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COMMENT

Iran, Democracy, and International Law

ABTEEN KARIMI[†]

INTRODUCTION

Every revolution is preceded by a state of general exhaustion and takes place against a background of unleashed aggressiveness. Authority cannot put up with a nation that gets on its nerves; the nation cannot tolerate an authority it has come to hate. Authority has squandered all its credibility and has empty hands, the nation has lost the final scrap of patience and makes a fist. A climate of tension and increasing oppressiveness prevails. We start to fall into a psychosis of terror. The discharge is coming. We feel it.¹

The tumultuous aftermath of Iran's disputed presidential election and the three years of tension and turbulence since have sparked renewed debate about the vitality of Iran's century old democratic movement. The same social forces that sparked Iran's Constitutional Revolution at the turn of the twentieth century, brought Prime Minister Mossadegh to power in the 1950s, and overthrew the Shah in 1979, have dramatically and unexpectedly forced the arc of history. While Iran's democratic movement currently lingers in a kind of "political purgatory,"² the future trajectory of Iran's political evolution towards a more representative government is a subject of great interest and importance. Furthermore, the revolutionary wave currently sweeping across the Arab world raises serious questions

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1. RYSZARD KAPUŚCIŃSKI, *SHAH OF SHAHS* 104 (William R. Brand & Katarzyna Mroczkowska-Brand trans., Vintage International 1992) (1985).

2. Carnegie Endowment, *Taking Tehran's Temperature: One Year On*, YOUTUBE (July 12, 2010), <http://www.youtube.com/watch?v=2DvgQ8JkLVM>.

about the nature of democracy in the Middle East and the role religion will play in the political architecture of Islamic societies.

Since the end of the Cold War, there has been an increasing trend towards regarding democracy as a universal norm under international law as well as a trend towards international delegitimization of efforts by governments to subvert democratic institutions and procedures.³ Numerous international covenants drafted in the latter half of the twentieth century, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and People's Rights (ACHPR), and the Charter of the Organization of American States (OAS), increasingly form a body of custom with respect to the universality of democratic norms.⁴

Many commentators, most famously Francis Fukuyama, have argued that liberal democracy is not only a universally desirable norm under international law, but the inevitable and final stage of human sociopolitical development.⁵ Fukuyama's original essay dealt mainly with the ideological death of Marxism-Leninism after the Cold War, but Fukuyama has more recently expanded his thesis to discuss Islamic fundamentalism, claiming that the appeal of radical Islamist ideologies is limited, and that Muslim societies will either become successful democracies like Turkey or will adopt a strict interpretation of Sharia law and collapse in on themselves like Afghanistan or Pakistan.⁶ Fukuyama's thesis is flawed, as Muslim voters in countries such as Turkey, Egypt and Tunisia seem to see little contradiction between Islam and participation in a generally open and pluralistic society.⁷

After establishing that there exists an international legal norm in favor of democracy, this paper will then proceed to discuss how the present government of Iran, the Islamic Republic, has violated this

3. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

4. See *infra* Part I.

5. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

6. Francis Fukuyama, *They Can Only Go So Far*, WASH. POST, Aug. 24, 2008, at B1.

7. Recent elections in post-revolutionary Egypt and Tunisia, albeit somewhat flawed and in Egypt's case led to broad majorities for the Muslim Brotherhood and the radical Salafi movement, nonetheless represent the beginnings of modern civil society in the Arab world.

norm, most prominently its obligations under the terms of the ICCPR, to which Iran has been a party since 1975.⁸ The ICCPR requires state parties to hold periodic and genuine elections, provides guarantees against arbitrary arrest and torture, and enshrines safeguards to ensure due process.⁹ While Iran's present constitution contains many of these protections, and ostensibly provides for regular, free elections, the theocratic structures created by Iranian law and custom neuter these guarantees.¹⁰ However, as scholars such as Alfred Stepan have argued, the fact that a country's laws and customs enshrine religious elements does not necessarily preclude the emergence of successful, pluralistic democracies.¹¹ Iran does not necessarily have to become a rigidly secularist state on the Kemalist model to become a successful democracy.¹²

I. THE EMERGING NORM IN FAVOR OF DEMOCRATIC GOVERNANCE

In 1992 Professor Thomas Franck published his landmark article *The Emerging Right to Democratic Governance*, in which he argued that a growing body of treaty law and state practice were converging to form an increasingly coherent international norm in favor of democratic governance and the right to self-determination.¹³ Franck cited two contemporary examples: (1) the international community's overwhelmingly negative response to the overthrow of the democratically elected government of President Jean Bertrand Aristide in Haiti, and (2) the reaction of the Conference on Security and Co-operation in Europe to the failed Soviet coup against Mikhail Gorbachev.¹⁴ Franck also noted how regional organizations such as

8. International Covenant on Civil and Political Rights, art. 25, Dec. 16, 1966, 999 U.N.T.S. 171, 179 (entered into force March 23, 1976) [hereinafter ICCPR].

9. *Id.* arts. 7, 9, 14, 25.

10. *See infra* Part III.

11. *See* Alfred C. Stepan, *Religion, Democracy and the "Twin Tolerations"*, J. DEMOCRACY, Oct. 2000, at 37.

12. *See infra* Part III.

13. Franck, *supra* note 3, at 47.

14. *Id.* at 46–47. In the aftermath of the failed 1991 coup attempt, the Conference on Security and Co-operation in Europe passed a resolution “condemning unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order” and “supporting vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating state by undemocratic means.” Conference on Security & Co-operation in Europe [CSCE], *Document of the Moscow Meeting on the Human Dimension of the CSCE*, ¶¶ 17.1–.2, 30 I.L.M. 1670, 1677 (1991). The CSCE is the predecessor

the OAS were increasingly taking action to condemn un-democratic regimes and their conduct, citing the example of the OAS condemnation of Nicaraguan dictator Anastasio Somoza Debayle for his brutal efforts to suppress the Nicaraguan Revolution.¹⁵ For most of the 20th century it seemed that cynical political calculations, often related to the heated atmosphere surrounding Cold War politics, rather than the democratic character of the government in question, determined whether or not a particular government was recognized as legitimate and thus empowered to represent the state internationally.¹⁶

Since the collapse of the Soviet Union, there has been an increasingly universal customary international legal norm, demonstrated by state practice and *opinio juris*, supporting democratic governments against extra-constitutional seizures of power. Until that time, there was a generally accepted understanding that the internal character of a government was, as a matter of international law, irrelevant to whether or not that government, as distinct from the state, was to be considered legitimate.¹⁷ Recognition of governments was considered as a bi-lateral question, resolved by individual states according to a wide array of varying political calculations.¹⁸

To the extent that international law prescribed any standard for determining the legitimacy of a government, the most commonly cited standard was the “Effective Control” test embodied in the *Tinoco* arbitration, which posited that there were several relevant factors in determining the right of a government to bind a state internationally:

The question is, has it [the government] really established itself in such a way that all within its influence recognize its

organization to the Organization for Security and Co-operation in Europe (OSCE). *Who We Are*, ORG. FOR SEC. AND CO-OPERATION IN EUR., <http://www.osce.org/who/87> (last visited Mar. 19, 2012).

15. Franck, *supra* note 3, at 65.

16. See generally Matthew Griffin, *Accrediting Democracies: Does The Credentials Committee of the United Nations Promote Democracy Through its Accreditation Process, and Should It?*, 32 N.Y.U. J. INT'L L. & POL. 725 (2000) (discussing the debates in the United Nations General Assembly concerning the right to represent Cambodia after the collapse of the Khmer Rouge regime).

17. See *infra* note 20 and accompanying text.

18. P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES* 84–85 (1994).

control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?¹⁹

Indeed, commentators such as Nehal Bhuta have noted that:

The problem of any new political order is the problem that new institutions—however legitimate from some abstract normative standpoint—are ‘built on quicksand’ and that unless the new claim of political authority is matched with effective power; during these times, ‘power and authority’ is a kind of composite, a sociological datum that fuses facticity (the capacity to coerce, compel, or oblige) with validity (the authority to legitimate, rationalize, or normalize).²⁰

Bhuta further notes that:

The authority claimed for power is predicated on a claim to legitimacy, but only if the claim is successful can effective power translate into stable domination—a state capable of consistently maintaining its power and authority. In the stabilization of a state order, cognitive, voluntary ‘consent’ of each and every subject to the claimed authority for the exercise of power is less significant than the empirically general acquiescence of the population in the means by which power is exercised and commands enforced (or permissions granted).²¹

The traditional view of governmental legitimacy and the factors listed in the *Tinoco* opinion mention nothing about the way the government in question came to power, and do not take into account the character of the government itself as being relevant to the question of legitimacy.

However, there is strong evidence that state practice and *opinio juris*²² have coalesced into an increasingly important norm providing

19. *Gr. Brit. v. Costa Rica*, 1 R.I.A.A. 369, 382 (1923).

20. Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 831 (2010) (footnote omitted).

21. *Id.* at 830 (footnote omitted).

22. Customary international law is generally understood to be demonstrated by state practice and *opinio juris*. See, e.g., *The North Sea Continental Shelf* (Fed. Rep. of Ger./Den.; Fed. Rep. of Ger./Neth.), 1969 I.C.J. 3, ¶ 78 (Feb. 20) (“Not only must the acts

that the character of a government, and the way it comes to power, are relevant to whether or not that government is recognized as “legitimate” under international law. The clearest examples of this are when the international community, whether under the aegis of the United Nations or through regional organizations like the OAS, has condemned efforts by the military to subvert and overthrow democratic governments.²³ Recently, the OAS suspended Honduras following what many considered a coup against the country’s democratically elected president.²⁴

As Franck discussed, one of the first and clearest examples of this principle in action was the international reaction to the overthrow of Haiti’s democratically elected president, Jean Bertrand-Aristide. In 1991, Aristide was overwhelmingly elected president of Haiti in free and fair elections monitored by the United Nations.²⁵ In September of that year, Aristide was overthrown in a coup led by the Haitian military.²⁶ The international community was unanimous in recognizing that the military coup against the democratically elected government of Haiti would not be allowed to stand. The OAS immediately condemned the coup, and passed a resolution recognizing the elected government of President Aristide to be “the only legitimate representatives of the Government of Haiti.”²⁷ The OAS foreign ministers also issued a declaration stating that no government resulting from this illegal situation would be accepted and urging OAS member states to freeze the assets of the Haitian government and impose a trade embargo on Haiti.²⁸

concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence as a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

23. Organization of American States [OAS], *Support of the Democratic Government of Haiti*, OEA/Ser.F/V.1/MRE/RES.1 (Oct. 3, 1991); Press Release, OAS, OAS Suspends Honduras (July 5, 2009), available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-219/09.

24. The case of Honduras is somewhat unusual because the coup had a least a modicum of legal justification, having been partially legitimized by the Honduran Supreme Court. Paul Kiernan et al., *Coup Rocks Honduras*, WALL ST. J., June 29, 2009, at A1.

25. BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 367 (1999).

26. *Id.* at 366–67.

27. *Support of the Democratic Government of Haiti*, *supra* note 23.

28. OAS, *Apoyo a la Democracia en Haiti* [*Support for the Democracy in Haiti*], OEA/Ser.F/V.1/MRE/RES.2/91 (Oct. 8, 1991), available at <http://www.oas.org/columbus/docs/HaitiMRE/RES291Spa.pdf>.

Additionally, the United Nations opposed the military coup in Haiti and supported the Aristide government. In 1992, the United Nations Credentials Committee rejected the credentials of the Haitian military regime and recognized the right of President Aristide's government to continue to represent Haiti.²⁹ The UN General Assembly condemned the coup's "illegal replacement of the constitutional President of Haiti, the use of violence and military coercion and the violation of human rights."³⁰ The General Assembly further affirmed as unacceptable "any entity resulting from that illegal situation" and demanded "the immediate restoration of the legitimate government of President Jean-Bertrand Aristide, together with the full application of the National Constitution."³¹

In 1994, the UN Security Council determined that the overthrow of the democratically elected Aristide government in Haiti represented a "threat to peace and security in the region" and authorized a multinational force to "facilitate the departure from Haiti of the military leadership" and usher in the "the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti."³²

In 1997, the international community again acted to oppose a military coup against a democratically elected government, this time in Sierra Leone. In that year, a group of soldiers overthrew the government of Ahmed Kabbah, Sierra Leone's first democratically elected president.³³ The Organization for African Unity (OAU) condemned the coup and supported efforts by the Economic Community of West African States (ECOWAS) to take military action to restore the elected government.³⁴ The United Nations also acted to condemn the coup, allowing the elected Kabbah government to retain its seat in the General Assembly.³⁵ The UN Security Council passed Resolution 1132, invoking Chapter VII of the UN Charter and

29. Griffin, *supra* note 16, at 746.

30. G.A. Res. 46/7, ¶ 1, U.N. Doc. A/RES/46/7 (Oct. 11, 1991).

31. *Id.* ¶ 2.

32. S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

33. See Karsten Nowrot & Emily W. Schbacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 323 (1998).

34. *Id.* at 328.

35. Credentials Comm., Rep. on its 52nd Sess., ¶ 10, U.N. Doc. A/52/719 (Dec. 11, 1997).

demanding that the military junta “take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order.”³⁶

II. THE EMERGING DEMOCRATIC NORM—INTERNATIONAL CONVENTIONS

One of the sources of customary international law is state practice,³⁷ and state practice, as demonstrated by the conduct of organizations like the UN and the OAS with respect to Haiti, Sierra Leone, and Honduras, clearly establishes a growing customary international legal norm in favor of democratic governance.³⁸

Another important source of international law are international conventions and the principles embodied therein.³⁹ Customary international law clearly establishes that a pattern of international agreements all standing for the same proposition can demonstrate that a practice is so widely followed that it has become a rule of customary international law⁴⁰ and numerous international conventions form a body of *opinio juris* and state practice that enshrine the increasingly universal customary international norm of

36. S.C. Res. 1132, ¶ 1, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

37. See, e.g., *Military and Paramilitary Activities (Nicar v. U.S.)*, 1986 I.C.J. 14, ¶ 183 (June 27) (observing that the Court must consider “practice and *opinio juris* of States”).

38. See *supra* Part II. The recent international reaction to the military coup in the West African nation of Mali is further evidence of this trend. On March 21, 2012, a group of officers overthrew the elected government of President Amadou Toumani Touré. On April 6, 2012, after widespread international condemnation and the imposition of trade and economic sanctions by ECOWAS, the ruling junta agreed to step down in favor of a transitional civilian government that will be tasked with organizing free elections. *Mali coup leaders to stand down as part of ECOWAS deal*, BBC News, Apr. 6, 2012. www.bbc.co.uk/news/world-africa-17642276.

39. See, e.g., Statute of the International Court of Justice, art. 38(1), 33 U.N.T.S. 993. Article 38 reads as follows: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

40. See, e.g., *North Sea Continental Shelf (Fed. Rep. of Ger./Den.; Fed. Rep. of Ger./Neth.)*, 1969 I.C.J. 3, ¶¶ 73–74 (Feb. 20).

democratic governance. Numerous international conventions, including several to which the Islamic Republic of Iran is party, have increasingly enshrined the norm of democratic governance and genuine, periodic elections. Article 21 of the Universal Declaration of Human Rights (UNDHR) states that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” where “the will of the people shall be the basis of the authority of government” and more precisely that “this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁴¹

Numerous regional conventions also enshrine the norm in favor of democratic governance. The Organization of American States Charter has several provisions to ensure the vitality of representative government, including the Santiago Commitment to Democracy and the Renewal of the Inter-American system, giving special priority to “strengthening representative democracy as an expression of the legitimate and free manifestation of the will of the people.”⁴² In 1991 the OAS passed Resolution 1080, which requires the organization’s Secretary General to call for an immediate meeting if there is a “sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states.”⁴³ Furthermore, Resolution 1080 establishes a specific procedure for defending democracy against the military coups that have plagued Latin American for decades, as happened in countries such as Haiti, Peru, Guatemala and Honduras.⁴⁴ In 1992 the OAS amended its charter with the Protocol of Washington, which requires the suspension of any OAS government whose regime came to power through a coup or by otherwise overthrowing a

41. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 21 (Dec. 10, 1948) [hereinafter UDHR].

42. See OAS, *Inter-American Democratic Charter*, arts. 17–22, G.A. Res. 1, OAS Doc. OEA/Ser.P/AG/RES/1 (XXVIII-E/01) (Sept. 11, 2001) (detailing collective action mechanism to preserve at-risk state’s “democratic system”); OAS Gen. Assembly Proceedings, 21st Sess., Volume 1, at 2, OAS/Ser.P/XXI.O.2 (June 4, 1991) (reprinting *The Santiago Commitment to Democracy and the Renewal of the Inter-American System*), available at <http://scm.oas.org/pdfs/agres/ag03805E01.pdf>.

43. OAS, Representative Democracy, G.A. Res. 1080, ¶ 1, OAS Doc. AG/RES/1080 (XXI-O/91) (June 5, 1991).

44. See generally Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393 (1994).

democratically elected government.⁴⁵ Article 3 of the First Protocol to the European Convention on Human Rights provides that “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁴⁶ Article 23 of the American Convention guarantees that every citizen shall have the right to “take part in the conduct of public affairs, directly or through freely chosen representatives” and to “vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.”⁴⁷ Article 13 of the African Charter on Human and Peoples’ Rights contains similar language, guaranteeing “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”⁴⁸

Perhaps the most important international convention with respect to the importance of maintaining democratic norms is the ICCPR, to which Iran has been a state party since 1975.⁴⁹ Article 25 of the ICCPR guarantees that every citizen shall have the right and the opportunity “to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”⁵⁰ The ICCPR also guarantees important freedoms, such as: due process rights,⁵¹ the right to

45. OAS, Protocol of Amendments to the Charter of the Organization of American States (Protocol of Washington), G.A. Amend. 56, art. I, OAS Doc. OEA/Ser.A/2 Add. 3 (SEPF) (Dec. 14, 1992) (adding Article 9 to the OAS Charter, which provides that “[a] Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate” in OAS).

46. Protocol to Amend the Convention for Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262.

47. OAS, American Convention on Human Rights art. 23(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144.

48. Organization of African Unity, African Charter on Human and Peoples’ Rights art. 13(1), June 27, 1981, 1520 U.N.T.S. 217.

49. ICCPR, *supra* note 8, art. 25.

50. *Id.* art. 25(a)–(b).

51. *Id.* art. 14.

freedom of assembly,⁵² freedom of association,⁵³ and freedom of expression.⁵⁴

In addition to violating the general customary norm in favor of democratic elections embodied in international conventions, Iran has also repeatedly violated its own specific obligations under Article 25 of the ICCPR. While Article 25's requirement for "genuine" elections is somewhat ambiguous, it seems certain that, at a minimum, a "genuine" election would have to be one where the victor was not determined in advance and where the ballots cast are fairly counted. Furthermore, for it to be an election in the literal sense there would have to be two or more candidates for a given position, or at least a reasonable opportunity for opposition candidates to enter the race. To take two extreme examples, it seems certain that elections in North Korea, or in Saddam Hussein's Iraq, would not qualify as "genuine" under the ICCPR. Parliamentary elections in North Korea have been described as:

[L]argely a formality, since only one candidate is listed on the ballot in each constituency. Officially, the vote is secret. But those who oppose the sole candidate must go to a special booth to cross out the name before placing it in a ballot box—an act of rebellion defectors say is all but unthinkable.⁵⁵

Similarly, in Saddam Hussein's Iraq, Iraqis were required to cast ballots—in their own blood—in a 2002 referendum on confirming Saddam's rule.⁵⁶

Under this interpretation, Iran has been in violation of Article 25 of the ICCPR for nearly 37 years, since Iran acceded to the convention in 1975. In 1975, the Shah of Iran, Mohammad Reza Pahlavi, abolished Iran's multi-party system (which had itself been a farce since the overthrow of Prime Minister Mossadegh in 1953) and replaced it with a one party system under the aegis of the Rastakhiz

52. *Id.* art. 21.

53. *Id.* art. 22.

54. *Id.* art. 19.

55. Jean H. Lee, *North Korea 'Votes' for New Parliament*, TORONTO STAR, Mar. 8, 2009, <http://www.thestar.com/News/World/article/598600>.

56. David Blair, *Iraqis vote in blood for Saddam*, TELEGRAPH (Oct. 16, 2002, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1410387/Iraqis-vote-in-blood-for-Saddam.html>.

(Resurgence) Party.⁵⁷ All Iranians were required by law to become members of the party, and refusal to do so was essentially deemed treasonous—those not wishing to join the party were supposed to be offered their passports and a passage to exile.⁵⁸

Following the overthrow of the Shah in 1979, Iran's political system has changed to make meaningful democracy nearly impossible. For instance, a Guardian Council determines in advance which candidates are ideologically acceptable and may stand in Iran's presidential and parliamentary elections.⁵⁹ Furthermore, millions of Iranians continue to believe that, in addition to tilting the playing field against opposition candidate Mir Hossein Mousavi, the Islamic Republic falsified the 2009 presidential election results to show a victory for its favored candidate, thus making the election a farce even by the Islamic Republic's own standards.⁶⁰

III. DEMOCRACY AND RELIGION

Parts I and II of this paper have established that there is an increasingly universal customary international legal norm in favor of democratic governance.⁶¹ This norm is embodied in state practice and numerous international conventions.⁶² Part III established that Iran, by failing to hold genuine elections, is in violation of this norm and its own specific treaty obligations under the International Convention on Civil and Political Rights.⁶³ This section discusses the steps Iran must take in order to meet its obligations under customary international law and treaties such as the ICCPR.

57. SIR ANTHONY PARSONS, *THE PRIDE AND THE FALL: IRAN 1974–1979*, at 16 (1984).

58. *Id.*

59. See KARIM SADJADPOUR, *CARNEGIE ENDOWMENT FOR INT'L PEACE, READING KHAMENEI: THE WORLD VIEW OF IRAN'S MOST POWERFUL LEADER 7* (2009), available at http://carnegieendowment.org/files/sadjadpour_iran_final2.pdf.

60. Since there has never been an independent, impartial audit of the 2009 Iranian presidential election results, it may be some time before it is clear what happened in June of 2009. In addition to violating its Article 25 obligations, the Islamic Republic has also violated virtually every other provision of the ICCPR, including the right to a fair trial, the prohibition on torture, and the rights to freedom of assembly and expression. For documentation of these abuses, particularly those that have occurred since Iran's disputed presidential election, see IRAN HUMAN RIGHTS DOCUMENTATION CENTER, *A YEAR LATER: SUPPRESSION CONTINUES IN IRAN* (2010), available at <http://www.iranhrdc.org/english/publications/reports/3162-a-year-later-suppression-continues-in-iran.html>.

61. See *supra* Parts I–II.

62. See *supra* Part II.

63. See *supra* Part II.

Unlike some of the world's more notorious recent dictatorships such as Ba'athist Iraq, North Korea, or Communist Cuba, Iran is a comparatively open and pluralistic society. Indeed, Iran's constitution guarantees many important civil, political, and economic rights, and in its early drafts was based largely on the Constitution of the French Fifth Republic.⁶⁴ However, the draft constitution was modified numerous times during the turbulent early days after the Iranian Revolution, in each case to grant more power to the Iranian clergy, who were slowly winning the battle for post-revolutionary control.⁶⁵

The process, through which the democratic ambitions of the 1979 revolution became fused with the Ayatollah Khomeini's totalitarian theocratic vision, is a fascinating one,⁶⁶ and these dueling, irreconcilable impulses are reflected in Iran's constitution. The Constitution of the Islamic Republic grants the Supreme Leader (whose title more accurately translates as "Leader of the Revolution") extraordinary powers over the levers of state and charges him with defending the ideals of the Islamic Revolution.⁶⁷ The Supreme Leader has the power to appoint members of: the judiciary, state radio and television, Iran's armed forces, the Revolutionary Guards and the Guardian Council, which has the authority to veto parliamentary decisions it believes conflict with Islam and to bar ideologically unsuitable candidates from running in Iranian elections.⁶⁸

These broad powers effectively grant one person either the direct or indirect power over Iran's executive, legislative, and judicial branches and make the Islamic Republic a *de jure* dictatorship.⁶⁹ Granting any one official such extraordinary, unreviewable powers

64. See *infra* notes 72–79 and accompanying text. See also Omar Sial, *A Guide to the Legal System of the Islamic Republic of Iran*, NYU LAW GLOBAL (Mar. 2006), <http://www.nyulawglobal.org/globalex/Iran.htm>.

65. Sial, *supra* note 64.

66. For a history of the machinations that went into drafting and adopting of Iran's current constitution, see Said Saffari, *The Legitimation of the Clergy's Right to Rule in the Iranian Constitution of 1979*, 20 BRIT. J. MIDDLE E. STUD. 64 (1993).

67. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 110.

68. See SADJADPOUR, *supra* note 60.

69. The Islamic Republic's constitution does state that the legislative, executive and judiciary branches of government are intended to be separate. However, it also states that all three branches of government will be supervised by the absolute authority of the Supreme Leader and the clergy. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 57.

would make democratic governance virtually impossible. However, the Constitution of the Islamic Republic also requires that the Supreme Leader be a member of the clergy, making the country a *de jure* theocracy.⁷⁰

In spite of this broad grant of authority, Iran's constitution appears at a glance to be in many ways a surprisingly democratic and progressive document, barring discrimination on the basis of ethnic affiliation,⁷¹ sex,⁷² and providing guarantees for the rights of women.⁷³ Iran's constitution also provides for many civil and political rights, including freedom of the press⁷⁴, freedom of assembly,⁷⁵ privacy protections,⁷⁶ and a specific ban on the use of torture by the government.⁷⁷ The constitution of Iran also provides for a democratically elected president.⁷⁸

However, virtually all these civil and political rights are specifically qualified by the requirement that they exist only so far as they do not "conflict with the principles of Islam."⁷⁹ As a matter of law and custom, the Supreme Leader, his subordinates, and clerical bodies such as the Guardian Council are charged with interpreting how Islamic doctrine applies to Iranian constitutional rights.⁸⁰ Indeed,

70. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 109. Iran's original Islamic Constitution, adopted in 1980, required the Supreme Leader to be a *marja*, the highest rank achievable for a Shi'a Muslim clergyman. SADJADPOUR, *supra* note 60, at 6. Iran's constitution was amended in 1989 to remove this requirement in part to allow Iran's current Supreme Leader, Ali Khamenei, who was a mid-level clergyman at the time of his elevation to Leader, to take over the office from Ayatollah Khomeini upon his death. *Id.*

71. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 19.

72. *Id.* art. 20.

73. *Id.* art. 21.

74. *Id.* art. 24.

75. *Id.* art. 27.

76. *Id.* art. 25.

77. *Id.* art. 38. Article 38 of Iran's constitution also appears to bestow a privilege against self-incrimination, although in practice this guarantee is virtually never honored, and coerced confessions are extremely common. *See generally* ERVAND ABRAHAMIAN, *TORTURED CONFESSIONS: PRISONS AND PUBLIC RECANTATIONS IN MODERN IRAN* (1999).

78. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 114.

79. *Id.* arts. 4, 20–21, 26–28.

80. *See* Edward Yeranian, *Iran's Supreme Leader Says He Represents the Prophet Muhammad on Earth*, VOA (July, 21, 2010), <http://www.voanews.com/english/news/middle-east/Irans-Supreme-Leader-Says-He-Represents-Prophet-Muhammad-on-Earth-98945624.html>.

the Ayatollah Khamenei has gone as far as to declare that his power is absolute, and that all must “obey him” since he speaks as the “representative of the Prophet Muhammad and [Shi’ism’s] 12th Imam on Earth.”⁸¹ By qualifying fundamental constitutional rights by stating that they are subject to the whims of a megalomaniac who literally claims to be God’s Prophet on Earth, the Constitution of the Islamic Republic makes those guarantees virtually meaningless. Furthermore, given the hideous human rights record of the Islamic regime⁸² it seems extraordinarily unlikely that the Supreme Leader and his subordinates will use the process of Islamic interpretation to expand civil and political rights.

In addition to granting the Supreme Leader and his associates warrant to suppress any dissent in the name of religious authority,⁸³ any constitution with a theocratic foundation necessarily grants officials of state the power to enforce, at their whim, prejudices against religious minorities and women. While Iran has an ancient and noble tradition of respect for other cultures and religions,⁸⁴ the Islamic regime has long persecuted members of the Baha’i faith on

81. *Id.*

82. IRAN HUMAN RIGHTS DOCUMENTATION CTR., *supra* note 61.

83. Iranians who opposed the Islamic Republic, and in particular those who oppose the imposition of the Velayat-e-Faqih are not considered enemies of the state as such, but heretics. Iranian dissidents brought to trial are typically charged with Moharebeh (waging war against God) or the related crime of Mofsed-e-filarz (sowing corruption on earth). Both crimes are punishable by death. *See, e.g.*, Peter Walker, *Iranian Court Jails Human Rights Activist for ‘Waging War Against God’*, GUARDIAN, Sept. 19, 2010, <http://www.guardian.co.uk/world/2010/sep/19/iranian-court-jails-human-rights-activist>; Neil MacFarquhar, *Iran’s Leader Derides Protests; Lawmakers Urge Death for Opposition Leaders*, N.Y. TIMES, Feb. 16, 2011, at A1. Velayat-e-Faqih, typically translated as “Rule of the Jurisprudent” or “Guardianship of the Islamic Jurists”, is the state ideology of the Islamic Republic of Iran. While historically the concept had given the Islamic clergy custodianship of the poor and insane, the Ayatollah Khomeini expanded this idea to include everyone living in an Islamic society, positing that a high ranking Islamic scholar should interpret Islam for all members of society in all matters. The concept is a highly controversial interpretation of Shi’a Islamic teachings and is not by any means universally accepted, even by high ranking Shi’a clergymen such as the Ayatollah Sistani.

84. Shirin Ebadi, in her speech accepting the 2003 Nobel Peace Prize, commented on Iran’s ancient tradition of tolerance and respect for other cultures:

I am an Iranian. A descendent of Cyrus the Great. The very emperor who proclaimed at the pinnacle of power 2500 years ago that “. . . he would not reign over the people if they did not wish it. And [he] promised not to force any person to change his religion and faith and guaranteed freedom for all.” The Charter of Cyrus the Great is one of the most important documents that should be studied in the history of human rights.

Shirin Ebadi, Nobel Lecture at the Nobel Institute (Dec. 10, 2003) (transcript available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2003/ebadi-lecture-e.html).

religious grounds.⁸⁵ The Constitution of the Islamic Republic, while granting religious freedom to Zoroastrians, Christians, and Jews, intentionally refuses to recognize the rights of Baha'is.⁸⁶

Having said all this, authors such as Alfred Stepan argue that even though a country's laws and customs enshrine religious elements, this does not necessarily preclude successful, pluralistic democracy. Stepan correctly argued that many democratic countries, particularly those in Western Europe, have carved out a role for religion in society without allowing doctrinaire theocracy to overwhelm the public sphere.⁸⁷ For instance Greece, a deeply religious country⁸⁸ and incidentally the birthplace of democracy, has enshrined a role for its own Eastern Orthodox faith in the Greek constitution while still maintaining a pluralistic democracy.⁸⁹ In the United Kingdom, the British monarch is not only the head of the armed forces, but also the leader of the Church of England, and in many English schools, church doctrine is taught not only as history, but as divine truth.⁹⁰ Countries like Germany and Austria permit local

85. For a recent history of persecution of Iranian Baha'is, see generally IRAN HUMAN RIGHTS DOCUMENTATION CTR., *A FAITH DENIED: THE PERSECUTION OF THE BAHÁ'IS OF IRAN* (2006), <http://www.iranhrdc.org/english/publications/reports/3149-a-faith-denied-the-persecution-of-the-baha-is-of-iran.html>; IRAN HUMAN RIGHTS DOCUMENTATION CTR., *COMMUNITY UNDER SIEGE: THE ORDEAL OF THE BAHÁ'IS OF SHIRAZ* (2007), <http://www.iranhrdc.org/english/publications/reports/3151-community-under-siege%3A-the-ordeal-of-the-baha%E2%80%99is-of-shiraz.html>. The persecution of Baha'is in Iran predates the Islamic Republic, but has always been founded on theological differences.

86. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 13. Islam recognizes the rights of so-called "People of the Book," specifically Christians and Jews, whose holy books and revelations predated Islam, and were later incorporated into Islamic doctrine. Shi'a Islam as practiced in Iran also recognizes the rights of Zoroastrians. The nature of the theological warrant for the persecution of the Baha'is essentially stems from the fact the Baha'ism claims as part of its faith prophets and revelations *after* those of the Prophet Muhammad. As Islam claims to be God's final and complete revelation to humanity, claiming any divine revelations after the fact would, from an Islamic perspective, be necessarily false and heretical.

87. Stepan, *supra* note 11, at 41.

88. Between 95 and 98 percent of Greeks are members of the Eastern Orthodox faith, 81 percent of Greek citizens believe that there is a God, and a further 16 percent believed in some sort of spirit or life force. DIRECTORATE GEN. PRESS AND COMM'N, EUROPEAN COMM'N, SPECIAL EUROBAROMETER: SOCIAL VALUES, SCIENCE AND TECHNOLOGY 9 (2005), http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf.

89. Indeed, Greece's constitution enshrines the role of the Eastern Orthodox Church in Greek society. 2008 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 3.

90. The author Christopher Hitchens once related a story regarding the teaching of church doctrine in British schools, as explained by Mrs. Jean Watts, who taught nature class at Hitchens' boarding school when he was 9 years old. Barbara Bradley Hagerty, *for Hitchens, in Life and Death, an Unaware Cosmos*, NPR (Dec. 16, 2011), <http://www.npr.org>

churches to play an important role in national civic and economic life.⁹¹

Indeed, it seems that democracies that promote an aggressive brand of secularism are the exception rather than the rule, and often subscribe to this model of secular organization in a variety of different ways for reasons peculiar to their own histories. As Stepan notes, a country like France, with its specific constitutional guarantee of “Laïcité” evolved its conception of the proper role of the church in public affairs during the inter-religious turmoil following the French Revolution, and even so, France still dedicates a large percentage of its public education budget for Catholic private schools.⁹² The First Amendment to the U.S. Constitution was similarly born out of religious conflict, and American politicians frequently make public displays of piety to win support. Finally, the most militant secular state in the world, the Republic of Turkey, has only developed towards democracy by allowing the full participation of Islamic parties, including the current governing party of Turkey, the AKP.

There is a dramatic difference between a constitutional structure that incorporates religious belief into civic life and one that forcibly imposes religious doctrine and forbids dissent. The former structure, even if not explicitly secular, would certainly be consistent with democratic governance—the latter, as practiced in Iran, would not. As such, Alfred Stepan’s definition of democracy could certainly include a constitutional structure with a religious foundation, or a secular democracy that permitted competition by religious parties:

Democracy is a system of conflict regulation that allows open competition over values and goals that citizens want to advance. In the strict democratic sense, this means that as long as groups do not use violence, do not violate the rights of other citizens, and advance their interests within the rules of the democratic game, all groups are granted the

/2011/12/16/143830372/for-hitchens-in-life-and-death-an-unaware-cosmos. He recalled that Mrs. Watts explained that God had made the grass and the leaves green as a gift to mankind, saying that green grass was proof of the glory of God, because He could have made vegetation “orange or red, something that would clash with our eyes, whereas green is the most restful color for our eyes.” *Id.*

91. See Stepan *supra* note 11, at 41.

92. *Id.* at 42.

right to advance their interests, both in civil society, and in political society.⁹³

Furthermore, just as there is no inherent conflict between the inclusion of religion in civic life and the maintenance of democracy, there is no conflict whatever between particular religions, such as Islam, and pluralistic democracy. Indeed, Stepan, who wrote his article years before the Arab Spring, rebuts the false impression that Islam is incompatible with democracy by noting that a case can be made that about half of all the world's Muslims live in "democracies, near-democracies, or intermittent democracies," and that the number is higher still if one includes Indonesia.⁹⁴

Finally, there is also nothing in Iran's own experience with democracy that would prevent it from blending together civic and religious life in a democratic, pluralistic context. Iran can still preserve an important role for Islam in its constitutional framework without sacrificing the basic principles of democracy. Indeed, Iran's pre-revolutionary constitution, while certainly imperfect by modern standards, declared Islam the official state religion and granted the clergy certain judicial powers, guaranteed the rights of religious minorities, provided for representative government and sought to curb the authority of Iran's monarchy.⁹⁵ Prior to the 1953 coup against Prime Minister Mohammad Mossadegh, Iranian nationalists sought to turn the Iranian monarchy into a purely ceremonial office, and to preserve a limited role for the clergy in judicial and family

93. *Id.* at 39.

94. *Id.* at 48.

95. Contrasting Iran's 1906 Constitution with the Constitution of the Islamic Republic is an interesting case study in how laws and constitutions can be manipulated by autocrats to serve political ends. The 1906 Constitution, on its surface, actually appears to grant powers to the clergy that are similar to those granted by the Constitution of the Islamic Republic, including requirements that government officials be Muslims and the granting of judicial power to clerics, and contains far less language about civil, political, and women's rights. QANUNI ASSAASSI IRAN [IRANIAN CONSTITUTION] 1906. Iran's last monarch, Mohammad Reza Pahlavi, contemptuous of both liberal democracy and what he perceived to be clerical reactionaries, largely ignored both the democratic and religious character of Iran's constitution as he sought to build a secular, modern state. *See generally* ABBAS MILANI, THE SHAH (2011). After the revolution, Iran's mullahs have largely ignored the more progressive clauses of the Islamic Republic's constitution in favor of their own ideological vision. *See supra* notes 69–86 and accompanying text.

affairs, in a way that would have resembled the systems established in countries like Germany and the United Kingdom.⁹⁶

CONCLUSION

Since the end of the Cold War, there has been an increasing trend towards holding democracy as a universal norm, and a trend towards international de-legitimization of efforts by governments to subvert democratic institutions and procedures.⁹⁷ The philosophical grandfather of this argument was Francis Fukayama, but Thomas Franck's *The Emerging Right to Democratic Governance*, set the stage for a much broader conversation about whether a right to democratic governance existed in international law.⁹⁸ There has also been an increasing body of treaty law, such as the ICCPR, the ECHR, the ACHR, the ACHPR, and the OAS Charter, that forms a body of custom with respect to the universality of democratic norms.⁹⁹

Given the emerging customary international norm in favor of democratic governance, the Islamic Republic of Iran has failed to meet its obligations under this norm, most prominently under the International Covenant on Civil and Political Rights.¹⁰⁰ In addition to failing to hold regular and genuine elections, Iran has failed to respect other rights essential to the functioning of democracy under the ICCPR, including freedom of association, freedom of the press, and the right to a fair trial.¹⁰¹ Iran's civic and political structures are equal to the task of resolving these problems, and there is nothing inherent in Iranian history or in Islam that would prevent Iran from making a successful transition to democracy. Finally, while the Iranian political system would have to change radically in order to accommodate democratic change, Iran would not necessarily have to go down the road of rigid secularism in order to build a successful, pluralistic democracy.¹⁰²

96. See generally STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003).

97. See *supra* Part I.

98. See *supra* notes 14–16 and accompanying text.

99. See *supra* Part II.

100. See *supra* Part III.

101. See *supra* Part II.

102. See *supra* notes 88–95 and accompanying text.