

ISLAMIC CONSTITUTIONALISM IN IRANIAN WAY

In this paper the author focuses his attention on constitutional system of Islamic Republic of Iran. There are many reasons for that and for the purpose of this paper they are divided into two groups: geopolitical and constitutional. With regard to the second group of reasons, to which the most part of the paper is devoted, it is pointed that the Islamic Republic of Iran is especially remarkable state among the states in which the principles of Islam are seen throughout the entire constitutional government. It is specific type of Islamic constitutionalism and for that the author also discussed the essence of Islamic constitutionalism (and its forms) through its relationship with the notion of constitutionalism. Main part of the paper contains the basics of the constitutional organization of the Islamic Republic of Iran according to the Constitution from 1979, revised in 1989.

Key words: *Islamic constitutionalism, Constitutionalism, Imam (Leader), Nation's Exigency Council, Guardian Council, Sharia law, Jafari legal school.*

I INTRODUCTORY PART

There are many reasons that make the constitutional government of the Islamic Republic of Iran draw attention of both, those who professionally deal with the theory and practice of the constitutional law, and broader scientific community. For the purpose of this paper we shall divide these reasons into two groups: geo-political and constitutional.

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Regarding the reasons from the first group we should first point out the geographical position of Iran. It is situated between Iraq and Turkey in the west, Afghanistan and Pakistan in the east, and Saudi Arabia and Kuwait in the south, from which it is separated by one of the strategically most important bays in the world – the Persian Gulf. In the north Iran shares its borders with the former Soviet Republics: Armenia, Azerbaijan and Turkmenistan, and touches the shores of the Caspian Sea with its north border. Such a position makes this country very important in geo-strategic sense for those who lead world politics. The importance, but also the strength of Iran, results not only from the above mentioned reasons, but also from the fact that it is a country with an area of 1.648 000 km², which places it among twenty the largest countries in the world. According to the census that took place in 2006 Iranian population is 70. 495 782, of which the Persians make up 51%, Azeri 24%, Gilakis and Mazandarins 8%, Kurds 7%, Arabs 3%, Lurs 2%, Baluchis 2%, Turkmen 2% and others 1%. The territory of Iran holds near 16% of the world gas reserves and 10% of the world oil reserves. If these data are added to those concerning Iran's nuclear program, that makes us all witness the strong tensions between Iran and the West, it is not hard to see the importance of the Iranian country for the world politics, for both, the present and the future.

The second group of reasons that draw attention to the constitutional government of Iran is made up of reasons considering the constitutional nature. In the periodization of the development of constitutionality in the world, the theory of constitutional law emphasizes that after the World War II, during the period of so-called constitutionality of socialist countries, social-democratic constitutionality and constitutionality of the third world, among the countries of the third world „...there are many examples of original organizational solutions within the constitution, but none of them has not become the role model“. The exceptions to the general conclusion, as further emphasized, „... may be the constitutions that regain the native principles of Islam“. Special group of such countries consists of those „...in which the principles of Islam are seen throughout the entire constitutional government...“¹ Among such countries especially remarkable is the Islamic Republic of Iran. According to another typology that refers to the notion of Islamic constitutionalism, and due to the overall presence of Islam in its constitutional order, the constitutional system of this country is classified as so-called *dominant constitutionalism* whose main characteristic is to use the constitution to incorporate the Islamic law as the supreme law of the country.² However, it is not only the overall presence of Islamic law what

¹ Ratko Markovic: *Ustavno pravo i političke institucije*, eleventh improved and updated edition, Belgrade, 2006, p.88.

² Intisar A. Rabb: “We the Jurists”: Islamic Constitutionalism in Iraq, *Journal of Constitutional Law*, Vol. 10:3, March 008, p.531.

makes the constitutional system of this country unique in the world, but also the way in which, in constitutional sense, the relationship between Islam and the entire legal system of Iran was set up. Therefore, the constitutional system of Iran, as far as the presence of Islamic law is concerned, does not differ from the constitutional system of, for example, the Kingdom of Saudi Arabia, considering the fact that the entire legal system of this country is also filled with the Islamic law. The best evidence of this is the fact that the very first Article of Saudi Arabia Basic Law of Government prescribes that Quran and the Sunnah of Prophet Mohammed are the constitution of this country.³ However, if we leave aside the fact that Saudi Arabia is the country of Sunni Islam while Iran is the country of Shia Islam (with Hanbali and Jafari schools as leading schools of law respectively), the thing that makes difference between the constitutional government of Iran and of Saudi Arabia is a special mechanism of establishing and implementing law, that does not exist in other countries which have incorporated Islamic law into their constitutions in one way or another. Therefore, this is what makes this country special compared to the rest of Islamic world, as well as worth of attention. The same was used as the reason for the title of this paper, due to a specific type of Islamic constitutionalism.

What we deal with here is the notion whose meaning causes great disagreements within the constitutional law, particularly its variants used by the west and those present in the Islamic world. As all this is about the notion whose meaning is needed in order to understand the notion of the Iranian constitutionalism we shall first discuss the essence of Islamic constitutionalism (and its forms) through its relationship with the notion of constitutionalism. After that, within the part related to the Iranian constitutionalism, the discussion shall be devoted to the presentation and analysis of the relevant provisions contained within the current constitution of the Islamic Republic of Iran, on the basis of which the appropriate image of the specifics of the country's constitutional order may be acquired. In the end of this paper we shall give our concluding remarks.

II CONSTITUTIONALISM VS. ISLAMIC CONSTITUTIONALISM

In the theory of constitutional law, both in European and Anglo-American version, the constitutionalism is determined in a multiple way. So it is said that it encompasses (our italics in the text):

„1. *A set of political theories* which have one thing in common - the fact that they, beginning with the principles of the national sovereignty,

³ This basic Law was passed by the King of Saudi Arabia, Fahd bin Abdul Aziz by decree from January 31st, 1992.

grounded on ideas of natural rights, demand from the public authorities to perform their functions in such a way to comply with restrictions and legal procedures established by the constitution and the law, as well as to act in the interest of individual members of a political community;

2. *system of constitutional institutions* aimed at the actualization of the constitutional government, via restrictions and mutual surveillance of all authorities in the country, based on the implementation of the powers separation principle, independence of the judicial powers, decentralization and local self-government, and constitutional guarantees to protect human rights and fundamental freedoms;

3. *genuine democratic political system (real or live constitution)* which mainly acts in accordance with the given principles and institutional solutions derived from them. Within such a system the government is established on the voters confidence shown during the elections. It is accountable to the people and assemblies elected by the people. Citizens have a constitutional right and real possibility of peacefully dismissing power holders in the general elections. This is the minimum requirement that must be met in order to determine a country as democratic.⁴

Louis Henkin defines constitutionalism as constituting the following elements: (1) government according to the constitution, (2) separation of power, (3) sovereignty of the people and democratic government, (4) constitutional review, (5) independent judiciary, (6) limited government subject to a bill of individual rights, (7) controlling the police, (8) civilian control of the military, and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.⁵

What can be noticed from the quoted is the fact that constitutionalism of the Western provenance implies constitutionality, rule of law and democratic political system, which ensures „...the restrictions of the power in the interest of the freedom.“⁶ Constitutionality implies the obligation of all holders of public authority to comply with the constitution and the law while exercising their duties. Rule of law is the notion greater than the notion of constitutionality, since its requests are not followed during the implementation of constitutionality and legality only, but they also prescribe that laws and other regulations must have a specific content, that is, specific characteristics, and that there must be institutional and procedural guarantees

⁴ Branko Smerdel, Smiljko Sokol: *Ustavno pravo*, Zagreb, 2006, p.49.

⁵ Louis Henkin: *Elements of Constitutionalism*, Occasional Paper Series, Center for the Study of Human Rights, Columbia University, 1994.

⁶ Ratko Markovic: *Ustavno pravo*, fifteenth updated edition, Belgrade, 2011, p.59.

that ensure human safety and freedoms.⁷ A man and his human rights and freedoms (their legal guarantee and effective mechanisms of realization and protection) are, therefore, one of the most important elements within the notion of constitutionalism, whereby these rights and freedoms (both, their contents and realization) are not legally related to religion.

Such an understanding of constitutionalism, and its elements, clearly separates it from the notion of Islamic constitutionalism. In order to explain the later notion it is very important to have in mind its fulfillment with Sharia law and Islam as religion. We point this out for three reasons. As we shall see from the presentation below, this notion cannot be said to be limited merely to the constitutionality, without being concerned about the purpose and the content of a state. It does so, but in a way that does not match the understanding of the purpose and content of a state and its law dominating in the understanding of constitutionalism by European-continental and Anglo-American legal civilization. Therefore, what these notions have in common is that they are not depleted of values. However, values that constitute the notion of constitutionalism are, especially legally observed, deprived of any religious influence which is even considered undesirable (the separation of state and religion). Still, when it comes to Islamic constitutionalism things are quite different, due to its content which is simply inconceivable without Islam as a basic component and its inherent religious law.

This type of constitutionalism also knows and acknowledges the human rights, but its implementation, when it comes to other religions, is guaranteed under the condition that those individuals, that is organizations to which they belong, avoid activities against Islam (which is prescribed by a proverb in the Article 14 of the Iranian Constitution).

Finally, in the field of democracy the Islamic constitutionalism does not allow different opinions when it comes to the organization of state and society based on the foundations of Islam and Sharia law, because they are considered absolute values which are undeniable. Therefore, this is where the prefix „Islamic“ in the name of this notion comes from. On one side it shows the unbreakable bond between religion (and its inherent law) and the organization of the state and society by using the law. Still, on the other hand, it can be seen from the very name that this is not the constitutionalism present in the theory and practice of the area in which we live. That is why the foreign literature says that the Islamic constitutionalism means „...the

⁷ Kosta Čavoški: *Pravo kao umeće slobode, ogleđ o vladavini prava*, Belgrade, 2005, p.125.

governmental structure with restricted powers where the written constitution determines Islamic law as a source of law.⁸

Based on analysis of comparative practice, for the purpose of this paper, we shall divide all countries belonging to the world of Islamic constitutionalism into four groups. Saudi Arabia after 1992 belongs to the first group. The second, and the largest one, is made up of several countries, such as Bahrain, United Arab Emirates, Qatar, Kuwait, Maldives, Mauritania, Oman, Sudan, Iraq, Egypt. We shall put Pakistan in the third group and the Islamic Republic of Iran into the fourth one. What all these countries have in common and what makes them part of the world of Islamic constitutionalism is the fact that constitutional document of each of them prescribes Islam as an official religion, and its rules to be the source of law.

The first group of such countries is made up of Saudi Arabia. This state was singled out into a special group since it is prescribed in its constitutional document only (the Basic Law of Governance made in 1992) that the Quran and the Sunnah of the Prophet Mohammed represent the constitution of this state (Article 1 of the Basic Law). This is the specificity of this state's organization compared to other states belonging to the Islamic world. Given the fact that the Quran and the Sunnah only make the constitution, the Article 48 of the Basic Law determines the obligation of each court to apply Sharia law in resolving all disputes brought before them, in compliance with the Quran and the Sunnah. True, this provision also prescribes the obligation of courts to resolve disputes in accordance with the regulations brought by Saudi ruler, provided they are not contrary to the Quran and the Sunnah.

The second group of states is the largest and it is characterized by heterogeneity of solutions used by the constitutions of these states to provide the obligation to harmonize laws and other regulations with Islam and Sharia law. However, there is something in common to be found even in such a variety. Namely, in essence, each of them determines Islam as the official religion, while Sharia law is determined as *the main source of law*, and the highest courts of these states are entrusted to decide if the laws and other regulations are in compliance with the constitution. Thus the evaluation of constitutionality means the evaluation of harmonization of the relevant regulations with Islam and Sharia law. This solution, in the essential parts, is found in the constitution of states that make this group (*Jemen* – Art. 3 and 124 of the Constitution, *Oman* – Art. 2 and 79 of the Constitution, *United Arab Emirates* – Art. 7 and 101 of the Constitution, *Bahrain* – Art. 2 and 106 of the Constitution, *Qatar* – Art. 1 and 140 of the Constitution, *Kuwait* –

⁸ Intisar A. Rabb: *Ibidem*, p. 528.

Art. 2 and 173 of the Constitution, *Maldives* – Art. 70c, 95, 143, 144 and 145 of the Constitution, *Mauritania* – Article 86 of the Constitution, *Sudan* – Art. 65 and 105 of the Constitution, *Iraq* – Art. 2 and 93 of the Constitution, *Egypt* – Art. 2 and 175 of the Constitution).

The third group of states that belong to the world of the Islamic constitutionalism is made up of Pakistan. The Article 203C of the Constitution of this state (Part seven, Chapter 3A) determined the establishment of the Federal Shariat Court. If it finds that the law or some of its provisions are against Quran or Sunnahh, that law, or that provision, shall cease to be valid.

Finally, the fourth group includes the Islamic Republic of Iran, whose constitutional solutions we shall present in the appropriate place below. However, before we do so, it is necessary to explain, at least in few lines only, why each of the states that belong to the world of the Islamic constitutionalism is characterized by the attachment to Islam and Sharia law. This connection exists because Islam and on it based Sharia law represent a comprehensive system of rules (religious, moral and legal) that regulate the overall life of an Islamic man and society. Within this system Quran represents the source of all rules of the human life, which must not be contradicted nor put in doubt. Quran, as the supreme legal source, contains perfect, final and unchangeable rules on what is permitted to a man (halal) and what is prohibited (haram). So set rules a man must not dismiss even if the wisdom of the certain rule is not obvious.

However, regarding this, the fact is that at the time of publication of Quran (which took 23 years), and after that while the Prophet Mohammed was still alive (he died in 632) there was a whole series of life situations for which Quran could not have offered clear solutions. The reason for this lies in the fact that, out of 6236 verses of Quran divided into 114 suras, there are only 500 verses which contain solutions that might be called legal. Still, legal solutions within these verses cannot be easily seen and must be *revealed*. The need to reveal the meaning of some verses arose during the lifetime of the Prophet Mohammed. This resulted in creating Sunnahh, as another source of Sharia law. Although Quran and Sunnahh are the supreme sources of Sharia law, it is a historical fact that disputes arisen from the new social relations, after the death of the Prophet Mohammed, should have been resolved by not only interpreting those sources, but also by creating new rules whenever the relevant ones could not have been found within Quran and Sunnahh. Islamic jurists devoted themselves to this job, and created numerous legal schools in time, of which only a few remained today.

III THE BASICS OF THE CONSTITUTIONAL ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN ACCORDING TO THE CONSTITUTION ESTABLISHED IN 1979, REVISED IN 1989

III 1. The religious roots of the ideology of an absolute theocratic rule as a ground for the current solutions on the constitutional organization of the Islamic Republic of Iran

The period that preceded to the Islamic Revolution is characterized by the discrepancy between what was prescribed in the Basic Law of Persia of 1906 and its Amendments in 1907 and what the situation of the state's legal life was really like. The essence of this gap between the normative and the actual lied in the fact that, during the reign of the Mohammad Reza Pahlavi especially, the Shah was inclined to the manipulation, relying on the army which he tried to keep under his control, as well as on the Iranian secret service SAVAK. Reforms conducted by the Shah in 1963, known as the "White Revolution", referring to the reform of a land, elimination of illiteracy and giving the women the right to vote, accompanied by his arbitrary reign, intensified the discontent all around the state. It was expressed by the intellectuals who sought democratic reforms, but also by religious leaders. One of them, Ayatollah Khomeini, as the opponent of the regime went into exile, staying first in Iraqi city of Najaf from 1965 to 1978, and then in France from 1978 until his return to Iran on February 1st, 1979. During his stay in Najaf Khomeini created his own ideology of the absolute theocratic reign⁹, under the leadership of a supreme leader, which was defined by the Constitution of the Islamic Republic of Iran dating from 1979 (adopted on October 24th, 1979). Considering the role of the leader in the functioning of the constitutional system of Iran, which was prominent just before and during the constitutional revision in 1989, in this section we shall give a short overview of the religious roots of this ideology. The Shiite Islam appoints special position to the institution of *Imam*, whereby this notion should be distinguished from the notion imam usually used in our country meaning the prayer leader of the Muslims. Shiites believe that Imam is the successor of the Prophet Mohammed, which is why Imam has a special religious role. According to the belief of Shiite, Imam is flawless since God saves him from the sins and mistakes, and that is why Imam's decisions on religious and secular matters are considered impeccable. In order to understand the position of Imams in Iran, which was of special significance prior to the revision of the Iranian Constitution in 1989, it is necessary to have in mind the importance of the Shiite teaching that Imam has a special ability of revealing the secret meanings of Quran. This ability allows him to

⁹ See more on this ideology in the book by Oliver Potezica: *Islamska republika Imama Homeinija: Pojam suverenosti u delima Imama Homeinija*, Belgrade, 2006.

interpret the texts of Quran in a manner that takes into account the daily changing circumstances of the community life. Imam, therefore, represents central, political and legal figure of the system. This position of Imam is the base of Khomeini's ideology of absolute theocratic reign.

III 2. The importance of the Preamble of the Constitution of Iran

The Islamic Republic of Iran belongs to a few states worldwide in which the Preamble of the Constitution is of a great significance for its normative part. Such importance of the Preamble of this Constitution is not to be a surprise if we bear in mind the fact that this Preamble (after its introductory part which describes the history of the Islamic Revolution in Iran) laid foundations of the entire constitutional system of Iran (of all its constitutional institutions and organs) imbued with the Sharia law. Although this part of the Constitution has not been nomotechnically divided into Articles there is no doubt that these are *normative statements*, considering their content, later only verified through the relevant solutions in the normative part of the Constitution.

For this opportunity we shall single out several parts of this Preamble. Thus, under the title "Islamic Government" it is prescribed that this form of government is based on the "religious guardianship" (*Velayat Faqiye*) established by Imam Khomeini. This provision of the Preamble is the result of the fact that Imam is a central, political and legal figure of the entire Iranian system for the reasons previously given. Such a position of Imam has been confirmed once again within the Preamble where it is determined that the Constitution provides the leadership by Imam as a person recognized by the people, whose function is protection of the state and the society from various deviations that might be caused by different organizations. These provisions of the Preamble are the legal base for several provisions of the normative part of the Iranian Constitution:

- Article 5 which defines Imam as a community leader,
- Article 57 which first determines that the powers of government in the Islamic Republic are vested in the legislature, the executive powers and the judiciary, and then that they all function under the supervision of Imam,
- Article 91 according to which Imam selects six judges for the Guardian Council which, as we shall see, plays a very important role in the establishment of the legislation,
- Article 112 according to which the Nation's Exigency Council meets on the call of Imam. This body, included into a constitutional system of Iran

by the constitutional revision from 1989, has a very important role, which shall be discussed in the appropriate place below,

- Article 157 which provides Imam with the competence of appointing mujtahid, an institution established by the constitutional revision in 1989. The holder of this function is the head of judicial power in Iran,

- Article 177 which determines the procedure for amending the Constitution of Iran, which is run after Imam issues the appropriate act regarding this subject.

III 3. The essential characteristics of the normative part of the Iranian Constitution

Due to such content and legal significance of the Preamble of the Constitution of Iran, its normative part is characterized by dualism or dichotomy. This characteristic is typical for the normative part since elements of Islamic and Republican are mixed within. It was, as the literature has pointed out, the cause of special constitutional dialectic (or rather the conflict – our remark) between the Islamic Consultative Assembly and the Guardian Council,¹⁰ which lasted several years, and led to the constitutional revision in 1989. This duality can be seen at the very beginning of the normative part of the Constitution. Thus, the Article 1 prescribes that the Islamic Republic is a form of government in Iran, which is confirmed by the long-term faith of people in the sovereignty of the truths of Quran. Then the Article 2 determines that the Islamic Republic, among others, is a system based on the belief in one God,¹¹ his exclusive sovereignty, his right to be the legislator as well as the necessity of submission to his commands. This Article sets up the goals of the Islamic Republic Iran, among which the dominant are those of purely religious character. Namely, beside the belief in one God, God's revelation and "the fundamental role of God in setting forth the laws", the Article 2 of the Iranian Constitution prescribes that the Islamic Republic is based on the belief on the return to God, but also on the continuous leadership of Imam and his fundamental role in ensuring that the process of the Revolution of Islam stays uninterrupted.

¹⁰ Kambiz Behi: Iran's "New Constitutionalism": Constitutional Politics in Post-Revolutionary Iran, October, 2010, p. 3-4. Available at http://www.works.bepress.com/kambiz_behi/

¹¹ This belief is the first out of five pillars of Islam.

Imam is chosen by experts in Sharia law,¹² elected by the people (Article 107 of the Constitution). They constitute a very important institution called the Assembly of Experts. There is a special law that regulates number and qualifications of these experts, the way in which they are to be selected, and what is interesting regarding this institution is the fact that, according to the Article 108, Paragraph 2 of the Constitution of Iran, the elected Assembly of Experts is responsible for making and adopting any further amendment to this law regarding the duties of the experts. Elected Leader (Imam) performs a series of very important state functions. Hence, according to the Article 110 of the Constitution of Iran, he is in charge of:

- determining the general policy of the Islamic Republic after consulting the Nation's Exigency Council,
- supervision of the regularity of the execution of the determined general policies of the Islamic Republic,
- issuing a decree on holding a national referendum,
- the supreme command over the Revolutionary Guard and the Army of Iran,
- declaring war and peace and mobilization of armed forces,
- the appointment, dismissal and acceptance of resignation of the religious jurists in the Guardian Council,
- managing the radio and television network of the Islamic Republic of Iran.

Imam may delegate part of his duties and powers to another person (Article 110, paragraph 2 of the Constitution). There are many other important functions of this institution, among which we shall point out that the Imam is a supreme judicial power in the country (it makes decisions on amnesty),¹³ makes a decision on whether the Iranian President shall be dismissed if prior to it the Nation's Consultative Assembly voted no confidence to him.

¹² According to Article 111 paragraph 1 of the Constitution whenever the Leader (Imam) becomes incapable of fulfilling his constitutional duties, or loses one of the qualifications for that function or it becomes later known that he did not possess some of the qualifications initially, he will be dismissed.

¹³ This function should be distinguished from the jurisdiction of the Nation's Exigency Council to make final and for all binding decision on the dispute between the Islamic Consultative Assembly and the Guardian Council regarding whether a regulation is contrary to the Sharia law. This will be discussed below.

Taking into account such a base of the Islamic Republic it is no wonder that the Article 4 of the Constitution prescribes that all civil, criminal, financial, economic, administrative, cultural, military and other laws and regulations must be based on the Islamic criteria. This principal, according to the same constitutional provision, is implemented *completely and in a general way*, and the religious jurists as members of the Guardian Council are responsible for making decisions on the conformity of all regulations with the mentioned criteria. Since Imam was assigned the continuous leadership position by the Preamble and the first Article of the Constitution, it is not surprising that the Article 5 determines that during the absence of the Great Lord of eternity the function of the leader (Imam) of the community (Ummah) is allocated to a righteous, pious commander, who is entirely aware of the circumstances of his time, who is brave and effective. The establishment of all legal and other regulations on the Islamic principles should be observed through the prism of the doctrine developed within the Jafari legal school, considering that this direction has the status of the official religion and school in Iran. This is clearly provided with the Article 12 of the Constitution, whereby the same provision determines its immutability. Therefore, this is a provision, not the only one, whose immutability is prescribed by the Constitution. It is typical for Jafari school to consider Quran, Sunnah, Ijma of Shiite jurists and reason (Aql) as sources of law, and of special importance is the fact that by Sunnah they include not only words, deeds and silent approvals of the Prophet Mohammed but also of the *Shiite Imams*.¹⁴

The Iranian Constitution contains a lengthy list of human rights (political, economic-social and cultural) within which certain contradictions can be spotted. Namely, at the beginning of the third chapter of the Constitution, devoted to human rights (Articles 19-42) it is prescribed that all people of Iran, regardless of their ethnic or tribal affiliations, enjoy equal rights (Article 19). However, this provision is contrary to the provision contained in the Article 14 of the Constitution according to which the principle of binding the Iranian state and all the Muslims to treat non-Muslims in conformity with ethical norms and principles of Islamic justice and fairness do not apply towards non-Muslims whose activities are against Islam.¹⁵ Then, the equality of people, generally guaranteed by the

¹⁴ Mr Fikret Karčić: *Istorija Šeriatskog prava (Predavanja na prvoj godini Islamskog fakulteta u Sarajevu)*, Sarajevo, 1996, p. 65.

¹⁵ By this contradiction Iran is no exception in the world of Islamic constitutionalism. It is simply inherent to it, considering the attitude that sovereignty dominates the Islamic ideology and the law based on it, and according to which, to use the words of Alija Izetbegovic, "Non-Muslim minorities within an Islamic state, provided they fulfill the condition of loyalty, enjoy religious freedom and all the protection". Alija Izetbegovic: *Islamic Declaration*, p. 21.

Constitution, is contradicted by the provision of the Article 28 of the Constitution, according to which each person has the right to choose freely his profession under the condition that, among other things, it is not contrary to Islam. The general equality of people is also contradicted by the provision of the Article 115 of the Constitution which provides that neither, non-Muslim nor Muslim, can be the President of Iran if he, beside other things, does not believe in the fundamental principles of the Iranian official religion, which is Shiite Islam in the form of Jafari school.

This is a kind of framework within which all political and constitutional institutions in the Islamic Republic of Iran function, while the other provisions of the normative part of the Iranian Constitution represent only the operationalization of that framework.

Thus the Article 57 of the Constitution prescribes that the exercise of power is entrusted to the legislator, executives and the judiciary, but they all work under the control of Imam and special body called the Governing Council.

The exercise of the legislative power is organized in a unique way, since it is performed simultaneously by the Islamic Consultative Assembly (in our area oftentimes is used the name *Majlis* for this organ) and the Guardian Council. The Islamic Consultative Assembly has a democratic legitimacy, because its members (270 of them) are elected by voters on direct elections. This organ provided the representation of the minority religions of Iran in the following way. The followers of the Zoroastrianism and the Jews choose one representative each, the Armenian Christians select two representatives, while the members of Assyrian and Chaldean Christians choose together one representative for this legislative chamber.

Any law or other regulation adopted by the Islamic Consultative Assembly, or the one adopted by any of its committees under the authorization of the Assembly, must be submitted to the Guardian Council. This organ consists of two groups of members with different competencies.¹⁶ The first group includes the so-called “*adil fuqaha*” – religious jurists chosen by Imam, while the second group consists of secular jurists specialized for different legal areas. The second group of jurists is chosen by the Islamic Consultative Assembly from the list of candidates made by mujtahid, an official who is the head of the judiciary system of Iran, and who is appointed by Imam. *Adil fuqaha* have exclusive jurisdiction over the matters of conformity of laws and other regulations with the Sharia law (by a majority

Available at [http://www.sahwa.info/downloads/knjige/bos.historija/Islamska%20deklaracija-Alija%20Izetbegovic/Islamska%20Deklaracija%20\(Alija%20Izetbegovic\).pdf](http://www.sahwa.info/downloads/knjige/bos.historija/Islamska%20deklaracija-Alija%20Izetbegovic/Islamska%20Deklaracija%20(Alija%20Izetbegovic).pdf).

¹⁶ The Guardian Council also makes decisions on the issues regarding the verification and confirmation of the quality of candidates for the President of Iran.

of its members). Therefore, the secular jurists, such as the members of the Guardian Council, cannot join them. However, *all* members of the Guardian Council decide on the conformity of laws and other regulations with the Constitution of Iran, whereas the majority of all members is sufficient to decide that a law or regulation is inconsistent with the Constitution. If the Guardian Council decides that a law or regulation is contrary to the Sharia law or the Constitution of Iran, the law or regulation is returned to the Islamic Consultative Assembly for reconsideration.¹⁷

These situations happened very often in the first eight years after the Islamic Revolution, which was the reason for the revision of the Constitution and the introduction of the new institution into constitutional system of Iran, which makes it specific in the world of Islamic constitutionalism. It is the institution called the Nation's Exigency Council, which functions as the Supreme Constitutional Court of Iran. It was first introduced by special fatwa of Imam Khomeini on February 6th, 1988, and then it became a part of the Constitution of Iran after the constitutional revision in 1989. What is the core function of this institution? It is reflected in the fact that the Nation's Exigency Council in the dispute between the Islamic Consultative Assembly and the Guardian Council about whether a regulation is in accordance with the Sharia law, makes final and binding decision for all. When making decision in each case the Council is guided by national interest, which can result in "...restrictions of the application of the Sharia law and it can cause the supremacy of the secular or social principles"¹⁸ if demanded by national interest. Quran provided the foundation for this, in the ayets describing the behavior of the believers in need. It is sura 2:173.

The Nation's Council makes decisions on these issues upon the order of Imam, after being determined by the Guardian Council that a certain regulation adopted by the Islamic Consultative Assembly is contrary to the Sharia law. It shall also meet to decide on other issues forwarded by Imam. Members of this Council (regular and irregular) are appointed by Imam.

The specificity of the Iranian constitutional system can also be seen in the organization of its executive power, as well as in the mutual relations between it, the legislative power and the Imam. The Government in Iran existed until the constitutional revision in 1989 but after the executive power was assigned to the President of Iran. The President of the Islamic Republic is elected by voters for a period of four years, through direct elections, by the

¹⁷ This situation should be distinguished from the provision contained in the Article 170 of the Iranian Constitution. According to it, in making decisions on the individual cases all the judges are obliged to refrain from applying laws and other regulations contrary to the Sharia law. Moreover, the Constitution, using the same provision, entitles everyone to seek the annulment of such regulations before the State Administrative Tribunal.

¹⁸ Kambiz Behi: *Ibidem*, p.49.

absolute majority of the voters. However, although it has this legitimacy, the Islamic Consultative Assembly can vote no confidence to it by two-third majority of its members, after which the Imam makes the final decision. If the Imam decides on the dismissal of the President, as well as in the case of his resignation, death or illness for more than two months, he is replaced, with the prior approval of Imams, by the first Vice President.¹⁹ Person eligible to be elected for the President of the Republic must be an Iranian citizen with the Iranian origin, who is religious and who believes in the fundamental principles of the Islamic Republic of Iran and official religion of Iran. The President of the Republic is the head of the Council of Ministers and as such, appoints all ministers, after which they must gain the trust of the Islamic Consultative Assembly. The President monitors the work of all ministers and is responsible to the Islamic Consultative Assembly for the work of the Council of Ministers. According to the Article 136 of the Constitution the President of the Republic can dismiss every minister, in which case he must earn the trust of the Islamic Consultative Assembly for the newly appointed minister. The President must act in the same way if the Islamic Consultative Assembly votes no confidence against the Council of Ministers or an individual minister.

Among other constitutional institutions we shall mention several more. One of them is the institution of a mujtahid, appointed by Imam, according to the Article 157 of the Constitution, for a period of five years. As this constitutional provision states, a mujtahid is responsible for all issues regarding the judiciary, which, according to the Article 158 of the Constitution, involves the establishment of the organizational structure necessary for performing the function of courts; making draft laws on the judiciary and appointment and dismissal of judges. Courts are organized into regular, military and revolutionary courts of first instance, while the Supreme Court is of the highest instance. However, this court lacks jurisdiction of reviewing the constitutionality of laws and other regulations. There is also the Administrative Court which, as previously shown, according to the Article 170 of the Constitution, any individual may address with the request for annulment any regulation that is contrary to the Sharia law. A special kind of courts is established for the Shiite clergy. These courts, adjudicating for the offenses committed by the clergy, act independently compared to regular courts and are responsible to the supreme leader – Imam. Decisions they make are final and cannot be appealed.

¹⁹ Beside dismissing the President for the aforementioned reasons, the Imam can also dismiss him in case the Supreme Court of Iran finds him guilty for violating the constitutional duties. However, the decision in any of the two mentioned cases is made after the Imam, as stated in the Constitution, “...takes all the interests of the state into consideration” – Article 110, Paragraph 1, Item 10 of the Iranian Constitution.

Finally, the last constitutional institution that shall be discussed here is a Supreme Council for National Security. According to the Article 176 of the Constitution, it is responsible for determining the defence policy and the policy of national security and coordinating the activities regarding these policies. It is composed of, among others, the heads of three branches of the government (legislative, executive and judicial), the chief of the Supreme Command Council of the Armed Forces, two representatives nominated by Imam, ministers of foreign affairs and ministers of internal affairs, as well as the highest ranking officials from the Armed Forces and the Islamic Revolution's Guards Corps.

Previously given provisions on the basic political and constitutional provisions of the Iranian institutions are in correspondence with the provisions on its economic and social organization, which is one more specificity of the constitutional system of this state. In our opinion, these provisions are necessary given that they, as we shall see, establish the system of ownership relations, which ensures the dominance of the state ownership in all areas of economic life important for the society and the state. In this way the authors of the Iranian Constitution secured the stability of the Iranian political system and its constitutional organization. The Preamble to the Constitution of Iran stipulates that economy is not a goal but a means that is to be used to meet the needs of an individual. That is why economy should not be used as the means for accumulation of wealth and profit (Preamble of the Constitution). The Article 44 of the Constitution determines that the economy of Iran shall be composed of three sectors: state, cooperative and private, given that the state sector encompasses all large-scale industries, foreign trade, banking, insurance, radio and television, post and telegraph services, aviation, shipping, roads, highways. The companies and other forms of organizations within this sector are owned and administered by the state. The cooperative sector includes cooperative companies that deal with production and distribution in urban and rural areas of the state in conformity with the Islamic criteria (Article 44, Paragraph 3 of the Constitution). Finally, the private sector consists of the activities that supplement the activities of the state and cooperative sector, and which are related to agriculture, animal husbandry, industry, trade and services (Article 44, Paragraph 4 of the Constitution).

According to its state organization Iran is a unitary and very centralized state. Units of local self-government are provinces, districts, cities, municipalities and villages. Number of provinces varies, depending on the decisions made by central government, and which, by itself, provides the information about the position of these units of local self-government. Within the units, beside the provincial council, there is also a governor appointed by the Minister of Internal Affairs, after receiving the approval of the Council of Ministers. The first local elections after the Islamic

Revolution were held in 1999.²⁰ The units of local self-government have their own, local councils, whose members are elected directly by voters in that local community.

The procedure of altering the Iranian Constitution makes this legal act firm. This conclusion is derived from the Article 177 of the Iranian Constitution according to which there are constitutional provisions that cannot be altered, such as: Islamic character of political system; provisions on the Sharia law as the basis for all regulations; religious basis; goals of the Islamic Republic; democratic character of the government; position of Imam; official Jafari religion. Other provisions are amended by the procedure that cannot start before Imam, after the consultations with the Nation's Exigency Council, issues an appropriate order on the direction in which the alteration of the Constitution should be done. For this purpose, the Constitution prescribes an institution called the Council for Revision of the Constitution composed of: a member of the Guardian Council; heads of the three branches of the government; permanent members of the Nation's Exigency Council; five experts from the Assembly of experts; ten representatives appointed by Imam; three representatives from the Council of Ministers; three representatives from the judiciary branch; ten representatives from among the members of the Islamic Consultative Assembly and three representatives of the university professors. Decision on amending the Constitution made by this Council, after being confirmed and signed by Imam, comes into force after being confirmed by the absolute majority of voters in a national referendum.

IV CONCLUDING REMARKS

Everything previously presented shows that the constitutional organization of the Islamic Republic of Iran has more specific features that make it different not only from the constitutional organization of the states outside the Islamic world, but also from the states within this world.

It can be said that the constitutional organization of Iran is completely imbued with Sharia law. Even when this is a characteristic by which Iran can be compared to other Islamic states (such as Saudi Arabia, Pakistan, Sudan) Iran is specific for several reasons. First, it has to be taken into account that this is a state of Shiite Islam with Jafari school representing the official religion. Consequently, Imam is a central political and legal figure of a

²⁰ Kian Tajbakhsh: Political Decentralization and the Creation of Local Government in Iran: Consolidation or Transformation of the Theocratic State?, Social Research, Vol. 67, No. 2, Summer 2000, p. 377.

system. This conclusion cannot be affected, at least not to a significant extent, by the fact that Iranian constitutional system has all elements which constitutes the notion of constitutionalism, with remark that these elements are adapted to the ruling Islamic religion. Government in Iran is organized according to the constitution and is based on separation of power. Article 57 of Iranian Constitution prescribes that the powers of government are vested in the legislature, the judiciary and the executive powers, in accordance with the Constitution, and these powers are independent of each other. Although “absolute sovereignty over the world and man belongs to God” it is also prescribed that the people are to exercise this divine right in the manner specified in the Constitution (Article 56 of the Constitution). This Constitution provides also for constitutional review the manner of which we already explained. Article 156 of the Constitution prescribes that the judiciary is an independent power, protector of the rights of the individual and society, and this Constitution has a long catalogue of human rights and liberties (Art. 19-42). Finally, there is special system of control of the military, and strictly circumscribed state power to suspend the operation of some parts of the constitution.²¹

But, this republican form of government, parliamentary government in Iranian way or the multi-party system cannot affect that Imam is a central political and legal figure of a system since legislative, executive and judiciary powers are performed under the authority of Imam.

This position of Imam got its expression in both, the Preamble and the normative part of the Constitution of Iran, which cannot be found in any other constitution worldwide. After the death of Imam Khomeini, apart from this institution, or better to say along with it, may function the institution of the Governing Council.²² These two institutions are of fundamental significance for the work of the entire political system, since it is them which, after having consulted the Nation’s Exigency Council, determine the general policy of Iran and monitor its implementation.²³ This is also something that makes the constitutional organization of Iran specific, not only in the Islamic world but worldwide as well. The institution, established after the revision of the Constitution of Iran in 1989, certainly contributed to

²¹ Article 79 of Iranian Constitution prescribes that in case of war or emergency conditions comparable to war, the government has the right to impose temporarily certain necessary restrictions, with the agreement of the Islamic Consultative Assembly. These restrictions can not last more than 30 days and if the need for them persists beyond this limit, the government must obtain new authorization for them from the Assembly.

²² Governing Council perform that function just in case of the death, resignation or dismissal of the Leader, until new Leader is elected. This Council perform that function also when the Leader becomes temporarily unable to perform the duties of Leadership.

²³ Governing Council perform this function just in cases we mentioned in preceding footnote.

this. We refer to the Nation's Exigency Council. It functions as a Supreme Constitutional Court of Iran, which makes it of crucial importance for the work of political and legal system of this state. Such its role is especially important in those moments in which there is a disagreement between the Islamic Consultative Assembly and the Guardian Council, related to whether a regulation which should be adopted is contrary to the Sharia law. In such situations, the Nation's Exigency Council is guided by the national interest which can mean a restriction in the application of the Sharia law. However, if we have in mind the aims of the Islamic Republic of Iran, determined in the Preamble and then in the normative part of the Constitution of Iran, it is obvious that even in such situations the protection of the Islamic social order is provided through the protection of the national interests.

All other institutions of republican character (the Islamic Consultative Assembly as the legislative organ, the President of the Republic and the Council of Ministers) do not have this authority. Therefore we can talk of a kind of intertwining of powers provided by the above listed key institutions. This intertwine of powers, with its mechanisms reminding of the system of checks and balances, represents the logical and, from the point of view of the Islamic interests, rational aspect of constitutional shaping of the Iranian political community in order to coherently organize the whole life in accordance with the official religion and from it derived Sharia law as interpreted by Jafari legal school. We believe this is the essence of the Islamic constitutionalism in its Iranian version. Everyone and everything must be subordinated to it and no other ideologies can exist along with it.²⁴

Judging by the previous experience, it is clear that the current solutions from the Constitution of Iran provide the uninterrupted daily functioning of this system, unique worldwide, and, observed from the legal point of view, its longevity.

²⁴ We shall remind here of the statement made at the time by Alija Izetbegovic in the Islamic declaration, regarding the relationship between Islam and other ideologies. Referring to it, he says, "There is no peace nor coexistence between "Islamic religion" and non-Islamic social and political institutions... Given the right to organize its world on its own, Islam obviously excludes the right and possibility of action by any other ideology in its area. Therefore, there is no secular principle, and the state should be an expression of the moral concepts of religion and to support them." Alija Izetbegovic: *Islamska deklaracija*, p. 13. Available at: [http://www.sahwa.info/downloads/knjige/bos.historija/Islamska%20deklaracija-Alija%20Izetbegovic/Islamska%20Deklaracija%20\(Alija%20Izetbegovic\).pdf](http://www.sahwa.info/downloads/knjige/bos.historija/Islamska%20deklaracija-Alija%20Izetbegovic/Islamska%20Deklaracija%20(Alija%20Izetbegovic).pdf)

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