

RELIGIOUS ISSUES IN THE IRANIAN CONSTITUTION

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1. INTRODUCTION

Iran is widely recognized as a Muslim state having the Constitution of a clearly confessional nature. Shia Islam was declared the official state religion as early as in 1501 during the reign of the Safavid dynasty and this principle was later confirmed in the subsequent two constitutions of 1906/1907 and 1979/1989. Nonetheless, one must not ignore the fact that for several thousand years, other religions prevailed in the ancient Persian country, especially Zarthustraism. Pre-Islamic Persia (since 1935, Iran) is after all the melting pot of various Eastern and Western cultures and religions, which in turn led to consolidation of Christians, Eastern rites and Jews¹. Their current official position and constitutional ability to practise religion and participate in the parliamentary life in this Islamic country originate from the historical presence of these religions on this territory. In general, religion was always present in the life of Iran (Persia) and after 1979, its instrumental treatment by those in power and its

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¹ The strength of the Persian Empire was built by Cyrus the Great. However, in 330 BC, Persia was conquered by Alexander the Great and the last ruler of the Achaemenid Dynasty, Darius III, was forced to step down from the throne in favour of the King of Macedonia. See A. Banuazizi, M. Weiner, *The State, Religion and Ethnic Politics*, Syracuse 1986, p. 121.

abuse to achieve the objectives laid down in the Constitution became more evident².

In Iran, the Shia Islam became the most widespread, which was especially highlighted in the core doctrine of the Constitution of 1979/1989. The preamble to the Constitution was also drawn in the religious spirit, indicating the central role of the Muslim clergy and the Quran. Furthermore, the system of power was coupled with the covenant of particular power centres with the God, while their activities were determined based on the need to adhere to the religious principles. The Iranian Constitution provided the basis for establishment of such a system of power, which later became known as Islamic fundamentalism, since it referred back to the roots of Islam as seen by the eyes of its original creator, Muhammad himself³.

The early Iranian Constitution of 1906/1907 was also not devoid of religious focus, which was undoubtedly manifested by recognition of Islam as the state religion and Sharia as predominant guidance on the regulation and application of legal norms. The Basic Law also forbade adopting any legal solutions contrary to Islamic doctrine and faith. However, it was not as radically religious the Constitution of the Islamic Republic of Iran. Both Constitutions clearly stressed the social respect for the Shia clergy and the religious values shaped in the tradition of Iran⁴.

2. THE CONSTITUTION OF 1906/1907

The Basic Law of 1906/1907 is the first Iranian constitution and was modelled on the corresponding provisions of the Constitution of Belgium of 1831. It might even be considered as a copy thereof translated into Per-

² A. Ehteshami distinguished as many as four stages in the relations between secular and religious powers in the modern history of the Islamic Republic of Iran, which he named as periods of: confrontation (1980- 1988), accommodation (1989- 1997), détente (1998-2005) and rejection (post-2005). See A. Ehteshami, *Iran's International Relations: Pragmatism in the Revolutionary Bottle*, [w:] *The Iranian at 30, Viewpoints Special Edition*, The Middle East Institute 2009, http://www.mideasti.org/files/iran_Final.pdf [2. 05. 2014].

³ See B. W. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge 2005, p. 100.

⁴ See J. Zdanowski, *Bracia Muzułmanie i inni*, Szczecin 1986, p. 78.

sian⁵. *In genere*, the Constitution was a tangible result of the first Iranian parliament's legislative activity and the result of conversion of an absolute monarchy into a constitutional monarchy. Even prior to its adoption, there were internal discussions concerning the confessional nature of the Constitution, in particular, in the relations between state and religion, the educational system model (religious or secular), the limits of freedom of speech and religion, the rights of religious minorities and women's rights in Islamic traditional society. In the end, the Constitution became a compromise, especially with regard to religious issues in question which had been placed in some of its provisions in the natural course of things. The first and most important article of the Constitution consisting of 51 articles was the one recognizing Shiism as the state religion⁶. The Constitution advocated the principle of secularization, though it was hard to reconcile with the traditional Sharia courts and religious school education. Hence, 1920s witnessed the development of the judicial system which recognized the duality with the use of the ecclesiastical courts, though this situation also gave rise to conflicting opinions as to the boundaries between Sharia law and secular law. It was necessary to take into account those areas of human social activities, which were not included in the Quran and Tradition. Nevertheless, the Parliament (Legislative Assembly) pursuant to Article 2 of the Constitution "could never contradict Islamic injunctions or rules laid down by the Prophet." Members of parliament were treated as Alims exercising the power on behalf of the absent twelfth Imam (these issues are discussed in the following chapter devoted to the next Constitution), and thus received a formal legitimacy to be an authority among the Shiites⁷.

Religious issues were also highlighted in the listing of civil rights i.e. Article 20 and Article 21 of the Constitution. All the Iranian citizens were generally guaranteed the right to personal inviolability, protection of private property, freedom of correspondence, freedom of the press, speech,

⁵ Belgian Constitution was also the prototype for the Turkish Constitution of 1876. See A. Kasrawi, *Tarikhe mashrrotehye Iran*, Tehran, 1954, p. 80.

⁶ See E. Rosenthal, *Islam in Modern National State*, Cambridge 1965, p. 307.

⁷ See J. Witte, *Law, Religion and Human Rights*, „Columbia Human Rights Law Review” 1996, vol. 28, p. 30.

association but conditionally. However, the exercise of the aforesaid rights could not be against religion. The Islamic footprint in the Constitution is noticed also as regards the issue of religious census determining the passive electoral rights enjoyed by men who are Muslims, the citizens of Iran and in the age group of 30-70 years. The Constitution did not contain so many religious connotations as its successor, but generally remained in line with the Sharia. This, however, did not prevent it from being treated as a legal act devoid of clearly outlined goals that have eroded over the next seven decades until the adoption of teleologically distinctive (also in terms of religious objectives) Constitution of 1979/1989⁸.

3. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN OF 1357⁹(1979)

In editorial terms, the Constitution of 1357 (1979) is not divided into articles or other editorial units typically found in the legislation, particularly in the Basic Law. This Constitution is made up of individual parts entitled: Preamble, The Dawn of the Uprising, Islamic Government, The Anger of the People, The Price Paid by the Nation, The Form of Governance in Islam, Governance of the Just Jurisprudent, Economy is a Means not an End, Women in the Constitution, An Ideological Army, The Judiciary in the Constitution, The Executive Power, Mass-Communication Media and Representatives. The very structure identifies two special features of this regulation. One concerns the ideology of the Iranian revolution and the other is the legislature's response to the question about the official state religion. Hence, no one can doubt that political changes can take place based on the assumptions of the Islamic religion¹⁰.

⁸ The period between enactment of the first and subsequent Constitution of Iran was rich in events: the Second World War, the dethronement of Reza-shah, the rule of Mosaddegh, the struggle for nationalization of oil in the years 1951-1953, the referendum on the "White Revolution" (1962- 1963) and finally revolution of 1978-1979 leading to the dethronement of Pahlavi monarchs. See R. K. Ramazani, *Revolutionary Iran. Challenge and Response in the Middle East*, London 1990, p. 18.

⁹ 1357 is the date given according to the Muslim calendar.

¹⁰ See B. W. Hallaq, *op.cit.*, p. 123.

The “Muslim” or more broadly “Confessional” nature of the Constitution is evident in the preamble, which includes a citation from the Quran 52:25: “In the Name of Allah, Most Gracious, Most Merciful He sent aforesaid our messengers with clear signs. And sent down with them the book and the balance (of right and wrong), that men may stand in justice”. The preamble contains also the words explaining that the failure of the previous social movements was “the non-doctrinal quality of the struggles” or “departed from the authentic positions of Islam”. In the section on the Dawn of the Uprising, the religious elements are less exposed in favour of the ideological gains of the Iranian Revolution, although there are also references to calling upon the God (“Allahu Akbar”) by the revolutionaries before the firing squads. On the other hand, the section devoted to the Islamic Government touched upon the themes of consolidation and unification of Iranian Muslims both home and abroad, around the concept of Islamic government, based on the governance of the jurispudent (the issues of the religious leader of Iran are elaborated by the author in the section concerning the amended Basic Law). In the references to the anger of the people, the Constitution used religious borrowings, especially by comparing the revolutionary struggle to Jihad and calling the victims of the fighting as martyrs (presumably religious). The following section of the Constitution referring to the price paid by the nation brought up the religious aspects by citing the slogans of the revolutionaries fighting against the monarchy, including “Independence, Freedom and Islamic Government”. The Constitution was intended to be the foundation of the Islamic regime and the authorities, in accordance with religious doctrine, were to create the conditions for the enactment of the Islamic religious teaching. According to the authors of the Iranian Constitution, the law was to be determined by the Quran and the Tradition (sunnah), while the government was to appear not in terms of supremacy of an individual or groups or a product created by a specific social class, but above all in terms of the institutions forming the law reflecting the divine pattern (according to the sunnah: “And to Allah is the final goal “). In the section on Governance of the Just Jurispudent, the Constitution recalls the sunnah saying that “Administration of affairs should be by those scholars who are learned in regard to God and that which He has permitted (*halal*) and that which He has forbidden (*haram*)”. The title of the following section of

the Constitution, “Economy is a Means not an End” corresponds to the Quran sunnah, which included a lecture on the nature of economic life in the doctrine of Islam. The Constitution relates directly to the religious guidelines. “Women in Islam” is a part of the Constitution which on the grounds of the religion indicates the dignity of women and the importance of family in building the principles of the Islamic system. The next section of the Constitution devoted to an Ideological Army refers to such religious concepts as jihad and faith (Islam) understood in terms of the internal security of the state. Further constitutional provisions indicate the need for functioning of “judicial system that is based on Islamic justice and is composed of just judges who are aware of the precise criteria laid down in Islam”. To confirm this principle, the following surah was included in the Constitution: “When you pass judgement among men, judge with fairness” (within the meaning of Islam). Further references in the Constitution to the tasks faced by the executive power in the context of its relationship with religion explicitly impose implementation of the concept of establishing the Islamic society in the state of Iran. Pursuant to the Constitution, religious significance was attributed to public media designed to promote the Islamic culture and protect the Muslim society against anti-Islamic influences. The people of mass-media were to serve as witnesses and examples of religious attitudes in line with the surah quoted in the Constitution: “Thus have We made of you an ummah justly balanced, that ye might be witnesses over the nations”. The final part of the constitutional law (representatives) contains confessional themes reminding people of the Prophet and the religious formulas to commemorate him in the form of a call “Peace and blessing be upon him and his family”¹¹.

4. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN OF 1357 (1979) AMENDED AND SUPPLEMENTED IN 1367 (1989)

The Constitution of the Islamic Republic of Iran (*Qanun-e Esasi-ye Jumbhuri-ye Eslami-ye Iran*) replaced the first Iranian constitution of 1906/1907 and formally consists of 14 chapters and 177 articles. It should

¹¹ See M. H. Kamali, *Principles of Islamic Jurisprudence*, Cambridge 1991, p. 98.

be noted, however, that in 1989, the Constitution of 1979 was subject to significant amendments designed to systematize it in line with the pattern followed by typical legal acts of the highest statutory rank, while retaining the spirit of the regulation and its Islamic and revolutionary axiological grounds. A distinguishing feature of the Constitution is a clear religious invocation included in the apostrophe “In the name of God the Merciful and Compassionate ...”, which is the so-called Basmala starting each and every surah in the Quran. Not only invocation is borrowed from Basmala but also most of the articles of the Constitution derive from the Quranic verses or hadiths of the Prophet. Hence, for practical reasons, the Iranian *Majlis* issued bibliography prepared by the Assembly of Experts and related to “Quranic verses and hadiths forming the grounds of the Constitution”.¹²

The preamble stipulates also that “The constitution of the Islamic Republic of Iran is a declaration of the social, cultural, political, and economic foundations of the Iranian society based on Islamic principles and norms that reflect the heartfelt desire of the Islamic community.” However, Article 2 of the Constitution refers directly to the religious (Muslim) grounds of the constitution, while Article 4 of the Constitution implies that injunctions of Islam should be a model for the entire legal system of the state, even more so that the article “governs all the articles of the constitution, and other laws and regulations.” The aforesaid constitutional provisions clearly indicate the primacy of the Quranic law over the statutory law. In addition, the constitution of the Islamic Republic is based on the specific dogmas of faith. Article 2 of the Constitution promotes the Shahada, or profession of faith (“There is no god but Allah”), and hence the exclusive attribution of sovereignty and the legislation of law to Him, and the necessity of surrender to His commands. The same constitutional provision pointed to the role of divine inspiration in the articulation of the laws, justice of God in creation of the world, the importance of Sharia and qualified jurists¹³.

¹² See Parts of Quranic verses and hadiths forming the grounds of the constitution-*Majlis-e Eslami-ye Iran*, Tehran 1986, vol. III, p. 1877–1883.

¹³ See D. Pearl, *A Textbook on Muslim Law*, London 1979, p. 19.

It should also be remembered that the Iranian Constitution clearly reveals the privileged formal position of Leader – Muslim Jurisprudent. He is at the top of the state hierarchy and the legislative, executive and judicial powers are actually subordinated to him. The position of the leader is strongly bound to the Islamic justification (Shiism) and he is to replace the Twelfth Imam, the so-called hidden imam (Article 5 of the Constitution)¹⁴. This concept of power has been prevailing officially since the Islamic Revolution of 1979, indicating the possibility of governance by a religious scholar, knowledgeable about religion and law, in the absence of the twelfth Imam, Mahdi, on earth. This principle is also referred to as the concept of the rule of the Islamic jurisprudent (*wilayat-e faqih*) and can safely be called the foundation of the Iranian political system¹⁵. The leader

¹⁴ Shiism is the most popular offshoot of Islam in Iran and in southern Iraq, being in opposition to Sunnism. Shiites also called Alids, as they derive in a straight line from Ali, the son-in-law of Muhammad and worship all the Imams, starting from Ali until the sixth Imam. After the death of Ja'far al-Sadiq (the sixth Imam), there was a division among the Shiites into two schools: the Ismailites and Imamites. The first ones recognize seven Imams, while the others have adopted the concept of the twelve Imams (hence they are called twelvers), except that the last Muhammad has gone into hiding (*Ghaybat*) and will reappear suddenly in the future as the Mahdi or Quaim (i.e. the one expected). During his absence, the Muslim jurists "take the wisdom of Allah and interpret His revelations". In contrast, the Sunnis based their religious doctrine on the theory of the caliphate, according to which the caliphs derive their power and authority from umma. See M. Stolarczyk, *Iran. Państwo i religia*, Warszawa 2001, p. 16-17.

¹⁵ Contemporary Iran is a place of various conflicting concepts concerning the time for fulfilment of the vision of the reappearance of the hidden Imam, also called in Arabic *imam zaman*. Dissemination of such information bears the hallmarks of political marketing and is geared for a specific image-effect. In recent times, the public Iranian television showed a series of documentaries under the telling title *The second coming is imminent*, in which the President Ahmadinejad was presented as the embodiment of Shuaib bin Saleh, a holy man to accompany the hidden imam. Mahmoud Ahmadinejad, a former guard of the revolution sees the signs of the reappearance of the hidden imam in the world events related to natural disasters, general economic recession and the so-called Arab Spring. The president publicly manifests his commitment to the twelfth imam, praying for his imminent arrival and even gathered his ministers (as he is the actual Prime Minister) at the well in the Jamkaran Mosque near Qom, where the expected imam is to appear. Interestingly, the current Iranian President deliberately maintains a distance in relations with Khamenei, though his predecessors were in a close relationship with the ayatollahs (teachers) established in Qom. See *Iran's Stolen Revolution*, Open Democracy, <http://www.opendemocracy.net/article/iran-s-election-and-what-comes-next> [2.05. 2014].

must have specific qualifications to be called a leader (*Rahbar*). Hence, it is not only about his perfect knowledge of Sharia law but above all about having the characteristics of a fair and charismatic leader. Especially charisma coming from God was the factor justifying the enactment of laws and normalization of social life by a person endowed therewith. Based thereon, the concept of Imamatus has been developed, which is also reflected in the Iranian Basic Law establishing the Musliman theologian as the head of state (this applied both to Ayatollah Khomeini and Khamenei). The title of the leader is not inheritable but the dying leader may appoint his successor, given the highest religious authority and dignity possessed in the Shiite hierarchy. The spiritual leader of Iran, referred to not only as *rahbar* but also as *Wali-ye Faqih*, *Wali-ye Amr*, *Faqih* or *Sarparast* in accordance with the Constitution (Articles 5 and 107), enjoys a wide range of competence. His powers include determination of the general directions of the state's internal policy and supervision of the overall functioning of all organs of power. The leader has also been granted the authority to declare war, peace, and to mobilize forces as well as to command the Iranian armed forces. He is also empowered to issue appointments and dismissals of representatives of the judiciary, the heads of radio and television, Chief of General Staff, commander of the Revolutionary Guard Corps, military commanders and special services. In addition, *Rahbar*, at the request of the Parliament, can dismiss the President, who is appointed and dismissed by the Assembly of Experts. The leader also affects the determination of the presidential election results by nominating the candidates for that office according to the criteria set out in Islam. With the help of the Consultative Council, he oversees the state policy and any changes in the constitution are not possible without his participation, as the Council for Amendment of the Constitution begins works at the request of the Leader and a draft thereof must be re-approved by *Rahbar* in order to be the subject of a subsequent referendum vote. This Iranian concept of granting the body with clear confessional connotations the authority to exercise the superpower over all the state authorities is not followed in the constitutional orders of other states and makes the Iranian spiritual leader really strong.¹⁶

¹⁶ See M. Sadowski, *Powstanie i rozwój islamskiej doktryny prawa*, „Przegląd Prawa i Administracji”, 2003, nr LIV, p. 28-29.

The second person in the country after the Leaders is the president (*rais jombhur*) and there is a presumption of competence in his favour, where it is not directly guaranteed constitutionally for the Leader. With respect to the president as an executive authority, the Constitution refers to the religious aspects twice. First, Articles 115 indicates that the president must be elected from among the religious and political elite who, apart from Iranian origin, shall meet the criteria of good administrative leadership, honesty, believing in the fundamentals of the Islamic Republic of Iran and the official religion of the country, while being above all a pious person. In practice, this means that only a practising Muslim can become the president. This religious requirement must be balanced against the need to obtain the Leader's approval for each of the presidential candidates, as it was already mentioned. In addition, the president must reckon with his opinion when appointing ministers of defence and foreign affairs, the most important ones from the point of view of the state security, which significantly limits his position against the Leader, though the president is in fact the head of the Iranian government¹⁷.

Confessional issues related to the President may be specified on the basis of Article 121 of the Constitution, which cites the oath made before the Islamic Assembly with the participation of the judiciary and members of the Guardian Council. The text of the presidential oath contains references to the God and the Islamic values appear repeatedly. First, there is a reference to "God the Merciful, the Compassionate", whose presence is evoked by the one making the oath, who commits to preserving the state religion (Islam) against the "Almighty God". In addition, the oath is made to the Holy Quran, which is an external symbol of respect for the Islamic law. Later in the oath, the person taking it undertakes to promote faith and morals and to advocate law and justice (meaning Sharia). In the last phrase of the oath the president, while holding his office, wants to "seek help from God and follow the Prophet of Islam and the Immaculate Imams."¹⁸ It is

¹⁷ See B. W. Hallaq, *op. cit.*, p. 109.

¹⁸ For a comprehensive understanding of the spirit of the presidential oath, it is necessary to quote the full text, which reads as follows: "*In the Name of Allah, Most Gracious, Most Merciful As President of the Republic I take an oath, before this glorious Qur'an and the Iranian nation, on God the exalted and the powerful, that I will guard the official religion of the country, the*

worth noting that no other oath (i.e. non-Islamic or even non-religious) is provided for, which in practice means that the failure to swear the oath according to the formula of Article 121 of the Constitution prevents taking up the presidential office in Iran¹⁹.

Another constitutional authority in Iran is the Islamic Consultative Assembly, often referred to as *Majles* (from Persian), or parliament (full name is *Majles-e Shorâ-ye Eslami*). The phrase “Islamic” gives this legislative authority a quasi religious nature. Religious connotations will also apply to other institutions in the area of legislative power e.g. participation of followers of other religions than Shiite in the Parliament, religious oaths or prohibition to legislate contrary to the principles of a state religion²⁰.

Article 64 of the Constitution provides for the possibility of having the representatives of religions other than Shiite in the Parliament. The number of such representatives has been set to a total of 5 people, which in the case of the Iranian *Majles* composed of 270 MPs corresponds to only approx. 0.02 percent of the total number of MPs. Pursuant to Article 64 of the Constitution the right of representation in the parliament has been awarded according to the following religious (non-Islamic) formula: Zoroastrians and the Jews each elect one representative; the Assyrian and Chaldean Christians elect one representative together; the Armenian Christians of the North and the South each elect one representative. The inclusion of these religious communities in the Constitution has undoubtedly historical

order of the Islamic Republic, and the constitution. I will employ all of my capabilities and qualifications toward fulfilling the responsibilities that I have undertaken. I will devote myself to the service of the people and the advancement of the country, dissemination of religion and morality, and protection of truth and justice. I will avoid any form of autocracy and will protect the freedom and dignity of the individuals and the rights that the constitution has granted the nation. I will not withdraw from any endeavour toward safeguarding the borders and the political, economic, and cultural independence of the country. By seeking help from God and following the Prophet of Islam and the Immaculate Imams, peace be upon them, I, like a wise and devoted trustee will cherish as a sanctified trust, the power that the nation has bestowed upon me, which I will transfer to the person whom the people elect after me”. Citation deriving from: M. Stolarczyk, *op. cit.*, p. 212.

¹⁹ <http://www.iranmania.com> [1. 05. 2014].

²⁰ See J. Bielawski, *Islam*, Warszawa 1980, p. 98.

justification, while the adopted proportions and omission of other provisions of Islam, for example Sunnis or Alawites is incomprehensible²¹.

Like in the case of the president, the oath made by MPs taking their parliamentary mandates has a religious formula. The only difference is that, since the MPs may be the followers of other religions than Islam, Article 67 provides for the possibility of taking an oath in relation to their own Holy Books. The text of the oath comprises direct references to the Islamic religion ("to be the guardian of the sanctity of Islam" and in another place "respect the faith," presumably Muslim). The Constitution obliges all, irrespective of their confessional commitment to make the Islamic oath, while not providing for any alternative formulas, for example, by Zoroastrians, Jews or Christians. Nonetheless, it must be kept in mind that oath made MPs, though saturated with religious elements, is not as abundant with them as the presidential oath²².

It cannot be ignored that the legislative activity of the Iranian parliament must take into account the need to legislate only such laws that are in accordance with Sharia law, while all adopted resolutions must be approved by the Guardian Council, which confirms their compliance with Sharia and the Constitution (Article 72 of the Constitution). Adoption of the principle forbidding to legislate the laws that contradict Islam is a consequence of its recognition in the Constitution as a state religion. Article 4 of the Constitution clearly states that "All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria." The foregoing demonstrates that religious doctrine governs all areas of human and social activity and

²¹ See W. Giełżyński, *Rewolucja w imię Allaha*, Warszawa 1979, p. 19.

²² Article 67 of the Constitution provides for the following oath to be taken by MPs: *"In the Name of Allah, Most Gracious, Most Merciful, Before the holy Quran, and the Exalted and powerful God, I take an oath on God the exalted and powerful. Relying on human dignity I pledge that I will be the guardian of the sanctity of Islam, and the protector of the achievements of the Islamic Revolution of the Iranian people, and the foundations of the Islamic Republic. I pledge to protect, as a just trustee, the trust that the nation has accorded to us; to abide by justice and virtue in performing the duties of a representative; to be always committed to the independence and advancement of the country, the protection of the rights of the nation, and the service to the people; to defend the constitution; to keep in my words, writings, and opinions the independence of the nation, the freedom of the people and the protection of their interest."* See M. Stolarczyk, *op. cit.*, p. 200-201.

concerns the legal acts issued at all the levels of regulatory activity. The guarantors ensuring the proper implementation of this requirement are “Islamic Jurisprudents of the Guardian Council”.²³

Another Iranian constitutional (Article 91) authority having religious connotations is undoubtedly the Guardian Council of the Constitution (Guardian Council of the Constitution), also called as the Guardian Council. This can be seen especially through the prism of the composition and competence of that body. The body consists of 12 people, half of which are clergy and the other half—experts in Islamic Law, (referred to as *fuqaha*) and is designed to ensure compliance of the legislation with Sharia and all the draft laws of the Iranian parliament must pass through this “religious sieve”. Only a positive opinion of the Council allows further legislative works.²⁴

In contrast, the Assembly of Experts of the Leader (*Majles-e Khebragan-e Rahbbari*) is a body forming along with other institutions the Council for Amendment of the Constitution²⁵. Composed of 86 Muslim clerics, it has been generally appointed to designate the Leader and control its activities. The permission to influence changes to the Constitution is rather illusory, since in fact the Council for Amendment of the Constitution has limited options to act. Article 177 of the Constitution clearly states fact that the fundamental provisions of the Constitution cannot be changed. This applies to the articles governing, *inter alia*, the Islamic nature of the political system, general legal assumptions modelled upon principles of Islam and the dogmas of faith, secular and religious leadership of the nation and the official religion of Iran. The above-mentioned catalogue is rather extensive and in fact leaves no room for manoeuvring²⁶.

²³ See I. J. Petruszewsky, *Islam in Iran*, London 1985, p. 91.

²⁴ See A. A. Sachedina, *The Just Ruler in Shiite Islam*, New York 1988, p. 43.

²⁵ The Council of the Amendment to the Constitution of the members of the Monitoring, heads of the three powers, the members of the Congregation for steel. Conservation Interest State, members of the Assembly of Experts Leaders (5), 10 persons appointed by the Leader, 3 from the Council of Ministers, three people with justice, 10 people-members of the Assembly of the Islamic and 3 representatives of the university (see. Article 177 of the Constitution).

²⁶ See L. Rosen, *Equity and discretion in a modern Islamic legal system*, „Law and Society Review” 1980-1981, no 2, p. 110.

In addition, Article 7 of the Iranian Constitution invokes the relevant surah of the Koran to justify the functioning of the executive in the form of the Islamic Consultative Assembly, Provincial Councils, Town Councils, Neighbourhood Councils, District Councils and Village Councils, thus all levels of central and local administration in Iran. The executive (administrative) authority in accordance with the objectives of Islam is “for Them, who conduct their affairs according to these commands, by mutual consultation” (42:38). At the end, the assignment of religious content to the concept of exercise of the public authority is typical of the constitutional order of the Islamic Republic of Iran²⁷.

In the area of the judiciary power, the Constitution allows and even requires the use of Koranic law in a situation where the applicable state legislation is unclear or there are gaps in the law. This applies particularly to “enforcing the conditions and regulations of the established Islamic penal code” (Article 156 of the Constitution)²⁸. Besides, the judiciary is generally based on the Koran and the principles of Islam, since the judges have the right to direct the use of Koranic injunctions and prohibitions, or appeal to the *fatwas*, which is a distinctive feature of the legal system²⁹. The very institution of *fatwa* is so interesting that it is worth devoting more attention. *Fatwa* is generally an opinion of the mufti respecting the rules of Sharia, addressed to a specific set of facts. It is supposed to fulfil diverse tasks, as it can be a form of advice to the ruler or guidelines for judges and morally educate the umma. But mostly we deal with fatwas which are answers to specific questions, derived especially from the judge asking at least two muftis for it. Although the decision rests with the judge applying

²⁷ See P. Owsia, *Formation of Contract. A Comparative Study under English, French; Islamic and Iranian Law*, London 1994, p. 87.

²⁸ See J. Bury, J. Kasprzak, *Prawo karne islamu*, Warszawa 2007, p. 125.

²⁹ The Iranian justice system is not uniform, since apart from the ordinary courts there are also special courts for the clergy and revolutionary courts, both, however, not confirmed in the constitutional regulations. The first of the courts operating independently of the judicial system and subject to the religious leader is involved with crimes committed by the clergy and their activities contrary to Sharia (judgements of this court are final). In contrast, the revolutionary courts have no clear relation to religious issues, as they are principally engaged in matters relating to national security threats and drug trafficking (use thereof is prohibited in Islam). See A. Hiri, *Shi'ism and Constitutionalism in Iran*, Leiden 1987, p. 43.

the legal standards, no less evident is the interaction not only of the judge and muftis, but also the Koranic schools laying down the principles of the Islamic law and the state executing the judicial decisions. There was a clear symbiosis and the actual interdependence of various institutions that form the Islamic legal system.³⁰

Also Article 110 paragraph 11 of the Constitution, providing for the right of pardon or commutation of sentence, refers to the procedures consistent with the principles of Islam. This power is attributed not to the office of the president and the competence of the religious leader, taking actions at the request of the superior judiciary. Religious law is applied in this case in parallel to the statutory legislation³¹.

In addition to the religiously ideologised bodies of legislative, executive and judicial authorities, the Iranian Constitution lists a number of other state institutions, whose activities bear the stamp of the Islamic religion stigmatizing them, for example, by religious composition, religious competence and special prerogatives arising from the confessional belonging. These include the Islamic Revolutionary Guard Corps – *Sepah-e Pasdaran-e Enqelab-e Eslami* (Article 143 of the Constitution), and the Basij, having no grounds in the Constitution (the full name is *Niru-yi Moqavaemat-i Basij*, translated as “The Organization for Mobilization of the Oppressed”). Both have military or paramilitary nature and are designed to protect public order and public (including religious) morality, except that the Corps is the professional formation and *Basij* members are volunteers. Furthermore, Article 144 of the Constitution explicitly stipulates that “The Army of the Islamic Republic of Iran must be an Islamic army” and further Article 151 refers to compulsory military training for all

³⁰ The fact that issues concerning contemporary *fatwas* are important in Europe is demonstrated by founding the European Council for Fatwa and Research in London in 1997. The *fatwa* best-known to the general public, not only in the Muslim world, was Ayatollah Khomeini’s *fatwa* of 14 February 1989, concerning the author of *The Satanic Verses*, Salman Rushdie, communicated that “the author of *The Satanic Verses*, a text written, edited, and published against Islam, the Prophet of Islam, and the Quran, along with all the editors and publishers aware of its contents, are condemned to death.” See W. Bar, *Wolność religijna w Dar al- Islam. Zagadnienia prawa wyznaniowego*, Lublin 2003, p. 148-152.

³¹ See I. C. Kamiński, *Możliwość tworzenia prawa w islamskiej kulturze prawnej (zarys problemu)*, „Państwo i Prawo” 1997, z. 7, p. 54.

citizens based on the principles of Islam. Therein, the Constitution evokes a relevant verse of Koran reading: “Muster against them all the men and cavalry at your command, so that you may strike terror into the enemy of God and your enemy and others beside them who are unknown to you but known to God”³².

In addition, development of foreign policy reveals religious elements, as according to Article 152 of the Constitution, its objectives should aim at, among others, to defend the rights of all Muslims. The interest of other religious groups, even those operating legally, is not taken into account, since the needs of the Shiite majority in Iran are treated as a priority³³.

Article 26 of the Constitution *in genere* formally allows freedom of parties, associations and trade unions, Islamic associations, or associations of the recognized religious minorities but does not do so unconditionally. The condition imposed by the legislator requires respect for the principle of “not negate the principles of Islamic criterion.” Hence, the Iranian constitutional system does not provide for the institution of a political party in the Western sense, while the existing ones (mostly conservatives and reformists) have primarily the electoral nature³⁴. The principle stemming from Article 26 of the Constitution concerning the political parties has been extended in the following article to associations in the form of organizations and pacts. It also set forth the condition for not violating the principles of Islam. Article 24 of the Constitution concerning freedom of expression of opinion by publishing houses and newspapers is maintained in a similar vein. The constitutional prohibition to negate the assumptions of Islam is reflected in the law specifically relating to this issue. The institutions of radio and television of the Islamic Republic of Iran have a typically religious nature. Article 175 of the Constitution gives them the freedom to express and publish opinions, but on condition that the

³² See T. Rahman, *Islamization of Laws*, „Hamdard Islamicus”, 24 (2001), no 1, p. 95.

³³ See M. al-Gazali, *Zasady moralności islamu*, Łódź 1994, p. 19.

³⁴ Currently, the party system in Iran is based on the functioning of several political organizations with the potential to vote relevant laws in the Parliament. This applies mainly to the Society of the Militant Clergy (conservatives), Alliance of Builders of Islamic Iran (technocrats) and Muslim socialists gathered around the Organisation of the Islamic Revolution and the Society for the Defence of the Islamic Values. See M. Stolarczyk, *op. cit.*, p. 231.

principles of Islam are adhered to. The same provision of the Constitution specifies that the Leader appoints and removes the head of the mass media of the Islamic Republic of Iran. Juxtaposition of these two constitutional provisions clearly indicates the place of the government controlled media in the implementation of the Islamic policy of the government of ayatollahs. The Constitution leaves no loopholes for non-Islamic radio and television broadcasters and the content contrary to Islam, disseminated via the Internet, which has been clearly articulated in the Act on the policies and procedures for management of the organization of radio and television, and control thereof adopted under the delegation resulting from Article 176 of the Constitution. Pursuant to Article 28 of the Constitution, even the choice of the profession should not be to the detriment of Islam, and therefore the formal and legal position must be understood correctly, for example, the Clergy of Christian communities not recognized by the state. Their legal status and generally the lack of legal protection by the Muslim state require an in-depth legal analysis beyond the framework of these considerations³⁵.

It is worth noting that the first articles of the Iranian Constitution refer to the rights of citizens, for example, by focusing on the importance of family in the Iranian society (Article 10). However, which is understandable, it promotes family ties based on morality and the laws of Islam. Granting rights to women is a clear reference to their position in the Islamic religion (Article 21). This is particularly true for the Islamic institutions exercising care of the women, who do not have a legal (religious) guardian, such as widows and older women, and the legal construction of bestowing the custody of children, in accordance with the Islamic law, to the qualified mothers³⁶.

A distinctive religious feature of the constitutional order of Islamic countries is the inclusion in the Basic Law of the clause of religious solidarity among the Islamic nations. The Iranian solutions also provide for the need to implement the obligation "to base its overall politics on the merging and unity of the Muslim nations" in its government policy (Article

³⁵ See J. Schacht, *An Introduction to Islamic Law*, Oxford 1998, p. 65.

³⁶ See J. J. Nasir, *The Islamic Law of Personal Status*, Londyn 1986, p. 29; H. Ramadan, *Kobieta w Islamie*, Łódź 1993, p. 16.

11 of the Constitution). Furthermore, the Iranian Constitution explicitly refers to the need for efforts aiming at “the unity of the Muslim world” (Article 11)³⁷.

However, the most distinctive confessional accent in the Iranian Constitution is the recognition of Islam as the state religion. Article 12 stipulates that the official religion of Iran is Islam and the Twelver Ja‘fari school of [shi‘i] religion. This principle shall remain eternally unchangeable. Other Islamic schools of thought, such as the Hanafi, Shafi‘i, Maliki, Hanbali, and Zaydi, deserve total respect and their followers are free to perform their own religious practices, religious education, and personal matters. They may practice their religious education, personal status, (marriage, divorce, inheritance, and bequest), in accordance with their own jurisprudence. The dispute over these matters is recognized in the courts. In any area where followers of these schools of thought are in the majority, local regulations, within the domain of the council’s jurisdictions, are set according to that school of thought so long as the rights of the followers of other schools of religion are maintained.”³⁸.

In addition, Article 13 of the Iranian Constitution refers to the legal status of religious minorities, which include “Zoroastrians, Jewish and Christian Iranians”. “They are free to exercise matters of personal status and religious education and they follow their own rituals.” The following article of the Constitution refers to the treatment of non-Muslims by the Islamic community, which implies an order to treat them with good conduct, in fairness and Islamic justice, and with respect for their human rights. Reference is made here to the Quranic injunction, which is invoked directly in Article 14 of the Constitution, reading as follows: “Allah forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them. For Allah loveth those who are just” (80:8). However, these obligations, both on the part of the state and individual Muslim shall not be applicable to non-Muslim individuals who conspire and act to the detriment of Islam”³⁹.

³⁷ See H. A. Jamsheer, *Jedność arabska. Geneza idei w tradycji wczesnego islamu*, Warszawa 1995, p. 29-30.

³⁸ See J. Danecki, *Podstawowe wiadomości o islamie*, Warszawa 1997, p. 22.

³⁹ <http://www.iranmania.com> [4. 05. 2014].

By contrast, the constitutional order of Iran does not tolerate the Islamic groups of Baha'i Faith, treating them as a sect, as a result of which the largest minority group of approximately 300 thousand followers cannot feel safe among the Shiite majority. The UN Human Rights Committee, in its two subsequent reports of 1998 and 1999 pointed to repeated violations of the rights of Baha'i community, including unlawful arrests, lack of respect for property, evictions, confiscation of property, demolition of places of worship, restrictions on burying the dead. Despite the intervention of international bodies, the situation of Baha'i minority does not improve and the followers of this branch of Mohammedan religion are treated more as Islamic heretics based on the belief that in Iran there is no place for other followers of Allah, except for the Shiites⁴⁰.

It should also be borne in mind that in Chapter II of the Constitution devoted to the language, history and the national flag, the Iranian legislature provided also for presence of strictly Islamic elements therein. Although the Persian (*Farsi*) language, due to its literary tradition, is regarded as the official and commonly used in writing and speech of the Iranian people, the Arabic language has a special significance⁴¹. It is associated, as clearly specified in Article 16 of the Constitution, with the fact that "Arabic is the language of the Quran, Islamic teachings and doctrines." In addition, the same provision and for the same reasons, Arabic has been ordered to be taught in all classes of primary and secondary schools⁴².

In the next article, the Constitution refers to the history and the Islamic calendar, which originated from the religious events. Article 17 assumes that the zero point is *hijra*, or migration of Muhammad from Mecca to Medina, while ignoring the pre-Islamic past of the country. In the same place, the Constitution recognizes Friday as an official weekly holiday. Another religious accent discernible in the Iranian Constitution is

⁴⁰ See F. A. Rauf, *Islam. A Sacred Law*, Putney 2000, p. 181.

⁴¹ Article 15 of the Constitution permits the use of regional and ethnic languages in the press, the mass media, and the teaching of their literature at schools, alongside the Persian language. However, the general rule is to use the Persian language in official correspondence and books. See W. Kitab, *Wybrane zagadnienia klasycznego ustroju politycznego w islamie*, Bydgoszcz 2003, p. 67.

⁴² See J. Strzebel, *Fundamentalizm religijny w Iranie po 19 latach*, „Znak” 1998, no 1, p. 18.

related to the religious formula appearing on the national flag in the form of words: *Allahu Akbar*, or God is Great (Article 18). An explicit reference to God can also be seen in Article 56 of the Constitution, which points to the source of absolute sovereignty over the world and human being (“God and only God”). Further in this article, the legislator included theological contemplations concerning the divine right allowing a man to decide his fate and inalienable nature of this right. Article 57 of the Constitution says that the sovereignty of the legislative, executive and judicial authority is combined with the absolute religious authority (of the Leader). The analysis of these two articles of the Constitution (56 and 57) leads to a clear conclusion of the primacy of religious law over the non-religious and the dominant role of Islamic leaders standing above all the authority⁴³.

However, as regards the economic turnover, the dominant constitutional provision in this respect is Article 49 forbidding usury and containing the wording originating from the Koran. Hence, the government has been granted the right to confiscate illegitimate wealth resulting from usury, usurpation, bribery, embezzlement, theft, gamble, misuse of Islamic government endowments, misuse of government contracts and transactions, uncultivated lands and others belonging to the public, houses of ill repute, and other illegitimate sources. The Constitution states that this wealth should be passed on to the rightful owners and in case such an owner is not identified it must be deposited in the public treasury. This ruling must be carried out by the government after investigation, research, and proof through Islamic law. It should be noted that all the previously mentioned activities meet the criteria of religiously prohibited acts, and the only form that allows their use is the concept of a common (public) use, which indeed corresponds to the Islamic doctrine in terms of comprehension of ownership. In this context, attention should also be given to Article 46 of the Constitution, forbidding to misappropriate someone else’s work, Article 47 on the principle of the inviolability of private property and Article 48 prohibiting discrimination in extracting natural resources. The connection between the aforementioned articles is their clear representation in the relevant Koranic surahs⁴⁴.

⁴³ See M. Stolarczyk, op. cit., p. 10-12.

⁴⁴ See F. Nomani, A. Rahnema, *Islamic Economic Systems*, London 1994, p. 93.

5. CONCLUSION

Despite the period of seventy years between the enactment of both Iranian Constitutions, the Islamic themes have not been eliminated (there was no such a need) from various institutional configurations. Both proclaimed Islam as a state religion, while the Sharia law was to provide the subsidiary support for the state law. Another common feature was the prohibition to legislate against the Koran, Tradition as well as the rules and doctrine of Islam (Sharia). After 1979, i.e. after entry into force of the second constitution, the political system of Iran can be described as a theocracy, in which the civil power is identified with the authority of the clergy and the government institutions are of divine origin. Therefore, the saturation of the Constitution with references to God and other elements of the confessional nature is not surprising. While reading the Iranian Basic Law, is not difficult to resist the impression that the entire government legal system is not capable of functioning without the use of Sharia and religious teachings of Islam. In the Iranian law, the Mohammedan religion plays the role of a universal plastic mass filling loopholes and conveying the impression of a complete regulatory framework. There is a false assumption that where the government laws do not provide a solution to a particular situation, they can be replaced with the Koran, Sunnah, Ijma or Kijas treated as the sources of the Islamic law equivalent to the state law. However, this concept does not stand up to face the reality that there are no conclusive rules for all the possible cases, despite the widespread belief in Muslim society that Koran can provide the comprehensive grasp of all the major legal norms⁴⁵.

The formal position of the spiritual Leader of the nation can be regarded as a highly confessional determinant adopted in the Iranian constitutional order. Its importance can be undoubtedly credited to the charisma of Ruhollah Khomeini and Ayatollah Khamenei, and in general, to the religious doctrine of Twelvers, including the figure of hidden (twelfth) Imam. His supreme position over the other state authorities has no equivalent in any other legal system, even in countries where Islam is officially

⁴⁵ See S. Witkowski, *Wprowadzenie do prawa muzulmańskiego*, Warszawa 2009, p. 32-55.

recognized. Therefore, the Leader exercises the supreme secular authority, while on the other hand, leads the Muslim community of the faithful. The Constitution puts high demands on him (must have adequate legal and theological education as well as distinctive religious authority). Simultaneously, he has the actual impact on the implementation of the government internal and external policies and the ability to publish religious *fatwas* is an effective instrument of power remaining at his disposal⁴⁶.

Furthermore, the religious relations in the Islamic Republic of Iran are significantly influenced by the Revolutionary Guard Corps and the Assembly of Experts. Both bodies are composed of Islamic clerics whose powers go beyond the ordinary powers of the other imams. In addition, the competence of the judiciary is not strictly government, as interferences in the affairs of a religious nature are discernible therein. It is difficult to find clear guidance as to the permissible limits in this regard, even in the Constitution, as the two spheres interweave each other⁴⁷.

Religious elements can also be seen in other constitutional provisions. These include such issues as: religious themes on the national flag state, the Koranic prohibition of usury, the ban to act to the detriment of Islam in the media, party activity, realization of civil rights, religious training in the army, the Islamic presidential and parliamentary oaths and finally the religious invocation preceding the actual text of the Constitution⁴⁸.

Finally, it should be noted that Iran is not alone in adopting confessional constitutional arrangements. The same is true for the Constitutions of other Islamic countries e.g. Algeria, Saudi Arabia, Bahrain, Brunei, Egypt, Gambia, Indonesia, Yemen, Jordan, Qatar, Kuwait, Libya, Maldives, Malaysia, Morocco, Mauritania, Oman, Pakistan, Somalia, Sudan, Syria and Tunisia. Nevertheless, the scale of Iran's borrowings from Islam introduced into the Constitution is much higher than in other basic laws of countries deriving from the same culture and religion⁴⁹.

⁴⁶ See I. Warraq, *Why I am not a Muslim*, New York 1995, p. 29.

⁴⁷ See *Iran: What happened, where now*, Open Democracy, <http://www.opendemocracy.net/farhang-jahanpur/iran-what-happened-where-now> [3.05. 2014].

⁴⁸ See A. Rachman, I. Doi, *Shari'ah. The Islamic Law*, London 1984, p. 19-21.

⁴⁹ See W. Bar, *Wolność religijna*, p. 213n.

In summary, it is difficult to assess the religious solutions adopted in the Iranian Constitution (especially those currently in force), which does not mean that such an assessment will not appear, since it should be the final result of the discussion held. Attention should be given however to the aspect of the specific Iranian identity, saturated with the oriental legal tradition and the influence of Islam, while the Constitution with its religious connotations should be read as if by an average Iranian cultivating the Khomeini's charisma. The contemporary world, especially non-Arab and non-Islamic countries, perceive Iran as an undemocratic, anti-Western country unfriendly to strangers and generally threatening to others. They do not understand the philosophy, whereby the spiritual religious Leader has the supreme authority over the state and Islam, with its different inflections, is the word most commonly used by the legislator. For those raised in the European (and still Christian) legal and political culture, the repeated references to Islamic values in the Basic Law seems to be an abuse, likewise the indication of the official religion, the meaning of Sharia law, religious judgements, dualism of religious and state law, multiple references to God and Islamic doctrine, or religious oaths taken by the highest state officials. The author is, however, fully aware that these ("Islamic") articles cannot be amended on the basis of currently applicable Iranian Constitution, which was clearly marked in Article 177⁵⁰.

SUMMARY

This paper is divided into three substantive chapters focusing on religious issues contained in the Iranian Constitutions as well as the introduction and the conclusion. The introduction points out the historical and religious context of the Persian and Iran society as well as the position of the Islamic (Shia) religion. In the first substantive chapter, the author discusses the confessional issues included in the first Iranian Constitution of 1906/1907, paying particular attention to the religious preamble, recognition of Shia Islam as the official religion and the necessity to draft legislation in accordance with Islam. The second part of the paper features

⁵⁰ See S. al-Uajmin, *Fundamenty wiary islamu*, Bydgoszcz 1996, p. 191.

references to God and religion in the Constitution of 1979, enacted after the victory of the Islamic Revolution. The key and most extensive analysis is presented in the third chapter of the paper devoted to the amendment of the Constitution carried out in 1989. Here, the author addresses various religious issues associated with bodies of state authority (parliament, spiritual religious leader, Guardian Council), a religious oath provided for in the Constitution for the President and Members of Parliament upon adoption of their offices, compliance with Sharia law and Islamic doctrine as well as administration of public activities in such a manner so as not to harm the Islamic values (political parties, media). Considerations end with the conclusion and an attempt to evaluate (rather critically) of the constitutional model assumed in Iran.