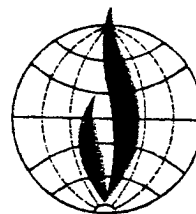


For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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location of its military indoctrination school; the whereabouts of my relatives; and other matters related to the revolutionary activities of my brother Mario Roberto Santucho.

"The Chilean military officers drugged me during their turn at interrogation, which was carried out by Col. Zeballos, then head of the Information Services of the Chilean Air Force, and by an officer named Oteiza, allegedly a psychiatrist. They probably exceeded the doses of the drugs since I was unconscious from Wednesday night until Sunday morning. Oteiza came to my cell the following Monday trying to persuade me to cooperate with them in order to ne-

gotiate my release.

"A few days later, Zeballos returned to Chile taking with him Jorge Fuentes Alarcon, a Chilean who had been detained in the Investigations Division (Political Police). His past and present whereabouts are unknown and the Chilean Government denies that it is holding him."

These events are clear evidence of unlawful collaboration between the Argentinian, Chilean, Paraguayan and Uruguayan reines, a collaboration which has resulted in countless killings of nationals of the four countries who have been clandestinely delivered to security forces and then became "disappeared" persons.

Iran

The New Constitution

Introduction

The Iranian revolution and its Islamic constitution cannot be understood outside the context of the teachings of Islam and the background and development of what is conveniently called "militant Islam"¹.

Islam, neglected for a long time in the West, has recently become the concern of politicians and scholars in all parts of the world. The vigour of the Islamic revival has surprised many who tended to look upon Islam as a static, feudal religion, out of touch with the progress of modern science and knowledge. There are about 750 mil-

lion moslems in the world today, in over 70 countries. Islam (literally "submission", implied to God), is a religion concerned not only with the private life of man, but, in the words of a leading Islamic writer, "it is a complete way of life, catering for all fields of human existence... individual and social, material and moral, economic and political, legal and cultural, national and international"².

Islamic law is an integral part of the Islamic faith. The sources of Islamic law are, in descending order of importance, the Koran, which is the word of God revealed to the Prophet and in itself divine, the Sun-

nah, which is the body of traditions based on the acts and sayings of the Prophet, *ijma* or consensus of the community (later understood as that of the scholars) and *ijtihad* or independent judgement. The "traditions" of the "four right-guided caliphs" (the first four rulers to succeed Muhammad from 632-661 A.D.) form another but less authoritative source of legal precedent. Early codifications of and commentaries on the sources split into four great schools of law which coincide with geographical areas. By the middle of the tenth century all the components of that total legal entity known as the Sharia law were established and consolidated.

Islam being a religion of laws, the men who are learned in religious doctrine are usually those who are learned in legal doctrine. In the absence of a Church or an institutionalised priesthood in Islam, these religious lawyers or *ulema* often become leaders of their community. They are the closest equivalent to clergy in Islam.

Very early in its history Islam split into two major sects: Shiah and Sunni. The fact that the majority of Iranians are Shiah moslems is essential to a proper understanding of the Iranian revolution and the constitution, because as C.H. Jansen in "Militant Islam" explains:

"The core of the Shiah faith is that the earthly community should be led by a charismatic, semi-divine leader, the imam, who acts as the mediator between the human and divine, while the Sunni belief is that the individual believer stands directly face to face with God, with no need for an intercessor. Shiism became a separate politico-religious entity when in 1502 it was declared the official religion of the new Persian state being established by Shah Ismail.

The doctrinal differences between Sunni and Shiah Islam are these: the Shiah, of course, do accept Muhammad and the Koran, but while the sources of Sunni law are

the Koran, the Hadith of the Prophet, the consensus of the community and 'analogy', the four bases of Shiah law are the Koran, the Hadith of the Prophet and the imams, the consensus of the imams and 'reason'. So the Shiahs have their own collection of Hadith and their own school of law, the Jaafari."

The concept of an Islamic state is nothing new. Many countries with a Moslem majority have proclaimed themselves in various degrees to be Islamic states, some by providing that the head of state must be a moslem, some that Islam is the state religion, others that the Sharia is a source of law, still others that the Sharia is the source of law. While some modern writers reject the whole concept of the Islamic state as "an obsession for political power for which Islam is being cynically exploited" (A.G. Noorani, *The Indian Express*, 1 Nov. 1979), others, like Ayatollah Khomeini believe that "since Islamic government is a government of law it is the religious expert (*faghih*) and no one else who should occupy himself with the affairs of the government". It is clear that there is no unanimity on what is an Islamic state. While most Islamic scholars agree that in an Islamic state government must be by popular participation, that the judiciary must be independent and that the legal system must be based on the Sharia, on other points there is much disagreement.

With this short and inadequate introduction, a description follows of the basic provisions of the constitution of the Islamic Republic of Iran and the procedures by which it was agreed and brought into force.

Drafting and Acceptance of the Constitution

A first draft of the constitution was published on 21 February 1979 for discus-

1) See, e.g., a recent comprehensive study by G.H. Hansen, "Militant Islam", Pan Books, London, 1979.
2) Khurshid Ahmad, "Islam, Its Meaning and Message", Islamic Council of Europe, London, 1976, p. 37.

sion by the public. Shortly afterwards on 30-31 March 1979 a referendum was held on the replacement of the monarchy by an Islamic republic. On the basis of the result of the referendum, officially announced to be 99% in favour, Ayatollah Khomeini proclaimed on 1 April the Islamic Republic of Iran.

Elections for a constituent council of 73 members to discuss the draft constitution, officially published on 18 June, were held on 3 August 1979. Several parties, including the National Democratic Front (NDF), the National Front (NF), the Moslem People's Republic Party (MPRP) and certain Arab and Kurdish political groups called for a boycott on the grounds that the proposed council would be unrepresentative as there was no possibility of free campaigning and fair elections in the current atmosphere of disturbances and civil war. Opposition groups alleged several irregularities. The results, announced on 11 August, showed that at least 60 of the 73 seats on the council had gone to religious leaders and other Islamic fundamentalists.

The council deliberated on the constitution from the end of August until November. On 2-3 December a referendum was held on the constitution, which was adopted with 15,680,329 votes in favour and 78,516 against. Although there were no official figures on the level of participation, according to observers approximately 65% of the electorate voted. In particular the referendum was reported to have been widely boycotted in the minority regions of Kurdistan, Baluchistan and Azerbaijan -- where the majority of the moslem population belong to the Sunni sect -- because of the lack of autonomy and the dominance given to the Shiah under the constitution. In an effort to ease the tension Ayatollah Khomeini announced some minor changes giving more latitude to national religious minorities.

With the help of the Iranian mission in Geneva an unofficial English translation of the constitution has been obtained.

Preamble of the Constitution

The constitution begins with a long and unusual introduction full of strident language stressing the importance of the events leading to the revolution and underscoring the impact of fundamentalist Islamic theory on the constitution. The subtitles are indicative: Vanguard of the Movement; Islamic Government; Anger of the Nation; Price Paid by the Nation; Method of Government in Islam; Supervision by the Faghih(s); Economics Is a Means to an End Rather Than the End Itself; Status of Women; Army; Judiciary; Executive; Mass Media; Representatives.

Significantly, the main body of the Constitution consists of 175 principles, and not articles.

General Principles

Principle 1 declares that Iran is an Islamic republic "under the leadership of Ayatollah Imam Khomeini". The principles which follow expand on the concept of an Islamic state. Moral virtue is stressed and a duty is placed on citizens and governments alike to "refrain from what is bad and to adhere to what is wholesome" (prin. 8). All laws must be based on "Islamic principles" (prin. 4), and the official religion is Shi'ite Islam (Ja-fari Asna Ashari). Shiah influence is also evident in the emphasis placed on the role of the imam or religious leadership (prins. 2(5) and 5), which is perhaps the most significant change to the original draft constitution.

Government

Principle 57 states that the three sovereign powers in the republic are the legislature, the executive and the judiciary, each being independent (although later principles qualify the independence) and linked by the office of the President, and all being under the supervision of the imam or leader. In addition to the leader, the other important organ which seeks to guide the republic on Islamic principles is the Guardian Council, in effect a second chamber of the legislature.

Each of these bodies is discussed in greater detail below.

The Leader or Council of Leadership (prins. 107-112)

Principle 5, framed in terms of the Shi'ite faith, firmly establishes that:

In the absence of Hazrat Vali-e-Asr, Imam Mehdi, the leadership of the community will fall upon the Faghih who is just, pious, informed, brave, enterprising and respected by the majority of the people as their undisputed leader. If no such person can be found, the leadership of the community will be in the hands of a Council of Leadership consisting of qualified Faghihs.

Principles 107-112 elaborate on this, explaining that Ayatollah Khomeini has been accepted by the people as the leader. Where there is no such clear popular choice, an assembly of experts shall be elected to choose a leader or failing that a council of leadership. The same assembly shall have the power to dismiss a leader who lacks the proper qualifications or is unable to carry out his duties.

The powers and duties of the leader are outlined in principle 110. The leader has

no direct authority over the National Assembly but indirectly controls legislation through his appointment of six religious lawyers on the Guardian Council, the second chamber which vets all legislation passed by the National Assembly. As regards the executive, the leader may dismiss the President, after the decision has been ratified by the supreme court, or upon disapproval by the National Assembly (although the Executive is stated to be independent from the legislature: prin. 57). The leader also has important powers with regard to the judiciary. He appoints the head of the supreme court and the prosecutor general in consultation with the judges of the supreme court. The leader is the supreme commander of the armed forces.

The Executive (prins. 113-142)

The President is the chief executive and the highest authority in the country next to the leader (prin. 113). The President must be a Shi'ite moslem and an Iranian. He is directly elected but can be dismissed by the leader, as noted above. The President has the responsibility for implementing the constitution, for defence and other matters "which do not relate directly to the leader" (prin. 113). From the reading of principles 115-142 it would appear that most of the presidential functions are ceremonial, with the important exception of the nomination of a prime minister which must be endorsed by the National Assembly. However, the activities of the first President, Dr. Bani Sadr, and his special relationship with the leader may have set a constitutional precedent for a stronger role.

Ministers, who are chosen by the prime minister, must enjoy the confidence of the National Assembly. They bear individual and collective responsibility to the Na-

tional Assembly for the actions of the government.

The National Assembly (prins. 71-90)

The National Assembly consists of 270 members who are directly elected and sit for four years. The primary function of the National Assembly is to make laws within the limits of the Constitution and the official religion (prin. 72), these limitations being determined by the Guardian Council. The National Assembly is prohibited from setting up a military government, from making laws which would substantially alter the boundaries, or would grant concessions to foreigners in agriculture, mining or industry.

In addition to law-making, "the interpretation of ordinary laws is within the competence and jurisdiction of the National Assembly" (prin. 73). The same principle adds that this does not invalidate the interpretation of laws by the judiciary, a somewhat vague provision which leaves unresolved the question of whose views prevail in case of conflict.

Another important function of the National Assembly is the investigation and scrutiny of "all affairs of state" (prin. 76). The government may not enter into treaties, employ foreign nationals or transfer ownership of government property without the approval of the National Assembly. Although the executive is stated to be independent from the legislature (prin. 57), the Assembly can pass a vote of no confidence on a minister who must then be removed.

The National Assembly has the power to investigate all complaints from the general public about the Assembly itself, the executive or the judiciary (prin. 90). It is not stated what measures, if any, the As-

sembly can take against the organs if a complaint is well-founded.

The Guardian Council (prins. 91-99)

The Guardian Council consists of twelve members, six of whom are religious lawyers appointed by the leader, the other six being secular "Islamic" lawyers appointed by the National Assembly on the recommendation of the High Judicial Council.

The primary function of the Guardian Council is to examine all legislation passed by the National Assembly in order to ensure that it is in conformity with Islamic precepts and the principles of the constitution. The interpretation of the Islamic precepts is the responsibility of the religious lawyers but constitutional review is the task of the council as a whole.

The Guardian Council is also responsible for supervising elections and referendums (prin. 99) and drawing up the law for the assembly of experts who choose the leader(s).

The Judiciary (prins. 156-174)

Principle 157 sets up a High Judicial Council, consisting of the head of the supreme court, the prosecutor general and three judges elected by their peers, which has the power to set up the legal structure, prepare legal regulations according to Islamic principles and recruit other judges. Judges are only dismissable after their "guilt" has been established by means of a fair trial.

The minister of justice is the link between the executive, legislature and the judiciary. He is appointed by the prime minister from among individuals recommended by the High Judicial Council.

Principle 170 places an obligation on judges to refrain from implementing and upholding laws which contravene Islamic principles, thus adding to the conflict of authority between the National Assembly, the judiciary and the Guardian Council in the area of interpretation of laws.

Other principles in this section on the judiciary state that trials must be open unless against the public interest or requested by the parties to a dispute (prin. 65), retroactive criminal laws are prohibited (prin. 169), press and political offences are triable before a jury (prin. 168), military courts are an integral part of the legal system but civil offences by military personnel shall be tried before the ordinary courts.

Human Rights

The rights of individuals are mainly dealt in the section entitled "Rights of the Nation" although several rights are also mentioned in other sections, e.g. under the general principles or in the section dealing with the judiciary.

Principle 19 states that "all the people of Iran enjoy equal rights and there is no distinction on grounds of race, colour, language and the like". Religion, sex and political conviction are not mentioned.

Principle 12 declares that while Shi'ite Islam is the official religion other denominations enjoy full respect and freedom in the practice of their religious duties and functions, such as in matters of marriage, divorce and inheritance. Zoroastrian, Jewish and Christian Iranians are recognised as official religious minorities who "are completely free to practice their religious duties within the framework of the law" (prin. 13). Principle 14 states that non-moslems are to be dealt with "on the basis of justice and goodwill", provided they are not "anti-Islamic and have not conspired

against Iran". One is left wondering who is an "anti-Islamic" non-moslem and what difference in treatment there is for official and unofficial religious minorities, especially in the light of serious allegations of persecution of members of the Bahai sect, who number over 100,000 in Iran.

The family, as the fundamental unit of the Islamic community, is to be upheld and protected by the law (prin. 10). In "upholding the rights of women in every respect" the government has an obligation to create conditions for the development of a woman's character and personality and to protect mothers, widows, elderly women and homeless children (prin. 21). No indication is given, however, of any specific measures to improve the legal status of women particularly in marriage and divorce law.

Freedom of thought is absolute (prin. 23) but not so with freedom of expression (prin. 24). The latter, together with the freedom to life and property (prin. 22), freedom of association (prin. 26), freedom of assembly (prin. 27) and occupation (prin. 28) are qualified by such vague phrases as "unless deemed otherwise by law", "provided Islamic principles are not contravened", "provided the independence, freedom, unity and Islamic principles of the Republic are not flouted". In view of the conflicting authority of the Guardian Council, the National Assembly and the judiciary over the interpretation of laws and the vagueness of the "Islamic principles", the constitution does not confer upon these fundamental rights the protection they deserve.

Principle 25 prohibits wire-tapping and interception of communications "unless carried out at the express request of the legal authorities". It is not clear who are "legal authorities" for the purposes of this principle.

Somewhat quaintly the unofficial English translation of principle 32 states: "Unless otherwise prescribed by law, no one can be arrested arbitrarily." There then follow detailed and clear provisions for the legal protection of arrested persons. Punishment can be prescribed only by the courts on the basis of the law (prin. 36). Principles 38 and 39 make physical torture and ill treatment for the purpose of extracting information or confessions illegal and punishable.

In accordance with Islamic notions of social justice, rights to social security and health (prin. 29), free education up to secondary level (prin. 30), housing (prin. 31) and free legal aid for the poor (prin. 35) are clearly and concisely stated. Principles 43 to 50 lay down the principal directives for an economic policy which aims at the fulfilment of basic needs and the providing of equal opportunity. Ownership in the public, private and cooperative sectors of the economy is to enjoy the full protection of the law, "in so far as it does not contravene Islamic law".

Emergency

During an emergency situation the government may limit rights for up to 30 days with the approval of the National Assembly. However, the emergency may then be prolonged indefinitely with the permission of the Assembly (prin. 79). Principle 69 permits the Assembly in times of emergency to deliberate in closed session, but its decisions at such sessions will be valid and binding only if reached in the presence of the Guardian Council and approved by three-quarters of the Assembly. A full report of the secret sessions must be published at the end of the emergency situation.

Conclusions

The Iranian constitution, which makes several references to pan-Islam, should be seen as part of the Islamic revival, sometimes militant, sweeping across the Islamic world. For example last year the Pakistan government made some changes in its legal system to bring it closer to the Islamic system (see ICJ Review No. 23). Recently the Egyptian electorate have approved in a referendum constitutional reforms which would make the sharia the principal source of law in Egypt. Of course, the distinctive feature of the Iranian constitution is that it has gone much farther than any other Islamic state or constitution in proclaiming a "Velayat-e-Faghih" (government by theologians or "hierocracy"). The concentration of so much authority in the hands of one man (or a small group of men) in the hope that he will be a just despot may seem unrealistic to those who do not believe in the imamate, but for the shiah majority of Iran it is an integral part of their faith. Whether or not this will work in the world of twentieth century politics, it is still too early to say.

The first draft for a new Islamic constitution, which was published on June 18, 1979, provided for a clearer government structure than the final text which inserted the preponderant role of the imam. Clearly the final draft, both in substance and in form, is the product of a more political body.

The Constitution has several positive features, in particular in the formulation of economic and social rights which are, in the words of the Preamble, "the provisions of equal educational and employment opportunities, as well as the satisfaction of human wants".

Other provisions try to regulate details which are usually not dealt with at constitutional level but this is understandable in

a post-revolutionary phase in which people zealously guard against a return to previous practices (e.g. employing foreigners in the public service).

On the other hand some weaknesses, in particular in the human rights sector, have been pointed out. Confusion about who is to interpret the vague and broad clauses, which permit restrictions on fundamental rights, does not augur well for religious minorities and secular dissent. Much will depend on further developments within the power structure of the Iranian government and on the stand taken by a truly independent judiciary.

The constitution skirts the issue of autonomy with rather summary principles on local councils (prin. 100-106), and a principle on the freedom of moslem denomina-

tions in family law matters (prin. 12). The test for human rights in Islam may well become its capacity to deal fairly with ethnic, religious and secular minorities.

Iran is a party to the International Covenant on Civil and Political Rights. The Human Rights Committee under this covenant did not complete its examination of the report submitted by the Shah's government first because the Committee requested additional information, and then because of the overthrow of the Shah's regime. The new government has yet to submit a report. The Committee's examination of the constitution and laws of Iran will provide an opportunity for an interesting discussion on human rights in this new Islamic republic ruled by men of religion.

Palestine

Torture in the Occupied Territories

To attempt to write or say anything impartial, objective or balanced about the situation in the occupied territories of Palestine is a thankless task. Either side in the argument will quote and make use of those passages which support its own case so as to give a distorted impression of what has been said.

At the 1980 session of the UN Commission on Human Rights the Secretary-General of the International Commission of Jurists made an oral intervention describing a recent brief visit to the occupied territories and an interview he had had with the Israeli Prime Minister, Mr Begin, who invited him to raise any matters concerning hu-

man rights. Those extracts of his speech which seemed favourable to the Israelis were reported in the Israeli English language and Hebrew press with no mention of the criticisms he had made. There is a group of Palestinian lawyers in the West Bank and Gaza strip affiliated to the ICJ who work to promote the legal protection of persons in the occupied territories. Seeking to redress the balance, they prepared a translation of the full text of the speech with a view to its publication in the Arabic press in Jerusalem. When it was submitted to the Israeli censors, the entire speech was deleted, including even the passages which had already been quoted in the Israeli press.