CHAPTER 3

Human Rights in Islam and the Islamic Republic of Iran

This chapter deals with Islamic views on human rights through various sources of jurisprudence and rights discourses and subsequently it will look into the Iranian constitutional provisions for protection of human rights. According to the UDHR, “human rights are guaranteed by the state through its law” (UDHR 1948 Preamble). However, the UDHR emphasizes and states that all the “rights” are “inalienable”, and “universal”. But the jurisprudence, doctrines and the practices of various Islamic states and their specificities in cultural practices have challenged the human rights notions of the Western world. Now these arguments are considered to be part of “cultural relativism.” The basic differences in the rights discourse is the between a community-centered approach and an individual-centered approach. But there can also be mutually shared norms regarding human rights in the universalist and Islamic notions.

Since 7th century AD, Islam spread to new territories and established new states and provinces that required establishing mechanisms of law and order. In the beginning of Islam, Prophet Muhammad dealt with disputes and different social issues along with state governance and public policies in Madina. The Prophet was well aware of the need for definite provisions to operating a state system and for regulating society within the legal framework. In the beginning of the Islamic state, Prophet Muhammad
created a Constitution for Madina, which, as a legal framework was intented to deal with different aspirations and to provide protection of rights of diverse communities in Madina. The Constitution of Madina is a good evidence for concerns in public policy making in Islamic states. The nature of contract between different tribes and communities in Madina and the guarantees offered by the government to the every citizen are described in this document.

After the Prophet Muhammad, the Islamic community of Madina followed Arab traditions for electing state leadership as the Prophet never gave any directions to electing the state leader (the Caliph). But people of Madina followed the system of electing the leader who was considered the eldest and who was supported by a majority of the people. Within a short period of the first Caliphate ended and it has transformed by Muawiya into a new monarchy. Later monarchy became hereditary in Islamic states and empires. In the 20th century, the Ottoman Caliphate was deposed by Ataturk and he established a modern state, which has been considered as the radical shift in the political practice of the Islamic world.

In the last decades of the 20th century, intellectuals of the Islamic countries have been thinking about new versions of Islamic government. The Islamic Republic of Iran came to be the realization of such a new form of the Modern Islamic state system With a new Islamic Constitution which had formulated principles affirmed with Qur’anic doctrines and Sunnah principles.
SOURCES OF JURISPRUDENCE IN ISLAM

When in early times Islam expanded its state framework from a religion to a state system, then it faced multiple challenges for the need to maintain a “state jurisprudence”. Different schools of Islamic jurisprudence emerged and they were derived from the basic resources of Qur’an and Sunnah. The shariah is not a fully uniform legal system across different schools but all these schools commonly accepted the prominent source of law that is Qur’an. In the changed situation the jurists were willing to accept the consensus on decision making power based on Ijtihad (independent reasoning). Abed al-Jabri observed that:

The end of the nineteenth century, in particular, the slogan of ‘opening the door of Ijtihad has been reiterated by those who reject ‘Westernization’. They called for ‘renewal’ in Arab-Islamic thought, as a solution for the contemporary problems and challenges facing, both as a system of life and a framework for public and private social relations (Abed al-Jabri 2009: 77).

Mohammad Hashim Kamali draws the comprehensive structure of the Islamic jurisprudence as it is not only a law but also divine. Kamali explains:

Islamic law originates in two major sources: divine revelation (wahy) and human reason (aql). This dual identity of Islamic law is reflected in its two Arabic designations, Shariah and fiqh. Shariah bears a stronger affinity with revelation, where as fiqh is mainly the product of human reason. Shariah literally means “the right path” or “guide”, whereas fiqh refers
to human understanding and knowledge. The divine Sharia thus indicates the path to righteousness; reason discovers the Shariah and relates its general directives to the quest for finding solutions to particular or unprecedented issues. Because the Shariah is mainly contained in divine revelation (that is, the Qur’an and teachings of the Prophet Muhammad or the Sunna), it is an integral part of the dogma of Islam. Fiqh is a rational endeavor and largely a product of speculative reasoning, which not command the same authority as Shariah (Kamali 1999: 107-8).

As noted earlier, Islamic jurisprudence was not fully homogenous in nature; it has contextual and relative differences. Ian Edge explains about the various schools of Islamic jurisprudence:

It is generally said that there are five main schools of Islamic law: four are Sunni and one Shi’a. The Sunni Schools are the Hanafi, Maliki, Shafi and Hanbali. The main Shi’a Schools is the Ithna Ashari School. … There are some other minor Sunni Schools and a number of other Shi’a Schools. The above five are however the main Schools that applies in the Islamic world today (Edge 2008: 485).

Islamic jurisprudence has been derived from basic Islamic values; it is entirely different from the Western historical context which has derived the Enlightenment thought. Abdulaziz Sachedina (2009) observes that the legal categorization in Islamic jurisprudence has simply followed the natural concepts of legality and rights, it has assessed as necessary (wajib),
recommended (mandub), or forbidden (haram). The primary textual sources of human rights documents in Islam and the primary textual source of legislations are the Qur’an and Sunnah. The Sunnah, which is the second source of legislation after the Qur’an, includes the Prophet’s sayings, speeches, deeds and treaties and agreements which the Prophet concluded. Dustur al Madinah (Constitution of Madina) is the first written constitutional document in the Islamic State and the first document that establishes rules with human rights and for respecting others in a legal form. Any comparison between fourteenth century old Madina constitutional principles and the new human rights doctrines of UDHR is irrational. Because centuries old practices of a state system should be evaluated in the particular context of that space and time.

**QUR’AN AND SHARIA**

Muslim rights authors rely on the Quran and life examples of the Prophet Muhammad, Sunnah (An-Na’im 1994:320) The Qur’an not only is a revelation for guiding the Islamic society, “the Qur’an was understood to be in large degree a source of information about the history of past nations and prophets and about other matters that were important as a contextual frame for the presentation of rules of law (Weiss 2010: 156). Ameer Ali (1923) observed that the basic foundational ideas of the Islamic system of society include:

1. belief in the unity, immateriality, power, mercy, and supreme love of the creator; 2. Charity and brotherhood among mankind; 3. Subjugation of the passions; 4. The outpouring of a grateful heart to the Giver of all good; 5.
Accountability for human actions in another existence (Ali 1923)

A very important source of Islamic law comes from the sayings of the Prophet and those close to him. These have been collected and are called *hadith*, many collections of traditions (*hadith*) had been made during the ninth century, but six works became recognized as authoritative in Sunni Islam, especially the Sahih al-Bukhari and the Sahih Muslim. The word Sahih actually means recognized, the other four are also highly respected. Muslims consider some of the *hadith* as respectable and some others as not fully genuine. Al-Bukhari, Muslim and the other texts are much quoted and have become highly regarded, considered second only to the Quran itself as sources of authority for the laws and customs of Islam. *The al kutub al-sitta* (‘the six books’) comprises the canonical *hadith* literature and, as such, forms the main sources of traditional law that informs us on the rights enshrined in Islam.

Islamic jurisprudence is known as Shar’ia, the systematic development of which began with the early periods of Abbasid era (750 AD). It has developed in the second and third centuries of the Islamic epoch. In the Abbasid period, the need of the jurisprudence was the important administrative and public policy matter. Prominent proponents of the different jurisprudence schools were Jafar al-Sadiq (died in 765), Abu Hanifa (died in 767), Malik (died in 795), al-Shafi (died in 820) and Ibn Hanbal (died in 855). Al-Shafi has founded the new system for interpreting Qur’an and Sunnah, and it is known as the *usul al-fiqh*, but the process of collection and authentication of Sunnah continued beyond their lifetime. In the Sunni
Muslim tradition, the authoritative jurisprudential matters depended upon the Sunna collections and interpretations of Bukhari (died in 870), Muslim (died in 875), Ibn Majah (died in 886), Abu Dawud (died in 888), al-Tirmidhi (died in 892), and al-Nasai (died in 915). In the jurisprudence of the different Schools of the Islam followed the reliable resources of the Sunna collections. The Shi’ia sect depended on the reliable sources provided in the collections of al-Kulayni (died in 941), Ibn Babawayh (died in 991) and al-Tusi (died in 1067).

In Islamic jurisprudence, there is a prominent role for jurists in the society. The jurisprudential practices in the Islamic world has not been homogenous in nature. Ibn Rushd observed that the jurists community consists of three groups, in which first had accepted the validity of Malik’s school; they prioritized the doctrines of the school, but without knowledge of the evidence. This group is concerned itself simply with memorizing Maliki’s view on legal questions. The second group believed that Maliki doctrine is valid because the foundational principles in which the school was based had become clear to its members. The third group is one that attained a deep and thorough understanding of Maliki’s doctrines (Hallaq 2004: 54).

The Muwatta of Imam Malik is not really a collections of hadith in the sense of the legal traditions, it specifically act as a guide to law. Some Muslim authorities include it instead of the Sunnah of Ibn Maja among the six canonical collections. Malik did not share the approach of Shafii towards the sunnah. Maliki declared that the only true sunnah was found in the hadith and not in the ijma (consensus) of Muslim school in significant work of hadith literature. Bukhari’s compilation includes all known traditions of
Muhammad’s life considered to be authentic. There are 7,275 hadith, some rather similar to others, which he says Amina, the wife of Muhammad refined out of 600,000 sayings. He classifies the hadith in terms of the different schools of law, usefully showing how the different schools tend to prioritize different hadith.

Muslim ibn al-Hajjaj entered into the legal debate personally, but collected the hadith that would be useful to others involved in law. The authentic version of the hadith could help them in their legal matters. Muslim records most of the hadith found in Bukhari’s collection but, whereas the latter placed parallel versions of the same tradition under various headings relating to various points of law, Muslim put them all together under their own topic of headings. The Shariah or Islamic law to Muslims means the “whole duty of mankind” (An-Naim 1990: 11). It contains the details of moral and spiritual aspirations and details of the ritual observances of Muslims, and it contains both public and private law. The belief among Muslims is that the Quran gives the broad principles and Muhammad established a model Islamic life through his sayings and practices. The second source of Shariah is Ijma that is the consensus of Muslims (scholars) on an issue. The third source of the Shariah is Qiyas, reasoning by analogy or concluding from a principle embodied in a precedent. Lastly, Ijtihad as a source of Shariah means independent juristic reasoning. However, Ijtihad can only to be applied to a case or in a situation where there is not a definite Qur’an or Sunnah position on an issue. According to the narrations of An-Naim on Ijtihad:

from an Islamic point of view, no human authority was or is entitled to declare that ijtihad is not permitted, though there
may have been consensus on this matter among Muslims. There is nothing, therefore, to prevent the emergence of a new consensus that *ijtihad* should be freely exercised to meet the new needs and aspirations of Islamic societies (An-Naim 2008: 15).

It is important to state that there were not any systematic rules like the *Shariah* until two centuries after the death of the Prophet. The reason for enacting the *Shariah* was due to the expansion and conversion of diverse cultural groups into Islam coupled with the need for a uniform Islamic way of life at that time (An-Naim 1990: 14). Consensus as a source of the *Shariah* was based on the saying of the Prophet that, “my people shall never be unanimous in error” (An-Naim 1990: 24). The legitimacy of *Sunnah* as an Islamic source is in the Quran, which states that:

> whatever gains God has turned over to His Messenger, from the inhabitants of the villages belong to God, the messenger, kinsfolk, orphans, the needy, the traveler in need –this is so that they do not just circulate among those of you who are rich – so accept whatever the Messenger gives you, and abstain from whatever he forbids you. Be mindful of God: God is severe in punishment (Qur'an 59:7).

By the process of *Shariah* outlined above, the founding jurists of the *Shariah* categorized the field of Muslim activities into permissible, prohibited, recommended, and reprehensible acts. The other main categories were worship and social dealings. This means that the religious obligations of
Muslims according to the *Shariah* cover all aspects of the individual-public and private life (An-Naim 1990: 32).

The Islamic scholars argued that the relevance of the issues of human rights as being a universal quest of *Qur’anic* discourses was based on humanitarian considerations rather than on national, regional, or domestic ones. That is why people were addressed by the phrase:

O humankind…” rather than “O my people…” as most of the prophets and messengers addressed their peoples. It can also be noted that this address used either “Oh human kind”, or “O you who believe” in hundreds of the *Qur’anic* verses. The first phrase of address invites people to become faithful and to embrace Islam; whereas the second call is directed for those who are already believers, or Muslims: O you who believe…do so (An-Naim 1990: 32).

Human rights in Islam, interpreted on the basis of the laws and principles said in the Qur’an, followed the humanitarian principles. Some of these principles forbid evil such as theft, murder, deceiving people and aggression etc. Therefore, it can be argued that human rights in Islam are humanitarian-based in accordance with the objectives of the *Qur’anic* discourse that deals with all humans in a general sense. It can be said that the conditions of the Arabs at the time of the Prophet did not constitute the basis for the rulings of the *Qur’an*. On the contrary, some rulings established in the *Qur’an* were not on the list of peoples’ priorities at that time. For example, rights to equality and freedom in the tribal Arab society were not seen as “rights”. In fact, that society used to deny those rights and consider violating them a sign of power.
and sovereignty (Hitti 1970: 23). Therefore, contemporary Muslim declarations and *ijtihad* on human rights are characterized by being diverse on the one hand, and by having additions pertaining to human rights unknown by classical jurisprudents on the other. The Muslim’s creed is based on the belief that the Qur’an has established the principles of human rights through the verses that dignify human beings and honour them through granting them vicergency, responsibility, reason, knowledge, and accountability (Zarzour 2011).

The Qur’an points out that human beings are born ignorant and that Allah has given them the tools to live in dignity. An *ayah* translates: “It is God who brought you out of your mothers’ wombs knowing nothing, and gave you hearing and sight and minds, so that you might be thankful.” (*Qur’an* 16: 78-79). In the same meaning the following *ayah* links between the creation of human kind and the dignity they have been given through knowledge that began by the revelation of the Qur’an. The following translation of a Qur’anic *ayah* provides a clear summary of the honor that humans were granted by the Creator:

> We have honored the children of Adam and carried them by land and sea; we have provided good sustenance for them and favored them specifically above many of those we have created (*Qur’an* 17: 70).

Like the Qur’an, the Prophet emphasized rights to life, the right to freedom and very explicitly the right to equality amongst human beings, which lies in the unity of creation. The latter right was given a humanitarian trait in this
Speech which was attended by more than 120,000 Muslims during the pilgrimage of the Prophet few months before his death:

O mankind! Verily, your Lord is one, and your father is one. No Arab is preferred to a non-Arab, and no non-Arab is preferred to an Arab, or a black to a red, or a red to a black except in piety (fear of Allah). Have I informed you? They said, “Yes, O Messenger of Allah.” Then, the Prophet resumed and said, “What day is today?” “It is a haram (sacred) day (in which no fighting, or killing or destroying living things, i.e. plants and animals, or people may occur),” they answered. Then, the Prophet said, “Which city is this?” “It is a haram city,” they answered. The Prophet said, “Verily, Allah has forbidden (made unlawful) amongst you your blood and property, the narrator did not recall whether or not the Prophet said, “and your honor and your skins,” as He made this day in this month in this city a haram one.” The Prophet then said, “Have I informed you?” “Yes. O Prophet! You have.” Then the Prophet said, “Let those who are present inform those who are absent. This was on the first day of Al-Adha Eid (feast) of the tenth year of Hijrah, corresponding to 632 A.D (Hitti 1970)

The Prophet’s Speech has been regarded as the most important “human rights document” in the Islamic history. The Speech set the criteria for equality which is neither racial nor sexual, equality among Ummah. The
Speech also determined that people’s honour, property and blood is sacred. The same virtues have been repeatedly mentioned in the Qur’an and Sunnah.

According Bielefeldt, people should expect conflicts of human rights with Islam because of the differences in their normative nature or origin. That is one based on freedom of the individual and the other on absolute obedience of believers to religious injunctions. Therefore, according to Bielefeldt, various attempts by Muslims (authors) at constructing human rights in Islam are attempts to reconcile the two, that is, resolving the conflicts between Islam and human rights (Bielefeldt 2000).

The Islamic concept of ‘right’, as recognized today in both their legal and philosophical disciplines, refers to the Arabic term “haqq” (Leaman 2006: 247). Ibn Manzur demonstrates many of the uses of the term haqq in the Arabic language including notions such as confirmation, necessity, correctness, certainty, ownership and truth and it also means truth in speech and becoming certain after being in doubt. Haqq is the opposite of batil (falsehood). It is that which is proven and cannot be denied, and which is true and accurate.

Early Muslim fuqaha’ (jurists) did not attempt to lay down an academic and exclusive definition of haqq from a legal perspective, since, according to them, the meaning in the language the particular word does not need any further definition due to its clarity. Furthermore, the wide range of usage to the word allowed them to use the term haqq in many contexts and to convey different meanings. According to contemporary Muslim legal scholars, there are two main dimensions to the concept of ‘right’. The first one includes a set of rules and provisions that regulate relations, on both the spiritual and
physical level in an obligatory manner, which corresponds to the ‘law’ in legal terms. The latter pertain to authority or power, such as the power of a buyer to return the goods if he or she discovers a defect in that particular goods.

Contemporary Muslim researchers believe that the concept of human rights in the Muslim culture today originated from *al-maqasid* (the objectives) of *Shariah*. These objectives aim, first, at maintaining the necessities of human life, which are: the preservation of human life or the integrity of a person, the preservation of religion, the preservation of reason and sanity, the preservation progeny and the preservation of wealth. Scholars of *fiqh* and legislation hold that this philosophy of the objectives of *Shariah* is at the same time the philosophy of the basic needs that are essential for the individual and social well-being. These basic needs precede more needs, which are expected to provide people with happiness and well being in this world and Hereafter (Muhammad 2001: 305-528).

Islam is a term used in reference to the religion and way of life of Muslims. In addition, it is also the complete submission to the will of God. Hitti pointed out that “in dealing with the fundamentals of their religion Moslem theologians distinguish between *iman* (religious belief), *ibadat* (acts of worship, religious duty) and *ishan* (right-doing), all of which are included in the term *din* (religion). “Verily the religion (*din*) with God is Islam” (Hitti 1979: 128).

Generally speaking, the issues of relevance to human rights in the Prophetic sayings and deeds are not different from those mentioned in the *Qur’an*. In fact what we have in *Sunnah* about human rights complements and clarifies
the conceptual framework of human rights as said in the Qur’an. Furthermore, life of the Prophet and his deeds were the best manifestation of these rights. It was narrated that Aishah, the Prophet’s wife, was once asked about his morals and she briefly answered by saying that: “He was a manifestation of the Qur’an” (Musnad 2001).

The Prophetic sayings cited in Al-Bukhari represent the entire attitude of Islam regarding human rights. They complement what was stated in the other sources about human rights in Islam. “The more we go about this minimized image, the more we emphasize and clarify it... The components of Islam are integrated, comprehensive, and compatible with each other. They are realistic and ideal in the social, religious, economic aspects and all other walks of life pertaining to this world and the Hereafter” (Husni 2002: 140-41).

The Islamic jurisprudence is oriented to the monitoring of the human behavioral nature according to Islamic doctrines. “Theological-ethical deliberations have led to the moral categorization of human acts based on rational understanding of one’s duties and responsibilities. Legal categorization in jurisprudence has simply followed that what was intuitively assessed as necessary (wajib), recommended (mandub), or forbidden (haram)” (Schedina 2009: 42). The interpretative possibility is very important as a source of Islamic law, particularly those concerning human rights.

The emergence of the concept of human rights in modern Muslim thought was manifest in the ideas of the Muslim reformers who lived in what can be called the renaissance age in the East. Among the most distinguished thinkers or reformers are names like Jamal Al-Din Al-Afghani, Muhammad
Abdu Qasim Amin, Abd Al-Rahman Al-Kawakibi, Muhamad Rashid Rida (1865-1935) and Muhammad Iqbal. They called for reform and a renewal of social and political status in their countries by reconsidering two major issues: the power of reason, and reviving Ijtihad; two essential issues basic for establishing equality and individual protection for all. Consequently, the concept of human rights in the modern Muslim thought developed under the umbrella of the call to return to the true spirit of religion, which was absent in the preceding age of stagnancy. A similar religious tendency could be observed in the Arab uprising movements called “Arab Spring” and while the Islamic Revolution (1979) of Iran emerged from the same political background.

**QUR’AN AND HUMAN RIGHTS**

In Islamic community, human rights has been formulated to guarantee the dignity of an individual and the entire community. Abdul Aziz Said (1979) says:

> In Islam in the other religious traditions, human rights are concerned with the dignity of the individual, the level of self esteem that sources personal identity and promotes human community. The religion of Islam establishes a social order designed to enlarge freedom, justice and opportunity for the perfectability of human beings. It also defines political, economic and cultural processes designed to promote these goals (Said 1979:63).

The Qur’an decided the right to life prior to the right to equality. The Qur’an is so keen to protect the right to life, and that is why the Qur’an provides this
right with all possible means of protection and maintenance. The code of penalty for example is not intended to “torture” people; it aims mainly at maintaining the different rights of people, and to begin with is the right to life. Life was protected from aggression by imposing deterrent penalties upon the aggressor, not to forget the punishment in the Hereafter. The Qur’an considered killing one person tantamount to killing all people. In this respect, an ayah translates: “On account of (his deed), We decreed to the Children of Israel that if anyone kills a person-unless in retribution for murder or spreading corruption in the land- it is as if he kills all mankind, while if any saves a life it is as if he saves the lives of all mankind. Our Messengers came to them with clear signs, but many of them continued to commit excesses in the land” (Quran 5: 32). A person may not be killed without a rightful legal reason. A reason could be as in retaliation of murder. The Qur’an goes even further than that by making it unlawful for a person to oneself as the following ayah translates: “…do not wrongfully consume each other’s wealth but trade by mutual consent. Do not kill each other, for God is merciful to you” (Quran 4: 29). The Prophet also proclaimed suicide unlawful in many of the authentic sayings and threatened those who commit suicide with severe punishment in the Hereafter. The Prophet said: “The major sins are: to worship another god besides Allah, killing, mistreating parents and false Witness” (Safi 2007).

Abdul Aziz Said observed that Islam was concerned about the rights of an individual as a part of the community. His observation is interesting: “In Islam as in the other religious traditions, human rights are concerned with the dignity of the individual, the level of self –esteem that secures personal identity and promotes human community. The religion of Islam established a
social order designed to enlarge freedom, justice and opportunity for the perfectibility of human beings. It also defines political, economic and cultural processes designed to promote these goals” (Said 1979: 63).

Qur’an pronounced equality as a human value. There is no distinction among people due to their color, race, language, or region. An ayah translates: “People, We created you all from a single man and single women, and made you into races and tribes so that you should recognize one another. In God’s eyes, the most honoured of you are the one most mindful of Him: God is all knowing, all aware” (Qur’an 49:13). This equality among people includes all forms of equality in both, rights and duties, reward and penalty. It also includes equality between men and women in all the above mentioned aspects. Men and women have been created from one soul as the following ayah translates: “People, be mindful of your Lord, who created you from a single soul, and from it created its mate, and from the pair of them spread countless men and women far and wide; be mindful of God, in whose name you make request of one another …” (Qur’an 4: 1). Islam abolished the absolute freedom granted to men only at that time. Both men and women are equally rewarded or punished. This is the case in most rewards and penalties. It is worth mentioning at this point that equality is not absolute in all competencies and actions.

The Qur’an also declared the principle of shura, which should be considered as one of the most salient features of the Islamic system at both social and political spheres. The doctrines of shura branches from the Qur’anic ayah in which translates: “The sorcerers were assembled at the appointed time on a certain day” (Quran 26: 38). This ayah clearly indicates
the importance of *shura* as a characteristic of Islam, which Muslims should adopt at all times. This discourse is directed to the groups of Muslims in Makkah as well the new state in Madinah. In fact the above *ayah* was revealed to the Prophet in Makkah whereas the following *ayah* is of Madinah revelation after the new Islamic state has been established. The *ayah* indicates *wujub al-shura* it translates: “By an act of mercy from God, you [Prophet] were gentle in your dealings with them- had you been harsh, or hard-hearted, they would have dispersed and left you-so pardon them and ask forgiveness for them. Consult with them about matters, when you have decided on a course of action, put your trust in God: God loves those who put their trust in Him” (*Qur’an* 3: 159).

*Shura* is the major mechanism in governance in the Islamic system. *Shura* must be utilized at all levels starting from the first entity that composes the bigger society: the family. This is manifest in different *ayah* one of them is what is known by “the suckling verse”, it translates: “Mothers suckle their children for two whole years, if they wish to complete the term and clothing and maintenance must be borne by the father in a fair manner. No one should be burdened with more than they can bear: no mother shall be made to suffer harm on account of her child, nor any father on account of his. The same duty is incumbent on the father’s heir. If, by mutual consent and consultation, the couple wishes to wean [child], they will not be blamed, nor will there be any blame of you wish to engage a wet nurse, provided you pay as agreed in a fair manner. Be mindful of God, knowing that He sees everything you do” (*Quran* 2: 233).
In recent times the compatibility between Islam and democracy is raised. Some scholars argued that *shura* means aspects of democracy. Others question such an argument. This question was emerging when the modern state appeared in the world. Those who employ this stance say that their argument lies in the assumption that the Islamic state was theocratic, the country ruled by God. They say that for pious Muslims, the legitimate authority for rule of the country comes from God alone, and the ruler derives his power from God and the holy law, and not from the people, because the participatory democratic notions was not in the world during the origins of Islam. Hence, “the rules of legislative bodies and Islam did not develop any principle of representation, any procedure for choosing representatives, any definition of the franchise or any electoral system. Therefore the following claim is concluded: Islam will never achieve democracy and human rights as long as there is no separation of religion and state” (Odeh 1998: 37-41).

Mohammad Abed al-Jabri deals with practices of democracy in Islam based on “the traditional and the Renaissance authoritative referents”. To him, "the first reads democracy in the Arab- Islamic *shura*, the other drives it from the outcome of development achieved through the struggle for democracy in Europe, which persisted there for more than three centuries. Let us, then, define the image of ‘democracy’ in contemporary Arab thoughts as defined by these two authoritative referents, beginning with the traditional one” (Abed al-Jabri 2009: 122).

The arguments that comprehensive solutions for all dealings of the human life had in the Quran and Sunna got into a crisis at the time of the two great Caliphs, Abu Bakr and Umar. Ibn Al-Qayyim says that Abu Bakr ruled in all
what came to him during his reign first according to the Qur’an. If an answer to a question was not found in the Qur’an, then he would look into the Prophet’s Sunnah. If an answer was not also found to the matter, he would call “representatives” of people for a meeting for consultation and judged by their consensus. The similar policy was adopted by Umar Ibn Al-Khattab. However and apparently, the Qur’an is not a “constitution” draft or a detailed reference book where answers for all questions in the life problems are found.

In this respect, Zarzour argues that the governor in Islam is a competent person who, even though, he is capable of practicing independent reasoning (mujtahid), he is not infallible. He is not a representative of Allah as some say. There are no clergy as governors in Islam. The governor is a deputy for the nation. He granted to the position of imam (ruler) through choice, bayah (pledge), and shura. Infallibility is a characteristic of the ummah (nation or people) when all people come to a consensus about a certain issue. This consensus raises the nation to the level of infallibility as the Prophet says: “My ummah may not have consensus on doing wrong” (Zarzour 1999).

The “nature” of the relation between the Muslim ruler and the people is determined by the extent to which the ruler observes Allah in ruling over “his” people. This means “he” has to govern the people with justice and by the rulings of Allah. Zarzour adds that obedience to the Muslim leader is not absolute due to being a deputy of Allah. On the contrary, it is determined by his implementation of justice and the rulings of Allah. If the leader does not observe this condition, then Muslims do not have to obey him. Consequently, they can revolt against him. It can be said that such an uprising against the
ruler represents the highest degree of political opposition in terms of modern politics. Furthermore, according to Al-Awwa, the governor in Islam is not recognized for “his” personal accomplishments, regardless how great they could be. The principle of shurah is directed to the benefit of the people. Shurah is meant to empower the people and enable them to decide their best interest and avoid dictatorship (Al-Awwa 1989: 202).

The question that poses itself every time shurah is mentioned today is: Who are the representatives of people mentioned in the Islamic history and who should practice shurah? Should they be ahl al-hal wa al-aqd as have been known in the Islamic political thought? Al-Awwa argues that such questions are no more than details that are subject to time and place within certain societies since no mention of such appears in the Qur’an. And it is only the people who should decide on the mechanism of choosing both groups of representatives and who should have say in terminating their mission if their needs are not met (Al-Awwa 1989: 203). Another question comes up at this point: Is governance in Islam is religious, i.e. attributed to Allah, or civil in the modern sense of the word? Zarzour suggests that the nature of rule in Islam is religious in terms of the source of legislation, which is manifest in the Qur’an and the Sunnah. It is at the same time “civil” or “secular” in terms of the source of power which is the ummah, or whoever is elected or authorized to represent the people (Zarzour 1999: 230).

Since democracy is considered a characteristic of the secular system, does shura mean democracy? Al-Qaradawi, in his reply to the many who say that Islam and democracy do not interchange, says that it is legitimate to “import” ideas and techniques in governance as long as they do not contradict a clear
Qur’anic text or rule. According to Mohammad Abed al-Jabri: “The words “democracy” and “unity” have become so popular in our contemporary Arab discourse that they no longer need to be defined, just like the word ‘sky’. In referring to ‘clear matters which need no definition’, our forefathers used to say, ‘this is like saying the sky is above us.’ In the minds of Arabs, who call and struggle for democracy, its meaning is as clear as those of ‘the sky above us’. Democracy, in this sense, is the opposite of injustice, just as the sky is in opposition to the earth” (Abed al-Jabri 2009: 122).

In the case of democracy, the majority opinion is considered as sacrosanct. This does not apply to all aspects of Islamic mode of living. Practice of democracy like voting fall within the territory of *ijtihad* (Al-Qaradawi 1994: 642-44). Furthermore, Safi argues that the values of democracy, in its modern sense, relates to Islam in many ways. He says that democracy presupposes that people treat each other equally. It also presupposes the right to differ; that is for people to have different opinions on various issues. He also says that democracy also presupposes that people of different backgrounds interact peacefully. Back to Islam, Safi stresses that all these values very much relate to many principles of Islam. To begin with is the principle of equality that is clearly mentioned in the *Qur’an* and the *Sunnah*. The same thing can be said about the right of people to have different religious beliefs. He says though that “minorities” is a very modern term in the sense that it supposes a majority ruling over a minority, while minorities in the Muslim history had the right to be different in their faith and in their legal system. In early Muslim societies, “different” people had what Safi refers to as moral autonomy (Safi 2007). That means they administered their own laws which enabled the community to practice what they believe in. Safi
adds, interestingly enough, in early Muslim history there were schools of law, or as he prefers to call them, communities of law. In other words one can be a Muslim but go to community court i.e. Hanifi or Maliki. The community was free and vibrant because there was no central law that forced all people to submit to it, but communities were able to develop their own sense of law and live accordingly. Safi concludes by saying that he believes that modern Muslim societies can be democratic in the sense of holding political officials accountable and by being part of decision making (Safi 2007). Finally, it can be said that Islam provides governance regulations at all levels. It gave sovereignty to the ummah, decided shurah to regulate governance and gave the ummah the right to oppose to the leader, elect “him”, or depose “him”.

THE CONSTITUTION OF MADINAH

The Prophet fourteen centuries ago gathered his companions, the heathens and the Jews to inform them of what he believed to be the best that brings them together and organizes the political authority in their city. They were all amazed by the Prophet’s proposals, which were based on the principle of peaceful coexistence between the categories of people who suffered a lot from wars and from lack of security and organization. The proposals, sahifah, or what is known as the Constitution of Al-Madinah, became an important event in the practice of human rights in Islam.

The constitution of Al-Madinah or “sahifah” can be considered a turning point in the Islamic history because many scholars regarded as the most important written document in the Prophet’s era. Its legal significance stems
from the fact that it identified the components of the ummah and indicated the formation of the state. On the other hand, this document clarified the nature of the relationship between Muslims and Jews, and between Muslims and Christians and many other Tribes. The document is as significant as any other modern constitution in terms of organizing the authorities of the state and the relationships holding between the groups living under the state. The document was established in the first year of hijrah (622CE), a period of belligerence between the two great powers of that time: the Roman and the Persian empires. This belligerence did not imply any rights for enemies neither in peace nor in war. The Arab Peninsula was in a state of anarchy as it was leading a tribal life. There was no central authority nor was there a unified government. Each tribe constituted an independent political unit. Power was the dominating logic amongst tribes. Due to the adverse political conditions dominating Al-Madinah at that time, it was necessary for the Muslims to do something to maintain peaceful coexistence between the various groups of people living there. There came the constitution of Al-Madinah to establish the first constitutional principles that the growing state needs in order to organize its political affairs on the basis of respecting human rights in the best noble form (Traer 1989: 118)

The major principles of the constitution are defining the basis for citizenship in the state. The document stated that Islam is the basis for citizenship in the new Islamic state with all that it implies for freedom and equality. Although Islam was the basis of citizenship, the concept of citizenship was expanded to include the Jews living in the state. Paragraphs 25 to 36 state that the Jews enjoy the same rights and duties as those of Muslims. The freedom of belief was also guaranteed for the Jews. Paragraph (20 b) mentioned some of the
duties imposed on the non-Muslims in *Al-Madinah*. This means that they were included under the rule of the new Islamic state and they were subject to the organizational principles of the state as indicated in the document. This is actually what is known nowadays as the rights of citizenship and naturalization. This right is mentioned in the Universal Declaration of Human Rights (UDHR) in article 15. The *Sahifah* also included a number of other principles such as: maintaining certain pre-Islamic traditions that were practiced by the Arab tribes as in the case of blood money and ransoming captives of war due to the good meanings that these traditions have; maintaining many principles of social welfare such as the need for settling debts; and observing law and order to keep peace and to enable the authority to perform its duties. The right to political asylum and supporting the oppressed and the principle of the “one for all and all for one” were among the principles established in the *Sahifah*.

In conclusion, one can say that the principles established by the *Sahifah* are considered one of the oldest and most important documented laws known for human communities including the Arab society and the neighboring ones. It is worth mentioning here that since the *Sahifah* was not dated, some claim that the items of the *Sahifah* are the sum of eight different *Sohof* (agreements) that have been written separately. The claim suggests that the first three items of the fifty ones make the first two documents that were written in the first *hijri* year, whereas the remaining twenty articles were written in the form of different six documents. However, Al-Mallah provides a systematic argument supported by the authentic evidence refuting the claim mentioned above (Al-Mallah: 2004, 59-63).
CONSTITUTIONAL TRADITION OF IRAN AND HUMAN RIGHTS

In 19th and 20th Century, most of the West Asian and North African countries had witnessed the movements for constitution and constitutional rule. Such changes in this region were seen at first in the North African country of Tunisia. Tunisia had the first Constitution adopted in 1861, the oldest Constitution of this region. Tunisia is considered as the first non-Western country in the world with the modern and new model of the written Constitution was adopted. The 1876 Ottoman Constitution and Meiji Constitution of 1889 in Japan were also coming forth in the 19th Century. Among these new Constitutions, the Constitution of Tunisia was distinguished by the features of the amalgam of Islam and traditional monarchy; it was adopted more elements of rationality. Thereafter, in the West Asian region, Syria adopted a new Constitution, the basic elements were different from the Western notion of the new modern constitutions. Brown and Sherif notes,

The short-lived Syrian Constitution of 1950 grafted a novel ideological element destined to become a staple in Islamic constitution making by declaring the shari’a the main source of legislation (Brown & Sherif 2004: 63).

The Kuwaiti Constitution of 1962 is another example that declared the principles of the Shari’a “a main source of legislation” (Article 2).

If Sharia was becoming source of constitutions in the West Asian region, it is because of the cultural tradition where the people were living under Islamic
traditions in private and public life for a long period of time. Anna Grzymala-Busse studied the importance of religion even in the secular state, and its influences in a state.

The study of religion holds great promise for the study of identity, institutional origins, the state, and the strategies of institutional actors in comparative politics. Doctrinal differences translate into distinct patterns of state institutions, economic performance, and policy preferences. Religious attachments affect voting and popular mobilization. Churches can become powerful institutional players that lobby, influence policy, and form effective coalitions with both secular and denominational partners. Finally, natural religious monopolies and (conversely) resolutely secular countries show how churches have played a central role in the struggle of nations and states. The relationship is thus mutual: religion influences political attitudes and institutions, and politics affects religious practice and political activity (Grzymala-Busse 2012: 421-422).

Political developments in Iran have been closely related with its religious cultural background. The powerful religious linkages within the Iranian community were determinant factors for politics of Iran. Said Amir Arjomand while narrating the constitutional movements of the West Asian region observes that, not only the aspirations of the public, it was the entire ideas of the intellectuals and their works regarding political changes opposing imperialism that influenced the process in the 19th Century. Arjomand observes that; “The movement for legal modernization and
codification of law for state-building in the Near East had begun by this time” (Arjomand 2012: 204).

In the case of Iran there were neither such comparable codification movements nor an alternative judicial system reorganized in the Nineteenth Century. But a Constitution and a first constitutional government were created by the Constitutional revolution in 1906. This Constitution had inherited the dual judicial system consisting of religious Shar’ia court and secular state courts. Arjomand says that the state judicial system was not stable, which faced peoples’ struggle against the complete lack of authority of state judicial system, which followed the Sharia principles. The Shari’a Courts didn’t have a judicial hierarchy system for appeal in case of contradictory verdicts.

Thus, Iran established the Parliamentary system in the beginning of Twentieth Century. The political desires of the Iranian people did not prefer either Islamic model or the Western model. Asghar Fathi observes that: “Thus the desire of many Iranians who have hoped and worked for a democratic system of government since the middle of the Nineteenth century still remains unfulfilled” (Fathi 1993: 702). Throughout the history of people’s movements of Iran, various scholars interpreted people’s movements and struggle for “more democratization”.

Iran witnessed Constitutional demand during a time of clash of many interests such as colonial, religious, secular etc. The colonial interest of the
West as well as the Russia culminated in a war for control of the regime of Iran in the latter half of the Nineteenth Century. Homa Katouzian narrates that history:

> As is well known, the defeat of Iran by Russia, and greater contact with Russia and other European powers, especially Britain, had opened a completely new window to the Iranian elite. Defeating and being defeated, even ruled, by foreigners had been quite familiar occurrences in the country’s history. So had the imposition or importation, since ancient times, of foreign traditions, habits, religions, products and commodities (Katouzian 2011: 757).

Ervand Abrahamian writes about the 1906 Constitutional revolutionary process; “The ancient regime had collapsed without a voice being raised on its behalf. Wealthy Merchants and Street peddlers, wholesale dealers and small shopkeepers, seminary students and Dar al Funun graduates, Clergymen and Civil Servants rising commercial Companies and declining craft gilds, Muslims and non-Muslims, Persians and non-Persians, Haydaris and Nimatis, Shaykhis and Mutashari’s, Sunnis and Shi’is, Bazzaris in the capital and Bazzaris in the provinces, all had joined together to batter down the traditional power structure” (Abrahamian 1982: 92).

The last decades of the Nineteenth Century and beginning the Twentieth Century had created historic developments in Iranian politics. The people come out to struggle against the monarchical policies of the Qajar dynasty and particularly for opposing the monopoly concessions in Tobacco trade
given to Europeans. The public as well as merchants and *ulema* demonstrated in the streets, demanding change in the decision to give tobacco concession. The tobacco merchants’ interests were completely negated by the Shah and it developed into another dimension of struggle, as they demanded for a ‘Constitution’ and ‘Constitutional rule’.

Homa Katouzian narrating the consequences of the Iranian Constitutional Revolution says:

> In 1906 a Constitution laid down the rules and procedures for government based in law. It was the first time in Iranian history that government was ‘conditioned’ to a set of fundamental laws which defined the limits of executive power, and detailed the rights and obligations of the state and society (Katouzian 2011: 757).

Katouzian further states:

> No such revolution had ever happened in Europe, because … there had always been legal limits to the exercise of power in European societies, however powerful the government might be, and however narrow, limited and unequal the scope of the law in defining the relationship between the state and society, and among the social classes. Europe, the law had often been unequal, and unfair to the majority of the people (Katouzian 2011: 757).
The European colonial possession was realized through the strange ways. Katouzian observes that:

It was about the possession, by their new adversaries and competitors, of techniques and institutions which had never been known before, and which gave them such superiority over the Iranians that it looked as if no amount of traditional power and technology might be equal. It almost looked like magic, if not to the elite, certainly too large numbers of people in towns and cities. The tales that were spread about Europe, European cities, European science and technology, European armies, European wealth, European liberties, and not least sexual habits, were mostly fantasy or at least highly exaggerated (Katouzian 2011: 257-258).

As a result of the Constitutional Revolution of 1906-11, the first Constitution was prepared mostly depended on the ideology of the Western constitutional tradition. The new Constitution had peculiar characters, specifically emphasized the constitutional process, not defined by the court and against the development of court-made constitutional law. Article 27 of the Supplement to the Constitution prescribes that “The explanation and interpretation of laws is a special function of the National Assembly” (Farmanfarma 1954: 242). This article strongly supports the supremacy of the National Assembly for making laws. In any circumstances that contradict the Constitution, the law will be the final authority. It means that the
National Assembly will interpret the constitutional provisions, not the Court. It was adopted from the interpretation given to similar Articles in the Dutch and Belgian Constitutions. The purpose of the Iranian Constitution was to restrain the monarchical rule (Farmanfarma 1954: 242)

The Constitutional Revolution of Iran (1906-11) had reevaluated and criticized by the Farmanfarma by observing that; “The scanty material on the history of the revolution reveals that the revolutionaries had patriotic and fanatic convictions, but knew very little of Constitutional theories. Long tradition and background in the field of political philosophy was absolutely lacking. The Constitution of Iran therefore does not have a national scholastic history in which one may find the origins of the concepts expressed in the instrument. Nor was there a constitutional assembly where the Articles could have been debated and their meanings disclosed in the debate records” (Farmanfarma 1954: 243).

Constitutional movement of Iran was not only an isolated movement for demanding a “Constitution” but also a movement against imperialistic and colonial interests. Said Amir Arjomand (1988) notes that in the West Asian and North African region, nationalist movements emerged by asserting the demand for constitutional democracy.

The Iranian Revolution of 1906 was also the first modern revolution in Asia, as well as the first to designate itself a Constitutional Revolution (enqelab e mashrutiyyat). It was followed by the Young Turks Revolution of 1908, which was similarly called the “second constitutional period” on account of its restoration of the Ottoman Constitution. Later in the Twentieth century, the nationalist movement against the
French in Tunisia adopted the name “Destour” (Constitution) and was led by the Destour (Constitution) Party, founded in 1920 (Arjomand 1988: 205).

Afshari’s observes that the Constitutional movement could not understood as “ideological combat of traditional Islam to European Political practices”. To Afshari, “employing purely rational political discourse to prove the compatibility of Islamic tradition with modern European political practices” may not be useful (Afshari 1993: 478). Afshari had studied the gradual changes of the Iranian political climate, and observed that with the influences of the intellectuals and press, people from every sphere came forward and joined the Revolution. Ervand Abrahamian also traced the details of the sections that participated in the Revolution. Afshari’s narrative description gave us the details of the Post-Revolutionary developments of Iran:

Majlis, Iranian Parliament was established by the decree of Grand Vezir, signed by King Muzaffer ed Din Shah (1896-1907) on 1907 few days before his death. The Supplement to the Constitution was signed by his son after succeeding to the crown. There was Pressure to produce the documents, but no intellectual preparation other than copying from Western European countries, mainly Belgium. There is no light therefore to be shed upon the meaning of Article 46 by searching events preceding 1907 (Afshari 1993: 478).

Afshari explains further:

Muhammed Ali was crowned on January 19, 1907, he regretted the Constitution, which was signed by him and his
father, and shot many revolutionaries on protest. An uprising dethroned him in 1909 and his minor son Ahammed crowned. It is from this date of the Constitution of Iran began its real life (Afshari 1993: 478).

The accession of the throne of Iran by Reza Shah with the backing of British power, established the Pahlavi dynasty in 1921. During the reign of Reza Shah (1921-1941), the political system of Iran in practice looked as if, “there was a sort of constitutional holiday in the country” (Farmanfarma 1954: 244). Under his regime, Prime Ministers of Iran were regularly dismissed and appointed.

Constitutional processes during the regime of Muhammad Reza Shah Pahlavi were not satisfactory. Farmanfarma observed that:

> With the amendment of the Constitution in 1949 introducing the power of dissolution, some of these problems were thought to be solved”. In practice, however, this has not proved to be the case. Five other cabinets, within two and a half years, have fallen without dissolution of parliament. In August, 1953, for the first time Dr. Mossadegh tried to make use of this power. He could not obtain the approval of the crown, resorted to a plebiscite, and finally was removed. But in December, 1953, a royal decree for the first time in its history dissolved the parliament of Iran and announced elections (Farmanfarma 1954, 247).

Articles 65, 69, and 70 of the Constitution regulate the criminal prosecution of ministers. These articles provide that parliament must prosecute, and the
Supreme Court shall have original jurisdiction. To implement these constitutional rules, a “Law for the Trial of Ministers and the Jury” was enacted in 1928. The first article of this law reads:

If the prime minister or a minister is accused of committing a crime in connection with his work or duty he shall be prosecuted by the National Assembly regardless of whether or not he held the ministerial position at the time of prosecution (Amendment Act of Iranian Constitution 1928: Article 1).

This law elaborately sets forth the rules for such prosecution and the procedure in connection therewith. Hitherto, ministers always have been tried by the Supreme Court after impeachment and prosecution by the Parliament in accordance with the law of 1928. Mossadegh's trial by a military court was the first of its kind. When the question was raised by Mossadegh in objecting to the court's jurisdiction, the court said that:

since the king had power to dismiss him as a prime minister and the prosecution concerned acts committed after the order of dismissal, these acts were beyond his ministerial functions and therefore within the power of the court. It seems that this military court has upheld the general practice that ministers should not be tried unless prosecuted by the parliament (Farmanfarma 1954: 247).

SHARI’IA IN CONSTITUTION

In recent time, many Islamic countries are adopting their constitutional provisions mainly as state laws inconsistent with Islamic law “Sharia”.

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Within the Muslim societies the people are divided between the supporters of Sharia and the opponents of Sharia. Clark C. Lombardi (2013) observes that:

The impact of a “Sharia Guarantee Clause” (SGC) depends largely on questions of constitutional design: who is given the power to interpret and apply the provision and what procedures do they follow? It then surveys a number of the remarkably varied schemes that countries have developed to interpret and enforce their SGCs, and it considers the impact that different schemes have had on society (Lombardi 2013: 615).

Most of the Islamic countries following the Sharia Guarantee Clauses (SGC) may be having authoritarian or imperfectly democratic constitutions. Lombardi evaluated that:

Unsurprisingly, the designers of SGC enforcement schemes in non-democratic countries have generally tried to ensure that their SGC will be interpreted and applied in a way that permitted or even promoted non-democratic policies. Nevertheless, from the experience of non-democratic countries with SGCs we can draw some important lessons about the types of SGC enforcement scheme that would allow more democratic states to promote both democratic political participation and rights (Lombardi 2013: 615).
Lombardi writes further:

On recent debates erupted in Western liberal democracies about how best to reconcile rights enforcement with democracy. These help to further clarify some issues that aspirations of Islamic democracies will face, as they try to develop SGC enforcement schemes for a democratic society, and they provide insights into the qualities that an institution must possess, if it is to address these issues effectively. A number of Muslim countries are currently debating how best to square a constitutional commitment to respect Islam with parallel commitments to democracy and rights (Lombardi 2013: 617).

On the emanating discussions on how the fundamental attitudes of the Sharia principles accommodates the democratic values, as well as raise the question of who will be the responsible authority of democratic matters, Lombardi says:

In both the Muslim world and the West, there has been debate about whether Islamic Constitutions can ever be truly democratic. Concerned that sharia principles are fundamentally inconsistent with democratic principles, some argue that Constitutions containing SGCs will inevitably prevent a country from realizing democracy or from
respecting liberal rights. Others insist that these fears are misguided. Both sides oversimplify the matter and overlook a crucial point. In almost every country in the Muslim world, people disagree about who can interpret sharia and about what sharia requires. As a result, incorporating an SGC does not, by itself, lead to particular outcomes. Whether an SGC permits or even promotes democracy and human rights depend upon its interpreters (Lombardi 2013: 616).

Hallaq (2001) have different point of view on Sharia and its principles followed by the states. He says whether the Shari`a can be restored depends upon some of the general as well as more technical issues related to the improbability of shari`a becoming a normative legal system in most Arab and Muslim societies today. He points to the dual realities of the nation-state and nationalism which resulted in Western legal principles becoming the dominant discourse in which Islamic jurisprudence or fiqh gradually declined.

**SHI'I PRINCIPLES AND CONSTITUTIONAL DEVELOPMENTS IN IRAN**

Various branches of Shi'ite Islam have their nucleus in “the Party” (shi'a) of 'Ali, the son-in-law of Mohammad, who became the fourth and last universally recognized “rightly guided” Caliph in 656 AD and died (assassinated) in 661AD. Of these, a group organized into a religious sect by
the mid-eighth century was to survive various crises of succession and become known as the *Imami Shi’a* on account of their doctrine of Imamate (divinely inspired leadership). The sect was also referred to as the “Ithna Ashari” (“Twelvers”) because of their belief in a line of twelve Imams as divinely inspired infallible leaders of a community of believers and teachers in religion. The Twelfth Imam, Mohammad al-Mahdi, is believed to have gone into hiding in the year 874 AD. He is considered to be the Lord of the Age, to reappear at the End of Time. The Shi’ia religious sect and its jurisprudence and Shi’ia religious norms as the custom for Persia (Iran) had been accepted by the Safavid Dynasty (1501-1732) in the beginning of sixteenth century. *Twelver-Shi’ia* jurisprudence has ultimately differed from the Sunni school of jurisprudence in many ways, but the three major significant differences are re-assessed by Hallaq (2009) in his important work on Islamic jurisprudence. Hallaq points out that:

The first relates to the divine appointment of the “Imamate”, which begins with the fundamental assumption that there exists a qualitative dissimilarity between human and divine qualities. Man’s intelligence is ultimately defective, with the implication that his understanding of the law is incomplete. This premise entailed that God is bound by duty to make legal obligations known to the human mind. As a means of communicating His signs that embody His Will and Law, God
chose a number of persons possessed of superior qualities and made them Prophets and Imams. The Imam is neither a second class Prophet nor a deputy, as the early Sunnite caliphs were conceived by the Sunnis. He is a substitute for the Prophet, taking on the tasks and functions of the Prophet in his absence (Hallaq 2009: 106-107).

The second premise is that “Imamat” is infallible and that the divine as well as the perfect being never made mistake. An Imam is considered as having superior qualities than everybody of his own lifetime. According to Hallaq,

The Imam would be no less a prophet than the Prophet Muhammad himself. They are considering the jurisprudence of the Islamic law and jurists concerns are that; “it is divine law that forbade our Imams being given the name of prophecy, not reason (Hallaq 2009: 107).

They believe that:

Prophet was an instrument of revelation, whereas none of the Imams was chosen for this task. But since their knowledge is infallible, their ability to convey the divine Law to their followers has the status of certitude (Hallaq 2009: 107).

This divine and inevitable power of the Imams and their influences in Iranian society is important in the legal and political developments in modern
Iran, for the elevated status accorded the Imam appears to run counter to the claim that the master-jurist can replace and fully represent the Imam in the latter’s absence. In fact, the Imams did not delegate their powers to anyone, and were reported to have condemned as fraudulent any political governance in their name.

Hallaq explained that the third premise was constituted by the historical; in and around the 874 AD, when the twelfth Imam disappeared, and since then he has been presumed to be in hiding as a result of the persecution he suffered, and he is known as the “Hidden Imam”. Yet, while hiding, he continues to bear the knowledge of law in its best, infallible and most perfect form.

The Imam thus represents law for Twelver-Shi’ism and they believe that recent practice is not perfect. But at the end of time, the Imam will reappear, implementing his just law with full force, but until then several functions that the Imams had fulfilled must somehow be discharged with the jurist in charge.

Ayatollah Khomeini stayed in Iraq where he was exiled for a decade and later in France before his triumphant return to Iran on the historic Islamic Revolution of Iran 1979. In 1978, Khomeini left “Najaf” in Iraq because of the problems with former President of Iraq Saddam Hussein. Najaf is the centre of Shi’i learning of Islamic law and ethics, this centre was revived by the scholarly works of Muhammad Baqer as-Sadr and his contribution to the
renewal of Islamic law and politics in contemporary West Asia. Sadr not only was a scholar in Shi’is jurisprudence but also a politician; he was actively engaged in the political processes of Iraq. Khomeini formulated his Shi’i principles regarding state from that centre (Mallat 1993: 8-12). Khomeini’s ideas formed a major theological basis for the constitution of the post-revolutionary regime in Iran.

The present Iranian legal system is based on Shari’a, its main source of legislation in constitutional and legal matters. In fact Shari’a is regarded as the theoretical structure of the country's legal system, and it provides the laws as codified by the legislative branch of power and applied by the government. This chapter examines how Shari’a theory of human rights is reflected in Iran's constitutional and legal system in general.

Islamic ulama were involved with the Constitutional revolution of the Iran in the 1906-11 and later they themselves came to the forefront of the revolution against the Pahlavi monarchical regime and toppled the Shah’s rule from the Iranian soil as well as kept the US away. Ayatollah Khomeini returned to Iran and held the power of the Iran and tremendously changed all its social and political face. The new Constitution of Iran was prepared according to the principles of Shar’ia and Islamic Republic of Iran’s state system and legal principles were strongly embedded in Sharia law.

Sharia principles created a crisis in the case of human rights, women rights, freedom of the press, freedom of the association etc. The countries legal shortcomings created serious contradictions with the modern human rights
standards of UDHR doctrines. The strict sense of the Sharia principles of the
government created international criticism as well as the domestic
challenges. As a consequence of its devotion, Iran has faced various
condemnations from international organizations but due to the demand from
the civil society it has been gradually refraining from the strict application of
Shari’a principles in certain aspects.

THE FIRST CONSTITUTIONAL PRINCIPLES OF IRAN, 1906-1911

When the First Constitution of Persia (Iran), the articles of the Constitution
and the Supplementary to the Constitution, was drawn up in 1906-1907,
liberal constitutionalists had intended to follow Western models of
constitution and bills of rights. They hoped to ratify constitutional laws that
would limit the powers of authorities and guarantee fundamental rights and
freedoms. Politically, they successfully recognized the principle of
sovereignty of the nation and the establishment of a powerful parliament
(Majlis), limiting the power of the Shah through the constitution and modern
constitutional system.

This largely incomplete document of 51 articles, dealt with no other
constitutional matter than the establishment and the functioning of a
bicameral legislature. A single article at the end obligated the king to respect
and uphold the legislature. Consequently, a Complementary Annex of 107
articles was added in 1907.

The Revolt of 1890–92 over the concession of Iran’s tobacco
trade was the first political act, properly so called, in Iranian
history, and a prelude and rehearsal for the Constitutional
Revolution, just as the revolt of June 1963 was a rehearsal for the Revolution of 1979. Both these revolts had the sympathy of most of the people, and if they had persisted they would have spread to the whole of the society, as in all such cases in Iranian history. The Tobacco Revolt did not go any further because the state backed down at various stages. The 1963 Revolt did not spread further because the state was strong enough to suppress it quickly with an iron fist, and before the less daring crowds could be encouraged to join the movement (Katouzian 2011: 759).

In the area of human rights, the Supplementary to the Constitution offered the concepts of equality and freedom, guaranteeing civil and secular political rights in its provisions. It recognized the equality of all citizens, and protected freedom of the press and association and some other basic rights. Emerging out of the struggle of modernism and tradition, however, the Constitution failed to institute the principle of separation of religion and state. The persistence of the conservative Ulama, who demanded “Shari’a constitutionalism”, resulted in the ratification of an article in the Supplementary to the Constitution that foresaw a Council of clerics to ensure that no laws passed in Majlis contradicted Shari’a laws. In addition, in several articles, “religious criteria” were invoked as justifications for restricting constitutional right. For example, Article 20 of the Supplementary to the Constitution, guaranteeing freedom of the press, excludes heretical
books or materials harmful to Islam. Article 21 restricts freedom of associations where this may provoke religious disorder. It was these restrictions in the Constitution, in the first year of the Constitutional Revolution, which caused some Ulama to believe in the compatibility of constitutional rights and freedoms with the Shari’a. Shi’ism became the state religion (Iran Constitution 1906: Article 1), and provided for the creation of an ecclesiastical committee, which was delegated to ensure that no legislation contradicted the norms set down by Islam (Iran Constitution 1906: Article 2).

All individuals, including Christians, Jews, and Zoroastrians were recognized as citizens and given equal rights before the law (Iran Supplementary Constitution 1907: Article 8). The authority and the legitimacy of the king was bestowed or vested by the will of the people (Iran Constitution 1906: Article 35). Further protection was offered to individual private ownership (Iran Constitution 1906: Articles 15-17). Nevertheless, the secular Pahlavi Shahs did not observe article 2 and other religious criteria; nor did they respect the fundamental human rights and freedoms guaranteed in constitutional provisions. In practice, the Pahlavi regime left “horrendous human rights records,” (Mayer 1999: 5)

CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN

In the Post-Revolutionary Islamic Republic of Iran, the provisional government prepared the draft text of the new constitution and submitted it
to the Assembly of Experts, consisted of people’s representatives, for ratification. The draft text was based on both Islamic principles and secular models have also borrowed from Western constitutions. The rule of the *faqih* (jurist) have been was introduced in Iran. It assumed that Iran’s politics is based on homogenous Islamic society. Homa Omid observes:

The assumption that the society of Muslims would be a homogeneous, quasi–tribal, hierarchical, respectful and obedient to the laws of God, as interpreted by the Faqih, proved fallacious (Omid 1994: 63).

But it is interpreted differently by Iranian scholar and expert Said Amir Arjomand:

Not surprisingly, it produced a type of constitution I have called “ideological” a category that also includes the Egyptian Constitution of 1971. Its Islamic ideology was the basis of its revolutionary counter-constitutionalism. What is more interesting from our point of view is that it created, in the form of the Islamic Republic of Iran, an Islamic juristocracy or rule by jurists in the literal sense of the term (Arjomand 2012: 204).

In the new situation the secular people and the intelligentsia were regrouping and were securing support among some of the religious classes. The *Mujahedineh Khalq, Fadayaneh Khalq* and the Tudeh Party got
influences among the Armed Forces (Omid 1994: 63). Ervand Abrahamian traced out the clear picture of the Revolution: people converged in to the revolution from the all section of the society, particularly the new social mobilization of the industrialization created capacity in to the people, as well as the middle class government servants also actively came forward in to the revolution, one section of the intelligentsia group labored behind the movement; Abrahamian explained that:

The salaried middle class numbered more than 700000, some 9 percent of the working population. It included 304,000 civil servants in the ever expanding ministries; some 200,000 teachers and school administers; and in excess of 60,000 managers, engineers, and professionals. The total exceeded one million, including college students and other aspiring members of the class. In the past, the term of the salaried class, the term had become more differentiated and specifically associated with intellectuals-writers, journalists, artists, and professors. The intelligentsia continued to be the bearers of intelligentsia rowshanfekr had been synonymous with the salaried middle class. But with the rapid expansion of nationalism and socialism.

Constitutionalization of the Islamic countries in the region of West Asia and North Africa region has seen the prominent tendency of the western educated elites demanding western modernized constitutions. Islamic Republic of Iran and Egypt followed the Islamic stream of legal system but both countries are
traditionally practicing different traditions such as the Sunni system of Islamic law and a Shi’ia system of Islamic law.

In Egypt, the Sunni school that applies is generally the Hanafi School but there is also occasionally reference to the Shafii School of law. In Iran, the Twelver (Ithna Ashari) School of Shia law applies. In each country, the legal system is complex being drawn from many sources but, apart from Islamic law; the main legal system is part of the civil law family having adopted this form in the nineteenth century. Most law is codified including parts of Islamic law (Edge 2009: 821).

The Constitution stipulates three independent branches of government, the executive, the legislative, and the judiciary (Iranian Constitution 1979: Article 59). The President is responsible for the implementation of the Constitution (Iranian Constitution 1979: Article 113) while the Council of the Guardians is responsible for its adherence with the Constitution and the ordinances of Islam. Ministers are appointed by the President, subject to vote of confidence by the Consultative Assembly (Constitution of Iran 1979: Article 133), which has the right to examine and investigate any public matter (Constitution of Iran 1979: Article 76).

Provision is made for locally elected self governing councils at various levels, including provinces, districts, cities and towns (Constitution of Iran 1979: Article 100). Although locally elected councils were foreseen in both 1906-7 and 1979 Constitutions, they did not begin to function for the first
time before 1999. All the people of Iran, whatever their ethnicity or tribal grouping, enjoy equal constitutional rights (Constitution of Iran 1979: Article 19). The rights of non-Muslims are safeguarded in the following terms: “The government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity and to respect their human rights” (Constitution of Iran 1979: Article 14). “Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education” (Constitution of Iran 1979: Article 13).

The Guardian Council (shure-e negahban) is the jurists’ experts in Shariah and “Twelvers Ithna Ashari” legal system and Guardian Council is responsible to authoritatively interpret the Constitution of Iran. Islamic Republic of Iran’s Constitution Article 93 reads: “Without the Guardianship Council, the Assembly has no legal validity as such, except for the approval of the representative, credentials and the election of the six jurists belonging to the Guardianship Council” (Iranian Constitution 1979). Article 94 says:

All legislation passed by the Assembly must be sent to the Guardianship Council for examination. The Guardianship Council in a maximum period of 10 days must ensure that the contents of the legislation does not contravene Islamic percepts and the principles of the Constitution. If there is any contravention and if not, the legislation shall be enforceable (Iranian Constitution 1979).
The Guardian Council members can be attend the parliament sessions, sometimes they are invited to attend the sessions in the emergency bills. Constitutional provision Article: 97 reads:

Members of the Guardianship Council are at liberty to attend the sessions of the Assembly during the deliberations of the members on various government bills for the purposes of speeding up the affairs. But when an emergency bill is being considered by the Assembly, members of the Guardianship Council are obliged to attend the Assembly and express their views on the bill in question (Iranian Constitution 1979).

Guardian Council has the responsibility to supervise the elections of the President, the Islamic Assembly and referendums, it has said in the constitutional Article 99.

Many historians have noted the prominence of the Ulama in major movements of political protest since the nineteenth century, including the tobacco protest movement of 1890-1891, the constitutional revolution of 1905-1911, the oil nationalization crisis of 1951-1953, the uprising ignited by the arrest of Ayatollah Ruhollah Khomeini in June 1963, and the Islamic Revolution of 1979. Abdol Mohammad Kazemi and Ali Rezai observed that: “The extent to which the masses participated in this revolution was certainly both unprecedented and unexpected, but more surprising was that these masses found in Islam an expression of their frustrations and their hopes” (Kazemi & Rezai 2003: 348). In the Post-Revolutionary Iran, through a
referendum it was determined to establish an Islamic constitution. The document was a mixture of the Islamic shari’a principles as well as the modern democratic elements. The first version of the Constitution of 1979 was amended in 1989. The idea of Vilayat-e faqih got a more comprehensive treatment in the amended version.

Hirad Abtahi (2005) explained how a form of a theocratic rule was established in Iran:

In the spring of 1979, after the collapse of the Imperial Government of Iran, a referendum resulted in the abolition of the 1906 monarchic constitution and the approval of the Islamic Republic as a form of government, which in turn led to the adoption of the constitution of the IRI (‘Constitution’). Reflecting the politico-religious vision conceptualized under the leadership of Ayatollah Ruhollah Khomeini, the Constitution was amended in July 1989. Beyond officially renaming the country from Iran into the Islamic Republic of Iran and stating that the Shiite Ithna Ashari twelver Ja’fari school is the official religion of the country, the Constitution makes the system of government of Iran a theocratic one (Abtahi 2005: 637).
The idea of *vilayat-e-faqih* assumed a very significant role that religious leaders can play in politics. Omid examined that the Revolution was orchestrated by radicals and fundamentals; it was a temporary coalition that fell apart almost as soon as Khomeini returned (Omid 1994: 63). Firoozeh Papan-Martin (2013) explained that the Islamic Revolution of Iran was the entire aspirations of the Iranian nationality:

> The concept of Islamic government, based on the governance of the jurisprudent (velayat-e faqih), which was provided by Imam Khomeini at the height of the repression and oppression by the despotic regime, produced a clear and unifying goal among Muslim people. It opened the way for authentic Islamic doctrinal struggle, and further intensified the struggle of the committed Muslim militants both inside and outside Iran (Papan-Martin 2013: 159).

The Islamic tradition in Iran is Twelver Shi’ism, the form of Shi’ism prominent religion in Iran—the Islamic *Umma* under the leadership in the series of infallible imams, the twelfth imam, the Mahdi, disappeared himself from this world in the ninth century A.D. Disappeared Imam called as Hidden Imam will return in the fullness of time to establish the government of truth and justice. Shi’ia jurists also held that during the absence of the Hidden Imam, the vice-regency of the Imam and this mantle of leadership of the community goes to the jurists, or *mujtahids*, themselves. Until Khomeini,
however, the jurists tended to treat the idea that the mujtahids were the true leaders of the community largely as a theoretical claim rather than an actual mandate to assume political power and to rule.

Khomeini was in Paris at the time of the fall of the Shah. He had few of his clerical followers in Iran: Hojatoleslam Mohamad Javad Bahonar, Ayottolla Mohammad Hosein Beheshti, Ayotollah Mohammad Reza Mahdavi-Kani, Ayotollah Abdol Karim Musavi-Ardabili and Hijatoleslam Ali Akbar Hashemi Rafsanjani. On his return on 31 January 1979 Khomeini appointed them as a Revolutionary Council for governing the country. Initially the council members included the secular members, but later it was reviewed and they were excluded from the council and council became a homogenous clergy wing.

Homa Omid observed that:

Qotbzadeh was in fact the man who accorded the title, Imam, to Khomeini. Though normally used by the Sunnis to denote religious leadership, ‘Imam’ for Shi’as represents notions of purity and infallibility. These characteristics had enabled the twelve Shi’i’a Imams to delineate the correct path for their followers and to provide eternal political and spiritual leadership. Since the occultation of the twelfth Imam no other religious leader had used this title. But Khomeini, who saw
himself as the Shadow of God on earth, was all too happy to adopt the title as his own (Omid 1994: 64).

With the constant increase in power of the conservative clerics, the Ulama dominated Assembly of Experts, discarded the draft text on the assumption that it was a secular one incompatible with requirements of the Islamic Republic. The Assembly prepared and ratified the final text of the constitution, which was approved in a referendum in December 1979.

Homa Omid (1994) explained on the mode of referendum:

Khomeini agreed to a national referendum provided it was staged to endorse the Islamic Republic. Accordingly in the referendum of 30 and 31 March, the people were not offered a choice between democracy and Islamic government. What they had was the option of endorsing the replacement of the monarchy by an Islamic Republic. They were asked ‘Do you approve of an Islamic republic. In strict Islamic terms this could be interpreted as demanding a consensus, ijma (Omid 1994: 65-66).

Ayatollah Khomeini claimed 98.2% majority in favour of his government and instructed the provisional government to draw up an Islamic Constitution (Constitution of Iran: Article 1). Mehran Tamadonfar (2001) explained that the serious Islamization was supported by hard-line clerics but later the
clerics themselves divided into two groups, one conservatives and the other moderates.

Like the First *Majlis* of the Constitutional Era (1906-1907) the Assembly of Experts experienced the same challenges over different articles of the new Constitution concerning politics, economy, and fundamental rights and liberties in the Islamic Republic. Once again, the particular challenge of the Constitution was the nature of conflictual relationship between Western concepts and institutions, on the one hand, and Islamic standards on the other. This time, though, the conservatives were in the majority in the Assembly, and they succeeded in introducing more religious criteria in the Constitution. Two unique characteristics of the Constitution are: the principle of *vilayat-e faqih* (the guardianship of the jurisprudent) and the supremacy and application of *Shari'a laws* in every public or private matter.

The system of governance based on the principle of *vilayat-e faqih*, elaborated by the late Ayatollah Khomeini in the 1960s and reflected in the 1979 Constitution, is derived from the core belief that authority originates from God, and ultimate sovereignty is affirmed in Him. Legitimate government, therefore, represents God on earth, directly or indirectly. According to the *Ithna Ashari-* Shi'ite school of Shari'a, after the Prophet Muhammad, leadership of the Muslim *ummah* rests in the institution of the *imamat* (the leadership of infallible Imams) which starts with Ali (the fourth Caliph) and continues through his descendants. In the view of some Shi'ite
ulama, after the Greater Occultation of the Hidden Twelfth Imam beginning in 837-839 AD, according to different narrations, the faqaha, or ulama, represent the Hidden imam, and may establish a legitimate government on earth on his behalf. The system of vilayat-e faqih presupposes the need for a supreme guide in the general conduct of the state. The faqih is uniquely qualified to provide such guidance to ensure the compliance of all laws with Shari'a and to enforce the application of Shari'a laws in the country.

The Constitution of the Islamic Republic, too, vests sovereignty in God, not in the people, and it recognizes the institution of vilayat-e faqih as the system of governance to represent legitimately the sovereignty of God on earth. According to articles 5 and 107 of the Constitution, the Assembly of Experts on leadership composed of only the elected ulama by direct vote of people, appoints one of the qualified faqaha as the leader of the country for an unlimited period of time. The Assembly supervises his performance and could constitutionally remove him anytime. In practice, this is difficult, for the competency of candidates to run for the Assembly's election must be approved by those members of the Guardian Council that are appointed by the leader himself. Beyond these legal-technical obstacles, the role of the leader as God's representative, and the common notion of complete obedience to him make his legal and peaceful removal very difficult.

The leader, according to the Constitution is to train governance and all the responsibilities arising therefrom. All three branches of government operate
under his supervision. He appoints the head of the judiciary branch, appoints
the jurist member of the Guardian Council to supervise the parliamentary
laws, and confirms the president-elects decree. Therefore, unlike Western
constitutions, the idea of three separate branches is “not to maintain a system
of checks and balances, but simply to facilitate management of affairs”. The
leader is also the supreme commander-in-chief of the armed forces with the
power to appoint and dismiss the commander of the armed forces.
Constitutionally, he enjoys many other powers over state affairs and in
practice; there is no limit to his power. He appoints his representatives in all
provinces, foundations, institutions, universities, and other organizations.
According to the interpretation of the Guardian Council, the institution of
vilayat-e faqih and the leader’s decrees and words are placed above the
Constitution and other laws. In sum, the leader unquestionably has the final
word in all social and political affairs of the country. The legitimacy of the
government, in general derives from the leader, and obedience to him equal
obedience to the Hidden Imam and God. It should also be mentioned that the
1989 Amendment to the Constitution, aiming at a more centralized political
system empowered him more than before. It also put three branches of the
government under his direct supervision.

Papan-Matin (2013) explains the problems attached with the entire nature of
the Islamic government:
The executive power has special significance in the execution of laws and ordinances of Islam and in achieving just relations in society. The executive power also plays a vital role toward the ultimate goal of life and must usher in a new Islamic society. Therefore, any complicated system that would delay the achievement of such a goal or impede its attainment will be rejected by Islam. Therefore, bureaucratic systems, which are born out of autocratic governments, will be severely rejected so that the executive system can function more speedily and efficiently in the fulfillment of its administrative duties (Papan-Martin 2013: 165).

A major principle and characteristic of the 1979 Constitution is the belief in the supremacy of Shari'a over other types of constitutional laws, and, thus, the necessity of applying Shari'a laws in every aspect of public and private life. According to the Constitution, all branches of law should be based on Shari'a, Article 4 reads: “All civil, penal, financial, economic, administrative, Cultural, military, political laws and regulations, as well as any other laws or regulations, should be based on Islamic criteria”.

Articles absolutely and generally, prevail over all of the Constitution, and other laws and regulations also based on the criteria of Shariat. This article provides that Shari'a constitutes the supreme law in Iran, and overrides the constitutional provisions, and the Guardian Council has the power even to
declare these provisions, including those related to rights guarantees, contrary to Shari'a and, hence, not enforceable. An-Na'im points out, this would negate the very concept and essential functions of the constitution. The supremacy of Shari'a over the constitutional and other laws has also been emphasized in the Constitution.

It should be pointed out that the Guardian Council consists of twelve members, six jurists to be selected by the leader, and six Muslim legal experts to be elected by the Parliament from the names submitted to it by the head of the Judiciary branch. The Council verifies all the rules and regulations passed by the Parliament to make sure that they do not contradict Shari'a. Secular Legislation and legal precedents are considering *ipso facto* invalid so far as they contradict shari'a. The Council, which replaces the committee of *ulama* provides in the 1907 Supplementary to the Constitution, certainly has more power and greater scope for supervision.

This characteristic of the Constitution, too, separates the Iranian political system from Western democracies, where the will of the majority of the people, or their representatives, is the source of law, and where no law can override the constitutional provisions.

The legal system in Iran is entirely based on Islamic principles, and applies Shari'a laws in civil and criminal codes. In other words, the civil and criminal provisions, constitutional rights guarantees, legal protections and safeguards, procedural law, judicial standards, punishments, and the
formation of legal courts are all based on Shari'a, all trials and hearings must apply Shari'a laws substantively and procedurally. Article 167, furthermore, notes that if a judge could not hold the appropriate law to apply in a specific case, he is required to refer to Shari'a, and settle the case, which, at least in criminal cases, is against the principle of legality of crime and punishment for those Shari'a laws that are not codified in Iran's legal codes.

The constitution, meanwhile, provides major constitutional standards of criminal justice and procedural safeguards for a fair trial and valid determination of such as the principle of legality, the benefit of legal advice guilt or innocence before and during the trial stage the prohibition of arbitrary arrest and torture, the presumption of innocence until proven guilty by a competent inviolability of property. The creation of the new General Courts, however, had a negative impact on these safeguards. These courts replace all the existing courts in different fields, and provide for the abrogation of the function of the prosecutor. In other words, the judge acts as investigator, jury, and judge are single phase study of a case.

The General Courts and the power a judge enjoys in this system, established to expedite the legal process, definitely harm the rights of defendants and basic fair trial safeguards, especially where the definitions and cases of certain crimes requiring capital punishment such as *muharibah* (highway robbery, resorting to arms in order to frighten people) and *ifsad fi al-arz* (corruption on earth) are not clear and are left to the judge to decide. It
should be borne in mind that, according to Article 164 of the Constitution and its interpretation, the head of the Judiciary Branch, appointed by the leader, enjoys the power to appoint, remove, and change the position and location of all judges. It is noteworthy, in passing, that the two above-mentioned characteristics of Iran's constitutional system may contradict each other. While the principles of the supremacy of Shari'a sets religious limits, and requires the application of Shari'a laws in every issue and conduct, the principle of the absolute guardianship of jurisprudent, as interpreted by Ayatollah Khomeini, recognizes no limit when exercising its power to safeguard the Islamic system of the country. According to Khomeini, the preservation of the Islamic state is superior even to Shari'a's principal laws. The leader may suspend or override any Shari'a law indefinitely if he deems that it serves the Islamic system. In this regard, the 1989 Amendment to the Constitution provides that the Council of the Expediency (maslahat) of the System be formed by, and under the supervision of, the leader, and to intervene in any dispute between the Parliament and the Guardian Council over Shari'a laws and to prefer one side based on the expediencies of the system.

Although the principle of the absolute guardianship of jurisprudent, especially with this interpretation of it, places greater restrictions on fundamental human rights and liberties, its preference over Shari'a
secularizes the legal system, at least in practice and in most disputed areas like human rights and *hudud* punishments.

Ayatollah Khomeini and his strong supporters had internally aware about the division among the revolutionary forces from the beginning. Homa Omid observed that:

> Both Ayatollah Taleqani and Shariatmadari were of the view that the religious establishment should only have a consultative part in the running of the country. Khomeini considered it necessary to have a collegial of Jurist consults to act as a collective advising the *Fiqih* (Omid 1994: 69).

Theocracy was not accepted the whole nation of Iran; anti-Theocratic Muslims formed a political party, the Islamic People’s Republican Party (IRIP), the aim of this party was to secure pluralistic political system. IRIP started from the holy city of Qom and they included public as well as clergy elected to parliament. Homa Omid explained the critical voices of Islamic intellectuals during the time of Khomeini:

> Shariatmadari was the only outspoken critic of the new constitution and the rule of the *Fiqih* amongst the *Ulema*. He stood firm in denouncing the public executions of pregnant women and the young and the very old as well as the practices of public whipping, press censorship and purges of academics and civil servants (Omid 1994: 69).
The democratic system of Iran is the amalgam or admixture of the Western democratic elements, Sharia doctrines and the Islamic Shi’ia principles. According to the Khomeini’s idea of the Islamic state will be led by Guardian Council (GC). Gunes Murat Tezcur, narrating the constitutional support and linkages of the Guardian Council, says:

The Guardian Council (GC) (shuray-e negahban) has the power to review all legislation passed by the parliament, authoritatively interprets the constitution (Article 98), and supervises elections to the assembly of experts, the presidency, and the parliament (Article 99). While the jurist members of the GC are elected by the parliament from among nominations by the head of the judiciary, the parliament does not have any power over the Council. The head of the judiciary is appointed by the faqih, who also chooses the remaining six members of the GC. In practice, the GC only reports to the faqih. The amendment of the constitution also depends on the faqih, who may decide to take the proposed amendment to a national referendum. The Islamic nature of the government and the principle of the velayat-e faqih are immutable (Tezcur 2007: 485-86).

Islamic Republic of Iran’s Constitutional principles are totally converged at the controlling power entrusted to the Guardian Council. The tremendous
power and influential position of the clerical regime have been controlling
the political and religious activities. The Presidential position is not reserved
for the clergy but many Presidents of the Iran came from the clerical
background. Tezcur (2007) writes:

The popularly elected president is entrusted with almost all
executive functions, while the popularly elected parliament is
given the task of legislation. The president does not need to be
a religious figure (Article 115) and is responsible to the
people, the faqih, and the parliament (Tezcur 2007: 486).

HUMAN RIGHTS AND IRANIAN CONSTITUTION

The principle of the supremacy of Shari'a in the Constitution, which reflects
the theoretical stand of the Constitution on the question of law and legality,
has significant implications for human rights provisions as well. In other
words, the Constitution has imposed Islamic standards and qualifications on
the rights provisions, restricting their definition, scope, and application in
order to accommodate those rights and liberties within an Islamic frame
work. In fact, similar to the Islamic declarations on human rights schemes,
the Iranian Constitution employs the modern language and concepts of
human rights afforded in Western constitutions and international human
rights documents. However, it imparts its own content in conformity with
Shari'a requirements.
Many argue that by using Islamic criteria to circumscribe human rights, the Iranian Constitution violates, as Shari'a does, basic human rights standards. International human rights standards, intended to protect humanity and the dignity of individuals, do not allow the violation of human rights based on divine relation. Any claim concerning the entitlement of the Muslim majority to implement Shari'a in an Islamic country could be considered only after modern standards of basic human rights for minorities have been met. The principle of majority rule, in fact, is “conditional upon complete and effective protection of fundamental rights of not only the majority or minorities, but also of all individual citizens.”

Any government should basically provide effective constitutional safeguards to secure constitutionalism, according to which the constitutional law is the only supreme law in the country and applicable to all citizens equally. By accepting the supremacy of Shari'a law, Iran’s constitution contradicts the principle of constitutionalism and, therefore, distances itself from democratic governance. Resorting to Shari’a laws contradicts Iran’s adherence to international human rights law. Although Iran continues to be a member of the United Nations Organization, and has never nullified its ratification of the International Bill of Human Rights consisting of the 1948 UDHR, the 1966 ICCPR, and the 1966 ICESCR it has often stressed that it is bound by international human rights at the expense Shari'a laws. These statements have been explicitly or implicitly reiterated by Iran's officials throughout the
post-revolutionary years. Therefore, it is not surprising that the Assembly of Experts of the constitution in 1979 rejected the proposal of some human rights movements that the Universal Declaration of Human Rights be incorporated in the constitution. Besides, since the blurred Islamic human rights standards and principles presented in the Constitution, to be reviewed below, have never been defined, and the scope of these rights have not been clarified, the government could end or restrict the will of rights and liberties approved even by Shari’a. The vagueness of Islamic qualifications would serve the government only to justify its conduct.

Article 20 of the Constitution clearly states that human rights are subordinate to Islamic criteria it reads: “All citizens of the nation, whether men or women equally protected by the law, and they enjoy human, political, economic, and social and cultural right according to Islamic standards” (Constitution of Iran 1979). This article, analyzed below, deliberately excludes the equality of rights regardless of gender or religion. Because of the phrase “and the like”, the article is not exclusive. However, based on Shari’a qualifications, it certainly does not cover gender or religion.

While it appears to guarantee the equality of rights unconditionally, it should be borne in mind that the supremacy of Article 4 (discussed above) overrides all other provisions of the constitution. Therefore, the issue of equality of rights protection before the law, too, is to be subordinated to Islamic criteria. Other rights provisions in the Constitution are also subject to Islamic
restrictions. For example, Article 21 States that: “The government shall guarantee the Article 24 reads: Rights of women in all areas according to Islamic standards.” Articles 27, 28, and 168, dealing with the right to assembly, the right to choose a profession, and the definition of political crimes, respectively, are other examples of rights provisions subject to Shari’a limitations and requiring that rights guarantees meet the terms with Shari’a standards.

The supremacy of Shari’a principles evidently covers all the laws other than the constitution as well. The Civil and Criminal Codes, for example, in articles dealing with human rights and the equality of rights before the law, require the observance of Shari’a laws and apply Shari’a limitations accordingly. Family law and personal law in the Civil Code and crimes and punishments in the Criminal Code are subject to more restrictions.

It may be concluded that the structure and legitimacy of the political system of the country, together with the principles of absolute guardianship of jurisprudent and the supremacy of Shari’a laws have overshadowed the rights guarantees and protections in the Constitution or elsewhere. The latter are subordinated to Shari’a and subjected to its limitations and restrictions. Rights provisions have been formulated in a secular legal framework, but only to be carried out under Shari’a qualifications. This has resulted in a denial of international human rights standards and deprived the people their fundamental rights and liberties.
The unclearness of Shari’a qualifications, the lack of legal patterns and guidelines, and the lack of a strong and independent judiciary system has led to the assumption that Shari’a standards are, in practice, used only to justify the government's conduct and restrictions upon rights for political convenience. Article 8 of the Constitution also provides that, based on a Qur'anic phrase, it is the duty of all citizens and the government in all aspects of life “to enjoin the good and forbid the evil”. Apart from mixing the issues of rights and duties, as it is the case in Shari’a, the article is another example that the government and pressure groups acting independently have used blurred qualifications to restrict human rights and freedoms.

This chapter has closely looked at human rights in Islam and in the Islamic Republic of Iran. It mainly examined the various jurisprudential source materials in Islam, particularly the Qur’an and Sunnah and independent reasoning. Shariah became the cardinal basic elements for the Constitution in the case of Iran. The Iranian Constitution declared that the provisions of the Shariah will determine all legal matters of the country. This is also to be seen in the general context of the debate between universalism and cultural relativism in human rights.

In the subsequent chapters we will examine the human rights provisions and violations in the Islamic Republic of Iran particularly regarding the rights of women and religious minorities of Iran.