political, and social activities, . . . improve . . . skills, and . . . make full use of . . . creativity,” and engage in the affairs of Iran.³⁴⁴

(4) Right to Choose Occupation:

Every citizen has the right to choose freely that person’s occupation, no one is to be compelled to work, and no one is permitted to exploit the work of another person.³⁴⁵

(5) Evil Practices:

“[T]he . . . infliction of harm and loss upon others, monopoly, hoarding, usury, and other illegitimate and evil practices” are forbidden. The scope of this prohibition is unclear, i.e., as written, the prohibition could be a duty incumbent on the government as well as each citizen.³⁴⁶

(6) Waste:

“[E]xtravagance and wastefulness” in the economy, including consumption, production, investment, and distribution, are forbidden. Here, too, the scope is undefined—read literally, it could apply to both the government and citizens.³⁴⁷

(7) Science and Technology:

Science and technology, including the training of “skilled personnel,” must be in accordance with the “developmental needs” of Iran’s economy.³⁴⁸

342. *Id.* at art. 43(1).

343. *Id.* at art. 43(2).

344. *Id.* at art. 43(3).

345. *Id.* at art. 43(4).

346. *Id.* at art. 43(5).

347. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 43(6).

348. *Id.* at art. 43(7).

(8) Foreign economic domination of Iran's economy must be prevented.³⁴⁹

(9) Agricultural (crops and livestock) output and industrial production must not only "satisfy public needs" but also "make the country self-sufficient and free from dependence."³⁵⁰

Among the confusing aspects of these metrics is that they are not expressly linked to the aforementioned four goals. Article 43 fails to spell out the relationships between economic aims and ways to measure their achievement. Some metrics may relate to two or more goals, and vice versa. That said, by inference from the text, metrics (8) and (9) appear related to the first goal, self-sufficiency. The second and third goals, poverty alleviation and human development, may be measured by metrics (1), (2), (3), (6), and (7). The fourth goal, concerning freedom, is manifest in metrics (4) and (5).

• **State, Cooperatives, and Private Sectors, but State First**

Article 44 is perhaps the most revealing provision about the confusion as to Iran's economic model. The provision identifies three sectors that compose the economy:

(1) State:

The "state" refers not only to the government but also to the entities it administers that are publicly owned.³⁵¹ The length and breadth of the illustrative list is remarkable: aviation, banking, dams and irrigation, foreign trade, insurance, major minerals, post, power generation, radio and TV, railroads, roads, shipping, and telegraph and telephone.³⁵² In all these "large scale and mother industries,"³⁵³ producers and exporters of goods and services are state-owned enterprises (SOEs) or state trading enterprises (STEs).

(2) Cooperative:

This rubric would seem to pertain to joint state-private entities, but that familiar sense of the word "cooperative" is misleading. Rather, and in a circular fashion, Article 44 defines "cooperative" as including urban or rural "cooperative companies and enterprises concerned with production and distribution . . . in accordance with Islamic criteria."³⁵⁴ Those criteria appear to refer to certain Islamic partnerships.

(3) Private:

This sector is not scripted to be the dominant one. Rather, it covers agriculture (including animal husbandry), industry, trade,

349. *Id.* at art. 43(8).

350. *Id.* at art. 43(9).

351. *Id.* at art. 44.

352. *Id.*

353. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 44.

354. *Id.*

and services “that supplement the economic activities of the state and cooperative sectors.”³⁵⁵

One contradiction follows immediately from this ranking: the economy “is to be based on systematic and sound planning.”³⁵⁶ Planning, of course, is the province of the state, whereas market-based supply and demand forces determine equilibrium outcomes in the private sector. Article 44, then, elevates central planning over those forces. Concomitantly, Article 48 demands that there be “no discrimination among the various provinces” in respect of distributing economic activities, exploiting natural resources, or utilizing public revenues.³⁵⁷ Every region must have access to “the necessary capital and facilities” for “its needs and capacity for growth.”³⁵⁸ Only with considerable state intervention could this nondiscrimination mandate be fulfilled. Left to market forces, inequities likely would arise.

• **Contradictions of Statist Economy**

The dominance of the public sector is confirmed by the daunting, nonexclusive list of SOEs and STEs, and the characterization of the private businesses as mere supplements to the state and cooperative sectors. Simply put, Iran’s economy is not capitalist, driven by the private sector, nor socialist, driven by worker-run cooperatives. It is statist—the government dominates all the factors of production (labor, land, physical capital, human capital, and technology) in all but small- and medium-sized areas, such as small stores and restaurants. To be sure, Article 46 states that each person is “the owner of the fruits of his legitimate business and labor.”³⁵⁹ Yet, the asymmetry among the sectors is further confirmed in Article 45. It provides that public wealth and property (e.g., abandoned or uncultivated land, forests, lakes, rivers, seas, marshlands, mineral deposits, mountains and valleys, rivers, and unenclosed pastures, as well as legacies without heirs and property recovered or of undetermined ownership or recovered from usurpers) are “at the disposal of the Islamic government for it to utilize in accordance with the public interest.”³⁶⁰ Thus, for example, Iran’s enormous hydrocarbon and gem endowments (as “mineral deposits”³⁶¹) are for the government to direct.

The statist economy implies three more innate contradictions in Article 44. First, ownership is said to be protected under the laws of the Islamic Republic, “in so far as ownership . . . does not go beyond the bounds of Islamic law.”³⁶² This provision, along with Article 47, aims to safeguard

355. *Id.*

356. *Id.*

357. *Id.* at art. 48.

358. *Id.*

359. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 46.

360. *Id.* at art. 45.

361. *Id.*

362. *Id.* at art. 44.

owners against expropriation.³⁶³ Yet, the Sharia holds tremendous respect for private enterprise. Second, ownership must “contribute[] to the economic growth and progress of the country.”³⁶⁴ Yet, in practice, SOEs and STEs are dominated by vested interests, such as the IRGC, which direct resources into these entities, and steer revenues from them, for their own purposes. The result of this pattern of ownership is the third contradiction: decrepit macroeconomic performance, which cannot be blamed (at least not entirely) on American or multilateral sanctions under which Iran has labored for decades.

Simply put, the Constitution does not identify with precision what constitutes a just, authentically Islamic economy, nor the means to achieve one. In rejecting capitalism and socialism, and choosing to make the state sector dominant, the Constitution ironically veers toward socialism. But that cannot be, because the Islamic Republic (as per Themes 1 and 2, above) plainly is a theocracy. The structural economic weakness at the core of the Constitution is the failure, beyond generic references to Islam, to chart out a theoeconomy.

• Irony of Environmental Protection and Economic Diversification

Article 50 could not be followed in its literal sense without a radical transformation in Iran’s economy. Its first sentence reflects a basic principle of the Sharia: “the preservation of the environment” for “present as well as the future generations” is an authentic, noble “public duty,” which this sentence rightly ascribes to “the Islamic Republic”—presumably the entire country.³⁶⁵ Its second sentence, applied to the Iranian context, demands diversification beyond hydrocarbons. This sentence says, “Economic and other activities that inevitably involve pollution of the environment, or cause irreparable damage to it, are . . . forbidden.”³⁶⁶ The obvious rationale for this prohibition is that environmental degradation violates the obligation of environmental protection. And yet Iran is overwhelmingly dependent on oil and natural gas exploration, drilling, piping, production, consumption, and (notwithstanding sanctions) exports.³⁶⁷ To adhere to the first sentence

363. In accordance with Islamic property law (discussed in separate chapters), Article 49 charges the government with the responsibility to confiscate wealth acquired by illicit means, or from illicit sources, and restore it to its legitimate owner—as distinct from expropriation. Among the illicit acquisitions are bribery, corruption, embezzlement, gambling, misuse of endowment or government contracts, sale of publicly owned lands or resources, usurpation, and usury. If the government cannot identify the rightful owner, then it must deposit the wealth in the public treasury. *See id.* at art. 49.

364. *Id.* at art. 44.

365. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 50.

366. *Id.*

367. Mohsen Tavakol, *Iran’s Crude Oil Exports: What Minimum is Enough to Stay Afloat?*, ATLANTIC COUNCIL (Jul. 16, 2019), <https://www.atlanticcouncil.org/blogs/iransource/iran-s-crude-oil-exports-what-minimum-is-enough-to-stay-afloat/>.

would require diversification away from reliance on hydrocarbons, which the Islamic Republic has not achieved.

There is a second irony to Article 50. One way in which Iran could diversify its energy base would be through the development of peaceful nuclear power. Setting aside matters of safe nuclear waste disposal, nuclear energy would be a cleaner, greener alternative than oil and natural gas. Yet the collapse of the July 2015 Joint Comprehensive Plan of Action (JCPOA) and subsequent reimposition of sanctions by the United States put this prospect far away on the horizon.³⁶⁸

I. Theme 9: Three (or Four?) Branches of Government

• Separation of Powers

Article 57 establishes the three parts of government conventionally found in the foundational documents of many countries: executive, legislative, and judicial branches. Article 57's declaration that "[t]he powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers"³⁶⁹ is a "familiar"³⁷⁰ feature of governance in other constitutions. Article 57 also says that these branches are "independent of each other,"³⁷¹ indicating that separation of powers exists. For example, Article 156 expressly declares that the judiciary "is an independent power, the protector of the rights of the individual and society, [and] responsible for the implementation of justice."³⁷² As another illustration, under Article 141 (discussed below), executive branch officials cannot serve in the legislature.³⁷³

Separation of powers also is evident with respect to the president and his Council of Ministers, on the one hand, and the Islamic Consultative Assembly, on the other hand. Article 134 makes clear the president is the head of the Council of Ministers.³⁷⁴ He supervises and coordinates its work and—with the cooperation of the ministers—sets the agenda and policies for the government.³⁷⁵ Decisions of the council, other than those interpreting or modifying the laws, are "binding" in instances of "discrepancies or interferences in the constitutional duties of the government agencies."³⁷⁶ Yet (as per Article 134), the president "is responsible to the Islamic Consultative Assembly for the actions of the Council."³⁷⁷

368. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 471–518.

369. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 57.

370. Horowitz, *supra* note 42, at introductory section.

371. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 57.

372. *Id.* at art. 156.

373. *Id.* at art. 141.

374. *Id.* at art. 134.

375. *Id.*

376. *Id.*

377. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 134.

Similarly, ministers continue in office unless they are dismissed, and the Islamic Consultative Assembly passes a vote of no confidence in them (including as a result of their interpellation)—meaning the assembly can put an end to the tenure of a minister. Resignation of any individual minister, or the entire council, must be submitted to the president. The president can appoint a caretaker minister for the relevant ministry, but only for up to three months under Article 135.³⁷⁸ And, as Article 136 provides, if the president seeks to dismiss a minister, then he must get a vote of confidence from the assembly for the new minister whom he appoints.³⁷⁹ If the president changes half (or more) of the Council of Ministers, then he must obtain a “fresh vote of confidence [in the council] from the Assembly.”³⁸⁰ Article 137 spells out that each minister “is responsible for his duties to the President *and the Assembly*.”³⁸¹ This responsibility is a kind of joint and several liability, because under Article 137, each minister “is also responsible for the actions of the others” on a matter the council approves.³⁸² In brief, the assembly plays a significant role in the life of what is commonly called (including in the United States, the United Kingdom, and India) the “cabinet” of the president, and each minister serving in his cabinet.

Article 170 also evinces separation of power between the judicial and executive branches. Judges “are obliged to refrain from executing statutes and regulations of the government that . . . lie outside the competence of the Executive power.”³⁸³ In other words, it is the judiciary that has final say (aside from the supreme leader) over the boundaries of presidential power. Similarly, Article 172 created a Court of Administrative Justice, supervised by the head of the judiciary, and charged it with investigating “complaints, grievances, and objections of the people” against government entities or officials.³⁸⁴ Article 173 established the National General Inspectorate, also supervised by the head, to ensure the proper conduct of affairs and implementation of laws by the “administrative organs of the government.”³⁸⁵

• Notable Exceptions

The constitutional separation of powers in Iran is not perfect (as it is not, perhaps, in any country). There are three major exceptions to the independent branch structure that are not common in most constitutions. First,

378. *Id.* at art. 135.

379. *Id.* at art. 136.

380. *Id.*

381. *Id.* at art. 137. Further, while Article 138 empowers ministers to make rules, regulations, and procedures and issue circulars, on matters within their jurisdiction, they must do so consistent with the “letter” and “spirit of the law,” and must bring such measures to the Speaker of the Islamic Consultative Assembly to ensure they are not contrary to law; if they are, then the Speaker may send them back to the Council for its reconsideration. *See id.* at art. 138.

382. *Id.* at art. 137.

383. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 170.

384. *Id.* at art. 172.

385. *Id.* at art. 173.

Article 57 states that the executive, legislative, and judicial branch powers “function[] under the supervision of the *absolute wilāyat al ‘amr*, and the Leadership of the *Ummah*.”³⁸⁶ This reference to Shiite principles of governance and “Leadership” of the Muslim community is to the supreme leader. In other words, while the three branches are separate powers, independent of one another, they are dependent on, and subordinate to, the supreme leader (e.g., Ayatollah Khomeini, *Āyatollāh* Khameini, and their successors), who, exercising “absolute” supervision, has final say in all matters conducted by these three branches.

Article 122 elaborates on this hierarchical scheme, stating that the president is “responsible to the people, the [Supreme] Leader, and the Islamic Consultative Assembly.”³⁸⁷ He is responsible to the people through the ballot box. And he is responsible to the assembly in respect of submitting draft legislation;³⁸⁸ likewise, per Article 125, his authorization to sign treaties and other international agreements with foreign governments and international organizations presumes the Islamic Consultative Assembly has approved those documents.³⁸⁹ Yet, most noteworthy is the responsibility of the president to the supreme leader. The president is subordinate to this first most powerful and influential figure in Iran.³⁹⁰ Indeed, should the president resign, under Article 130 the president submits his resignation letter to that leader.³⁹¹

A second clear example of theocratic primacy—that is, the top-most role of the supreme leader—is Article 157. It states that the supreme leader appoints the head of the judicial power. But for the leader, the head is the “highest judicial authority.”³⁹² The Constitution does not oblige the supreme leader to seek the consent of the president, Islamic Consultative Assembly, extant head, Supreme Court, prosecutor-general, or any other part of the judiciary. In turn, under Article 158, the head of the judiciary is responsible for the following:

- (1) The organizational structure of the judiciary branch
- (2) “Drafting judiciary bills appropriate for the Islamic Republic”
- (3) Employing (appointing) “just and worthy judges,” as well as dismissing, transferring, and promoting judges.³⁹³

The head of the judiciary, per Article 162, also selects the chief judge and prosecutor-general, in consultation with the Supreme Court judges, for five-

386. *Id.* at art. 57 (emphasis added).

387. *Id.* at art. 122.

388. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 122.

389. *Id.* at art. 125.

390. *Id.*

391. *Id.* at art. 130.

392. *Id.* at art. 157.

393. *Id.* at art. 158.

year terms.³⁹⁴ Thus, put bluntly, in Iran's theocracy, it is the top theocrat who picks the senior-most judicial figure, who in turn runs the judiciary. That is, the supreme leader is constitutionally authorized to affect the judiciary through the head whom he selects.

Third, the relationship between the minister of justice and the judiciary blurs the line between the executive and judicial branches. Article 160 identifies the minister of justice as being responsible for the relationship between the executive and judicial branches. The minister is to be "elected from among the individuals proposed to the President by the Head" of the judiciary.³⁹⁵ That head may delegate full authority to the minister with respect to administrative and financial matters, and the appointment of officials other than judges.³⁹⁶ Thus, the president does not have a free hand in selecting the justice minister, and the head can delegate work to this minister.

Fourth, Article 3(11) intimates that the military is a *de facto* fourth branch. That is because the military is tasked under this provision with more than protecting Iran's "independence" and "territorial integrity."³⁹⁷ The military also must "safeguard[] . . . the Islamic order of the country."³⁹⁸ Indeed, "universal military training" is conducted partly to secure this end.³⁹⁹

• Executive Branch

Executive branch authority is, according to Article 60, "exercised by the President and his Ministers."⁴⁰⁰ But that authority does not extend to "matters that are directly placed under the jurisdiction of the Leadership by the Constitution."⁴⁰¹ In other words, the supreme leader preempts the president in essentially all respects.

Otherwise, the presidency is the second most powerful and influential office in Iran. Indeed, under Article 125, the foreign affairs representative of Iran—the person authorized to sign treaties and other international agreements with foreign governments, and international organizations—is the president (not the supreme leader).⁴⁰² Likewise, under Article 126, the president (not the leader) "is responsible for national planning," including "budget and state employment affairs"—in effect, for the macroeconomic fiscal and employment policy.⁴⁰³ He also decides under Article 128 who

394. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 162.

395. *Id.* at art. 160.

396. *Id.*

397. *Id.* at art. 3(11).

398. *Id.*

399. *Id.*

400. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 60.

401. *Id.*

402. The Islamic Consultative Assembly must first approve these treaties and agreements. *See id.* at art. 125.

403. *Id.* at art. 126.

Iran's ambassadors will be, and whether to accept the credentials of ambassadors to Iran proposed by foreign countries.⁴⁰⁴ And he bestows state awards per Article 129.⁴⁰⁵

Interestingly, though, the president has no veto power. Article 123 makes clear he must sign legislation the Islamic Consultative Assembly approves (as well as any referendum results).⁴⁰⁶

The election of the president is supervised by the Guardian Council under Article 118.⁴⁰⁷ Per Article 119, such elections must occur no later than one month before the expiry of the term of the existing president.⁴⁰⁸ Once elected, the president under Article 124 may appoint deputies, including a first deputy to administer the work of the Council of Ministers.⁴⁰⁹ Even the technical details of the office of the first deputy illustrate a broad theme—namely, Islamicization (Theme 1). Article 131 provides that if the president dies, resigns, is ill for longer than two months, or is dismissed, then his first deputy assumes presidential “powers and functions”—but only “with the approval of the [Supreme] Leader.”⁴¹⁰ In this circumstance, a council, composed of the first deputy, Speaker of the Islamic Consultative Assembly, and head of the judiciary, must arrange for the election of a new president within fifty days.⁴¹¹ If the first deputy dies, then recourse is to the supreme leader: he must, under Article 131, “appoint another person in his place.”⁴¹²

It is common across countries for their chief executive, upon selection, to take an oath of office. Iran is no exception. Article 121 contains that oath. A new president must say it and affix his signature to it, at a session of the Islamic Consultative Assembly, with the Guardian Council and head of the judiciary present:

In the *Name of God*, the Compassionate, the Merciful, I, as President, swear, in the presence of the *Noble Qur'ān* and the people of Iran, *by God*, the Exalted and Almighty, [1] that I will *guard the official religion of the country, the order of the Islamic Re-*

404. *Id.* at art. 128.

405. *Id.* at art. 129.

406. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 123.

407. *Id.* at art. 118.

408. Article 120 addresses the procedure for handling elections if a candidate dies. In the event a candidate whom the Guardian Council has approved as suitable based on the Article 115 qualifications dies within ten days of the election day, then voting is postponed for two weeks. If, in the scenario of a run-off, one of the candidates securing the highest number of votes dies in the intervening period between the first and second round, then the second round is postponed for two weeks. Though this article does not explicitly say so, presumably it would be for the Guardian Council to approve any replacement candidate. *See id.* at art. 120.

409. Under Article 127, “[i]n special circumstances,” and “subject to the approval of the Council of Ministers,” the president may appoint a special representative with “specific powers.” *See id.* at art. 127.

410. *Id.* at art. 131.

411. *Id.*

412. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 131.

public, and the Constitution of the country; [2] that I will devote all my capacities and abilities to the fulfilment of the responsibilities that I have assumed; [3] that I will dedicate myself to the service of the people, the honor of the country, the *propagation of religion and morality*, and the support of truth and justice, refraining from every kind of arbitrary behavior; [4] that I will protect the *freedom and dignity of all citizens and the rights that the Constitution has accorded* the people; [5] that, in *guarding the frontiers and the political, economic, and cultural independence of the country*, I will not shirk from any measure; [6] that *seeking help from God, and following the Prophet of Islam and the infallible Imāms* (peace be upon them), I will guard, as a pious and selfless trustee, the authority vested in me by the people as a sacred trust, and transfer it to whomever the people may elect after me.⁴¹³

As the italicized language indicates, the oath bespeaks the Islamic nature of Iran's Republic (Theme 1).

This oath invokes Allāh (mentioning God thrice), the Prophet Muhammad, the Qur'ān, and the Shiite Imams. The first of six duties is to protect Twelver Shiism and Iran's Sharia-based system. Accordingly, the fourth duty is bounded by Islamic law. The president must protect the "freedom and dignity" of Iran's citizens, but within the context of the Constitution,⁴¹⁴ which, of course, is Islamicized. The second duty commits the president to spreading that religion and its morality, with no explicit limitation to Iran's domestic territory. The italicized language also manifests Iran's stance against foreign intervention (Theme 5) and—read literally—obliges the president to take "any" action to do so (second duty).

- **Legislative Branch**

Article 58 manifests the legislative function in the Islamic Consultative Assembly, which consists of "elected representatives of the people."⁴¹⁵ Article 71 identifies the subject matter jurisdiction of the assembly—namely, to legislate "on all matters, within the limits of its competence as laid down in the Constitution."⁴¹⁶ And as explained above, Article 72 forbids any un-Islamic legislation and enthrones the Guardian Council to judge compliance with this limit. The assembly, under Article 73, also has the "competence" to "interpret[] . . . ordinary laws," along with "interpretations that judges may make" in appropriate courts.⁴¹⁷ The assembly may receive proposed legislation in one of two ways specified in Article 74. First, the government (i.e., executive branch) may present a bill to the assembly after its Council

413. *Id.* at art. 121 (emphasis added).

414. *Id.*

415. *Id.* at art. 58.

416. *Id.* at art. 71.

417. *Id.* at art. 73.

of Ministers has approved that proposal.⁴¹⁸ Second, members of the assembly may sponsor a proposal, so long as at least fifteen members sponsor it.⁴¹⁹ And under Article 76—a provision that, read literally, confers enormous power on the legislative branch—the assembly “has the right to investigate and examine *all* the affairs of the country.”⁴²⁰

Notably (especially in view of the economic hardship in Iran associated with sanctions⁴²¹), any bill (including new legislation or an amendment to an existing law) that would either reduce government income or increase government expenditure must be accompanied by a compensatory proposal—that is, an idea to boost income, cut expenditures, or both.⁴²² Though Article 75 does not spell out the rationale, surely it is fiscal responsibility and avoidance of adding to government deficits of the national debt. There is an ironic similarity with the “Contract with America.”⁴²³ In 1994, then leader of the House Republican Conference and soon-to-be Speaker of the US House of Representatives Newt Gingrich (Republican-Georgia) called for balanced budgets and no new spending bills without a way to fund them.⁴²⁴

Once the assembly approves legislation, under Article 58, it communicates the new law to the executive for implementation and the judiciary for enforcement.⁴²⁵ However, as per Article 59, in an “extremely important economic, political, social, . . . [or] cultural matter[],” the assembly may exercise its legislative function by “direct recourse to public opinion.”⁴²⁶ A proposal for a referendum must be approved by two-thirds of the assembly members before the matter is put to the public for a vote.

The nature and operation of the legislature is in some ways unremarkable, yet in others remarkable. Article 62 states that the Islamic Consultative Assembly consists of “representatives of the people elected directly and by secret ballot.”⁴²⁷ However, “[t]he qualifications of voters and candidates” and “the nature of the election” are “specified by law.”⁴²⁸ This proviso allows for disenfranchisement of voters and disqualification of candidates, phenomena which have occurred repeatedly in Iran’s elections.⁴²⁹

418. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 74.

419. *Id.*

420. *Id.* at art. 76 (emphasis added).

421. See 2 BHALA TRADE TEXTBOOK, *supra* note 10, at 493–518.

422. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 75.

423. See generally NEWT GINGRICH & DICK ARMEY, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994).

424. *Id.*

425. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 58.

426. *Id.* at art. 59.

427. *Id.* at art. 62.

428. *Id.*

429. See *id.* at art. 62.

Assembly representatives serve a term of four years, as per Article 63, and elections must take place before their terms end “so that the country is never without an Assembly.”⁴³⁰ Article 64 sets the number of seats in the assembly at 270.⁴³¹ It allows for growth by not more than twenty seats for each ten-year period (measured from the date of a national referendum in 1949) to accommodate geographic, political, and human factors—without defining precisely such factors and their relationship to the number of new seats.⁴³² Consistent with a hierarchy among religions (Theme 3), there are quotas for recognized minorities. Jews and Zoroastrians each elect one representative.⁴³³ Armenian Christians in the north, and in the south, each elect one representative.⁴³⁴ Assyrian and Chaldean Christians jointly elect one representative.⁴³⁵ These quotas appear to be minimum reservations, not maximum caps. There is no obvious mechanism for expanding the seats of religious minorities as the country grows. Thus, the prospect of them being an ever-dwindling proportion of the assembly (even if their constituencies were to increase demographically) exists.

Across countries, it is customary for representatives to take an oath upon their election or reelection to a legislative body, as it is for the president (discussed above). The oath set forth in Article 67 is an example. But, as with the president’s oath in Article 121, the oath for legislators in Article 67 clearly manifests the Islamic nature of Iran’s government (Theme 1), exhibits resistance to foreign domination (Theme 5), and intimates boundaries on free speech (Theme 4):

In the Name of God, the Compassionate, the Merciful:

In the presence of the Glorious Qur’ān, I swear by God, the Exalted and Almighty, and undertake . . . *to protect the sanctity of Islam and guard the accomplishments of the Islamic Revolution of the Iranian people and the foundations of the Islamic Republic*; to

430. *Id.* at art. 63.

431. *See* 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 64. Article 65 defines two-thirds of the total number of members (*i.e.*, 180 out of 270) as comprising a quorum in the assembly, and thus as the number needed to approve legislation. *See id.* at art. 65. Drafts and bills are to be considered in accordance with the assembly’s *Code of Procedure*. Two-thirds of members present are necessary to approve this *Code*. *See id.* Article 66 provides that the election and terms of the Speaker and Presiding Board of the assembly, along with the number of committees in the assembly and disciplinary matters concerning the assembly, are set by the *Code of Procedure*. *See id.* at art. 66.

Article 68 addresses the functioning of the assembly during wartime or occupation. In the event of war, or if all or part of Iran is occupied by a foreign military power, then elections to the assembly may be delayed across the country, or in the occupied portion thereof, if the president proposes a delay, and the delay is approved by three-fourths of the assembly and endorsed by the Guardian Council. *See id.* at art. 68. The extant assembly continues to function until a new one can be formed. *See id.*

432. *See id.* at art. 64.

433. *Id.*

434. *Id.*

435. *Id.*

protect . . . the honor bestowed upon me by the people, to observe piety in fulfilling my duties as people's representative; to remain always committed to the *independence and honor of the country*; to fulfill my duties towards the nation and the service of the people; to defend the Constitution; and to bear in mind, both in speech and writing and in the expression of my views, the independence of the country, the freedom of the people, and the security of their interests.⁴³⁶

All assembly representatives must swear this oath and affix their signature to it, although members of religious minorities "will swear by their own sacred books."⁴³⁷ That is less an accommodation than a measure of the seriousness of the oath. As a general matter, it is assumed that a person is more likely to view as a solemn duty an oath sworn on his own holy book than that of another faith. Thus, for instance, a Christian representative in the assembly would swear on the Bible—"to protect the sanctity of Islam."

Several provisions in Chapter VI address transparency. Article 69 mandates all assembly deliberations "be open, and full minutes of them [be] made available to the public by the radio and the official gazette."⁴³⁸ Likewise, under Article 70, the president, as well as his deputies and ministers, has the right to participate in open sessions of the assembly, along with their advisers.⁴³⁹ If members deem it necessary, then they may opt to compel ministers to attend an open session.⁴⁴⁰

However, Article 69 also carves out an exception for "emergency conditions, . . . if required for national security."⁴⁴¹ Upon request by the president, one of the ministers, or ten members of the assembly, the assembly may meet in closed session.⁴⁴² Yet, even then, legislation the assembly considers during closed session is invalid unless "approved by [a supermajority of] three-fourths [rather than the normal majority] of the members in the presence of the Guardian Council."⁴⁴³ Literally, the "presence" of that council means physical presence of the council's participants—presumably, each one of them—at the assembly's closed session. The role of the council at these sessions is unspecified, but presumably it is to cast a watchful eye over the extraordinary meetings. Once emergency conditions are lifted, the minutes of closed sessions, and the text of any approved legislation, "must be made available to the public."⁴⁴⁴ Oddly, however, the wording of this text allows for closed-session legislation to enter into force before the pub-

436. *Id.* at art. 67 (emphasis added).

437. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 67.

438. *Id.* at art. 69.

439. *Id.* at art. 70.

440. *See id.*

441. *Id.* at art. 69.

442. *Id.*

443. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 69.

444. *Id.*

lic actually sees the content of the legislation. The council, then, would be the safeguard against legislative overreach, whereby (for example) the assembly enacted a rule that grossly infringed on the Islamic character of the country or civil liberties of the people.

- **Judicial Branch**

Article 61 entrusts the courts, as distinct from the Guardian Council (discussed above, under Theme 1), with judicial functions—that is, the administration of justice, “in accordance with the criteria of Islam.”⁴⁴⁵ Article 61 reflects the *velayat-e faqih* doctrine Ayatollah Khomeini promulgates in *Guardian of the Jurist*:

Khomeini was against “superfluous bureaucracies and the system of file-keeping and paper-shuffling that is enforced in them, all of which are totally alien to Islam.” His proposal: “When the juridical methods of Islam were applied, the *Shari’ah* judge in each town, assisted only by two bailiffs and with only a pen and inkpot at his disposal, would swiftly resolve disputes among people and send them about their business” (p. 31).⁴⁴⁶

In brief, an authentically Islamic judicial administration is not bureaucratic, because bureaucracy results from *taghuti* (worship of false gods) governance, which is not Islamic.

Article 61 singles out four such functions: (1) “examin[ing] and settl[ing] lawsuits”; (2) “protect[ing] the rights of the public”; (3) “dispens[ing] and enact[ing] justice”; and (4) “implement[ing] the Divine limits (*al hudūd al-Ilahiyyah*).”⁴⁴⁷ The first three functions are common to sacred and secular legal systems alike, but the fourth one is unique to the Sharia. It refers to *‘uqūbāt* (criminal, or penal, law), specifically the *ḥaqq Allāh* (claim of God) offenses and *ḥadd* (limit) punishments for them.

The judiciary plays several vital roles in the Islamic Republic, each of which manifests at least some degree of separation of powers. For instance, Article 140 requires that any allegation of criminal conduct by the president, deputies, or ministers be investigated by common courts.⁴⁴⁸ In doing so, the courts must keep the Islamic Consultative Assembly informed.⁴⁴⁹

In general, the courts are the “official bodies” with jurisdiction to hear “all grievances and complaints.”⁴⁵⁰ Article 156 identifies five duties for the judiciary:

- (1) Investigate and render judgments on complaints, resolve litigation, settle disputes, and administer probate (wills) matters

445. *Id.* at art. 61.

446. Horowitz, *supra* note 42, at *The Iranian Constitution and Ayatollah Khomeini* (citing IMAM KHOMEINI, *VELAYAT-E FAQEEH [GOVERNANCE OF THE JURIST]* (Hamid Algar trans., 2005)).

447. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 61.

448. *See id.* at art. 140.

449. *See id.*

450. *Id.* at art. 159.

- (2) “[R]estor[e] public rights,” and “promot[e] justice, and “legitimate freedoms”
- (3) Supervise the “proper enforcement of laws”
- (4) “[U]ncover crimes,” “prosecut[e], punish[], and “chastis[e] criminals,” and “enact[] the penalties and provisions of the Islamic Penal Code”
- (5) Implement “suitable measures to prevent the occurrence of crime and . . . reform criminals”⁴⁵¹

As in most countries, Iran’s courts are structured in a hierarchical fashion. The Supreme Court is the highest court and, per Article 161, is responsible for “supervising the correct implementation of the laws by the [lower] courts, [and] ensuring uniformity of judicial procedure.”⁴⁵² Per Article 162, the head of the judiciary selects the chief judge and prosecutor-general, in consultation with the Supreme Court judges, for five-year terms.⁴⁵³

Further indicative of the independence of Iran’s judiciary is Article 164, the constitutional prohibition against removal of a judge from his post unless he is first tried and proven guilty of an offense, or unless he has committed “a violation [that] entail[s] his dismissal.”⁴⁵⁴ Likewise, a judge cannot be transferred or reassigned “without his consent, except in cases when the interest of society necessitates it,” but then only by decision of the head of the judiciary in consultation with the chief judge of the Supreme Court and the prosecutor general.⁴⁵⁵

Articles 165, 166, 168, and 169 call for transparency and fairness in judicial proceedings. Article 165 says that all trials “are to be held openly and members of the public may attend without any restriction.”⁴⁵⁶ However, there are two exceptions: (1) both parties in the trial may request a closed hearing; or (2) the court in which the trial is being held may “determine[] that an open trial would be detrimental to public morality or discipline.”⁴⁵⁷ Apparently, open jury trials are not an exception with respect to “[p]olitical and press offenses.”⁴⁵⁸ They must be tried publicly, and with a jury. Article 166 requires a court verdict “be well reasoned out and documented.”⁴⁵⁹ Article 169 bars the *ex post facto* application of criminal laws,⁴⁶⁰ a “familiar” feature of constitutional rule.⁴⁶¹

- **Military**

451. *Id.* at art. 156.

452. *Id.* at art. 161.

453. *See* 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 162.

454. *Id.* at art. 164.

455. *Id.*

456. *Id.* at art. 165.

457. *Id.*

458. *Id.* at art. 168.

459. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 166.

460. *See id.* at art. 169.

461. *See* Horowitz, *supra* note 42, at introductory section.

The military, then, is the protector of the Islamic Revolution, against any threats, foreign or domestic. The other three branches may have some influence in how it so protects, but they do not direct it in fulfilling this strategic aim. Articles 143–151 (discussed above) constitute Section 3, covering the army and IRGC. This section is part of Chapter IX, which concerns the “executive power.” Thus, it is the president who, from the textual placement, has the greatest say (i.e., greater than the legislative or judicial branch) over the armed services.

However, the president is not the ultimate commander in chief over the military. There is a special role for the army⁴⁶² and IRGC⁴⁶³ to preserve the Islamic Revolution. And there is the practical reality (also discussed earlier) about the IRGC and its special relationship to the supreme leader.⁴⁶⁴ Thus, the independence of the military is elevated to a level akin to that of the executive, legislative, and judicial branches.

• **Checks and Balances**

Among the provisions in the Constitution that most clearly demonstrate an effort at separation of powers are Articles 88 and 89. They concern legislative oversight of executive power. Article 88 authorizes the Islamic Consultative Assembly to order the appearance of the president or any of the ministers in his Council of Ministers, rendering them answerable to the assembly. Specifically, if at least one-fourth of the assembly members pose a question to the president, then the president must attend the assembly and answer the question within one month.⁴⁶⁵ If any individual member poses a question to a minister, then that minister must appear to answer the question within ten days.⁴⁶⁶ In both instances, a delay is permissible for “an excuse deemed reasonable” by the assembly.⁴⁶⁷ But even more dramatic is the prospect of removing the president or a minister, which Article 89 contemplates.

The first paragraph of Article 89 is a legislative check against the Council of Ministers or any single minister, while the second paragraph concerns removal of the president. The first gives the assembly the power of interpellation over the Council of Ministers, or any individual minister, on a matter “deem[ed] necessary” by the assembly, through a motion signed by at least ten assembly members.⁴⁶⁸ Within ten days of that motion being

462. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 143–44, 147–48.

463. See *id.* at art. 150.

464. See *infra* p. 560.

465. See 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 88.

466. See *id.*

467. *Id.*

468. *Id.* at art. 89. If presidential powers are assigned to the first deputy of the president (as per Article 131), then ministers cannot be interpellated by the Islamic Consultative Assembly, nor can the assembly pass a vote of no confidence against them, and a national referendum cannot be held. See *id.* at art. 132. As for the ministers themselves whom the president appoints, they must be presented to the assembly for a vote of confidence. See *id.* at art. 133

tabled, the council, or interpellated minister, must appear before the assembly to address the motion and obtain a vote of confidence.⁴⁶⁹ If the council, or minister, fails to attend the assembly, then “the Assembly will declare a vote of no-confidence if it deems it necessary.”⁴⁷⁰ If the assembly “does not pronounce a vote of confidence,” then the council, or minister, is dismissed, and any interpellated minister cannot become a member of the next council.

The second paragraph imparts to the assembly interpellation power over the president. If at least one-third of the assembly members “interpellate the President concerning his executive responsibilities in relation with [i.e., to] the Executive Power and the executive affairs of the country,” then the president must attend the assembly within one month of the tabling of the interpellation motion to “give adequate explanations in regard to the matters raised.”⁴⁷¹ Following the reply of the president, and statements in favor of and opposition to the president, two-thirds of the assembly members may “declare a vote of no confidence.”⁴⁷² A declaration of no confidence in the president must be “communicated to the Leadership for information and implementation” under Article 110(10).⁴⁷³ Article 110(10) lists as a “duty and power” of the leadership the dismissal of the president based on a no-confidence vote “testifying to his incompetence,” or a decision by the Supreme Court pronouncing him guilty of violating his constitutional duties.⁴⁷⁴

Simply put, the assembly can remove the president in coordination with the supreme leader. Dismissal of the president is, of course, ultimately the decision of the leader. An outright confrontation between the assembly and leader would provoke a constitutional crisis, in terms of legitimacy of the president in view of the no-confidence vote (or judicial judgment) against the president.

• Executive and Legislative Branch Collaboration on Fiscal Policy

On certain matters, Iran’s Constitution assigns shared responsibility to two or more of the branches. Economic management, specifically, fiscal policy (that is, taxation and expenditures), is an example. The government (i.e., executive branch) must “draw[] up” a budget each year and “submit[] [it] to the Islamic Consultative Assembly for discussion and *approval*.”⁴⁷⁵ The assembly, then, can reject the government’s spending or taxation plans and priorities, in whole or in part. Once the assembly approves the budget, it is the job of the government to collect taxes and deposit them in the

469. *See id.* at art. 89(1).

470. *Id.*

471. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 89(2).

472. *Id.*

473. *Id.*

474. *Id.* at art. 110(10).

475. *Id.* at art. 52 (emphasis added).

“central treasury.”⁴⁷⁶ However, no tax may be imposed (or tax reduction or exemption granted) “except in accordance with the law.”⁴⁷⁷ To the extent the assembly enacts tax laws, the government—as a practical matter—must collaborate in the legislative process.

The assembly has a further role, as regards expenditures. It is charged with oversight of the National Accounting Agency. This agency, established by Article 54, is “directly under the supervision of the . . . Assembly.”⁴⁷⁸ The agency operates in Tehran and each provincial capital. Its job is to “inspect and audit . . . all the accounts of ministries, government institutions and companies as well as other organizations that draw, in any way, on the general budget.”⁴⁷⁹ Article 55 mandates that each year, the agency submit to the assembly a report—with “its own comments”—on the government’s budget, chronicling whether, and how, expenditures were made for their “specified purpose[s],” and did not “exceed[] the allocations approved.”⁴⁸⁰ “This report must be made available to the public.”⁴⁸¹ Note, then, the theory underlying Articles 53 and 54—namely, fiscal transparency and anti-corruption: the existence of the agency, overseen by the assembly, which reports on the “settlement” of each budget, offers a potentially critical analysis and produces and publishes a report.

As per Theme 2, all branches of government are under the guidance of the supreme leader. In theory, that apex power need not destroy separation of powers among the branches, nor prevent them from operating as checks and balances against one another.

V. IF NOT INTERNATIONAL LEGAL EDUCATORS, THEN WHO?

International lawyers are supposed to solve problems, preferably through peaceful negotiations. Distinct from patriotism, nationalism is a problem. It cannot be squared with two thousand years of sound Christian teaching. Yet, nationalism remains endemic in several countries, and its historically evidenced consequences include violent cross-border conflict. International legal educators are supposed to train future international lawyers to solve the problems of tomorrow, drawing on and applying insights from yesterday. Teaching the same syllabi, from the same perspectives, will not do. Curriculum innovation is needed to break out of death grips like that which America and Iran have been in for over four decades.

Empathy is vital in this pedagogical process: studying legal texts of a foreign culture from the perspective of that culture, just as the student would wish foreigners do for the texts of that student’s culture. That is, as

476. *Id.* at art. 53.

477. 1979 IRANIAN CONSTITUTION, *supra* note 53, at art. 51.

478. *Id.* at art. 54.

479. *Id.* at art. 55.

480. *Id.* at art. 55.

481. *Id.*

to how the study of a foreign legal culture can increase empathy, it is the open-minded, open-hearted study itself – the process itself. But that process requires appropriate substantive curriculum. Challenging substantive curricular options are equally vital to this pedagogy. For American international legal educators and their students, the 1979 Constitution of the Islamic Republic of Iran is one such option. Their ability to understand Iran, and quell prejudice against it, would help combat nationalism that undermines the human dignity of Americans and Iranians alike.