

# Constitutional Rights and Liberties in the Islamic Republic: A Critical Review

Vahid Nick Pay\*

Department of Politics and International Relations, School of Social Sciences, University of Kurdistan Hewler, Erbil, Kurdistan Region – F.R. Iraq

\*Corresponding author's email: vahid.nickpay@ukh.edu.krd

Received: 07 December 2017

Accepted: 21 December 2017

Available online: 28 December 2017

## ABSTRACT

This study is aimed at analyzing aspects of individual rights and liberties in theocratic systems by examining the Iranian Constitution as a case study. As it will be shown the current constitution (1979) appears to be riddled with several formal and epistemological inconsistencies, arising from its fundamental ideological underpinnings. Surprisingly these have rarely been subject to systematic analysis capable of addressing both the form and content of the Fundamental Law. My previous manuscript in 2014 provided the basis for such an analysis in an academic format. Nonetheless, in the light of recent updates to Iranian normative system, in particular, the prevailing Islamic Penal Code, this requires a thorough revision and reinterpretation. In this pursuit, various linguistic, legal, procedural, and conceptual tools have been deployed to highlight inadequacies and incoherencies in support of the claim that the country, currently, lacks clear normative frameworks for guaranteeing basic rights and freedoms, which should be the *raison d'être* of all fundamental loci of rights. In addition, as it is argued below, serious conceptual flaws in the constitution of the Islamic Republic itself could be regarded as the prime suspect for the systematic violation of basic principles of rights and liberties, rather than an alleged failure to adhere to the constitution as it is often claimed.

**Keywords:** Constitution, Constitutionalism, Iran, Islamic Constitution, Public Law

## 1. INTRODUCTION

The term “constitution” has different connotations in domains of political theory and public law studies. As the term is employed in expressions such as “mixed constitutions” and “constitutional division of power” the area of inquiry edges toward an analysis of the layout of political power of the state rather than legal studies of a normative locus of basic principles of sovereignty, individual rights, liberties, and other relevant concepts. On these grounds, several distinctions have been made between various types of the constitution including parliamentary, presidential,

and flexible and inflexible constitutions (Parpworth, 2012, p. 6–7). In spite of these traditional patterns of state structure, it is evident that a significant proportion of the same socio-political principles and forms are reflected in a specific written formal document. These manuals then serve as the cornerstones of the diversified modern-day political systems and are the locus where not only the doctrines of sovereignty and rights are defined but also where the actual form of the various parts of government and their relations to the people are laid out (Ibid, 3). Hence, a closer study of each country’s constitution could provide a better understanding of the state’s doctrinal convictions on the modality of the arrangement of power and the safeguards to guarantee the survival and continuity of certain repositories of authority and legitimacy. The importance and centrality of such legal provisions have been one of the main themes of political narratives since ancient times and have given rise to fundamentally or partially opposing schools of political philosophy. As regards the sources of legitimacy

### Access this article online

DOI: 10.25079/ukhjss.v1n1y2017.34-45

E-ISSN: 2520-7806

Copyright © 2017 Nick Pay. Open Access journal with Creative Commons Attribution Non-Commercial No Derivatives License 4.0 (CC BY-NC-ND 4.0).

and sovereignty, the rational humanist school was said to accord the ultimate source of power and authority to the people. On the other hand, certain politicized schools of theology promote notions of divine sovereignty. Hence, it is not surprising that in modern-day societies the extent and the legitimacy of political power have been at the heart of both secular and divine narratives of sovereignty. Regardless of this, the very existence of an inclusive constitution in any society could be regarded as an important step toward the rationalization of authority through such provisions as the separation of power, equality before the law and in general the protection of the citizen's rights and liberties.

Thus, it is evident that, for a government to be capable of advancing any claims to secular legitimacy there should be an entrenched normative system of rights. Hence, the building block of every country's political arrangement is its universal embodiment of such an outline of the structure of power and rights, as reflected in its national constitution. This is usually where the basic guidelines are drawn to lay down the foundations of various organizations and structures to preserve and promote certain values and convictions deemed to be central to the worldview underlying a certain political ideology.

Evidently, in some cases, this might well be an unwritten document based on established traditions and customs, as is the case with countries such as the United Kingdom (Parpworth, 2012. p. 11). Otherwise, in the majority of cases, it is a well-defined body of guidelines, which ought to be resilient enough over time to serve as the basis for all subsequent developments of the society. Nevertheless, it is possible to find a great variety of constitutional formats with different degrees of flexibility. For example, the North Korean constitution appears to be easier to amend and modify than many others, but is nonetheless proclaimed to be the bedrock of its relative political system<sup>1</sup>. In any case there are universal functions which one could observe in a great majority of the world's constitutions today, such as being general by not entering into details, or being enforceable, clear, free of internal contradictions and - most importantly - being superior and acting as the meta-law for all other legal provisions and directives in the country (Madani, 1997. p. 39). To safeguard these basic purposes of a national constitution, various provisions and institutions need to be tirelessly at work to interpret any potential obscurities and make sure the entire political system is compliant with such provisions

<sup>1</sup> See the Constitution of North Korea, in particular the 'Supreme People's Assembly' Chapter VI, especially Article 91.

and, if need be, provide for the possibility of amending the constitution in certain exceptional situations that might arise out of unforeseen circumstances.

For the sake of simplicity, one could claim that the main role of any constitution is, on the one hand, to define the structure of power in a society and on the other to protect and promote individuals' rights which will constitute the subject of the current study.

### 1.1. Background

Throughout Iran's history there have been various royal acts and directives aimed at designing a socio-political order deemed essential to the correct functioning of various social structures, but it was not until the early years of the 20<sup>th</sup> century that the country adopted what one could unequivocally define as a modern constitution (Deraxše, 2012. p. 71-75). However, closer scrutiny of various discourses, correspondences and public articles by different proponents of the first Iranian constitution reveals that each contributing source had a fundamentally different understanding of the epistemological nature of the concept of constitutionalism. Nevertheless, these trends resulted in the drafting of the first Iranian constitution in 1906. The final result was a five-chapter constitution with 51 articles, together with a detailed preamble in 107 sections which was signed by the King in December 1906.

A closer examination of the first Iranian constitution, which was predominantly based on Western legal sources, particularly the French and Belgian constitutions, on the one hand, and on certain Islamic Shari'a principles on the other (Rahimi, 1978. p. 94), shows that this by itself was a ground-breaking achievement. The ambitious objective was to engender a system based on the rule of law and a relatively restrained system of political sovereignty in which the monarchy was forced to make significant concessions with respect to the basic rights of the citizens. Indeed, it is argued that through this arrangement for the 1<sup>st</sup> time in Iran's entire history the people of the country acquired the actual legal status of citizens and significant restrictions were imposed on the scope and extent of the king's hitherto unlimited power (Deraxše, 2012. p. 71-75).

In spite of this substantial achievement, one could readily notice various shortcomings in this elementary document of the early 20<sup>th</sup> century. First and foremost, one would struggle to find a coherent order in the drawing of various sections of the constitution and a large part of the content seems to have been dedicated to instructions on the actual

running of the parliament. Most importantly, various articles seem to be in clear contradiction to each other; for example, Article 26 on national sovereignty seems to be at odds with Articles 35–55 in which the rights of the monarchy are laid out due to the incompatibilities in the extent and the scope of their authorities. It is also not possible to identify any clear guidelines regarding basic constitutional notions such as the separation of powers and independence of these sources of authority. In Article 27, for example, both legislative and executive powers are subjected to the king, whereas Article 28 emphasizes the need for a clear separation of powers. Furthermore, there seems to be some confusion regarding the roles and scope of the authority of both the national Parliament and the Senate. For instance, Articles 15–21 state that the legislation in “all matters” falls under the jurisdiction of the national parliament whereas Articles 23–25 entrust certain legislative powers, such as the right to make national concessions and agreements or foreign borrowings and even the establishing of companies, exclusively to the Senate.

In any case the Iranian constitutional monarchy witnessed numerous changes and amendments to the text of the constitution particularly during the Mohammad Reza Pahlavi era (1941–1979), which were mainly aimed at including more secular notions, such as the new provisions on the choice and place of work of the court judges in Articles 81 and 82, and conversely to pave the way for the succession within the Pahlavi dynasty (Esfad and Mohseni, 2000. p. 9). In addition, this period witnessed the institution of modern government structures based on the European patterns and in particular fundamental transformation of the judicial system, traditionally under the strict control of the clergy and tribal leaders, into secular national judiciary institutions (Amin, 2003. p. 31).

Following the Iranian Revolution in 1979, a new constitution was drafted to embody the doctrinal convictions of the new religious elites. The initial text was prepared over 5 months and put to a popular vote; although this timescale does not reflect the considerable amount of time Ayatollah Khomeini had previously dedicated to the formulation of his personal theory of the nature of an Islamic state. In fact, various elements of the Iranian constitution could easily be traced back to Khomeini’s original treatise on Islamic Government. A brief reflection on both texts reveals that Khomeini had been very consistent, although often elusive, in his fundamental convictions on Islamic government. In spite of being a rudimentary article, “Islamic Government” - originally a collection of 19 lectures, was an attempt to

elucidate his exclusive concepts of the government entirely legitimized through a spiritual and religious qualification reserved for prophets, Imams and by extension the clergy (Ibid, 42). Therefore, the limited circle of the clerical class was regarded as the only true guardian of the “Islamic order” who could prevent any “innovation” in Shari’a law, “keep the people on the righteous path of Islam,” “fight against the oppressors and protect the oppressed throughout the world,” “establish social justice” and “eliminate the western encroachment and influence on Islamic land” (Ibid, 54). Moreover, the unquestionable capacity of Shari’a to address all human societies’ modern-day needs is eloquently proclaimed by Khomeini as follows:

A complete guideline for government and administration, together with necessary laws, lies ready before you. If the administration of the country calls for taxes, Islam has made the necessary provision; and if laws are needed, Islam has established them all... Everything is ready and waiting ... The Islamic Laws were laid down for the purpose of creating a state and administering the political, economic and cultural affairs of society (Ibid, 43).

Thus, it comes as no surprise that the Iranian constitution closely reflects Khomeini’s ideas on the necessity of establishing a government firmly rooted in the Islamic Shari’a, which would, in turn, be placed under the direct control and supervision of the *Valiye Faqih* (Guardianship of the Islamic Jurist). This stemmed from the conviction that all non-Islamic systems of government were instances of *kofr* (disbelief) and *taqut* (tyranny), and it is ‘our duty to remove ... from the lives of Muslim society (all traces of *kofr*) and destroy them’ (Ibid, 48). In short, as Hamid Algar expounds, the main themes of Khomeini’s essay on “Islamic Government” is to subordinate political power to Islamic goals and precepts, and to define the duty of the religious scholars to establish such a government and to assume the legislative, executive and judicial powers within it (Ibid, 25). Khomeini appears to go even further than that by actually denying the very necessity for a legislative power by underlining that “in Islam the legislative power and the competence to establish laws exclusively belongs to God almighty” (Ibid, 55). Thus, he concludes that in an Islamic government “a simple planning body should take the place of the legislative assembly ... who draws up programs for different ministers in the light of the ordinances of Islam” (Ibid, 56).

As will be demonstrated below, most of these radical views were incorporated into the Islamic Republic of Iran’s constitution with profound implications not only

on a political level but also at all levels of the cultural and social life of the nation and beyond. Surprisingly, a few recent authors have questioned the existence of an actual prior political agenda by Khomeini and underlined the fact that the initial drafts of the constitution did not include any notions of the Guardianship of the Jurist central to Khomeini's initial treatises (Rahnema, in Adib-Moghaddam, 2014, Chapter 4). It is not within the scope of this study to analyze the truthfulness and coherence of the social, psychological, and personal underpinnings of Khomeini's dexterous maneuvering of public sentiments in the months building up to the public vote on the constitution. Although motivations matter, the political actions and the actual on-the-ground manifestations of personal convictions of the policy-makers are more interesting subjects for political scientists. This indeed constitutes the central distinctive feature of the field of political science as compared to other domains of the human sciences such as sociology, philosophy, or psychology. Hence, despite numerous constitutional notions introduced both because of the influence of the secular elements within the revolutionary forces and also as an inevitable result of moderate ideological elements within the Shi'a school of political theology (Axworthy, 2013. p. 161–162), the ideology that eventually prevailed throughout the constitution proved to be the original narrow and exclusive Najaf arguments of Khomeini regarding the mandate of the jurists and the constitutional role and rights of the people in the Islamic Republic, which might indeed have been an unintended result of pure chance, ideological reorientation or a combination of various concomitant forces.

The electoral law was thus drafted by a restricted group of predominantly religious scholars that was to be called the "Assembly of Experts" during June and July of 1979. Elections were also held at the same time to choose 73 members of parliament to represent different regions and religious minorities of the country (Madani, 1991. p. 39). This eventually led to the formulation of the Iranian constitution in 12 chapters and 175 articles which were put to a public vote in December 1979. With the notable exception of the Democratic Party of Iranian Kurdistan and a few other smaller groups who boycotted the referendum as a sham, the constitution was unsurprisingly approved by an overwhelming majority of Iranians. It has since been amended once, in April 1989, following a formal request by Ayatollah Khomeini detailing the sections to be revised by a reviewing committee who were to carry out the amendments (Hašemi, 1994. p. 31).

## 2. THE CONSTITUTION

One could safely claim that the main function of any national constitution is to resource, protect and promote the basic rights and liberties of its citizens. The endorsement of such principles could be observed even in the first constitution of Iran adopted in 1906, in which Articles 8–25 were directly dedicated to this issue and covered a significant part of the Universal Declaration of Human Rights. As far as the current argument is concerned, it is interesting to note that certain articles such as Articles 18, 20, and 21 still set out the limits of education, public communication, publication, assemblies, and public gatherings to not being harmful to the principles of Islam or explicitly banned by the Shari'a<sup>2</sup>.

This initial constitution was subject to various modifications and revisions until the Islamic Revolution of 1979 embarked on the task of drafting an entirely new document based directly on the proclaimed principles of Islam as interpreted by the founders of the Islamic Republic. Here again the citizen's rights have been endorsed in various articles; in particular Articles 19–42 are entirely dedicated to the individual's liberties under the title "Rights of the People." Before this part the initial section on "General Principles" also addresses this subject, in particular, Article 2, section 6 stresses the "dignity and value of man and his freedom coupled with responsibility before God<sup>3</sup>." Furthermore, in the same article in section C, it is declared: (the Islamic Republic is a system based on) "the negation of all forms of oppression, both the infliction and submission to it, and of dominance, both its imposition and its acceptance."

## 3. PLACE OF MEDIA IN THE CONSTITUTION

The 3<sup>rd</sup> Article of the Iranian constitution is very broad and addresses various issues which are developed throughout the following chapters of the constitution. These highlighted principles of individual liberties constitute a practical outline which could be used as a point of departure to trace and analyze all relevant articles throughout the constitution and attempt to elucidate how these have been passed down in the form of legal provisions and public laws within the Iranian legislative system.

Section 2 of Article 3 declares that one of the functions of the Islamic Republic is to "raise the level of public awareness in all areas, through the proper use of the press, mass media,

2 See supplement I on the Iranian constitution of 1906.

3 The Iranian constitution with modification of 1989, Islamic Republic Official Gazette.

and other means.” This section is fully developed in Article 24 of the constitution which reads: “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. The details of this exception will be specified by law.”

A brief survey of the relevant legal provisions reveals interesting aspects of these normative formulations within the Islamic republican system. The Press Law dated March 1986 with the additional April 2000 supplement clearly sets out the guidelines regulating the press’ activity in Iran. The mission of the authorized press as stated here includes such official tasks as: “To increase the public awareness, fight against the imperialist cultures of waste, luxury and lust and emphasize the culture of no to west and no to east<sup>4</sup>.” Prescriptive instructions foresee that “all newspapers need to participate in the realization of at least one of the above objectives and not be in contradiction with others<sup>5</sup>.” In particular, the supplement of April 2000 more clearly delineates the boundaries of the activities of the press, with unambiguous emphasis on the fact that it should strictly avoid publishing material which is:

Detrimental to the principles of Islam and against Islamic laws, and public morality ... should refrain from incitement to take action against the interests of the Islamic Republic ... should strictly avoid leveling false accusations against the leader ... the personalities, organizations and institutions of the Islamic Republic ... or offending the religious authorities even though this might be in the form of publishing their portraits or their caricatures<sup>6</sup>.

These and numerous other legal provisions set out detailed guidelines by the legislators of Iran to safeguard the principal convictions of the Islamic Republic. The foreseen punishment for such violations as “to insult Islam and its sacred principles” is actually the same capital punishment as that reserved for heresy and the negation of religious fundamentals<sup>7</sup>.

4 This has been one of the main slogans of the Islamic Republic which, in an attempt to differentiate its ideology from the Western ideologies and the Eastern Bloc doctrines, adopted the slogan of ‘no to East and no to West.

5 Islamic Republic Official Press, Press Law March 1986 with the added supplement of April 2000.

6 Ibid.

7 Article 26 for the press law refers to such crimes as ertedad (heresy) deserving capital punishment. It goes on to add that in cases in which the crime of heresy is not applicable other commensurate punishments based on the Islamic Penal Code will be administered.

Therefore, it is easy to recognize various pitfalls in the Iranian constitution and the related legislation regarding freedom of the press and public means of communication. Undoubtedly, as shown above, interesting potentials for the safeguarding of the principle of the freedom of expression within the Iranian constitution could be identified. There are sections of the constitution which clearly endorse such basic individual rights and seemingly put all members of the public on an equal footing of common standing<sup>8</sup>. Nonetheless, closer scrutiny reveals that these provisions are all subjected to various restrictions and supervising organs<sup>9</sup> which are endowed with effective means to suppress or severely restrict *ad arbitrium* various modalities of free expression of thought within the Islamic Republic.

Furthermore, all relevant articles seem to have been very broadly drafted and vaguely worded to the point that they could easily be employed to waive even the most basic public rights in this domain. The concept of insult or “false accusation” is so broad and the punishments so severe that undoubtedly this would lead to significant amounts of auto-censorship or the “anticipated sanctions” to avoid the potentially violent consequences of publicly denouncing anything. If the criticism or public denunciation of a perceived shortcoming of any “personalities, organizations, and public institutions” could constitute a potential for false claims, such “criticism” could be severely burdened with several heavy punishments laid out by these regulations, not least because free access to information and source verification is never guaranteed in the relevant legal frameworks. In addition, the restrictions on publishing any material deemed harmful to the “interests of the Islamic Republic” would leave very little room for any act of public expression at all, let alone the basic exercise of democratic rights of contestation and invigilation.

#### 4. CONSTITUTIONAL PROVISIONS ON EDUCATION

Returning to Article 3 of the constitution, sections 3 and 4 endorse the necessity for providing free education and physical training to all members of the society. These sections are further developed in Article 30 with similar guidelines instructing the government to provide everyone with free

8 Articles 19 and 20 for instance.

9 All newspapers and other mass communication material, along with all media and public entertainment creations, need to be verified and authorised by the Islamic Republic’s Islamic Culture and Guidance ministry.

elementary and higher education to “the point of national self-sufficiency.”

It must be recognized that the Islamic Republic has dedicated a significant amount of resources to realizing the objectives of these articles. Nevertheless, there is still a lot of work to be done, in particular concerning the content of the educational material which could not be treated in this space but as far as the constitutional provisions and their direct outcomes on the state’s normative policies and regulations are concerned, several aspects of these fundamental guidelines should be highlighted. It appears that considerable effort has been made to give the educational system a specific direction, for example, by limiting the study of natural sciences. This direction is particularly apparent when teachings are deemed contrary to the principles of Islam. There has been direct manipulation of teaching curricula at primary, secondary, and higher education level to censor material considered hostile to the principles upheld by the Islamic regime. It is said that, currently, there are 12 separate working groups within the Islamic Culture and Islamic Guidance ministry implementing a pervasive mechanism of censorship on all published material in Iran<sup>10</sup>. This process was initiated immediately following the Islamic Revolution, particularly through the so-called “Cultural Revolution” of 1980–1983, during which time a complete revision and purging of teaching material and academic staff took place in an attempt to introduce new syllabi and educational curricula based on the newly constitutionalized precepts of the Islamic Shari’a<sup>11</sup>. A recent example of this would be the suppression of teaching material on the scientific basis of evolutionary biology or the teaching ban on Western philosophers such as Jürgen Habermas or even the former authorities of the Islamic Republic such as the late presidents Akbar Hashemi Rafsanjāni or Mohammad Khatami, whose books and articles are severely restricted from circulation<sup>12</sup>. These include books which have previously been authorized for publication but have later been blacklisted in light of new political developments.

To better manage the flow of information, and to filter and channel the sources of public education and information,

10 See for instance a report on this mechanism [here](#).

11 See for instance Mojab (2004) “State University Power Struggle at Times of Revolution and War in Iran” International Higher Education [here](#).

12 A sample list of some of the forbidden books by the Islamic Republic can be found [here](#).

the Islamic Republic has instated a dedicated ministry called the Ministry of Culture and Islamic Guidance which effectively regulates any material destined for mass publication and the national educational system. Unsurprisingly, such meticulous control, selection, filtering, and eventual punishments have resulted in arbitrary invigilation, direct interference and even self-censorship by all actors in the socio-cultural sectors.

Thus, although the constitutional article and legal provisions relating to education have endorsed the necessity of providing an inclusive system of free national education, various forms of manipulation, censorship, filtering, and the threat of possible punishment have *ipso facto* reduced the scope and usefulness of this important constitutional repository of rights and liberties. Accordingly, the educational system appears to have degenerated into a strictly guided formative vehicle for providing a restricted kind of information and learning closely reflecting the totalitarian patterns of the prevailing cultural hegemony<sup>13</sup>.

## 5. PERSONAL LIBERTIES

Moving onto sections 6 and 7 of Article 3 of the Iranian constitution one encounters important provisions regarding the necessity of “eliminating all forms of despotism and tyranny and all attempts to monopolize power” and also of “guaranteeing the political and social freedom within the framework of the law.”

These two sections, together with other relevant articles, constitute the main normative repository for the protection of the citizen’s basic rights. An in-depth survey of the constitution demonstrates that these concepts are further developed directly in 9 Articles throughout the constitution with numerous other articles indirectly related to these themes. The 1<sup>st</sup> Article directly treating these principles is Article 19 of Chapter 3 under the title: “Rights of the People.” This article upholds the conviction that “all people of Iran, whatever their ethnic group or tribe, enjoy equal rights; and color and race and language do not bestow any privilege.” It is worth mentioning that Iran is also a signatory of various international covenants and treaties upholding these principles, which effectively makes the country a proactive member of international charters on non-discrimination

13 Detailed analysis of various mechanisms of Cultural Hegemony can be found in Antonio Gramsci’s seminal work *Prison Notebooks* (1992)

and the fight against racism and apartheid<sup>14</sup>. The same notion had also been underlined in Article 8 of the first Iranian constitution of 1906. On a side note, it should be reiterated that there are far-reaching injunctions on this principle in Iranian history dating back to the 6<sup>th</sup> century bc in the form of the cuneiform cylinder made by order of the Persian King Cyrus<sup>15</sup>. Therein it is believed the king explicitly forbade slavery and servitude, a mandatory provision in an empire composed of numerous ethnicities, cultures, and religions<sup>16</sup>.

Notwithstanding this, both before and after the Islamic Revolution, it is still possible to observe many shortcomings and in some cases discrimination and deprivation which could at least partially be interpreted on the grounds of ethnic and religious idiosyncrasies. Foreign observers and human rights organizations have repeatedly accused the Islamic Republic of widespread discriminatory laws and practices on ethnic, religious, gender, or other distinctive grounds, to which the Iranian government has not appeared to be very responsive<sup>17</sup>.

The second constitutional article directly related to sections 6 and 7 of Article 3 is the very comprehensive Article 20 of the Iranian constitution. It reads: "All citizens of the country, both men and women, equally enjoy the protection of the law

and enjoy all human, political, economic, social and cultural rights in conformity with the Islamic injunctions." This is further detailed in:

- Article 21 on women's rights;
- Article 23 on individuals' beliefs;
- Article 25 on the prohibition of inspection in private communications;
- Article 26 on the freedom of political and professional associations;
- Article 27 on the right to hold public gatherings and marches;
- Article 32 on the prohibition of illegal arrests and detainments; and other articles related to the freedom of occupations, residence, and so on.

All these fundamental articles provide a significant number of constitutional guarantees to uphold various principles of individual liberties. A closer analysis of each of these articles and their actual enactment within the relative normative frameworks is needed here to see how these constitutional guidelines have been reflected in the ordinary laws of the Islamic Republic.

As regards the general provisions on the protection of private space, Article 22 states that "the dignity, life, property, rights, residence, and occupation of individuals are protected from violation, except in cases sanctioned by law." Thereafter, Article 23 guarantees the right to hold personal beliefs by clearly stating that: "The investigation of individuals' beliefs is forbidden; no one may be molested or questioned for holding a certain belief." These articles are clear reflections of the relevant principles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights<sup>18</sup>.

Unsurprisingly, the limits of these freedoms are declared to be set by relevant legal provisions. A brief consideration of a selection of these provisions is instructive here. Property rights have been endorsed in many pieces of legislation<sup>19</sup> which seem to be relatively compliant with the international laws and conventions. Other provisions such as Articles 24 and 34 of Iran's Code of Criminal Procedure, which states that "the police cannot detain suspects for more

14 These include: The International Convention on the Elimination of All Forms of Racial Discrimination. This has been adopted, opened for signature and ratification by General Assembly resolution 2106, 21 December 1965 and the International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973

15 There is some disagreement concerning the interpretations of the actual content of the Cyrus Cylinder; nevertheless numerous sources and historic records, including religious texts such as the Old Testament, attest to a high level of social tolerance and openness by the Persian monarch towards the different ethnic groups, religions and cultures enabling one to seamlessly highlight the uniqueness of such policies throughout the ancient world. See for instance Masroori, C. (1999) 'Cyrus II and the Political Utility of Religious Toleration', in Laursen, J. C. (ed.), *Religious toleration: the variety of rites from Cyrus to Defoe*, New York, St. Martin's Press.

16 It is interesting to notice that the practice of slavery was formally outlawed more than 2000 years later in the Western political tradition.

17 See the latest United Nations Human Rights reports on Iran here.

18 See Articles 3, 5, 6, 9 and 12 of the Universal Declaration of Human Rights and Articles 6, 9 and 12 of the International Covenant on Civil and Political Rights accessible on the United Nations' website here.

19 See for instance Articles 30, 132, 301, 311, 329 and 331 of the Islamic Republic's Civil Code.

than 24 h and have to immediately refer the case to the appropriate juridical sources” also satisfies the minimum requirements for the protection of individual’s rights in such specific circumstances<sup>20</sup>. Nevertheless, several instances of incompatibility and in some cases outright contradictions in the existing legal framework should be underlined.

As explained above, the Article 23 guarantees the individual’s right to hold any belief but makes no reference to the actual “expression” of those beliefs. In fact, it is not possible to identify any articles that explicitly and unambiguously guaranteed the freedom of expression for individuals. The provisions reserved for the means of mass communication were discussed previously; it is interesting to observe that these could not be automatically extended to the expression of personal beliefs and convictions at the individual level. Individual beliefs could include all intellectual convictions in the domains of religion, culture, politics, and so on which in theory should be protected by this article. It goes without saying that the ideas should be expressed to come to be recognized as such in the public domain, but there are various means of expression which go beyond oral and written acknowledgement of convictions. Practical example of such expressions of belief could include wearing a cross around your neck, for instance, or a symbol denoting atheism or any known organization or association - as long as this does not directly offend another member of society.

Thus, it would appear that this major omission concerning the freedom of expression in the text of the constitutional article would cause a significant vacuum which could potentially give rise to various arbitrary suppressions of individual liberties in the absence of any unambiguous normative guarantee in this matter. Various authors have tried, on the one hand, to interpret the article to cover actual expressions of personal beliefs by logical extension and, on the other hand, to affirm that it only guarantees the holding of personal beliefs and not the actual act of expression, which demonstrates the great ambiguity and potential for misinterpretation that exists in this article<sup>21</sup>. A brief comparison with the relevant articles of the International

Covenant on Civil and Political Rights<sup>22</sup> and the Universal Declaration of Human Rights would elucidate this point. Article 19 of the International Covenant reads in part:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Only such an unambiguous declaration could stand a chance of protecting the basic rights of individuals, which would otherwise be trampled on and waived due to potentially *ad arbitrium* interpretations.

One final observation involves the protection of religious beliefs in the Iranian constitution. Article 13 acknowledges that Zoroastrianism, Judaism, and Christianity are the only recognized minority religions. Therefore, there are no guarantees of freedom for followers of any other faiths to practise their religion or to include their religious, or non-religious for that matter, convictions in any official social contexts and forms. This is not only in contrast with the Universal Declaration of Human Rights (Article 2 in particular) but also in clear contradiction to the affirmation of “all people of Iran” in Article 19 of the same constitution which declares “equal rights” for all.

## 6. WOMEN’S RIGHTS

This is a very problematic area for any legislation founded on the doctrinal convictions of the so-called “Western religions,” including the Islamic Shari’a. Certain modernist states in the Islamic world such as Turkey and Tunisia have

20 See for instance Articles 22 to 25 and 96 to 104 of the Iranian Code of Criminal Procedure here.

21 For a detailed discussion of this argument see Izanloo, 2003, and Katouzian, 1998.

22 Article 19 of the International Covenant on Civil and Political Rights:

1. Everyone shall have the right to hold opinions without interference;
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order, or of public health or morals.

opted for a modern interpretation of religious prescriptions in this matter to be able to endorse a certain level of gender equality and parity of the sexes. Conversely, the Iranian legal framework with its salient religious proclamations could not fully accommodate the provision of its own constitution throughout its legislative arrangements<sup>23</sup>. A brief survey of Iranian legislation in this regard reveals a significant body of discriminatory laws aimed at extending male domination in various sociocultural and private domains. Article 1133 of the Civil Code, for instance, reserves the right to divorce for men only and provides further simplification in cases where the wife suffers from certain types of illnesses; whereas the wife does not enjoy equivalent rights even in the case of certain serious ailments of the husband. Article 1130 of the same Code defines the rare cases where the wife could actually file for divorce, including such instances as when she can prove to have been subject to “continuous and unbearable physical mistreatment.” Thus, it is unambiguously implied that when the physical mistreatment could be said to be “tolerable,” there will be no grounds for a wife-initiated request for the legal dissolution of the marriage. Even in such specific case, the wife is usually required to waive all her legal and financial rights sanctioned by law or specified in the matrimonial deed. Another blatant example based on the Islamic Shari’a is that monetary compensation paid in the event of unintentional manslaughter would be half as much in the case of women compared to men<sup>24</sup>. Numerous other examples could be cited which highlight a systematic and prevailing legal discrimination on gender grounds throughout the Islamic Republic normative injunctions.

On the other hand, it is also possible to identify certain examples of the actual protection of women’s rights, particularly regarding their rights to maintenance, protection from certain types of physical violence, legislation against physical abuse and prostitution together with some provisions for work environment entitlements and various provisions for social and economic assistance<sup>25</sup>. Despite this, the majority of these laws, in particular Article 21 of the Constitution - which in theory should serve as the basis

for the protection and promotion of basic women’s rights - seem to have adopted a protectionist approach toward the safeguarding of the already underprivileged position of women, rather than actually empowering them to gain equal social rights. Indeed it appears that the emphasis seems to have shifted toward the protection of the family and motherhood with significant consequences for women’s individual rights. Such assertions of rights do not seem to stem from women’s entitlement to basic elements of right as individuals independent from the role they ought to play in a religious, family-oriented society<sup>26</sup>.

All these discriminatory legal frameworks point to the conclusion that the Islamic Republic does not appear to have been successful in enacting various international charters or even some of its own constitutional provisions<sup>27</sup>. Hence, it appears that very little has been done to empower women in the Islamic Republic, who seem to be shackled by centuries of discriminating socio-cultural traditions and beliefs. On the contrary, all evidence indicates that in practice they have actively been restricted and discriminated against in a system where the only “dignifying” role for women seems to be in the capacity of motherhood. Several repercussions of such a prevailing religious ideology can be identified, such as a significant number of juvenile marriages of underage women, which underscore a considerable amount of actual domination in private spheres<sup>28</sup>. To mention yet another instance of such a prevailing domination, Article 1041 of the civil code could be cited which acknowledges that while the legal marriage age for girls is set at 13 years, the marriage of girls below this age would still be permitted if the father or the grandfather of such an underage individual gets permission from a civil judge<sup>29</sup>.

It is interesting to note that one specific recurrent expression in the Iranian Civil Code on family laws, based on the Islamic religious exegeses, is the term *tamkein* (obedience), which provides significant grounds for the subjugation of women in all private spheres. The term is regularly referred to in

23 This is indeed the case due to numerous religious guidelines, in particular explicit instructions in the Quran such as those in the Surah Al-Nisa requiring total obedience and subordination of women to men in all life matters; see for instance Quran, Al-Nisa: 34

24 See for instance Article 382 of the Islamic Penal Code of Iran.

25 See for instance Articles 1085 of the Civil Code and Article 76 of the Labour Law.

26 In sections 2 and 3 of Article 21 dedicated to the protection of women’s rights we read: ‘the government must ensure the protection of mothers, particularly during pregnancy and childbearing and to ... establish competent courts to protect and preserve family’.

27 See for instance the United Nations’ recent special report here.

28 See for instance the UN’s stand on this matter as reflected in an article here.

29 Article 1041 of the Iranian Civil Code.

civil laws and Islamic Penal Code when describing women's conjugal duties. Hence, unsurprisingly, the ordinary laws of the Islamic Republic derived from these dominatory constitutional and legal provisions prove to provide significant grounds for the encroachment of individual liberties and independence.

## 7. POLITICAL PARTIES

Other arguments dealt within Article 3 of the constitution, which has so far been utilized as a basic point of departure for the analysis of fundamental individual rights in the Iranian constitution, are the guarantees for the protection of individual rights to participate in or form political and social parties and associations. Articles 26 and 27 further develop these principles and delineate the framework of these liberties in society. Article 26 in particular declares:

The formation of parties, societies, political, or professional associations, as well as religious societies, whether Islamic or pertaining to one of the recognized religious minorities is permitted provided that they do not violate the principles of independence, freedom, national unity, the criteria of Islam, or the foundations of the Islamic Republic.

Various aspects of this article deserve further analysis. First of all, it is noteworthy that in terms of religious parties and associations, only the officially recognized religions are authorized to have their own associations, which as discussed previously, proves to be extremely discriminatory to the followers of other convictions and faiths. Second, and most importantly, the clear "red line" set out here for the activities of political parties is declared to be the fact that they should not violate the basic principles of the Islamic Republic. This becomes clearer in Article 27, where the freedom of peaceful public gathering and marches is guaranteed provided that they are not "detrimental to the principles of Islam." This is a recurrent limit set for most articles concerning the basic principles of individual liberties and all their social and political means and modes of public manifestations. As seen previously, this is a very broad principle that could be interpreted in various ways. Most strikingly the Council of the Guardians of the Islamic Republic - which is constitutionally the only authorized body for providing interpretation and clarification of the ambiguities in the constitution - refrained on at least one occasion from providing any clarification to this phrase following official enquiries from the government

authorities<sup>30</sup>. Unsurprisingly, the ordinary laws of the Islamic Republic dominated by conservative legislative elements have interpreted this to implement restrictive provisions both on the formation of political parties and even on peaceful public gatherings and associations, to the point where, with the exception of the so-called "loyal opposition," currently, there is no single fully independent political party in the Islamic Republic<sup>31</sup>.

Regarding the ordinary laws derived from such constitutional injunctions, Article 6 of the law on activities of the political parties, ratified in August 1981, could be cited. This law sets out numerous exceptions to the freedom of activity of various political, social and professional parties and associations including: "Violating the principles of national independence, contact with foreign embassies, receiving money from foreign countries, violating Islamic principles and the basic foundations of the Islamic Republic (with) anti-Islamic propaganda." Furthermore, various articles of Iran's Islamic Penal Code are dedicated to punishments foreseen by law not only for those who perform activities against national security (ex. Articles 71, 109) but also those who are involved in propaganda against the system or promotion of groups and organizations which are against the Islamic Republic (Article 286).

Once again, as with other articles of the Islamic Republic's constitution cited above, it is impossible to overlook interesting attempts to include various principles of the Universal Declaration of Human Rights (Article 20) and the International Covenant on Civil and Political Rights (Article 21). Despite this, numerous restrictions and provisions and, most importantly, inherent ambiguities, have rendered these articles incapable of resourcing and protecting the most basic principles of civil liberty.

In addition, various levels of inconsistency can be highlighted which seem to have been caused primarily by a profound underlying ambiguity in the interpretation of the locus of legitimacy and sovereignty within the Iranian constitution. As shown above, there is an explicit acknowledgement of the role of the people in administering all "affairs of the

30 Collections of the Opinions of the Council of the Guardian. Research Centre of the Council of the Guardians pub. 2002, p.373, hence the expression "detrimental to the principles of Islam" remains be extremely vague and flexible with notorious consequences.

31 See for instance the research published on the only existing Iranian parties here.

country” (Article 6). Nonetheless, numerous limitations and boundaries imposed on this exercise of authority seem to directly contradict the explicitly highlighted rights and prerogatives of the people. The existence of these numerous ambiguities and in some cases even contradictions within the Iranian Fundamental Law, inevitably raise the question of what sources of clarification have been foreseen within the constitution itself to deal with the numerous potentials for misinterpretation. Yet another example of such complications can be pointed out in Article 14 of the constitution, which claims that: “The Government of the Islamic Republic of Iran and all Muslims are bound to treat non-Muslims in conformity with ethical norms and the principles of the Islamic justice and equity and to respect their human rights.” As discussed previously, only three religions are officially recognized by the Islamic Republic in Article 13 of the constitution. Thus, it is unclear how the Islamic Republic could guarantee the “human rights” of all non-Muslims while not recognizing the basic rights to religious organizations for the non officially recognized congregations of faith. It goes without saying that the individual rights of those with no religious convictions are not even mentioned therein.

Hence as highlighted above the only envisaged authoritative source for clarifying constitutional omissions, ambiguities and contradictions, remains to be the same Council of Guardians whose members are half appointed by the Leader of the Islamic Republic and the other half proposed by the head of the judiciary system, himself directly appointed by the Leader. Thus, the Office of the Leader directly or indirectly hand-picks all members of the Council of Guardians which could raise serious concerns regarding the nonalignment and impartiality of the council as the sole interpreter of the Islamic Republic’s Constitution.

## 8. CONCLUSION

This study attempted to show that the constitution of the Islamic Republic fails to provide solid unambiguous foundations for promoting, protecting and sanctioning adequate guarantees for the protection of elementary individual rights on several levels. It was empirically demonstrated by referring the constitutional injunctions to the actual sanctions of the ordinary laws of Iran, that a significant pitfall has been created for systematic violation of rights which not only concerns minorities and women but also the entire Iranian population. In addition to all this, a fundamental void could be felt regarding the existence of an overriding impartial constitutional court capable of

enforcing the very same principles of the Iranian constitution. As it was shown, the Council of the Guardians, which is constitutionally defined as the authority for interpreting ambiguities and addressing potential claims, proves to be a mere legal tool in the hands of the same dominant religious ideology for doctrinal imposition of values which at times has even acted as a powerful contravening body against the prerogatives of the legislative system. Unsurprisingly, due to such fundamental constitutional flaws the contemporary history of Iran abounds with instances where questionable verdicts have been delivered, political leaders, activists and members of public have been silenced, or other contraventions against the basic principles of human rights have taken place.

This indeed raises the question of the centrality or even the relevance of a corpus of Fundamental Law in a country where the centers of loyalty and allegiance prove to be above and beyond formally agreed on loci of rights and authority.

All evidence examined, it will be uncontroversial to claim that as things stand, not only do we fail to identify significant constitutional guarantees for upholding individual rights in several domains but also that the same body of laws and normativity appear to be the prime suspect for institutionalizing the systematic violation of the basic principles of human rights. In recent years reformist presidents such as Khatami and Rouhani have repeatedly called for a full implementation of the Iranian constitution as a means to promote basic individual liberties. Yet as it was demonstrated here the actual source of domination in the Iranian political layout appears to be the very normative repositories that are theoretically destined for diametrically opposing ends. Hence, all the data examined points to the conclusion that the *buoni leggi* (good laws) as the first cornerstone of any political edifice claiming to be upholding principles of right and liberty, appear to be fundamentally lacking in the system under analysis<sup>32</sup>. In such a layout of public law, any assertions of principles of individual rights appear to have been fundamentally waived by means of the alleged claims of *raison de foi* which, as shown, has systematically permeated the entire normative apparatus of the Islamic Republic.

## REFERENCES

Adib-Moghaddam, A. (2014). *A Critical Introduction to Khomeini*. Cambridge: Cambridge University Press.

32 See Machiavelli’s Discourses for instance

- Amin, H. (2003). *Tārix-e Hoquq-e Iran*. Tehran: Dāyeratolma'āref Iran Šenāsi Pub.
- Axworthy, M. (2013). *Revolutionary Iran*. UK: Penguin Books.
- Deraxše, J. (2012). In: Sarvari, Q. X., editor. *Politics and Government in the Islamic Republic*. Tehran: Imam Sādeq Pub.
- Esfad, M., & Mohseni, F. (2000). *Hoquq-e Asāsi Jomhoori-e Eslāmi-e Iran*. Tehran: Alhoda Pub.
- Gramsci, A. (1992). *Prison Notebooks*. New York City: Columbia University Press
- Hašemi, M. (1994). *Hoquq-e Asāsi Jomhuri Eslāmi-e Iran*. Tehran: Šahid Beheštī University Pub.
- Izanloo, M. (2003). *Āzādi-e Baiān dar Hoquq-e Asāsi Iran in Āzādi-e Andiše va Baiān*. Tehran: Tehran University Press.
- Katouzian, N. (1998). *Mabāni-e Hoquq-e Omumi*. Tehran: Gostar Pub.
- Khomeini, R. (1981b). *Islamic Government in Translation by Algar*. Berkeley: Mizan Press.
- Machiavelli, N. (2000). *Discorsi sopra la Prima Deca di Tito Livio*. Milano: Einaudi.
- Madani, J. (1991). *Hoquq-e Asāsi va Nahādihāye Siāsi Jomhuri Eslāmi-e Iran*. Tehran: Hamrāh Pub.
- Madani, J. (1997). *Kolliate Hoghooghe Asāsi*. Tehran: Paidar Pub.
- Nick Pay, V. (2016). *Republican Islam: Power and Authority in Iran*. London: I.B. Tauris.
- Parpworth, N. (2012). *Constitutional and Administrative Law*. London: Oxford University Press.
- Rahimi, M. (1978). *Qānun-e Asāsi-e Iran*. Tehran: Amir Kabir Pub.