Velayat-e Faqih, Law and Human Rights by Hamid Hamidi

Abstract
Hamid Hamidi discusses the development of the idea of the Velayat-e Faqih, the rule of the supreme jurist in Shi’a jurisprudence, where clerics take on guardianship of society in the absence of the Twelfth Imam prior to his arrival. He argues that in Shi’a tradition, prior to the mid 1800s, before the influence of Mulla Naraqi, jurists gave individual opinions and not general proclamations on or directions on public policy. As Iranian politics developed so did the concept of Velayat, albeit prior to the Revolution its scope related to individual duties and religious responsibilities rather than wider political activity. Khomeini transformed the concept to be the foundation of the Islamic Republic with all power deriving from the ability of the head of the religious establishment to interpret the Shari’a and he enshrined it in the constitution. Hamidi contrasts the traditional role of constitutions, the Universal Declaration of Human Rights and the Iranian constitution and highlights the contradictions caused by the composite nature of Iran’s approach, unsuccessfully melding modern constitutional norms with the Velayat. He notes Khamenei’s recent fatwa strengthening the authority of the Velayat-e Faqih over that of other jurists and sources of power and argues that this leaves little room for the human rights of its citizens.

Biography
Hamid Hamidi is a respected European-based Iranian journalist. Over the past two decades he has dedicated much of his time to supporting efforts towards Iranian women’s struggles for equal rights, and has conducted research and studies concerning important social issues including the rights of women and children as well as human rights.

Velayat-e Faqih, law and human rights

When did the concept of Velayat-e Faqih enter Shi’ite political writings? What is the source of its legitimacy? How is it justified as the rule of the divine over an entire nation? Is the concept in line with modern principles such as the right to self-determination or majority’s vote as the source of the legitimacy of a government? Does political Shi’ite jurisprudence accommodate human rights, and if so, how?

Government Legitimacy

The legitimacy of any government (legality and not acceptability and lawfulness) is a long-standing issue in political philosophy. In order to prove its legitimacy, the system of a government stands in need of identification of the basic principles that define the legitimacy (legality) of its political order. It is based on this that it can then assume responsibility for public and social affairs. So one can ask the question, what, if any, is the source of the legitimacy of the Velayat-e Faqih? How does religion view this phenomenon?

Some of those who believe in Islam claim that Velayat-e Faqih is a system of governance based on guardianship on behalf of and in the absence of the Hidden Twelfth Imam. Others view people’s votes and choice as the source of government legitimacy (as in acceptability) and regard government as an outcome of a social contract between the elected and the electors. This contradiction yields to a fundamental challenge between the concepts of ‘social contract’ and ‘natural rights’ of the people on the one hand, and ‘divine contract’ and ‘divine duties’ on the other. As Shi’ite teachings clarify, a government is legitimate when it is headed by one of the Imams. The first cause of concern for Shi’as (with regards to legitimacy) is the possibility of usurping power in the absence of the Hidden Imam.

24 Some Shi’ites believe that in the Vali-e Faqih represents the Promised Imam and has the right to rule until His appearance.
For centuries, it was the absence of the Imam, which caused Shi’as to avoid involvement in political activities or accept donations in His name. In fact, until the mid 1800s Islamic jurisprudence lacked any explicit injunctions on the issue of Velayat or politics. Furthermore, interpretations rendered by Islamic jurists, even regarding public affairs, were simply regarded as individual opinions of the jurists and not public policy. In this same vein, matters regarding governance and the affairs of state were only discussed in light of the duties and characteristics of the ruler and not the manner of his rule.

More importantly, one of the fundamental principles in Islamic jurisprudence specifies that no one has the right to guard over another. Instead, each person is responsible for one’s own affairs.25

The first mention of political guardianship of the jurists,26 as in an Islamic jurist ruling over an entire nation, is in the writings of Mulla Ahmad Naraqi less than two centuries ago. A number of other jurists (Sheikh Morteza Ansari and Akhund Khorassani, Ayatollah Khoei) opposed this view and believed that Islamic jurisprudence fails to legitimise the political aspects of such a position. However, a few others began to expound on Naraqi’s proposition, including Mohammad Hossein Najafi Saheb Javaher, Mohammad Hossein Boroujerdi, Golpaygani and Khomeini.

Prior to the Constitutional Revolution in Iran, the concept of Velayat was further developed, however, it did not go further than pronouncements on differentiation between secular and religious affairs. During the second term of Qajar Muslim clergy were increasingly vocal against foreign influence by the British and the Russians and greatly influenced internal affairs of Iran.27 By the third term, the concept of Velayat with regards to religious governance saw more development but the clergy remained focused on personal judgements and duties of the individual (i.e. caring for the orphans, the handicapped, etc.). After the Revolution, however, this was further extended to matters regarding public hygiene, security and education. The jurists also came face to face with modern concepts such as human rights, freedom, justice, supervision, separation of power, equality and advocacy. This encounter resulted in two responses. One was the establishment of constitutional rule with Sheikh Fazlollah Nouri as the appointed representative of Islamic jurists over matters pertaining to individual duties and Muslim reign over matters pertaining to public affairs; and the other was the formation of a constitutional government based on approval of the jurists through Ayatollah Naieni. Based on the latter, the state is governed by logic not compulsion, and supreme jurists handle all matters pertaining to Islamic laws, but they are not in charge of the government.

Velayat-e Faqih in an Islamic Government

Velayat-e Faqih is the most noteworthy aspect of the Islamic Republic. In accordance with the constitution, it yields a great deal of power in political affairs both directly (appointments and dismissals) and indirectly (legislation and ultimate authority). The intellectual and theoretical foundation of the Islamic Republic is based on the views and theories of Ayatollah Khomeini and the constitution, as the legal and administrative structure founded on those views and theories.

In other words, intellectually and theoretically speaking, Velayat-e Faqih is an absolute power, and politically speaking, it encompasses the constitution. The constitution is composed within a legal framework born out of the Shari’a, which according to qualified Islamic jurists, is obtained from the

25 This was first identified by Ayatollah Sheikh Ja’far Kashef Ul-Gheta, during the reign of the Qajars.
26 The term itself was first mentioned by Shahid Thani in Malek Ul-Afham, in reference to matters pertaining to judgement, Friday public prayers, and duties of the jurists in the absence of the Hidden Imam with no reference to public or political affairs.
27 The Tobacco Sanctions during the reign of Nasir al-Din Shah
In order to better understand the position of the Vali-e Faqih within the Islamic Republic, we must consider the following articles of the constitution.

Article 4 explicitly states that all laws, rules, regulations, and directives must be in line with Islamic standards. Since this Article is part of the preamble of the constitution, it overrules other articles, and therefore if stipulations based on other sections of the constitution do not comply with Islamic standards, they are not acceptable, even if they are in line with the constitution. Article 5 states that in the absence of the (Hidden/Twelfth) Imam, the position of guardian is assumed by the Faqih. Following ideological beliefs the right to rule over people by the Imam, according to Article 57, is fulfilled through Velayat-e Faqih. Articles 110 and 177 of the Islamic Republic’s constitution enumerate the powers of the Vali, which places him in complete charge of every arm and activity of the government.

Clearly, the Islamic Republic is a religious and ideological system of governance. This is emphasized in the first section of its constitution. For example, Article 2 stipulates that the Vali-e Faqih is the only person who is able to assume power and convey the will of the divine. Article 5 further emphasizes whenever power is assumed by anyone other than a Faqih, the foundation of the system itself is no longer based on Imamate and will subsequently fail to embody divine legitimacy.

The Islamic Constitutions and the Universal Declaration of Human Rights
A constitution is the highest legal document in a country. It acts as a guide for legislation. It defines the political principles, hierarchy, status and parameters of political power of its government. It determines and guarantees the rights of citizens and is approved by them in order to safeguard their welfare, order, individual and group freedoms, social and political rights as well as relations with other countries and the global community. It also assists those in charge of its implementation in defining the relationship between the various arms of the government (all of which must directly or indirectly be elected by the people). In light of such a scope:

1) A constitution is in no way a contract between the people and the government. Instead, it is the law and the directive of the people to the government (judiciary, legislative and executive arms). The public does not vote to legislate laws in order to limit their rights and freedoms, they do so in order to ensure their rights and determine the responsibilities of the ruler(s). In this vein, government is defined as upholding rights in trust and, therefore, in reality they are not entitled to any rights over the people. In other words, those elected by the people have accepted the responsibilities of representing them by safeguarding their rights in collaboration with other arms (of the government) and the global community.

2) In addition to the above, the aim of approving a constitution is to facilitate material welfare and social tranquility. Therefore, no interpretation can be in contradiction with the spirit and the letter of the law. In other words, any interpretation that is in opposition to the articles and spirit of the
constitution must be to the benefit of the masses and their rights. Furthermore, interpretations must be in accordance with the exigencies of time and place. A constitution is not a dead text void of any spirit rendering one single interpretation. Social, political, global, international and economic changes necessarily influence the understanding of lawmakers and interpreters of the constitution.

In the case of Iran, the challenges posed by its constitution are not only due to its contradictory sections or its overall inconsistency with the Universal Declaration of Human Rights. The challenges lie in the fact that the constitution is an amalgamation of ideas from a number of inconsistent systems. As an amalgamation, and not a collection, it embodies and reflects conflicting principles.

The first conflict is based on the contradictory aims of the founding authors of the constitution. The second conflict arises from the friction between those aims and the incapability of Iranian society achieving them. Furthermore, parts of the constitution are borrowed from other countries. These parts only bear partial relevance, as they represent particular Western philosophical and political paradigms. But this is not all. Another part of the constitution is based on Islamic fiqh and the seminary culture. The majority of this body represents contradictory and conflicting elements due to its internal inconsistencies and the fact that it opposes the first section, meaning those articles borrowed from Western secular sources. Therefore, each of these inconsistent systems stands as a barrier to the legal implementation of the other and the constitution in its totality forms a body of laws that in interpretation and implementation stands in contradiction to the Universal Declaration of Human Rights.

For instance, the Iranian constitution stipulates that the law treats everyone equally. But this principle is not divorced from that of supreme guardianship by the jurist. In fact, the entire constitution is subjected to any and all limitations imposed by it. Based on that and those articles of the constitution that relate to the rights of the leader, citizens are not treated equally by the law. If absolute and complete guardianship by the jurist is the most encompassing article of the constitution, then other articles are to be interpreted and implemented accordingly. Therefore, when assessing the constitution, the percentage or number of articles that refer to human rights is irrelevant. Rather it is important to note the priority of these articles and when challenges in implementation arise assess which can overrule the other.

However, this is not the only challenge to an analytical approach to the Iranian constitution, as it emphasises the order and not the content of the articles. Each of the articles of the constitution and the document as a whole are based on a general understanding of the nature of man, society and knowledge. Separating this understanding from its articles and content is impossible. Without a basic notion of human nature and the fate of man and his role in society, of knowledge as a branch of humanity, and of society as the place of human interaction, drafting a constitution is an impossible task. Likewise, drafting and conceptualising laws without understanding the underlying views of the public is impossible. Within an analytical framework, assessing a constitution based on its articles must focus on comparing the scope and number of its laws. Based on that if just laws outnumber the others then that body of laws is deemed the same. However, based on a systemic approach the focus is on the ultimate result of a legal system. It is this ultimate result that affects a society.  

To better understand this point we can review specific articles of the Iranian constitution.

**Article 56**

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30 Dr. Ahmad Alavi expands on this relationship in his work entitled *Rabeteh ghanoon-e asasi hokoumat-e Iran va monshour-e jahani-e haghoogh-e bashar* (The relationship between the constitution of the Islamic Republic in Iran and the Universal Declaration of Human Rights) available on-line at: http://www.komitedefa.org/sidor/Aad.htm
Article 56 states: “Absolute government over the world and man belongs to God, and it is He who has made man the master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.”

This article was mentioned in the original draft as follows:
Article 15: “The right to national government is the right of all people and must be of benefit to the public. No individual or group can assume this divine public law or exploit it for the purpose of personal or group benefit.”

The Article was approved with 66 votes in favour and 6 votes against it. At that point in time, some believed that the authority of man over his own fate is against Islamic standards. Karami, one of the opponents of this article writes: “This text is against Shari’a as the absolute fate of man is not in his hands.” However, most of the representatives did not share this view and so the article was approved.

**Article 57**

Article 57 states: “The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute velayat al-amr and the leadership of the Ummah, in accordance with the forthcoming articles of this constitution. These powers are independent of each other.”

Prior to 1368 (1989) this article was as follows: “The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the velayat al-amr and the leadership of the Ummah, in accordance with the forthcoming articles of this constitution. These powers are independent of each other and interactions between them are facilitated by the president.”

A number of points must be highlighted: 1) only three powers have been described, 2) these powers bear direct results, in the form of legislation, punishment and implementation, 3) the leader bears the sole responsibility for supervision of all three powers and then the parliament is in charge of the supervision of any bodies run by senior officers, such as the national media or the judiciary. For instance, the appointment of the head of the national police, which is done by the leader, is still under the direct supervision of other powers. Therefore, the three powers are separate but based on the constitution supervised the other and were in turn responsible to the others.

However, during the 1368 (1989) review of the constitution, the responsibility for coordinating the three powers was removed from the presidency and the phrase ‘absolute’ was added to the text of the Article. So a question arises as to whether the leader is also the ‘absolute’ guardian of people and public institutions? Or does the ‘absolute supreme jurist’ oversee political parties and leadership experts? Do the instructions of the leader apply to the critics of government or are they simply viewed as guidance? There is no legal documentation within the body of the constitution that binds the leader’s instructions to the general public and civil organisations. If orders and instructions of the supreme leader are viewed as laws, which apply to everyone, including religious scholars, political parties, non-governmental organisations, leadership experts and the general public, then we have accepted that an individual will also judge his own actions. This was manifested in Ayatollah Khamenei’s recent fatwa, which removed the veil of ‘government of God’s will’ that over the past three decades had hidden the authoritarian face of the ruling theocracy in Iran. Khamenei

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[Proceedings of the parliamentary session reviewing the constitution, meeting number 21, p. 537]
demanded everyone’s obedience to the decisions of the Vali-e Faqih and stated that based on Shi’a beliefs:

“All Muslims must obey the instructions of the Vali-e Faqih, as they are in effect subjected to his injunctions (amr) and prohibitions (nahi). This order also applies to grand jurisprudents, in addition to those who emulate them. In our view, the necessity to obey the Velayat-e Faqih is no different than obedience to Islam and the Imams.”

In another section, Khamenei refers to the ‘absolute supreme jurist’ as the sovereign of Muslims in managing their Islamic societies and stated “the sovereign of Muslims after assuming the weighty responsibility of leadership based on the Shari’a, must, in whatever case he deems necessary, make his decisions and issue orders based on Islamic fiqh.” In his words “decisions and powers of the Vali-e Faqih that take into account the interests of Muslims and Islam, if faced with public opposition, override people’s decisions and powers.” He further states that if the Vali-e Faqih has occupied the position of guardianship through legal channels, then obedience to his instructions pertaining to matters of government is binding on everyone including other faqih. It is not permissible for anyone to oppose the supreme leader on the merits of his own judgement. Furthermore, with regards to the fact that “the concept of administrative guardianship does not exist” in Islamic studies, Khamenei states that opposition to administrative matters based on legal codes and regulations and “instructions by representatives of the Vali-e Faqih within each of their assigned jurisdiction” is not permitted.

Based on the above perspective, man is deprived of any inalienable rights before the government and bears no responsibility but to obey the instructions of the divine ruler. As history of religion demonstrates, such a perspective leads to devastating effects on the life of humanity, which is best evident in the contradictions between theocracy and democracy. A human being, however, has two natural tendencies of rationality and freewill that entitle him to rights. Therefore, in terms of acknowledging the concept of human rights it is essential to understand what it means to be human being. Because a person is not only responsible before the government, other human beings or God, but he is also entitled to certain rights, even though those who support the ‘will of God’ school of thought view human rights (void of duties) as a form of blasphemy.

Unfortunately, the authoritarian outlook of the leadership and the main figures within Iran’s power structure, fail to consider the full extent of human rights including its human and material dimensions, is rooted in power presentation. This directly results in discrimination and destruction at all levels of society, with a notion of social justice conditioned on regarding human beings as human but disregarding any type of ethnic, linguistic, religious or racial distinctions leading to “random justice.” In light of such an outlook, penal laws and punishment of offenders do not result in reform and restitution of a just and lawful society, instead, they lead to a mafia system of governance that in the name of the will of God and religious teachings, hides behind the veil of religion, and has taken over the fate of an entire nation. It has also planted seeds of hatred, rancour and revenge, today’s enemies of humanity.

In reality, Velayat-e Faqih does not address any of today’s problems and challenges. Instead, it reduces society, its values and ethics, to its own level. Today’s Iran is much like the Middle Ages, when government, religion and power formed the three pillars of society, and the legitimacy of the government or monarchy was granted by religion, as both dominated the society and its discourse. As a result, the authorities have left no room in theory or in practice for human beings and their rights.