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Constitutions and the struggle for political order

a study in the modernization of political traditions

THE CONSTITUTIONS of the last two centuries are monuments to an eminently modern enterprise: the reconstruction of the political order by rational human effort. Constitution-making is a deliberate attempt at institution-building at the fundamental level of laying down the normative and legal foundations of the political order. Framing a constitution always purports to be an act of foundation; an act intended to break with the past, and with the existing cultural and institutional traditions, in which principled discussions take the place of everyday horse-trading in politics (1).

Constitution-making is a phenomenon of the formation and international transmission of a political tradition. In this historical process, the norms and institutions crystallized in the experience of particular nations are gradually amalgamated and generalized. The institutional structures and normative patterns generated in the formative experience of one nation become blueprints autonomous of the particular circumstances of their birth, and acquire fixity and rigidity. By acquiring normative and organizational autonomy, institutions can survive their original matrix and subserve other value-ideas and ideologies. The relation between the organizational form and normative logic of particular institutions, on the one hand, and the prevalent political culture, on the other, is one of reasonable consistency rather than strict determination. Formal inflexibilities introduce a comical aspect to the process of transmission of the international political culture through imitation. Nevertheless, this transmission involves not only adaptation but also confrontation. The two processes usually go hand in hand: adaptation

(1) Arendt was correct in considering the framing of the American Constitution as an act of foundation, but her sweeping statements (1977: 125-26, 146) on the deflationary spiral that has allegedly ravaged all subsequent constitutions cannot be accepted (Elster 1988).

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involves some confrontation between imported and indigenous norms, even when the intention is to imitate, and confrontation results in some adaptation of foreign norms, even when the intention is to resist penetration by rejecting them in favor of indigenous norms.

Constitutions are monuments around which institutions can crystallize. They can thus create a new constellation of institutional interests, and thereby, new agenda for politics. The agents of modernization and political reconstruction, the bearers of adopted norms and institutions, must confront the social and institutional bearers of the prevalent constellation of norms and social principles. The reaction of the latter sets in motion what will be termed 'constitutional conflict' or more generally 'constitutional politics', on which the outcome of the process depends. Constitutional politics thus consist in the contention among social and institutional forces over political agenda set by the constitutional (re)definition of norms and consequent (re)distribution of legitimate authority (2). The transplantation of the politico-legal tradition of constitutionalism, by requiring political reconstruction through rational design, generates conflicts and patterns in politics that are distinctly *constitutional*.

Modernization in the non-Western world has produced regimes with systemic properties of their own that are not a replica of the regimes they sought to emulate. The tendency to dismiss constitutions and the organs they set up on the grounds that they fall short of some Western standard is an old one (3). Yet the reception of constitutionalism by the non-Western world has created new regimes that are unlike any previous form of government. The novelty of these regimes cannot be understood without reference to their respective attempts at political reconstruction through constitution-making. Constitutions are important social realities in the contemporary world, whether in force or in suspense. They are important as transcendental justifications of political order. When suspended or breached in practice, as is often the case, they delegitimize governments and constitute normative assets for the opposition.

(2) Constitutional politics are thus the crucial instance of the 'politics of modernization', as conceptualized by Lepsius (1977).

(3) Max Weber (1989), for instance, leaving aside the careful, value-free categories of his historical sociology for the facile, value-loaded ones of the political essayist, dismissed the Russian Constitution of 1906 as a 'pseudo-constitution', and the subsequent trend as 'pseudo-democracy' and 'pseudo-constitutionalism'. The truth of the matter is that the establishment of the Duma introduced a significant change in the Russian structure of authority and its normative foundations, as had done the establishment of the Zemstvos a generation earlier (Shapiro 1984: Ch. 1); and both changes had revolutionary consequences.

I. *The constitutionalist tradition in the West*

1. *Law, constitutionalism and limited government.* The conception of constitution and the term itself come from Rome. The idea of legislation—the creation of man-made law (*lex*) proposed by the magistrates and approved by the popular assemblies, and the conception of the state as the *res publica* are two fundamental Roman contributions to universal constitutional history. In the second century A.D., the legislative power of the emperor was explicitly recognized, and the term *constitutio* acquired the more technical meaning of an act of legislation by the emperor. The constitutions of the emperors were usually drawn up by a council consisting of eminent jurists. Like the edicts of all magistrates, they survived their author (Gaudemet 1982: 355-56, 572-88). Although legislation by popular assemblies came to an end with the republican era, the legislative power of the emperor was theoretically derived from the people. Furthermore, the emperor's authority, though unlimited, was public and could only be legitimately exercised in the interest of the *res publica*. The idea of the impersonal rule of man-made law—law that was public and was usually produced by conciliar deliberation—survived the Roman empire.

The world religions produced a very different conception of law: that of the sacred law—an eternal law based on the transcendent justice of God. Law was not man-made but made by God; transcendent justice was equated with divine commandments. However, as the sacred law was in principle eternal and unchanging, and, as the explicit divine commandments were few, the object of legal science was to *find* what the law was in particular instances. The determination of legal norms thus took the form of law-finding rather than law-making. Among the world religions, only in Christianity do we find a successful synthesis of the Roman and the religious conceptions of law, and the transformation of law-finding into legislation.

In early Christianity, church councils legislated by declaring the law of God's church. The studies of Roman law in the Middle Ages assimilated the church to the empire, and the legislative power of the emperor was transferred to the Pope. The Pope assumed the emperor's function of issuing rescripts. A papal rescript or decretal was not necessarily or usually a decision on a concrete case, but rather an abstract answer to an abstract question. But as the questions were submitted by the bishops to the Pope, the answering *epistolae* would be declaring the common law (*ius commune*) of Christiandom, the law of the universal church (Maitland 1898: 9-16, 124-27). Thus, by the

thirteenth century, the Popes, assisted by the canon lawyers of the *curia*, had gradually converted the power of finding and declaring the law into the power of law-making.

Fragmentation of authority in the medieval West was crucial to the development of constitutionalism. This fragmentation took two overlapping forms: the differentiation between spiritual and temporal authority; and the distribution of authority between the king and his feudal vassals. These cross-cutting divisions of authority implied their mutual limitation. Feudal Europe made a fundamental contribution to constitutional history in the form of the distinction between the concepts of government (*gubernaculum*) and jurisdiction (*jurisdictio*), between the administrative order and the definition of right. This distinction separated the definition of right from the administrative order. Feudal *jurisdictio* came to mark the limits of the king's authority, and government could accordingly be conceived of as 'limited' by the existence of rights and 'liberties' defined by law. This 'limitation of government by law' (McIlwain 1947: 21-22) was to become the definitive quality of constitutionalism.

Modern constitutionalism emerged from the late medieval system of estate representation (*Ständesstaat*) in Europe. The second half of the thirteenth century witnessed the establishment of parliaments in England and France; and it was in parliaments that constitutionalism found its definitive institutionalization. The system of estate representation also established the principle that there could be no taxation without representation (Maitland 1920: 64-68, 95-96, 181-82). It should not be forgotten, however, that the parliaments were courts of law. The *parlement* of Paris was the King's Court, and as such, played an important role in institutionalizing the king's justice in conjunction with territorial sovereignty. The *parlement* of Paris registered edicts, ordinances, and royal declarations. It 'had the duty to remonstrate with the king when it deemed royal decisions to be in contradiction with earlier laws and regulations or contrary to public interest' (Mousnier 1984, II: 259). It did not, however, have the right to legislate, which was the king's alone (Mousnier 1979, I: 667). While parliaments were conceived of as judiciary organs, the notion of the absolute and transcendent law lingered on, and their function was seen as jurisprudential rather than legislative. It was not until the onset of the Puritan revolution that the High Court of Parliament categorically claimed the legislative authority of the King (Kantorowicz 1957: 21).

Except for the taken-for-granted political right to participate, there was no notion of the rights of citizens in ancient Greece and Rome.

The very conception of such rights, according to Friedrich (1964), presumed the transcendence of justice introduced by Christianity. The safeguarding of the self and its spiritual welfare against all positive laws ultimately derives from this transcendence of justice. With Aquinas, this comes to mean that the rights of the individual, as established by the natural law, are inviolable by human laws, and any law that violates them is unjust and has the character of violence (Aquinas 1965: 120-21). The religious element of constitutionalism was blended with notions derived from the common law tradition into the Bill of Rights that followed the revolution of 1688 in England. Of the somewhat mixed contents of this declaration, Locke's formulation separated the security of 'life, liberty and property' as the kernel of inviolable rights of the individual to be protected against governmental power. Each individual was thus entitled to a personal, private sphere of autonomy which included religious conviction and property. Thereafter, natural rights were gradually transformed into 'civil liberties', and the freedom of religion into academic freedom, freedom of expression and the press, of assembly and association (Friedrich 1964: 92-94). The civil rights of the individual became an established element in the international political culture to be drawn upon by the modern constitution-makers. Furthermore, the fundamental notion of human rights could be extended, as it was in modern times, to social and economic rights as rights to self-realization or prerequisites for the development of the individual (4).

Aquinas's adoption of the Stoic idea of natural law, and his theory of the divine emanation of the law of nature and its accessibility to human reason, made possible the emergence of a distinctively modern transcendental basis for the legitimacy of human laws and thus for the foundations of the political order. With the triumph of Thomism, Western Christianity accepted human reason as the agency for the determination of transcendent justice in matters political and secular. Natural law was henceforth not only independent of and superior to positive law, but the very source of legitimation of positive law. The revolutionary potential of this conception of law was demonstrated during the Reformation, and even more clearly in the eighteenth cen-

(4) It should be noted that civil and political rights have an essential element in common: they both entitle the individual to participate in the process of the creation of law. Civil rights are exercised directly, through the courts, to obtain 'individual norms' in particular cases, while political rights are exercised indirectly, through legislation, in the creation of general norms. Thus, contrary to a common misperception, a private right is also ultimately a political right (Kelsen 1961: 87-90). This, the advocates of the rule of law in the Middle East in the nineteenth and twentieth century knew well, as did the advocates of the rule of law in Eastern Europe in the 1980s.

tury when natural law became the transcendent basis for the legitimation of the revolutionary constitutions.

Montesquieu's seminal idea, that of the separation of powers, is a distillation of the European historical experience. It was in Europe (and not just in England) that he observed the separation of the legislative, the executive and the judiciary powers, with the prince holding the first two powers but leaving the third to his subjects. There was thus more liberty under European monarchies than in Turkey, where the three powers rested with the Sultan, *or* the Italian republics, where the same body of magistrates exercised these three powers. The separation of powers entailed their delimitation, and was thus an essential step away from the arbitrary, personal exercise of power and toward institutionalization of authority in offices. For Montesquieu, however, public law was based on natural law. Therefore, taking the Thomistic secularization of public law for granted, he could assert that, in a free state, 'as every man who is counted as having a free soul should be governed by himself, it is necessay for the people as a body to have the legislative power' (5) (*Spirit of the Laws*, XI.6)

2. *Institution of public authority in the bureaucratic state.* The thirteenth century also witnessed two other decisive developments. First, the notion of the rule of law became distinct from royal government. With the reception of Roman law, the Christ-centered kingship of the early Middle Ages gave way to the law-centered theories of kingship. In the late Middle Ages and early modern times, the law-centered idea of kingship was partly replaced by one centered on the polity as 'the mystical body of the commonwealth', as the King's Two Bodies, his body politic and his body natural, were made distinct (Kantorowicz 1957). The second trend was generated by the reception of Aristotle, and had momentous politico-legal consequences. Aristotelianism produced an independent political science which gave currency to the notions of the *res publica*, the public thing, and of public interest. In France, particularly, these notions developed in close connection with the growth of royal authority (6).

In the latter half of the seventeenth through the eighteenth century, with the defense of the realm identified as the foremost common interest of the realm, the value-ideas associated with the *res publica*—secular

(5) But as this is impossible in large states and inconvenient in small ones, it should be done through representation (XI.6).

(6) According to the *Songe du Vergier* (1378), royal action is quintessentially the exercise of public power, 'pour la deffense du pays et de toute la chose publique' (Royer 1969: 207). Sovereignty thus belonged to the *respublica*, not to the king (Mousnier 1979, I: 660).

public law and public authority—developed into the continental absolutist states (Hintze 1975). Public authority became instituted as bureaucratic administration. The state acquired legitimacy as a service-rendering organization independently of dynastic kingship, adding education, road-building and provision of welfare to defense as public services (Barker 1944). The quintessence of this development was the Prussian *Rechtsstaat* built upon the idea of impersonal devotion to the duty of state, with the king as its first servant.

3. *The classical era of written constitutions.* The English champions of the 'fundamental law', had argued that laws were of greater antiquity than kings, were immemorial, and therefore did not derive their validity from the will of the king (Pocock 1957: Ch. 2). This conception of the fundamental law made of tradition a transcendental basis for the political order. The English notion of the fundamental law as unwritten constitution, however, was not transplanted elsewhere. The future was not with unwritten constitution and law immemorial, but with charters and written constitutions. These had to find an alternative transcendental basis for the political order and were first developed in North America.

Constitution-making in Virginia established the procedure for the creation of written constitutions by a collective representative body; and constitution-making in Massachussetts established the procedure for the ratification of draft constitutions by popular vote (Kenyon 1979). Soon after these formative developments, written constitutions were naturalized in Poland and France, and from France transmitted to other European countries.

Already in seventeenth century England, we witness 'a trend from the claim that there is a fundamental law, with the parliament as its guardian, to the claim that parliament is sovereign' (Pocock 1957: 49). This trend became dominant during the eighteenth century, and was formulated into the doctrine of national sovereignty in the French Constitution of 1791. It transformed the medieval relationship between government and jurisdiction completely. Democracy had taken the place of the rule of law as the first principle of political organization.

4. *Social rights and twentieth century revolutionary ideologies.* Within a hundred years after the classical era of constitution-making, the notion of the state as a service rendering organization for the promotion of the economic and social rights of its citizens, and for the education and welfare of the nation, had entered the international political culture. The advent of socialism, too, had important legal consequences. It created

new demands for social legislation, introduced a new principle of social justice, extending the natural rights of the individual to social and economic entitlement, and put forth alternative principles of legitimacy of the legal order. It was now possible to embark on political reconstruction in accordance with ideologies other then the classic revolutionary theory of natural rights. The economic rights of labor, social welfare and land distribution thus became enshrined in the Mexican Constitution of 1917 (Arts. 27.7, 123; Blaustein and Sigler 1988: 294-97, 327-30). Socialism, however, was not the last such ideology, as Weber (1968: 878, n. 19) seems to have thought, and other late-coming ideologies such as fascism, integralism and the contemporary Islamic ideologies were to follow it. Nor would socialism eradicate the principles of legitimacy derived from natural law entirely. In fact, from 1966 onward, 'a materialistic natural law which would enable citizens to invoke inalienable rights against the State' would surface in the Soviet Union, amounting to a revolution in Marxist legal theory (7) (Butler 1991: 2).

With the Soviet Constitution of 1918, we witness the advent of a new genre, the ideological constitution, whose central goal is not the limitation of government but the transformation of society according to a revolutionary ideology. Limited government and civil liberties have to give way (8). The constitution itself can now be considered as an instrument of social transformation. Henceforth it is possible to have constitutions without constitutionalism. Compliments paid by vice to virtue, however, are never entirely devoid of consequences. Owing to the retentive character of the international repertoire of political culture analyzed below, the seeds of constitutionalism remain implanted, albeit in infertile grounds. This is best demonstrated by the dramatic rediscovery of the 'rule-of-law state' (*provovoe gosudarstvo*) as 'the antipode to the administrative-command system' in the Soviet Union since 1976 (9) (Butler 1991: 10).

(7) Weber's treatment of the advent of socialism as the transition from formal to substantive natural law also seems highly questionable in the light of the above-mentioned political content of civil rights. See n. 4 above.

(8) Far from limiting government, Article 9 of the Soviet Constitution of 1918 establishes, 'in the form of a powerful All-Russian Soviet Government, the dictatorship of the urban and rural workers' (Blaustein & Sigler 1988: 342-43). The author of the Soviet Civil Code would describe law as 'even more poisoning and stupefying opium for the people than religion', and the presumption of innocence could be described as 'bourgeois rubbish' down to the 1980s (Cited in Freeman 1991: 38, 40).

(9) From the viewpoint of the transmission of international political culture, it is important to note that the 25th Congress of the Communist Party of the Soviet Union in 1976, in which the subject of the socialist rule-of-law state was first raised and then dropped, was preceded by the Final Act of the Helsinki conference on human rights in 1975.

The present century has witnessed the spread of constitution-making throughout the world. With the end of colonialism came increasing emphasis on the developmental responsibilities of the modern state, and the notion of limited government did not retain its appeal in most of the new states. In the context of self-determination and the attainment of independence, it was particularly appealing to view the constitution as an instrument of social change; and the political elites of the new states tended to prefer the model offered by the ideological constitutions. Furthermore, with continuous accretions to the international repertoire of political culture, selective appropriation of its various elements becomes possible and likely. Syncretism becomes not only possible but also attractive.

II. *Inconsistency of the heterogeneous principles of constitutional order*

The enterprise of constitution-making itself, as Arendt (1977: 148, 154) noted with respect to the United States, is in some tension with constitutionalism (10). The American constitution-makers were using the constitutionalist rhetoric of the ancient liberties, but their object was not to limit but to create government. The tension arises from the substitution of natural law, embodied in a written constitution, for unwritten fundamental law and custom as the transcendental foundation of political order. But natural law itself contained diverse elements that were to develop into heterogenous, indeed contradictory, principles of order.

Although democracy may in practice be the best guarantee for the rule of law and limited government, the two are by no means identical. Montesquieu (XI.2-3) made a distinction between the power of the people and the liberty of the people, the latter being their right to do all that is permitted by the laws. Division of the powers was necessary so that one power could hinder another and abuse of power would be avoided or minimized (XI.4). Robespierre was formulating the same distinction when he asserted that 'constitutional government is chiefly concerned with civil liberty, revolutionary government with public liberty' (Cited in Arendt 1977: 132-33). According to a more recent statement, 'the rule of law and democracy correspond to two different conceptions of liberty', the negative and the positive respectively. The will of the

(10) To this day, the cradle of constitutionalism is without a written constitution, and the law of the constitution is 'not the source but the consequence of the rights of the individuals [...] Thus the constitution is the result of the ordinary law of the land' (Dicey 1982 [1885]: 121).

people—democracy—implies exercise of authority, the rule of law—constitutionalism—the curbing of authority (Sejersted 1988: 131-32).

Democracy rests on the right of political participation, the rule of law on civil rights. It became apparent in the nineteenth century that the two types of rights could be contradictory; and it was one of Mills' objectives in the essay *On Liberty* to reconcile them. The twentieth century has demonstrated that there can be contradictions between civil and social rights. Democracy, the rule of law and social welfare can now be seen as three heterogeneous principles of order which stand in a relationship of inevitable tension (Lepsius 1977: 23). Federalism constitutes another such principle (11). But the most spectacular demonstration offered by the constitutional history of the twentieth century is the potentially glaring contradiction between the rule of law and the constitutional empowering of the state as an instrument of social transformation, between ideology or ideological constitutions and constitutionalism.

As the national assemblies, representing the will of the people, took the place of the sovereign kings, a new balance of power and right needed to be established through the mutual articulation of the *authority* of the legislative branch of the state and the *rights* of the individual citizens. Written constitutions came to serve two basic functions: to protect individual rights, *and* to constrain future majority decisions, and thus to prevent political change that would occur if the majority had its way. In other words, constitutions limit both the executive *and* the legislative branches of government (Elster 1988). This is done in order to resolve the tension between democracy—or more precisely national sovereignty exercised through parliamentary legislation—and the rule of law—or more precisely the limitation of the power of government by liberties guaranteed by the law. As constitutions usually give the legislative organs unlimited authority to create general legal norms, certain prohibitions have explicitly to be made to safeguard the rights of the citizens. Form, however, can be deceptively substituted for content. When the same legislative organs are given the power to restrict or abolish a constitutional prohibition and a concomitant right, introduced by the qualification, 'except by law', the constitution takes back with one hand what it pretends to give with the other (Kelsen 1961: 264-66). When the same restriction or abolition is effected by making a right

(11) The conflict between federalism and other principles of order, which resulted in the division of Pakistan into two countries in 1971, is currently highlighted by the disintegration of the Soviet Union as a result of the decision by the Soviet republics to exercise their right to secede expressed in Article 26 of the treaty of union of December 30, 1922, and repeated in the Constitutions of 1936 and 1977.

conditional upon its compatibility with the established ideology or the interests of the Revolution, the state as the presumed guardian of the above is given a free hand to violate it. What remains unresolved in the latter case is the contradiction between ideology, as the guiding principle of social transformation, and the rule of law or government limited by civil rights.

The tension between religion and constitutionalism is similarly an inherent one. A distinct tendency to use natural law and natural rights as a replacement for religion sets in with the French Constitution of 1791. Militant secularism becomes possible, as shown by the Mexican Constitution of 1917 (Arts. 3, 27.2 & 130). Mexico, however, is an exception in refusing syncretic compromise. The constitution-makers of most countries invoke religion to reinforce the transcendental authority of their products. In most cases, both religion and natural rights, explicitly or by implication, provide transcendental bases for constitutions (Markoff & Regan 1987). The number of heterogeneous principles of order is thereby increased, and with it the potential for tension. The legitimatory appeal to religion reintroduces a source of tension which is perhaps the oldest in world history: that between transcendent and man-made law.

Constitutions are sediments of diverse historical processes, crystallized into a small number of indigenous and borrowed principles, which are brought together in a single text. These principles, and the practices associated with them, become effective social forces to the extent that they are borne by social groups and institutions. Written constitutions represent compromises among the social and institutional bearers of these principles. They set relative weights to inherently heterogenous principles of political order, thereby bringing them into a measure of congruence. The inconsistency of these principles and the appositeness of the relative weight given to them in a particular constitution, then set the parameters for the constitutional politics of the subsequent period.

III. *Political reconstruction and constitutional politics in the Islamic world in comparison to Japan*

We can now consider constitution-making and constitutional politics in the context of the politics of modernization in the Islamic world, with Japan as a point of overall contrast. This consideration is by necessity selective, but it purports to cover the typologically significant range of variation.

1. *The transition to constitutional monarchy in Asia.* The normative foundation of kingship in medieval Islam was justice rather than the law. Justice was a notion pertaining to patrimonial administration and meant the fair treatment of subjects. Law existed indeed, but it neither governed kingship, nor emanated from the commonwealth. The legal order in the Islamic Middle East had two distinct components: public law and the *sharī'a* (sacred law). The Aristotelian science of politics, though leaving its mark on works in political philosophy such as those of Aquinas's Persian contemporary, Nasir al-Din Tusi, had no lasting impact on this institutionalized political tradition. Public law, enforced as the law of the land, consisted of the decrees of the ruler. The *sharī'a* was the result of the law-finding activity of the jurists and covered ritual, personal status law and transactions. Public law conceived of the community as the subjects (*re'aya*; literally, the flock) of the king, the *sharī'a*, as the community of believers (*umma*). There was no parallel to the symbiotic relationship between Roman and Canon Law in Western Christianity, and the *sharī'a* remained the law of the jurists who loosely organized themselves into Schools of Law, but developed no hierarchy comparable to the Catholic Church. Nor did the *sharī'a* ever develop a theory that sovereignty resided in the *umma*.

The term used for constitution in Turkish and Persian (fundamental *qanun*) is indicative of the mode of its accommodation in the Islamic politico-legal culture. *Qanun* was the most common term for public law. It retained its original Greek fiscal connotations as regulation of land taxes, but also acquired the more general sense of state law in medieval Islam. It drew its substance from the pre-Islamic Persian administrative tradition (12), and came to mean financial and administrative regulations laid down by the ruler independently of the *sharī'a*. The Mongol invasion brought in a new, Turkish notion of public law: the Yasa and its later derivatives. When the Mongol rulers of Iran adopted Islam, the Yasa ceded its religious character to the *sharī'a*, and became the law of the state. The Yasa lost its Mongol connotations in the fifteenth century, and, in the forms of *yasaq* and *yasaqnama*, came to common use as a code of law. Early Ottoman writers praised the Yasa, and used its derivatives to refer to state law and public regulations. This paved the way for the emergence of the *qanun* as state law, and ushered in the great age of the *qanunnamas* (codes of law) in the latter part of the fifteenth

(12) It is interesting to note that the term used to render constitution in modern Arabic and Urdu is *dastur*, instead of the fundamental *qanun*. The Persian term *dastur* also denotes public law, and was used as a synonym for *qanun* as tax regulations already in the eighth century.

century. The *qanunnama* of Uzun Hasan in Iran and Mehmed II and Bayezid II in the Ottoman empire thus brought together the traditions of Persian statecraft and that of the Turco-Mongol Khanates (Inalcik 1978) without any Aristotelian input.

In the latter part of the seventeenth century, regulations promulgated by the Ottoman Sultans became increasingly couched in terms pertaining to the *sharī'a* and incorporated rulings of the foremost religious dignitary of the empire, the Shaykh al-Islam. In the eighteenth century it became established practice to solicit the opinion of the Shaykh al-Islam on important governmental matters; the *sharī'a* thus came to impose limitations on the Ottoman government in an institutionalized fashion (Inalcik 1978). This trend did not have a counterpart in Iran, where Shi'ism had become established as the state religion in 1501. The Shi'ite hierocracy became independent of the state in the eighteenth century, and acquired much greater power than its Ottoman counterpart early in the nineteenth century. This independence, however, produced a pluralistic structure of religious authority and militated against the institutionalization of the hierocracy-state relations. The Shi'ite ulema (*'ulamā'a*) remained private jurists, the most preeminent of whom, as the 'sources of imitation' (*maraji'-e taqlid*), were authorities not only independent of the state but also categorically independent of each other (Arjomand 1979; 1981).

From the beginning of modernization, it was public law (*qanun*) that constituted the precedent for the adoption of European legal codes in the Ottoman empire and Iran. The laws inspired by European legislation were established by royal decrees as *qanuns*; and the constitution, as the foundation of public law, was accordingly considered 'the fundamental *qanun*'. The transmission of the idea of the rule of law from Europe to the Ottoman Empire began in earnest with the Rose Garden Decree (*ḥatt-i şerif-i gulḥane*) by Sultan 'Abdul-Majid in 1839, and its confirmation in the decree of 1856 (*ḥatt-i humayun*) (13). There ensued

(13) An interesting Ottoman constitutional document from the first decade of the nineteenth century is worthy of consideration because it is indicative of the possibilities that did not materialize. The military reform introduced by Sultan Selim III (1789-1807), and the increased taxation it required, provoked a rebellion among the old Janissary corps, the ulema and the populace; and the Sultan was deposed upon an injunction by the Shaykh al-Islam who declared him unfit for the caliphate. In the turbulent period of transition that followed, two Sultans were forced to sign agreements with their subjects. The second of these agreements, the Deed of Union (*sened-i ittifak*) of 1808, had three significant features. It was drawn up in the form of a contract according to the rules of the *shari'a*; the state, not the Sultan, was a party to the contract; and the provincial notables were recognized as independent authorities, with several dynasties standing surety for each other and extending the guarantees to the lesser notables under their jurisdiction as a kind of subinfeudation (Inalcik 1964: 50-53; Lewis 1966). None of these principles became insti-

two decades of administrative and legal reforms known as the Tanzimat. These included an unsuccessful experiment with an assembly of provincial notables in 1845, and provisions for elected provincial councils in 1864. During the Tanzimat period, the autonomous rulers of Tunisia and Egypt who were under Ottoman suzerainty granted their subjects written constitutions in 1861 and 1866.

In October 1876, the constitutionalist reformer, Midhat Pasha, prevailed upon the young Sultan 'Abdul-Hamid II, who was ascending the throne in the face of demands for reform from the European powers, to set up a Constitutional Commission. The drafters drew heavily on the Belgian constitution of 1831 (14). A bill of public rights (*hukuk-i 'umumiyye*) was adopted: all Ottoman subjects were declared equal before the law, security of property and inviolability of domicile were granted and torture prohibited. The Sultan, however, refused to accept the principle of ministerial responsibility to parliament which was deleted from the draft. He also insisted on the addition of an article (Art. 113) giving him the prerogative to exile anyone he considered seditious. A parliament, consisting of a chamber of elected representatives (*meb'uthan*) and an appointed chamber of notables (*a'yan*), was set up to share the Sultan's legislative power. The latter could still legislate without the parliament, while parliamentary enactments had to be ratified by the Council of Ministers and the grand vezir, and depended on the Sultan for their promulgation. The lower house, however, was given important powers in fiscal matters, notably the right to vote on the annual budget. The principle of the separation of powers was given perfunctory recognition. The Fundamental Law of 1876 went beyond its Belgian model to accommodate the particular legal features of the Ottoman empire. Foremost among these was the nature of the monarch's authority. The Sultan was not only the monarch (*padishah*) of the Ottoman state but also the Caliph of all Muslims and 'the protector of Islamic religion'. His person was sacrosanct and immune from responsibility (Arts. 3-7). Islam was declared the religion of the state (Art. 11), and the typically Islamic duality of the legal order was recognized: the Sultan was in charge of 'the execution of the ordinances of the sacred and the state law (*ahkam-i sher'iyye we kanuniyye*)', and judiciary power was exercised through a religious and a secular branch.

tutionalized, however. No sooner had Mahmud II (1808-1839) reasserted his authority than he destroyed the provincial notables. Any legal consolidation of feudalism was thus foreclosed by the liquidation of its would-be bearers. Nor did the contractual form of the *shari'a* provide a basis for the future constitutions, which instead took the form of *qanun*.

(14) The Belgian Constitution of 1831 had served as the principal European constitutional model throughout the nineteenth century (Blaustein and Sigler 1988: 182).

Furthermore, the Shaykh al-Islam was included in the council of ministers. The Sultan promulgated the Fundamental Law on December 23, 1876, with a decree that served as its preamble. It was thus granted by the grace of the monarch (Pritsch 1924: 165-67; Lewis 1966; Shaw & Shaw 1977: 172-78).

The parliament opened in March 1977, but early Ottoman parliamentarianism foundered on the rock of ministerial responsibility. In February 1878, in response to a demand that three ministers appear in the chamber to defend themselves against specific charges, the Sultan suspended the constitution, which nevertheless continued to be printed regularly in the imperial yearbook. The Sultan, as the Caliph of the Muslims, moved on to his pan-Islamic experiment.

The transmission of constitutionalism to Japan invites a few broad comparisons. In contrast to the Islamic world, the normative order of traditional Japan contained no sacred law of a world religion and there was therefore no tension between man-made and transcendent law. The framing of the constitution was the symbolic act of foundation of modern Japan. The borrowed model was the Prussian constitution, which already incorporated many features of the Belgian constitution of 1831. It was a fairly typical nineteenth century constitution and, contrary to anachronistic readings, was not particularly authoritarian (Kroeschell 1987: 52-54). Nevertheless, mindful of the advice offered them by the German emperor and the political scientist, von Gneist, the Japanese constitution-makers foreclosed a pattern of constitutional conflict generated by the parliamentary control of the budget in the Prussian-German Constitution by exempting the current government expenditure from parliamentary control in Articles 67 and 71 of the Meiji Constitution (Martin 1990: 79). Nor was their blueprint so rigid as to preclude solemn symbolic proclamations that could serve the function of creating a new political order disguised as the Meiji restoration. The empire of Japan, it was proclaimed, was ruled by 'a line of Emperors unbroken for ages eternal' (Art. 1), and the Emperor was declared 'sacred and inviolable' (Art. 3)(15). In an 'unprecedented event' on February 11, 1889, on the 2549th anniversary of the legendary founding of the empire, the Meiji emperor, who then lacked the stature he was to acquire in the course of political reconstruction (Akita 1967: 61), promulgated the Meiji constitution in Western military uniform (Gluck 1985: 42-72). The creation of a modern *Rechtsstaat*, under way

(15) Ito's (1906: 7) official commentary on Article 3 supplies its cosmological grounding: 'The Sacred Throne was established at the time when the heavens and the earth became separated [Kojiki]'.

since 1867, gathered full momentum. The Confucian reverence for official authority, and the negative evaluation of politics in Japanese political culture brought the Meiji normative constitutional order into congruence with the reality of the *Rechtsstaat*. Consequence: remarkable absence of the patterns of constitutional conflict we are about to encounter in the Islamic world.

The next period of Near Eastern constitutional history begins in Iran, where the first modern Asian revolution occurred in 1906, shortly after the Russian revolution of 1905. Like the Russian revolution, it produced a constitution, which took the form of the Fundamental Law of 1906 and its Supplement of October 1907. Whereas the Ottoman constitution of 1876 had been a compromise between the ruler and reforming bureaucrats, the Iranian constitution was the outcome of a more complex process that involved a greater number of social forces.

Two important social groups were the advocates of constitutionalism in Iran: a small group of enlightened bureaucrats who advocated the rule of law and reform of government; and the merchants, supported by craftsmen, who demanded civil rights, especially the security of life and property, and enfranchisement. The two groups converged in their demands for the rule of law under constitutional government, which they contrasted with arbitrary rule under absolutism, and for a parliament consisting of the representatives of the people. Each of these groups had a further special interest: the merchants' was to establish some control over the alarming economic concessions made by the government to the imperialist powers, Russia and Britain; the enlightened bureaucrats' was the building of a strong state capable of overcoming Iran's backwardness. It must be said that the first group was better served by the prevailing international politico-legal culture than the second. The blueprints for constitutional law, emanating from the most 'advanced' countries, corresponded rather well to the aspirations of the mercantile class. The state-builders, on the other hand, found less that fitted their goals but accepted parliamentary democracy simply as the modern form of government.

In August 1906, under intense popular pressure, the Shah ordered the election of a parliament for which a charter was subsequently drawn up and ratified as the fundamental charter at the end of December. The fundamental charter was not a systematic constitutional law, but rather a hasty document largely concerned with the constitution and functions of the parliamentary assemblies. Nevertheless, it was arguably a more original document than the Supplement that followed it, and reflected both the major preoccupations of the constitutionalists and the specific

conditions of Iran. It set up a National Consultative Assembly (*majles-e shura-ye melli*) which was given the legislative power (16) (Arts. 1-14, 16 & 21), and important prerogatives in financial and economic matters (Arts. 18, 22-26). These articles realized one of the major goals of the constitutionalists, which was the assertion of the rights of the Majles, as the body representing national sovereignty, to approve international treaties and economic concessions, and to control both the natural resources of the country and government finances. The Majles was eager to exercise these rights, and one of its first acts was in fact to veto a proposed loan from Britain and Russia (Lockhart 1959: 377).

To complete the first constitutional law the Supplementary Fundamental Law of October 1907 was enacted. The bulk of this law was translated from the Belgian Constitution of 1831. It contained a bill of rights (Arts. 8-25) and introduced many new elements from the international political culture into the traditional political ethos of patrimonial government. The principle of national sovereignty was established. The Powers of the realm were said to emanate from the people and were separated into three branches (Arts. 26-27). The financial prerogatives reserved for the Majles in the Fundamental Law were reaffirmed and reinforced (Arts. 27, 96 & 105). The principle of ministerial responsibility to the parliament, which had been contested by the government and dominated the constitutional politics of the early months of 1907 (Arjomand 1988: 40), was also reaffirmed (Arts. 58-70).

The Supplement contained a number of features not found in its Belgian model. A few of these, reflecting changes in the international political culture during the intervening decades, were taken from the more recent Bulgarian Constitution of 1879. One such was the provision for the creation of a national educational system (Art. 19). This provision, however, did not go very far in giving legal embodiment to the idea of the state as a service-rendering organization.

The two groups I have identified as the bearers of constitutionalism succeeded in obtaining the grant of a constitution from the monarch only by enlisting the support of the prominent religious leaders, the highest ranking ulema, who in fact appear in the forefront of the constitutional movement. In order to understand this formal prominence of the religious leaders, the dualistic traditional structure of authority in Shi'ite Iran should be recalled (Arjomand 1981). The Shi'ite hierocracy was drawn into constitutional politics by the forces that wanted to establish a new institution, namely the Majles. The

(16) In conjunction with a Senate (Arts. 17 & 19). However, the Senate was not convened until 1951.

ulema were initially willing to support constitutionalism because they assumed that the limitation of the power of the ruler would enhance hierocratic power. But once they came to realize the secularizing potential of parliamentary legislation, they insisted on safeguarding their institutional interests in the final version of the Supplement of 1907.

Shi'ite Islam was declared the official religion of Iran (Art. 1). The enactments of the Majles could at no time be at variance with the principles of Islam; a committee of no less than five religious jurists was given the power to 'reject, repudiate, wholly or in part, any proposal which is at variance with the sacred laws of Islam' (Art. 2). The duality of the traditional judiciary system was endorsed, as had been done in the Ottoman Fundamental Law, and the religious courts were recognized alongside the civil courts. The validity of all legal enactments was conditional upon their conformity with the standards of the Sacred Law (Art. 27).

In 1908, shortly after the constitutional revolution in Iran, the Young Turks ushered in the second constitutional period (*ikinci meşrutiyet*). Sultan 'Abdul-Hamid was forced by the rebellious army officers in Macedonia who were members of the Society of Union and Progress (*Ittihat ve Terakki Cemiyeti*) to restore the suspended Constitution of 1876. Their action set in motion a wave of mass demonstrations and political mobilization as unprecedented in Ottoman history as that set in motion by the constitutional revolution had been in the history of Iran. A wide variety of social groups with divergent interests rallied under the banner of Union and Progress. In so far as this apt designation captures the shared aims of these groups, parliamentary representation was an effective mechanism for the promotion of political integration and the unification of the population. It was otherwise with progress. To the Young Turks, the officers who dominated government for the next decade, progress meant modernization of the state and the economy. Once again, the international politico-legal culture offered these prospective state-builders norms and blueprints which reflected their desires and aspirations very imperfectly. Following those norms rather than the unformulated sentiments of the Young Turks in uniform, two imperial decrees in August 1908 modified Article 113 of the Fundamental Law and reinforced its bill of rights. The parliament opened in December 1908 and set up a constitutional commission to draft proposals.

In April 1909, religious traditionalist elements attacked the parliament building in support of autocracy. Later that month, with Istanbul occupied by units of the Macedonian army under Mustafa Kemal, a gathering of most of the members of the upper chamber, the cabinet and

some former ministers which styled itself the National Public Assembly, having followed the precedent of obtaining an injunction for his deposition from the Shaykh al-Islam, deposed the Sultan in favor of his brother. Parliamentary government was restored, with the Unionists in control of both chambers, and the proposals of the constitutional commission were taken up. On August 21, 1909, a new law significantly amended the Constitution of 1876. Civil rights were reinforced, the Grand Vezir and the ministers were made responsible to the Parliament, and the Parliament was given the right to depose the Sultan (Shaw & Shaw 1977: 274-75, 282-85). Not only was the principle of ministerial responsibility to parliament finally established but the parliament as the representative of the people could now depose the ruler.

Before long, however, the tension between the principles of limited government and modernization through a strong executive produced a constitutional crisis. It was, paradoxically, the Unionists themselves who proposed constitutional changes to increase the authority of the Sultan over parliament in 1911, dissolved it in the face of opposition, and after an interlude of Unionist dictatorship, eventually secured the desired changes by a series of amendments from 1914 to 1918 (Lewis 1966).

To pursue our analysis of constitutional politics under monarchy after World War I, we need to return to Iran. Iran's modernizer and state-builder, Reza Khan, came to power with a coup d'Êtat in 1921, was appointed prime minister two years later, and began contemplating replacing the monarch. The change of dynasty required the amendment of the Fundamental Law for which no provision had been made. A constituent assembly was deemed appropriate for the task; one was elected and enacted the amendment necessary for the establishment of the Pahlavi dynasty in December 1925. Reza Khan's reform of the army had been carried out with the support of the Majles, and his other reform programs had broad parliamentary support (Abrahamian 1982: Ch. 3). Once he had become king, however, the Majles rapidly lost its vigor, was packed with his hand-picked candidates and became a rubber stamp for his policies. The constitution was manipulated, and its Islamic provisions were ignored.

With Reza Shah's forced abdication and the accession of his son in August 1941, vigor returned to the Majles and with it chronic political instability. Three distinct patterns can be found in Iranian constitutional politics in the 1941-53 period. The first highlighted the tension between parliamentary constitutionalism and effective reformist government. The Majles exercised its rights to limit executive power of

the state to excess. Not only did the Majles use its power of the purse to control successive governments and obstruct the exercise of executive authority, but interpellations, inconclusive debates and filibustering and 'obstruction' tactics became frequent, and the deputies often absented themselves to deprive the Majles of a quorum (Azimi 1989).

It was clear that the obstructive limitation of the executive power paralyzed the state as an instrument of the national will to achieve economic and social development. The young Mohammad Reza Shah, who intended to resume his father's modernization of the state, saw constitutional reform as a means of enhancing royal authority for doing so. In May 1949, a favorably disposed Constituent Assembly amended Article 48 of the Fundamental Law, giving the monarch the power to dissolve parliament. This victory, however, brought forth a second pattern of unresolved constitutional conflict within the executive branch of constitutional monarchy. In 1950, the Shah appointed the strong-willed General Razmara as prime minister to carry out his reform program. But it was precisely because of its forceful assertion of executive authority that Razmara aroused the Shah's deepest apprehension. The monarchical constitution, with its many 'gaps' and overlapping division of authority over governmental functions, provided no remedy for this kind of tension between Shah as the titular head of the executive power and the prime minister as the head of government. Razmara was assassinated in 1951, and the Shah was forced to appoint Dr. Mohammad Mosaddeq as prime minister. Under the impact of Mosaddeq's programs of reform and nationalization of oil, the tension created by the triangular division of power among the Majles, the monarch and the prime minister produced the severest constitutional crisis of the Pahlavi period. In July 1952, with very strong support in the Majles, Mosaddeq demanded plenary powers and control of the armed forces, and forced the Shah's acceptance. Mosaddeq's constitutional formula that the monarch should reign while the government ruled was thus established for a short period, putting an end to the tension within the executive branch of constitutional monarchy.

However, a different constitutional crisis, following a third pattern and concerning the relation between the legislative and judiciary branches, erupted in the same year. In August, the Majles passed what amounted to a posthumous bill of attainder granting amnesty to Razmara's assassins. The Senate, which had finally come to existence, refused to approve this bill, and its Justice Committee properly declared the amnesty contrary to the separation of judiciary and legislative powers in the Fundamental Law. From March 1953 on, the first and

older pattern of conflict between the legislative and the executive branches of government was revived. The Majles Speaker, Ayatollah Kashani, insisted on the prerogatives of the Majles and the observance and proper implementation of the Fundamental Law, while the arch-constitutionalist Mosaddeq, a seasoned practitioner of 'obstruction' when in opposition, now championed a strong executive as the head of government in the reformist state.

Mosaddeq resorted to a referendum—a device not provided for by the Fundamental Law—to dissolve the Majles in August 1953. A few days after the referendum, he was ousted by a coup d'État. It was now the monarch's turn to try his hand at modernization with compliant heads of government. In May 1961, Mohammad Reza Shah, invoking the amended Article 48, dissolved parliament, and embarked on the Land Reform. In January 1963, he followed Mosaddeq's example, which he had correctly considered unconstitutional ten years earlier, and by-passed the Majles by putting his program of reform directly to a national referendum. The Shah carried out his program of social transformation through the executive branch of the state, with hand-picked parliaments compliantly approving the bills submitted to it, and even briefly indulged in a farcical experiment with a one-party system. All this came to an end with the Islamic revolution of 1979.

To conclude this survey of constitutional monarchy, it is appropriate to note that the switches from one principle to its opposite by the Unionists in the Ottoman empire, and by Mosaddeq in Iran, demonstrate the independence of the patterns in constitutional politics from political personalities and particularistic group interests.

2. *Republican constitution-making in Turkey and Pakistan.* Defeat in World War I produced a system of dual power, with Anatolia under the control of the nationalists who, however, recognized the Sultan in occupied Istanbul as its head. A Grand National Assembly constituted itself as the chief organ of the Ankara regime of Mustafa Kemal. Its membership consisted of civil and military government officials (40 %), professionals (20 %), landlords and merchants (20 %) and ulema (17 %), thus representing all the main sections of the Turkish urban society (Shaw & Shaw 1977: 351). Here we have the typical composition of the bearers of nationalism in much of the Middle East for the next half century: army officers, intellectuals in uniform produced by the modern military academies, speaking for a diverse set of urban social groups under the banner of nationalism. The Law of Fundamental Organization of January 1921 asserted that 'sovereignty belongs

unconditionally to the nation' (Art. 1). Both legislative and executive powers of 'the state of Turkey' were vested in the Assembly as the sole and rightful representative of the nation (Arts. 1-3). The state no longer needed a ruler. On November 1, the Sultanate was severed from the Caliphate and declared to have ceased to exist, leaving only the vague residual religious authority to the Ottoman head. On March 3, 1924, the Caliphate, too, was abolished. The republican form of government was thus transplanted from the West to the Middle East.

With the republican form of government came the monistic notion of secular public authority. The Constitution of April 20, 1924, declaring the Turkish state to be a republic, brushed aside the traditional duality of the legal order. Not only was the term it used for legislative power, *teshri'iyye* (Arts. 5-6 & Ch. 2), derived from the *sharī'a* rather than from *qanun*, as had been the case in the Iranian Fundamental Law, but the Grand National Assembly cursorily assumed the authority over 'the execution of the ordinances of the *shari'a*' alongside 'the enactment of the *qanuns*' (Art. 26). Both legislative and executive powers belonged to the Assembly as the representative of the sovereign people. However, the former was to be exercised directly, and the latter through the President (Arts. 3-6). There was to be no upper house but only a single elected chamber of the representatives of the nation.

The Republican Constitution of 1924 was twice amended. In April 1928, Article 2 was amended to disestablish Islam as the religion of the Turkish state. In February 1937, the same article was amended again to incorporate the six ideological principles of the Republican People's Party, declaring the Turkish state to be 'republican, nationalist, populist, statist (*étatiste*), secular (*layik*) and revolutionist'. The introduction of these principles is an interesting attempt by a ruling party to introduce ideological principles into a constitution after it had been written. The objective was to revamp a constitution that was centred on national sovereignty through parliamentary representation into an ideological constitution oriented toward the revolutionary transformation of society (17). The fourth and the last principles were designed to legitimate a strong executive and remove limitations to its exercise of power (Shaw & Shaw 1977: 375-88).

On July 19, 1961, a new Constitution was ratified by sixty-one per cent of the popular vote. Consonant with the Turkish republican tradition of solidarism inspired by Durkheim (Arjomand 1982; Parla 1985), the Constitution of 1961 adopted some of the more recent

(17) The distinct form for this type of constitution, as we shall see, was to be perfected in Algeria in 1976.

accretions to the repertoire of international political culture, and introduced many social and economic rights, such as the right to employment, qualifications to the right to private property, and pledges to promote cooperatives. Furthermore, to counter Western individualism, the family was declared 'the fundamental unit of Turkish Society' (Art. 35; Shaw & Shaw 1977: 418-20). The military government that suspended the Constitution in 1980 attributed the sharp increase in the level of political violence in the 1970s to its liberal features, and eventually produced the Constitution of 1982 which restricted some of the rights introduced by the 1961 constitution and strengthened the executive considerably.

Constitution-making in Pakistan is interesting from our viewpoint for the new role it assigns to Islam. After nine years of debate following the partition of India, the Constitution of 1956 designated the state created for the Muslims of the Indian subcontinent the Islamic Republic of Pakistan. In contrast to Iran and the Ottoman empire, the appearance of Islam among constitutional principles did not stem from its institutionalized place in the old political order. Islam appears as a result of the affirmation of the collective right to cultural identity.

The Ottoman and Iranian constitutionalists had taken the sovereignty of the monarch for granted, and had assimilated the added heterogeneous principles of national sovereignty to it without any conceptual difficulty. For the Kemalists, furthermore, the republican form of government meant the transfer of sovereignty from the Sultan to the nation. By contrast, the republican form of government raised a serious conceptual problem for the Pakistani constitution-makers who had not lived under the sovereignty of a native monarch for a century, and who wanted Islam included among the transcendental principles of the political order they were creating. This was due to the fact that the jurists of the *sharī'a* had never endowed the community of believers with sovereignty, as had been the *respublica* in the late medieval West, nor even developed a notion corresponding to sovereignty. The Pakistani compromise solution was contained in the preamble of the Constitution of 1956: 'Whereas sovereignty over the entire universe belongs to God Almighty alone, and the authority exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust'. This statement, purporting to reconcile the contradictory principles of democracy and theocracy, conceived of as God's sovereignty, was in fact devoid of legal implications. So were the provisions made for the 'repugnancy clause', requiring that no law should be enacted contrary to the Koran and the Tradition of the Prophet, and that existing law be

brought into conformity with the injunctions of Islam. The implementation of this clause was left to a commission, to be appointed by the president, whose status was merely advisory. The first state designated as an 'Islamic Republic', was thus Islamic only in form (Binder 1961).

3. *Normative consequences of the rise of bureaucratic states.* Constitution-making was the fundamental act of political reconstruction, but it was only the first step. During the first decades of the twentieth century, the most important acts of legislation by the Iranian and Turkish parliaments concerned bureaucratic reorganization of state administration. These were then carried out with iron fists of soldiers, Mustafa Kemal in Turkey (Lewis 1957) and Reza Khan in Iran (Banani 1961; Arjomand 1988a: Ch. 3). Thus, in the Near East, as in Japan, the reception of constitutionalism produced and legitimized monolithic bureaucratic states which had their own normative logic. As institutions, bureaucratic states monopolized the means of coercion and were far more powerful and penetrating than the parliaments they theoretically subserved. They became normatively autonomous as systems of public authority, and claimed legitimacy for serving the nation and promoting its welfare through development and modernization. The constitutionally envisioned separation of the judiciary power never became a reality. The state bureaucracy became a monolithic institution and the bearer of the idealized norms of the *Rechtsstaat*. However, the cultural impact of the establishment of bureaucratic states, pervasive though it was in Turkey and Iran, did not find explicit constitutional translation. This was to come with the Algerian Constitution of 1976.

4. *The ideological constitutions of Algeria.* When Algeria became independent in 1962 after eight years of armed struggle for national liberation, the Soviet Union as a superpower and socialism as an ideology were at the height of their appeal to the third world, and determined the mode of reception of international political culture by the new state. In June 1962, the National Council of the Algerian Revolution adopted the program of government by the party. The National Liberation Front (NLF) was to be made into the single *avant-garde* party and the instrument of 'democratic centralism'. According to the strict logic of the adopted ideological position, the party represented the only mandate from the people possible in Algeria (Vatikiotis 1966: 352). None the less, according to the typical syncretic tendency of latecomers, parliamentary institutions were also adopted. A National Assembly with constituent power, the list of candidates for which had been approved by

AhmadBen Bella, was elected in September 1962, and appointed him prime minister.

The defeat of qualified constitutionalism by the socialist ideology took place within the National Assembly, and was acknowledged by the resignation, in August 1963, of the president of the Assembly, Farhat Abbas. The party submitted a draft constitution to the Assembly in July 1963 as 'the official project of the NLF'. Farhat Abbas and a number of other deputies protested that the draft constitution had been prepared in disregard of due process, and in violation of the constituent mandate of the National Assembly. It is interesting to note that none of these deputies questioned the principle of the uniqueness of the NLF, which they accepted as the transformation of the principle of unanimity in the revolutionary struggle. They wanted rather the unique party to be democratically organized and to incorporate the Assembly as a network (Borella 1964: 55-61). In response, a recalcitrant spokesman for the government observed that the party cadres were at least as representative of the people as the elected deputies of the Assembly, who had anyway been designated by the NLF (Leca & Vatin 1975: 61). The draft constitution was approved by the Assembly with little modification, after some twenty amendments had been summarily rejected. It was ratified by a popular referendum, and promulgated on September 10, 1963 (18).

The Algerian Constitution of 1963 is an ideological constitution conceived of as an instrument of social transformation, and of the furtherance of the Revolution, for which the gaining of independence was but the first step. It also contains a strong affirmation of the collective right of the Algerian nation to cultural identity. Islam is thus declared the religion of the state, the Arab character of Algeria vigorously emphasized, and further 'effective realization of Arabization' required (Preamble & Arts. 2-5, 9-10, 76-77).

In the constitutional text, the sovereignty of the party in effect replaces that of the nation. 'The National Liberation Front reflects the profound aspirations of the masses. It educates and organizes them; it guides them in the realization of their aspirations' (Art. 25). The party articulates the general will by designating the candidate for presidency, and one candidate for each seat in the National Assembly, who are then

(18) Of the two established procedures in the international repertoire of political culture—the drafting of a constitution by an elected assembly and its ratification by a popular referendum, the second is used to cover up the violation of due process with respect to the first. Here, late-comer syncretism makes possible the breach of a cardinal principle of constitutionalism, namely the observance of due process.

to be 'elected' by universal suffrage (19) (Arts. 27, 39.2). The Constitution also contains a formulaic declaration that national sovereignty belongs to the people and is exercised through the National Assembly (Art. 27). This instance of syncretism, typical of the latecomers, gives rise to an obvious contradiction of the conception of the vanguard party. Article 48 purports to resolve this contradiction by stating that the National Assembly 'expresses the will of the people, concretized by the party' (Cited in Borella 1964: 71). The pivotal conception, evidently, is not parliamentary representation but the 'concretization' of the general will by the party; and it goes without saying that the socialist ideology tells us in advance how the general will is to be concretized.

The party thus replaces the nation as the depository of sovereignty. It constitutes the political society and is the sovereign power of the body politic. It is not subject to any electoral control whatever and its legitimacy derives exclusively from being the vanguard of the revolutionary ideology. Nowhere is the power of myth and ideological blueprint, or the comical inflexibilities in the transmission of the international political culture, better demonstrated than in this instant. The idea of the party had no actual corresponding bearer. There was no organized party with distinct institutional interests in existence at the time of constitution-making, and the NLF did not remotely correspond to the Leninist model of a disciplined party; nor did it ever became an effective organization (Fougère 1963: 20; Leca & Vatin 1975: Ch. 3). Yet as a legal institution, it was carried over to the Constitution of 1976, remaining theoretically supreme. The history of contemporary Algeria, on the other hand, also illustrates the limited impact of ideas without an effective institutional bearer. The institution that took hold was not the party but the bureaucratic state. It was the state, not the party, that emerged almost immediately as the real instrument of social transformation in Algeria, as had been the case with the modernization, from above, of Turkey and Iran.

The Constitution of 1963 also had its parliamentary and presidential features. It made provisions for a unicameral parliament, which, through inept adaptation of certain proposals for constitutional reform of the Fourth Republic in France (Borella 1964: 69), could dismiss the president of the Republic with a vote of no confidence. Much more

(19) This retention of the Greco-Roman practice of election as a curious ritual by a typically ideological constitution of the twentieth century shows how little is deleted from the repertoire of international political culture, though much can be overwhelmed through accretion and manipulation. That such retention could have important consequences was at last proven in December 1991, when the Islamic Salvation Front won more than ten times as many seats as the NLF (188 against 16 in the first round) in the free elections for the 430 seats of the National Assembly.

consequential were the considerable powers given to the president in order to assure the creation of a strong and effective state. He was both head of the state and head of government, and the commander in chief of the army. He could legislate by decree, and could assume plenary powers under conditions of national emergency (Art. 59). Finally, the National Liberation Army, the spearhead of liberation, would 'participate, within the framework of the party, in [...] the edification of the new economic and social structure of the country' (Cited in Leca & Vatin 1975: 64).

The 1948 Universal Declaration of Human Rights is explicitly adhered to, the usual range of civil rights enumerated, and torture prohibited. However, in the manner typical of ideological constitutions, the fundamental rights and liberties are substantially nullified by being made conditional upon conformity with 'national unity, the socialist aspirations of the people and the principle of unity of the NLF' (Art. 22). The social rights of the citizens, including the rights to education and to a decent share of the national income, are enumerated. As one would expect from an ideological constitution, the judiciary is not treated as a separate power but rather as a set of jurisdictional functions (Borella 1964: 76).

Less than a month after the promulgation of the Constitution, President Ben Bella, invoking Article 59, assumed the plenary powers he was never to relinquish until his fall, though the national emergency that had occasioned it soon passed. In 1964, the parliamentary assembly languished while the state-building president frequently legislated by decree. While the state and the personal power of its head were growing ineluctably, a group of NLF Marxist ideologues, who were soon to disappear from the Algerian political scene, were busy denigrating the state as the legacy of colonialism and deploring all 'bureaucratic formalism' (Leca & Vatin 1975: 32-35). Taking the state to be a superstructure if not a shadow, they had met to discuss the constitution of the shadowy party they took for the essential reality of the revolution and made subject of the Charter of Algiers in April 1964 (20).

(20) The organization of the party and its manner of recruitment had not been touched upon in the Constitution. This rather grave defect of the Constitution of 1963 with regard to its central political institution had been noted during the constitutional debates (Borella 1964: 60), and prompted the meeting in Algiers. The Charter of Algiers, adopted unanimously, vigorously condemned the multiparty system in Marxist terms as capitalist and a reflection of class society installed when the interests of the ruling class are not threatened (Thesis 4). At the same time, however, it stated that the single party presents no smaller danger: 'The confiscation of revolutionary power for the benefit of a caste' (Thesis 5) (Leca and Vatin 1975: 14-19). The NLF was at the time identified with national independence and thus enjoyed considerable historic legitimacy. Such an exercise in aca-

President Ben Bella was ousted by the coup d'État of Defense Minister Colonel Boumediene in June 1965; and, in July, a constitutional ordinance declared the Revolutionary Council 'the depository of sovereign authority', pending the adoption of a new constitution (Cited in Leca & Vatin 1975: 73). Despite this abrogation, the Constitution of 1963 remained significant as a frame of reference conferring legitimacy on the new state. In 1976, a National Charter, as 'the supreme source of the policy of the Nation and the laws of the State' (Bensalah 1979: 152), was prepared by the state and submitted to a popular referendum, as was the new Constitution of November 19, 1976. The inappropriate ritual of a constituent assembly was thus dispensed with.

As solemn hymns to the state and the presidential sultan at its apex, the National Charter and the Constitution of 1976 rectify the wishful thinking of the Charter of Algiers, and supply us with a legal mirror adequate to the reality of the new sultanism in much of the Near East. The National Charter celebrates the incorporation of the civil society into the state in an integralist and organicist language (21). The Marxist terminology of economic and class conflict constantly subserves an organicist imagery of harmonious integration through the state. It is the state that creates and maintains the organic totality of Algeria through scientific planning. It is within this organic universe that socialism is united with Islam as its natural development (Leca & Vatin 1977: 18-21). While socialist ideology rationally indicates the path for development in the future, Islam represents the force of social cohesion essential for the salvation of the nation, and 'one of the strongest bulwarks against the enterprise of depersonalization' (Cited in Bensalah 1979: 142).

The myth of the vanguard party is carried over into the new constitutional documents. The Constitution of 1976 recognized the NLF as the single party of the regime with important ideological and political tasks (Arts. 50, 94-103, 128). The state, however, was no longer content with being covered by a surrogate, and expressly took over the pedagogic task of educating society from the party, and the task of 'the radical transformation of society' (Art. 28). The state was said to derive its authority from the popular will (Art. 26). This authority, however, was to be exercised entirely by the president of the Republic who 'incarnates the State in the country and abroad; [and] incarnates the unity of the political direction of the Party and the State' (Art. 111.1-2).

demic Marxism as the Charter of Algiers could only have weakened the historic legitimacy and symbolic power of the NLF.

(21) The integralism of the Charter is echoed in the First Article of the Constitution of November 22, 1976: 'Algeria is a democratic and popular Republic, one and indivisible'.

The already considerable executive and legislative powers granted to the president in the previous constitution were greatly augmented. The new presidential incarnationism left little room for the separation of powers.

The Constitution of 1976 recognized civil rights and representative institutions. Its bill of rights is superficially impressive in its length. However, not only are there many ideological qualifications, but its last article (Art. 73) doubly nullifies the 'fundamental rights' covered by the previous thirty-three articles when they are used 'to the detriment of the Constitution, the essential interests of the national collectivity, the unity of the people [...], and the socialist Revolution' (Bensalah 1979: 160-64).

From the beginning, the Boumediene regime had fostered the growth of temporary and permanent bodies representing economic and social forces at the grass roots. This continuous institution-building from below preceded law-making until it found recognition in the 1976 Constitution: 'National sovereignty belongs to the people who exercise it via referendum or through the intermediary of its elected representatives' (Art. 5). Referendum, this convenient device for the passive expression of national sovereignty, is thus eagerly adopted. As for the more active expressions of national sovereignty, 'the popular assembly' are 'the base institution of the State', and 'representatives of the social forces of the Revolution' (Arts. 7-8). The nominal depository of legislative power, renamed the National Popular Assembly, is not treated until much later (Art. 126). Severe limitations are imposed on the power of this heteronomous assembly. Apart from the fact that the popular will it is to express has been pre-established by the socialist ideology, the Assembly has no power over the president, who can by contrast suspend it at will, and its power of interpellation of the ministers is in effect reduced to begging for information. Already during its brief existence under Ben Bella, the National Assembly itself had subjected the civil right of parliamentary immunity to grave political abuse by systematic deprivation of dissident deputies in 1964 (Leca & Vatin 1975: 67 n. 85). In the Constitution of 1976, this politicized abuse takes legal collectivist form, empowering the assembly to unseat the alleged betrayers of popular confidence (Arts. 134-35, also 131). The other elected assemblies, the communal and provincial (*wilaya*) assemblies, can express the wishes of the people. These would then have to be taken up by the totalizing state which alone has the power to initiate legislation (Art. 150). By contrast, the president can legislate by decree or with the assent of the National Popular Assembly. The latter is in effect a chamber for the registration of decrees enacted by the

president and the executive, as was the case with the medieval *parlement* of Paris (22).

Statism remains the prominent feature of the constitutional law of Algeria, even though the president no longer incarnates the unity of the state and the party and the prime minister (23) was made the head of government by the constitutional referendum of November 1988. The primacy of ideology and the idea of government by the party, on the other hand, have not survived the collapse of totalitarianism in Eastern Europe. The new Algerian Constitution of February 1989, fully reflecting the current changes in international political culture, disestablished the NLF as the sole party (24), being content only to commemorate its historical role in the preamble, and dropped all references to the National Charter and to socialism as the ideology of the regime. The abolition of the monopolistic position of the NLF was followed by the sweeping victory of the Islamic Salvation Front against the NLF and nine other parties in the elections of June 1990 in which it won 46 per cent of the seats (5987) in the communal and 56 per cent of the seats (1031) in the provincial assemblies, with its strength concentrated in the major cities (Burgat 1990: 7). This produced a constitutional crisis that was aggravated by the violent clashes of June 1991, and by the stunning defeat of the NLF by the Islamic Salvation Front in the first round of elections for the National Assembly on December 26, 1991. Within two weeks, a demoralized and divided political elite responded with a military take-over.

4. *Theocracy and constitutional politics in the Islamic republic of Iran.* The Iranian Fundamental Law of 1906, like the Ottoman one of 1876, was embedded in the legal culture of traditional patrimonial monarchy where the entire body of public, governmental norms had the character of regulations and directives and there were no right-granting laws. Consequently, the Fundamental Law originated in a royal decree to which its short preamble refers. It was a case of the established traditional authority legitimizing a new political order. Consequently, no transcendent basis was sought for the Fundamental Law. In sharp contrast, The Fundamental Law of 1979, like the Algerian Constitution of 1963, came into being as a result of the revolutionary overthrow of the established order. Its long preamble, therefore goes into consid-

(22) See above, p. 42.

(23) The position had been optional in the Constitution of 1976 but was made regular by a constitutional amendment in July 1979 (Bensalah 1979: 392).

(24) Note the parallel abolition of the monopoly of the Communist party in Eastern European countries, and the repeal of Article 6 of the Soviet Constitution in March 1990.

erable length to establish a transcendental foundation for the new political order in Islam, and to find justification for the new order in the ideology of the revolutionary movement that founded it.

The Fundamental Laws of 1906-7, as we have seen, were conceived as *qanun* or state laws, and there was no attempt to create an Islamic constitution or a system of public law rigorously on the basis of Shi'ite doctrine and law. This was to be done after the Islamic revolution of 1979 on the basis of Khomeini's theocratic idea of Mandate of the Jurist (*velayat-e faqih*). The result was a radical modification of the traditional Shi'ite theory of authority and its imposition upon the principles and organization of the modern nation-state. The new Fundamental Law was not just a republican constitution consistent with Shi'ite Islam, but a theocratic constitution that purported to incorporate specifically Shi'ite principles of government.

Khomeini himself does not appear to have attached much significance to constitution-making at first, and was reportedly prepared to accept a draft constitution similar to the previous one with only minor changes. However, the draft constitution instantly became the subject of debate by various secular parties, journals and organizations. These debates alarmed Khomeini who told the clerics that revision of the draft had to be undertaken from an Islamic perspective and was their exclusive prerogative (Bakhash 1984: 78). Many of his clerical followers complied. At this point, a process largely independent of the personal inclinations of the participating Ayatollahs was set in motion—that of working out the full logical and institutional implications of Khomeini's theocratic idea in the framework of the modern nation-state. This impersonal process unfolded in the form of the constitution-making of a clerically dominated elected assembly that completed its work in mid-November.

The Fundamental Law of 1979, ratified by a popular referendum, is an ideological constitution that set forth the goals of the Islamic revolution as its guiding principles. As an ideological constitution, it imposes rather severe restrictions on the civil rights of the individual. The vague qualification of the freedom of association in the earlier constitution is replaced by the much more restrictive one, that parties and associations should not 'violate the Islamic standards and the bases of the Islamic Republic', which could be and has been interpreted as outlawing secularist political parties and associations. Furthermore, the previously unqualified right to unarmed gatherings is virtually nullified by the qualification that they 'not be detrimental to the fundamental principles of Islam' (Art. 27).

More extraordinary and far-reaching than this ideological character is the Islamic and theocratic nature of the new constitution. The first chapter of the Fundamental Law explicates theocracy by making sovereignty and legislation the exclusive possession of the One God (Art. 2). Thereafter, the underlying principles of the previous Constitution such as national sovereignty, separation of the powers and the legislative power of the Majles are systematically reassessed and reformulated from this particular Islamic theocractic perspective.

In this manner, 'the Right of National Sovereignty' appears as the title of a chapter (v), but there is no direct statement on national sovereignty. Instead, national sovereignty is delimited obliquely and in a manner devoid of clear legal implications, while a subsequent article (Art. 56) declares that 'absolute sovereignty belongs to God, and it is He who has made man the governor of his social destiny'. The Majles as the organ of national sovereignty is nevertheless retained. Furthermore, it is protected by a constitutional gap: no one has the power to dissolve it (25). Its legislative power, however, is subjected to important new limitations. It cannot enact laws contrary to the principles of Shi'ite Islam, and the determination of this matter is left to six clerical jurists of a Council of Guardians, which is, in effect, an appointed upper house with veto power over all Majles legislation (Arts. 72, 91-96).

The Fundamental Law of 1979 diverges sharply from the Algerian and other ideological constitutions in the importance it attaches to the judiciary power. This is due to the fact the clerics completely dominated constitution-making, and their religious authority was primarily a juristic one as experts in the *sharī'a*. A clerical Supreme Judiciary Council is instituted, and the traditional duality of the judiciary system of Shi'ite Iran, which was recognized in the old constitution, is replaced by a monistic theocratic one under exclusive clerical control.

The centerpiece of the new Fundamental Law was the Mandate of the Jurist. Article 5 states that, during the occultation of the Lord of the Age (26), 'the mandate to rule and the Imamate devolve upon the just and pious Jurist (*faqih*)'. The extensive powers of the Leader, as the supreme Jurist is designated, include the supreme command of the armed forces, appointment of the highest judiciary authority, and of the jurists of the Council of Guardians. Being a source of imitation is stipulated as a necessary qualification for the position of Leadership; and the selection of the Leader is entrusted to a popularly elected but clerical

(25) The last Shah had succeeded in closing this gap in the old constitution after much effort in 1949. See p. 50, above.

(26) The hidden twelfth Imam. On the relation between occultation and Imamate, see Arjomand 1979.

Assembly of Experts, which can also dismiss him in case of incapacity (Arts. 107, 110-111).

Some secondary features of the Fundamental Law are also worth mentioning. The referendum, practiced without constitutional warrant by Mosaddeq and the last Shah, is now adopted, in a formulation close to that in the Algerian Constitution of 1976, as a direct means of expression of the will of the people (Art. 59). The constitution-makers of 1979, who claimed to be in the vanguard of a global Islamic revolution, were not impervious to international currents. Women thus make their appearance and are said to be equal to men before the law, and enjoy certain specific rights. These rights, however, are largely defined in the context of the family and as mothers (Arts. 3.14, 20-21). Following the Turkish Constitution of 1961, the family is declared 'the basic unit of Islamic society' (Art. 10). The idea of the welfare state, combined with the pervasive influence of Marxism and socialism, account for the extensive enumeration of the socio-economic duties of the state, the social rights of the citizens, the qualification of the right to private property, and for attention to the economy and promotion of cooperatives (Arts. 3, 28-31, 43-49).

The Fundamental Law of 1979 did not succeed in making the constitutional law of the Islamic Republic of Iran consistent with the Shi'ite law (Arjomand 1992). This largely accounts for the continuous constitutional crisis (27), which was marked by the frequent exercise by the Council of Guardians of its veto power over parliamentary legislation and resulted in Khomeini's extraordinary statement in January 1988. Government in the form of the God-given absolute mandate (*velayat-e mutlaq*), he asserted, was 'the most important of the divine commandments and has priority over all derivative divine commandments [... It is] one of the primary commandments of Islam and has priority over all derivative commandments, even over prayer, fasting and pilgrimage to Mecca'. In the same month, President Khamana'i, who was to succeed Khomeini as the Leader, proclaimed:

> The commandments of the ruling jurist are primary commandments and are like commandments of God [...] The validity of the Fundamental Law, which is the basis, standard and framework of all laws, is due to its acceptance and confirmation by the ruling jurist. Otherwise, what right do fifty or sixty or a hundred experts have [...]? What right do the majority of people have to ratify a Fundamental Law and make it binding on all the people? (Cited in Arjomand 1989).

(27) Another contributing factor was the unsatisfactory division of executive authority between the president and the prime minister.

In strict logic, the God-given Mandate of the Jurist did not need such man-made propos as the Fundamental Law. Had there not been a constitutional crisis, this explicit degradation of the Fundamental Law would have been avoided. Nevertheless it only gave expression to the unresolvable contradiction between man-made constitutions and divine law as rival transcendental bases of political order which had been reconciled in the syncretism of a latterday theocratic constitution.

Shortly before his death, Khomeini set up a commission to amend the constitution. The revised Fundamental Law of July 28, 1989 eliminated the qualification of being a source of imitation for position of the Leader; recognized the Commission for the Determination of Interest, an overwhelmingly clerical commission set up in 1988 to adjudicate in cases of disagreement between the Majles and the Council of Guardians; eliminated the position of the prime minister in order to concentrate executive power in the presidency; and replaced the Supreme Judiciary Council by a single Head of the Judiciary Power to be appointed by the Leader. The Assembly of Experts was given virtually unrestricted latitude to dismiss the Leader, and the provisions for a Leadership Council to fulfil the function of the Jurist in case a single person could not be agreed upon were eliminated.

As Montesquieu well knew, the separation of powers cannot merely be legislated but is the result of institutional differentiation. The clerical constitution-makers of Iran were genuinely ambivalent about the separation of powers, the principle they carried over from the old into the new Fundamental Law in 1979. Despite the amendments of 1989, which aim at concentrating all the powers, the separation of the legislative and executive powers remains a reality in Iran because of the solid institutionalization of the Majles and the institutional differentiation planned by the early constitutional governments, carried out under Reza Shah Pahlavi, and swallowed entire by Khomeini's theocratic Leviathan. The administrative, legislative and judiciary machineries are distinct. It is somewhat paradoxical that the effort to concentrate power through the constitutional amendments of 1989 have created a single head of the judiciary as the counterpart to president as head of the executive, thereby enhancing the separation and autonomy of the judiciary.

The institutionalization of the Mandate of the Jurist into a monistic authority structure of the nation-state signalled the end of the traditional pluralism of the institution of the religious leadership of the sources of imitation, and the beginning of the *conciliar* institutionalization of hierocratic authority in Shi'ite Iran (Arjomand 1992). With this radical

transformation and politicization of traditional Shi'ite norm of religious authority, the present constitution of Iran reconciles theocracy and the nation-state in the following manner: (i) the centralization of authority in the executive and judiciary branches of government, invested in the Leader on behalf of the Hidden Imam; (ii) the legal institution of a fundamental distinction between a hierocratic elite, defined by their formal qualification as jurists (*mojtahed*), and the lay citizens, with eligibility for Leadership, Headship of the Judiciary Power, membership in the Assembly of Experts, and the six consequential positions in the Council of Guardians, and many other offices being reserved for the former; and (iii) the subordination of parliamentary legislation to clerical supervision.

IV. *Conclusions*

1. *Transmission of international political culture.* During the last two centuries, the urge for political reconstruction has been transmitted through the international system of sovereign states. The availability of constitutional models for political reconstruction has depended on the prevalent international political culture, and not on internal factors. In the Ottoman case, a constitution drawn up by bureaucrats was modified by an elected parliament some thirty years later, in the Iranian case, the elected parliament was involved in constitution-making from the beginning. But the results were remarkably similar. Both countries adopted bills of rights, the principles of ministerial responsibility to parliament and of parliamentary control of government finances from the international political culture by drawing heavily on the Belgian Constitution of 1831. Furthermore, owing to the identity of the blueprint borrowed from the international political culture, adopted institutions can perform the same function and have the same shortcomings in different countries. Both in the Ottoman empire and in Iran, elected parliaments acted as the agency for the political integration of civil society into the structure of government. By contrast, in neither country was parliamentary constitutionalism conducive to modernization through the state, as the reformist bureaucrats had hoped. The blueprint adopted by Algeria in a different era was the ideal one for modernization and social transformation from above, but it had not been available to the modernizers of Turkey and Iran.

2. *Political reconstruction and traditional institutions.* All this is not to say that the traditional structure of authority is irrelevant. On the contrary, the preconstitutional institutional structure, and especially its degree of pluralism or extent of the separation of powers, is likely to have lasting consequences. The absence of serious constitutional struggle between the executive and the legislative in the United States, in contrast to the chronic recurrence of such conflict in France, can plausibly be traced to the absence of a prerevolutionary legacy of entrenched royal prerogative and *étatisme* in the former (Henkin 1989: 1027, 1031). The veto power conceded to a committee of religious jurists in the Iranian constitutional law of 1907 reflected the difference between the dualistic structure of authority in nineteenth-century Iran (Arjomand 1981; 1984: Ch. 10) and Ottoman 'Caesaropapism', and was secured by the extensive participation of the Iranian ulema in constitutional politics. The Ottoman religious institution, though heteronomous unlike its Shi'ite counterpart, was nevertheless institutionally differentiated and distinct. The drawing of the Shaykh al-Islam into Ottoman constitutional politics, though much more limited than the extensive participation of the Shi'ite religious leaders in Iran, points to an important analytical similarity. Unlike the medieval West, in neither case was hierocratic power a constitutionalist force, but in both cases it was the differentiated hierocratic component of the established authority structure that was drawn into the constitutional politics of modernization, and made further division of powers possible. The constitutional separation of powers was thus facilitated by the pluralism of the traditional institutional structure of authority. In Algeria, by contrast, the nationalist elite took over the monolithic colonial state. The absence of pluralism in the prior structure of authority had lasting consequences that are best reflected in the minimal differentiation of the judiciary function from administration which stands in sharp contrast to the recently enhanced differentiation of the judiciary in theocratic Iran.

Furthermore, the traditional institutional structure of authority has a significant bearing on the viability and normative validity of the constitutional order. The Japanese *Rechtsstaat* was consonant with the Shinto national religion and the traditional Confucian ethic. By contrast, the bureaucratic machinery set up by the Fundamental Laws of Turkey and Iran systematically excluded the ulema from the structure of public authority, in effect disestablishing the *sharī'a*, and discontinuing its institutionalized implimentation. Many of the legal provisions of the *sharī'a*, it is true, were incorporated into Iran's legal codes, but this bypassed the religious institution, and was at the sufferance of lay

legislators and for execution by secular judges. Ataturk disestablished Islam in 1928, thereby driving the Islamic opposition to extra-constitutional channels; Reza Shah did the same by the *de facto* secularization of public authority. The traditional Ottoman Caesaro-papism allowed the successor republican state to liquidate the ulema effectively. Shi'ite dualism made this impossible in Iran. The traditional institutions of religious authority survived, and with them the possibility of withholding legitimacy from the constitutional order as the system of public authority. As we know, this was done with a vengeance by Khomeini in order to overthrow constitutional monarchy.

3. *Syncretism of the later constitutions and increasing possibility of conflict among the heterogeneous principles of order.* More consequential than the institutional structures of different countries is the timing of constitution-making. As the international repertoire of political culture grows by accretion, the later the constitution, the more syncretic it tends to be, and the larger the number of heterogeneous and potentially conflicting principles of order it embodies. Recognition of Islam as the established religion by the first Ottoman and Iranian Fundamental Laws added one such principle to those found in the Western and Japanese constitutions. The Turkish constitution of 1961 introduced the socio-economic and welfare principle that was taken up in the subsequent constitutions of Algeria and Iran. Algeria adopted the ideological constitution. The Iranian constitution-makers of 1979 adopted both the social and the ideological principles of order, and, in addition, introduced the principle of Islamic theocratic government. Impressive though it is as an attempt to reconcile contrary principles, Iran's present constitution is the most syncretic and contains the largest number of heterogeneous principles of order.

The thrust of our analysis throughout has been against the holistic conceptions of society and historical process implied by the naive and outdated theories of modernization. Our examination shows modern political culture itself not to be a consistent homogenized universe but a composite of distinct and potentially contradictory principles and traditions. These principles and traditions, however, are autonomous, have definite structural properties and generate distinct patterns in constitutional politics. Patterns in constitutional politics are independent of routine politics, and show remarkable distinctness within and across countries. This distinctness derives from the relation between specific heterogeneous principles of order whose clash or tension occasions the particular instance of constitutional politics. Let us consider the most salient of these patterns in the Near East.

(i) *Transition from traditional monarchy to constitutional state.* The institution of the modern state as a system of public authority ran counter to the vested interests of traditional monarchy and thus generated a distinct pattern in constitutional politics. The bureaucrats and constitutionalists of the 1870s and the 1900s were united in fighting against unlimited *executive* power, in the form of absolute monarchy, which they sought to subject to the rule of law. Their objective—the establishment of a constitutional state in place of traditional monarchy—determined the pattern of constitutional politics. As we have seen, both in the Ottoman empire and in Iran, the issue of ministerial responsibility was dominant in constitutional politics. This issue was doubly significant. Not only did it affect the distribution of power between the monarch and the elected representatives of the people, but it also marked the transition from a personal, patrimonial system of authority to an impersonal bureaucratic one, and was, as such, of primary importance to the modernization of the state as a system of public authority. Nor was the transition from traditional monarchy to the *Rechtsstaat* very successful. Both cases display two patterns typical of monarchical constitutions. The first stems from the conflict between the executive and the legislative, the second from the ambiguity of the executive power being invested in the monarch and exercised by the prime minister. These patterns of constitutional politics are absent in Algeria where the nationalist elite inherited the colonial *Rechtsstaat.*

(ii) *Ideology and the rule of law.* The authoritarianism of the Near Eastern ideological constitutions of 1970s stands in striking contrast to the liberalism of the earlier ones. This authoritarianism is due entirely to the triumph of ideology. In Algeria, it was the imported socialist ideology, pure and simple, that legitimized presidential incarnationism in the name of the forward march of history. In Iran, it was the Shi'ite religion transformed into a political ideology, on the basis of Khomeini's unrecondite idea but under the decisive influence of totalitarisnism and its ideological model of constitutions. The Algerian unanimism and the Shi'ite theocratic monism alike ignore the traditional Islamic differentiation of the *qanun* and the *sharī'a*, and are diametrically opposed to Montesquieu's conception of a constitutional system premised on diversity. These modern and modernized (in Iran's case) forms of denial of transcendence and differentiation result in the removal of limitations to government and the decline of civil rights.

(iii) *Islam, national sovereignty and parliamentary legislation.* The constitutions of the Ottoman empire and Iran succeeded in putting the law above the monarch. Traditionally, *qanun* derived its validity from

the will of the monarch; now the validity of the monarchy itself depended on the Fundamental *Qanun* as the foundation of political order. This newly acquired supremacy could at any time invite invidious comparison to the *sharī'a* as the law of God. It is not surprising therefore that the invocation of this invidious contrast to delegitimize the autonomous political order as the modern idol, coupled with the demand for the implimentation of the *shari'a*, have been the hallmark of Islamic fundamentalist opposition to the secular state. Thus would the Islamic Salvation Front confront the monolithic Algerian state with the slogan : 'No Constitution and no laws. The only rule is the Koran and the Law of God' (28).

The recognition of Islam as the state religion added a new kind of tension in relation to the legislative power. What now needed to be reconciled were the heterogeneous principles of parliamentary legislation and law-finding in Islamic jurisprudence. This reconciliation could be avoided so long as Islam was swamped by national sovereignty, as in Iran in 1907, Turkey in 1924, and Pakistan in 1956, or by socialism, as in Algeria in 1963 and 1976. But, once a serious attempt was made to derive the transcendental principles of legitimate political order from Islam, other principles of order had to give way. It was left to the Iranian constitution-makers of 1979 and 1989 to alter the priority among the contradictory principles of order, and to win the institutional battle against national sovereignty by systematically subordinating the popularly elected president to the clerically selected Leader as the vicar of the Hidden Imam, and by imposing clerically determined limitations on the legislative power of the Majles.

With the revolutionary Islamic reconstruction of the political order in Iran, legislation, codification and systematic review of public law, as distinct from law-finding, have thus become institutionalized in the Shi'ite legal tradition. If the medieval popes effected the transition from the law-finding to law-making in Christianity through the revival of Roman Law, Khomeini and his followers have done the same in Shi'ism through the take-over of the modern state and its legal framework. Nevertheless, the fundamental contradiction between divine sanction and popular consent as the transcendental basis of political order inevitably lurks in the background, as the above-quoted statement by Khamana'i eloquently demonstrated (29).

(28) Reported in the *New York Times*, December 26, 1991, p. 13. The slogan was used during the electoral campaign in December 1991. See also note 19 above.

(29) See above, p. 71.

4. *The modern state and the principles of constitutional order.* The true institutional enemy of constitutionalism is the state, as its true cultural enemy is ideology. The ability of the bureaucratic state to subvert constitutionalism is too obvious to require elaboration. The only real protection against this danger is the strength of civil society. The crucial linkage between taxation and representation in the constitutional history of Europe was noted. It indicates the fiscal dependence of the medieval European states on their respective civil societies. This interdependence of state and society and balance of power in early modern European polities, so indispensable for the nurturing of constitutionalism, finds no counterpart in the twentieth century Near East. The techniques of deficit financing were adopted by Turkey and Iran by the time of World War II; access to international credit became much easier in the 1960s; and oil revenues of the Iranian and Algerian states became enormous in the 1970s. The autonomous state does not need to compromise with the forces of civil society.

I have argued elsewhere (1984: 7-12) that Max Weber's ideal type of traditional authority was too formal. It ignored the normative content of the principles of legitimacy of different traditional orders, and thus failed to meet Weber's own criterion of adequacy at the level of meaning. Similar criticisms have been made regarding Weber's ideal type of rational-legal authority (Willer 1967). Weber's model of the authority structure of the bureaucratic state takes the abstract normative order of the *Rechtsstaat*—consistent adherence to rules for making rules—as the grounds of its legitimacy. The actual normative content of the principles of legitimacy, as embodied in the constitution of the modern states of his time—namely monarchy, democracy and national sovereignty—are missing in his ideal type.

No one can deny the importance of the normative order of the *Rechtsstaat* in view of the pervasive power of the bureaucratic state and the undeniable fact that the effective exercise of authority is self-legitimatory. Our survey of political reconstruction in the Near East offers telling evidence for the reality of the *Rechtsstaat* and its ability to subvert other principles of constitutional order. Both the Algerian and Iranian cases demonstrate that the institutional reality of the state can subvert the ideological intent of the constitution-makers. As regards Algeria, we have noted the pathos of the attempt by the drafters of the 1964 Charter of Algiers to subordinate the state to the party it had already swallowed. The Iranian case is even more instructive.

Iran's Islamic revolutionary elite has in theory succeeded in subjecting all spheres of life to Islamic law by a series of institutional

innovations that have extended the competence of the religious jurists from law-fiding to legislation. Nevertheless, its victory is more apparent than real. In practice, popular (parliamentary) legislation covers most areas of life. This legislation has now been 'Islamicized' and can claim Islamic legitimacy as a result of the institutional innovations of the clerical constitution-makers. But in reality, the tremendous expansion of 'Shi'ite' public law made possible by these innovations has meant the absorption of an enormous amount of secular legal material. The Majles has shown great vigor, beginning with the revision of the Commercial, Civil and other European inspired Codes of the Pahlavi era, and has enacted an impressive body of laws. These now appear Islamicized as they bear the approval of the jurists of the Council of Guardians.

Thus, even the astute Khomeini was defeated by the cunning of history. The lasting consequence of his constitutional statements and amendments has been the strengthening of *the authority of the state*. To see the irony of this development, one only needs to be reminded of the declaration on executive power in the preamble to the Fundamental Law of 1979: 'The system of bureaucracy, the result and product of idolatrous (*taghuti*) forms of government, will be firmly cast away!' Nine years later, Khomeini in effect told the Iranians that obeying petty bureaucrats, who derive their authority from the sacred Mandate of the Jurist, is more important than prayer and fasting. The constitutional amendments of 1989 completed the translation of the Mandate of the Jurist into constitutional law of the bureaucratic state by compartmentalizing, conciliarizing and bureaucratizing it. The result is a resounding triumph not only for conciliar clericalism but also for the state.

Tocqueville (1955) noted that the paradoxical consequence of the French Revolution was the strengthening of the state it sought to destroy. He has once more been vindicated. The state, which Khomeini initially intended to wither, has not only grown enormously in size (Arjomand 1988: 173), but in the legal sphere, too, has emerged as the unintended victor of the Islamic revolution, making its clerical masters also slaves to its logic.

Nevertheless, the absorptive capacity of the modern state should not be misconstrued. The modern state with its rational-legal legitimacy is capable of assuming many forms. It rests not on one but on several heterogenous principles of orders, which can be set in different configurations and be given enormously varying weights. Furthermore, contrary to what is suggested by Weber's ideal type, these principles are of traditional provenance. Foremost, among these, is the transcendental justification of the political order. Iran's Islamic constitution illustrates

the enormous possibilities for syncretism and synthesis of heterogeneous principles open to the latecomers into the international political culture, which include the reintroduction of religion as the transcendental foundation of political order.

Finally, if our analysis is correct, the widespread ineffectiveness of constitutions and their incongruence with the practice of government in the non-Western world should not be seen as proof of their symbolic and normative feebleness. The ineffectiveness of constitutions, rather, emerges as a consequence of the tension among the different principles of political order they embody, the low degree of institutional pluralism in the polities concerned, and the resulting imbalance of power between the bureaucratic state as the bearer of the norms of the *Rechtsstaat* and the respective institutional bearers of other principles of political order *.

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