Governance in the Constitutions of Iran: A Comparative Perspective

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For this paper I was asked to "put into historical perspective issues of governance in constitutions in Muslim contexts" with regard to the constitutions of Iran in the twentieth century. To do so, the first point to make is that, unlike the Ottoman empire, where the monarch was both the sultan and the caliph — and as you recall, Mustafa Kemal abolished the two separately and one at a time in 1923 and 1924 — monarchy was secular in Iran by the twentieth century because of the growth of an independent Shi`i hierocracy in the preceding two centuries. So the issue of sovereignty was entirely unproblematic. The constitutionalisation of the principle of national sovereignty by the makers of the 1906-7 Fundamental Laws simply meant the transfer of sovereignty in the new constitutional state from the shah to the nation (*mellat*), and did not pose a conceptual problem and therefore generated no debate[1]. So the issue of "sovereignty of God" — so troublesome in its resolution and consequences in the making of the 1956 constitution of the Islamic State of Pakistan never arose.

The implication of this transfer of sovereignty for governance was worked out roughly according to the model of constitutional monarchy in the 1831 constitution of the Kingdom of Belgium: The executive power of the state was held by its ministers under the prime minister on behalf of the nation. If ministers of the state were acting for the sovereign nation, were they responsible to the Majles (Iranian parliament) as the elected representatives of the nation? The

[1] Mohammad `Ali Shah, however, added "by divine grace" (*be-muhebat-e elāhi*), in his own hand in parenthesis after "sovereignty is entrusted by the nation to the person of the king (pādshāh)" in Article 35, when signing the Supplement to the Fundamental Law in October 1907.

section addressing this issue in the Fundamental Law of December 30, 1906, is significantly entitled "On the functions, limits, and rights of the Majles" (emphasis added), and it contained a number of ambiguities. As the constitution was a royal grant, specifying the rights of the parliament being instituted by the shah seemed appropriate. Among the rights the Majles thus received, was the right to question the ministers (Art. 27) — i.e., the right of interpellation. The Majles could, however, only request that the shah dismiss a minister who failed to provide satisfactory answers according to "the laws that bear the royal signature", and was found guilty of violating the provisions of the law (Art. 29). Ministers were answerable to the shah if they relied on a verbal or written command of his as an excuse for failing to discharge their duties according to enacted laws (Art. 28; cf. supplement, Art. 64). On 16 Rabīʿ I 1325/30 April 1907 the Majles brought down the caretaker cabinet of the acting prime minister, Solṭān-ʿAlī Khan Wazīr-e Afkham, in order to establish in practice the principle of ministerial responsibility to the parliament. The right to appoint the prime minister, however, remained invested in the monarch.

Thus, it was only with the Supplementary Fundamental Law of October 8, 1907 that the principle of ministerial responsibility to the parliament was explicitly stipulated (Arts. 58-70). For a comparative view, we should bear in mind that the Ottoman constitution of 1876 foundered on the issue of ministerial responsibility to parliament, which was unacceptable to Sultan Abdul-Hamid and a major reason for his suspension of the constitution in 1878 (Devereux 1963). In Iran, too, the issue was a bone of contention between the first Majles and the new monarchy, Mohammad-`Ali Shah, in 1907. Articles 60-61, 63, and 67-68 which stressed the responsibility of ministers to parliament were in fact drawn up by the committee during a clash with the council of ministers, who, as servants of the shah, refused to consider themselves answerable to

the Majles. Articles 61 and 62, like Articles 107 and 153 of the Bulgarian constitution[2], were intended to ensure the transition from autocracy to constitutional monarchy. Article 67 empowered the Majles to dismiss any minister or the entire council of ministers with a vote of no confidence[3].

As the Majles re-emerged as a major force in Iranian politics after the abdication of Reza Shah in 1941, his young son, Mohammad-Reza Shah began to submit his nomination to the Majles for a formal "vote of inclination" before making the actual appointment. When, in November 1948, the shah appointed Moḥammad Sāʿed prime minister without calling for a prior vote of inclination by the Majles, the former premier Aḥmad Qavām and his party accused him of violating constitutional procedures.

As early as October 1945 the shah wanted to amend the constitution in order to enhance royal authority, and by 1949, he had won the influential support of Sayyed Hasan Taqīzāda, one of the its original architects who argued that the constitutional law and the supplement had both been drawn up in haste and required revision (Azimi, p. 374 n. 30). Although the constitution was amended in that year, the shah was granted the right to dissolve parliament but failed to increase his constitutional power further by obtaining the right to veto legislation (Azimi, pp. 201-07). During the ensuing constitutional crisis during Mohammad Moṣaddeq's 2-year term as prime minister (1951-53), it is the arch-constitutionalist Moṣaddeq who is demanding extraordinary powers while his conservative opponents in the Majles resist his attempts in the name of constitutional order, and when he failed to obtain extraordinary or emergency powers

[2] Although the bulk of the Fundamental Law was a translation of the Belgian Constitution of 1831, a few articles were taken from the Bulgarian Constitution of 1879 (Arjomand 1992).

[3] In addition, two prominent features of the old Persian patrimonial system were abolished: Article 63 prohibited use of the honorific title "minister" by those who did not hold office, and Article 68 forbade ministers to accept any other concurrent service.

for the prime minister from the Majles, Mosaddeq had them approved by a referendum, which was unconstitutional (Azimi, pp. 257-338). Here, we see a paradox somewhat reminiscent of the decade of increasingly authoritarian government by the Young Turks after they forced Sultan Abdul-Hamid to restore the Ottoman constitution in 1908 (Shaw 1976, vol. 2).

If the articles on governance under the Iranian constitutional monarchy in 1906-7 were taken from its blueprint, the 1831 Belgian constitution, those in the 1979 constitution of the Islamic Republic of Iran were based on the 1958 constitution of the French Fifth Republic that had served as the model for Bazargan's draft published in the spring of 1979 — that is, before an Assembly of Constitutional Experts was elected and before Khomeini's theory of Mandate of the Jurist (*velāyat-e faqih*) was publicized. The theory, as we know, was incorporated into the constitution ratified in December 1979, and became its most spectacular, theocratic feature. Let me admit that the second article I suggested we read deals mainly with this spectacular feature, at the expense of the problem of governance that we are discussing today. The *velāyat-e faqih* clearly eclipsed the principle of national sovereignty, which was nevertheless eclectically and inconsistently retained, and placed sovereignty of the jurist at the apex of its constitutional structure, and superimposed upon the Articles pertaining to governance. Nevertheless, the latter survived from the Bazargan draft, albeit at a subordinate level.

Here the most obvious comparative remark is that the governance structure divided the executive power of the state between a president and a prime minister, and did so more evenly than had its predominantly presidential Gaulist model. This meant that the typical problem of cohabitation of a president and a prime minister in the house of power presented itself within a few years, and was one of the major components of the constitutional crisis of the 1980s. The then moderate third IRI President, `Ali Khamenei, found cohabitation with the then radical prime

minister, Mir Hossayn Musavi, increasingly difficult and complained to Khomeini about it. Cohabitation was not the main component of that constitutional crisis; the deadlock between the Majles and the Guardian Council and the issue of succession to Khomeini as the Supreme Jurist were clearly more important. Nevertheless, when Khomeini convened a commission for the amendment of the constitution in 1988, the year before his death; solving the problem of executive cohabitation by centralizing executive power was one of the seven tasks he assigned to them (Arjomand 2001: 311).

Although many of the amendments were approved during the month after Khomeini's death in June 1989, the commission faithfully followed his instructions. The constitutional amendments of 1989 accordingly solved the problem of unsuccessful cohabitation of the president and the prime minister by abolishing the office of the prime minister and putting the cabinet directly under the president as the Head of the Executive Power. The office of the president was further strengthened by allowing him to appoint deputy-presidents (Article 124), and by the creation of a Supreme National Security Council (*shurā-ye 'āli-ye amniyyat-e melli*) chaired by him (Article 176). When president Hashemi-Rafsanjani lost the support of the Majles during his second term (1993-97), Article 124 came in very handy, and he would appoint some of his ministers from nominees rejected by the Majles with votes of no-confidence as vice-presidents, whose number increased as his second term went on.

The president's position vis-à-vis the leader, however, was significantly weakened. A new Article (112) established the Council for the Determination of Interest of the Islamic Order as an organ of the state at the service of the leader. The Maslahat/Expediency Council had been set up by Khomeini *ad hoc* to solve the deadlock between the Majles and the Guardian Council. Its functions now expanded beyond the original intent to impinge on governance. It was now also

to advise the leader on "the determination of the general policies of the regime" (Article 110), and on any other matter he referred to it. The Maslahat Council was thus made into an advisory arm of leadership (i.e., of the Supreme Jurist), and was given the authority to determine major state policies[4]. The already extensive powers of the leader in the 1979 constitution, including executive power "in matters directly concerned with the leadership", were expanded, giving him the power to appoint and dismiss the head of the Iranian radio and television (Article 175), transferring to him, from the president, the responsibility for coordinating the relations among the three powers (Article 57), and entrusting to him the above-mentioned "the determination of the general policies of the regime" (formerly included among the prime minister's responsibilities) (Article 110) (Arjomand 2009: 38-41).

The 1989 amendments, however, did not solve the problem of cohabitation but simply shifted it upwards to that between the Supreme Jurist as the clerical monarch and head of the state with much expanded executive prerogatives, and the elected president as Head of the Executive Power[5]. Between 1989 and 1997, cohabitation between a new leader, Ayatollah Sayyed `Ali Khamanei and the new president, `Ali Akbar Hashemi-Rafsanjani, was workable because the latter had been the former's king-maker in the Assembly of Leadership Experts, and because the former contented himself with the surreptitious promotion of his men into key positions of power. Cohabitation proved very difficult when Sayyed Mohammad Khatami was elected president in 1997 and immediately embarked on his reform program. Just as he sensed the upcoming problem in 1997, Ayatollah Khamanei broke with the precedent of appointing the incumbent president as Chairman of the Maslahat Council by appointing the outgoing president,

[4] This went beyond Khomeini's original terms of institution, which had stipulated that it "should not become a power alongside the other [three] Powers." and another major clerically dominated organ of the conciliar regime.
[5] The 1989 amended constitution thus styled the president, centralizing, in a parallel fashion, Judiciary Power under a head appointed by the leader, and styling the Majles speaker as Head of Legislative Power.

Hashemi-Rafsanjani, to that position. But he went far beyond that, especially after Khatami's supported won the Majles elections in 2000, and frustrated all his reformist measures in the next five years with unscrupulous use of his constitutional powers and control of the Guardian Council and the Judiciary.

To forestall the continuation of the cohabitation crisis, Khamanei helped Mahmud Ahmadinejad beat Hashemi-Rafsanjani's bid for another term as president. This solution worked for Ahmadinejad's first term (2005-2009), but not nearly so well, as the latter began to act as his own man and acted more and more assertively, in his second term. The leader had to resort to threats of impeachment to control Ahmadinejad in his last unruly years of tenure. As no successor with similar personal power, accumulated during over a quarter of a century of leadership in sight, cohabitation may be one of the many serious problems that can arise in case of Khamenei's death.

As for comparisons within the Middle East, the potential for the cohabitation of powers exists wherever executive power is shared between a president and a prime minister. Turkey comes to mind first. When Recep Tayyip Erdoğan became prime minister in 2003, after the sweeping victory of his party (AKP) in the national elections of 2002, there arose a cohabitation problem between him and President Sezer, former president of the (Kemalist) Turkish Constitutional Court, even though the latter's authority was not very extensive. As the AKP got 47 per cent of the popular vote in 2007, Erdoğan solved the problem by using its parliamentary dominance to put his man/foreign minister, Abdullah Gül, in the top seat. President Gül disappointed many by not showing his independence when Erdoğan began to unveil his plans, pre-announced in his infamous earlier remark that democracy is like a train; you get off once you have reached your destination, but thereby avoided any cohabitation wrangle. Arguably the most

important part of Erdoğan's plan was to eliminate the cohabitation problem altogether by switching to a presidential system in two steps. First, by greatly augmenting the powers of the President and making the office directly elective. He made the necessary constitutional changes approved by two referendums to become the first directly elected president of the Turkish Republic in August 2014. Since then, he has set up a parliamentary commission to carry out the second step — i.e., to pave the way for a completely presidential system. As of now, he does not have the necessary two-thirds majority for constitutional amendments, but he may be planning a snap election or a referendum, or both.

In the post-2011 Arab world, there seem to be no comparable cohabitation problems in Egypt and Tunisia, nor in the constitutional monarchies in Morocco and Jordan. In Tunisia, the cohabitation was overshadowed by the prolonged process of constitution-making which lasted until January 2014. The elections for a Constituent National Assembly were held in October of 2010. The Islamist Nahda Party obtained 36 per cent of the popular vote and became the predominant minority in the National Constituent Assembly which was inaugurated on November 22, 2011 and which elected as its President the leader of the Ettakatol, the party which had come third, Mustapha Ben Ja`far. Ben Ja`far proposed a tripartite formula for the formation of a ruling coalition and division of power among its partners which became the basis for an interim constitutional enactment on December 10, 2011 — the law regulating the powers of transitional government. The Law on the Interim Organization of Public Powers defined the constituent and legislative powers of the National Constituent Assembly under its president and the division of executive power between the president of the republic and the prime minister (as the president of government). In accordance with its "three presidents" terms, which softened the cohabitation problem by adding a third (albeit non-executive) president, a tripartite coalition

government was formed, electing as president of the republic the leader of the second coalition partner, Congress for the Republic, Moncef Marzouki, who in turn appointed Hamadi Jebali, who represented the Nahda as the major coalition partner, prime minister.[6] (Arjomand 2014)

Let me conclude by going back to the role of the Iranian Maslahat Council in governance in the IRI since 1989. Its main function may be characterized as legislative, because it was to arbitrate between the Majles and the Guardian Council, and could add anything it wished to the substance of the disputed bills without referring it back to either. But, as I pointed out, it can also set any state policy it is asked to by the leader. The most important example is its radical reinterpretation of Article 44 of the IRI constitution in 2006 to launch the government's so-called privatization of the economy (Arjomand 2009: 184). No parallel institution in the Middle East and North Africa comes to my mind. But it highlights that the constitution of the IRI is more hydra-headed than any other in the Muslim world. Many of its organs can interfere in governance, but do so only periodically as they can be played against one another. Hence their shifting predominance in different periods: the Majles under Khomeini, the presidency under Hashemi-Rafsanjani, the Guardian Council under Khatami, and more briefly and intermittently the Maslahat Council as an arm of leadership when called upon in preference to other organs of the regime.

[6] The *amir* of the Nahda, Rāshed al-Ghannouchi, chose to stay out of government. Furthermore, On March 25, 2012, in a historical compromise, the Nahda irrevocably endorsed Article 1 of the 1959 constitution which declares Tunisia an Arab and Muslim state but contains no reference to the *shari`a* as a source of legislation.

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