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Law's Comprehensiveness and Sovereign Leadership: On the Juridico-political Thinking of Ayatollah Khomeini and Carl Schmitt

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ABSTRACT

This essay takes its point of departure in a letter written by Ayatollah Khomeini suggesting that sovereign authority is a matter of “absolute divine guardianship” and that the state “may suspend any matter ... when it contravenes the best interests of Islam for the duration that it is so.” Khomeini’s insistence that the Islamic state headed by a Guardian Jurist is authorized to suspend normally valid law if need be, brings to mind Carl Schmitt’s (in)famous proposition that the sovereign is authorized to suspend the normally valid legal order in the state of exception. This essay will explore to what extent this evocation might be indicative of a more general affinity between Schmitt’s juridico-political thinking and Khomeini’s interventions and innovations during his years as the Guardian Jurist of the Islamic Republic of Iran. The essay ends with reflections on what juxtaposing Khomeini and Schmitt might yield and bring into view.

KEYWORDS

Ayatollah Khomeini; Carl Schmitt; constitutional theory; constitutional law; sovereignty; concrete orders; Velayat-e Faqih

Introduction

This essay takes its point of departure in a public letter addressed to the President of the Islamic Republic of Iran, Ali Khamene’i,¹ dated 6 January 1988, in which Ayatollah Ruhollah Khomeini, who between 1979 and 1989 occupied the highest constitutional political office in the Islamic Republic of Iran, the office of the Guardian Jurist (*Velayat-e Faqih*)², suggested that sovereign authority is a matter of “absolute divine guardianship” and that the state “may suspend any matter – be it devotional or non-devotional – when it contravenes the best interests of Islam for the duration that it is so.”³ The letter has been the subject of much scholarly attention and Said Hajjarian, one of the most influential intellectual and political figures in post-revolutionary Iran, has suggested that it marked “an inflection point” in the history of the Islamic Republic by introducing a new

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¹Dispensing with diacritics, this essay uses a simplified version of the *Iranian Studies* transliteration system (except in quotes).

²The office is sometimes translated as Trusteeship of the Jurist or as Mandate of the Jurist.

³Khomeini, *Sahifeh-ye Emam*, vol. 20, 170–1. My trans.

understanding of the relation between political authority and religious law into Shi'i jurisprudence.⁴

Khomeini's insistence in the letter that the Islamic state headed by the Guardian Jurist is authorized to suspend normally valid law if need be, brings to mind Carl Schmitt's (in)famous proposition in *Political Theology* from 1922 that the sovereign is authorized to suspend the normally valid legal order in the state of exception.⁵ This essay will explore to what extent this evocation might be indicative of a more general affinity between Schmitt's juridico-political thinking and Khomeini's interventions and innovations during his years as the Guardian Jurist.⁶

The investigation will be carried out in two steps. First, the parallels between Khomeini's and Schmitt's juridico-political thinking will be explored. Three interrelated themes will be in focus: (1) the limitations of legalism, (2) the distinction between constitutions and constitutional laws, and (3) the role of personal, sovereign, leadership. Next follows reflections on what juxtaposing Khomeini and Schmitt might yield and bring into view.

Something should, however, be said already at this stage about why this essay places Khomeini's juridico-politics next to Carl Schmitt's. The rationale is, importantly, not an assumption of natural affinity between on the one hand the notion of an all-powerful God in the monotheistic religions of Christianity and Islam, and the idea of absolutist leadership, which, as we will see, both Khomeini and Schmitt espoused.⁷ The juxtaposition is instead employed to create an opportunity to approach Khomeini as a political thinker with sensibilities and propensities shared with political thinkers elsewhere with a penchant for dictatorship based on popular support from the majority. In this way, Khomeini's juridico-political thinking is de-localized and de-exoticized despite the fact that it was articulated through the local [and exotic] language of Shi'i Islam.

While there is a widespread idea in the Western world that religion as such can somehow explain the actions of a figure like Khomeini, in the literature specifically discussing the Ayatollah's political and legal ideas, his juridico-politics is often presented as a distortion of religion for the purposes of secular realpolitik.⁸ In this essay, a dichotomous view of authentic religion versus (strategic) politics is rejected and religion is instead approached as a malleable discourse, which cannot be neatly separated from the politics of the believer. This approach could be labeled Schmittian because it assumes that religion becomes more than religion, and takes on a political character, when it is deployed as a resource for (re)shaping life in common in a context marked

⁴Hajjarian, "Emam Khomeini," 35.

⁵Schmitt, *Political Theology*.

⁶Schmitt's juridico-political thought is often divided into two phases: an early decisionist phase later superseded by an institutionalist, or concrete-order, phase. The understanding of Schmitt which undergirds this essay, reads him as a thinker whose decisionism is infused with concrete order thinking and whose concrete-order thought retains strong elements of decisionism. His oeuvre is thus read as one whole. For a development of this understanding of Schmitt, see Brännström, "Carl Schmitt's Definition".

⁷Here are two reasons for not assuming a link between monotheism and absolutist political rule: (1) monotheistic religions have not only been employed to offer a foundation for sovereignty but also to articulate anti-sovereignist and pluralist visions of co-existence (see e.g., Peterson, "Monotheism as a Political Problem"), (2) the phenomenon of sacred kingship in Iran can hardly be made sense of as a transfer of an Islamic image of an all powerful Allah into the sphere of politics (see Azfar Moin, *Millennial Sovereignty*).

⁸Illustrative examples would be: "[Khomeini's] motives had little to do with theological traditions, and he instituted political innovation in the garb of traditional religion," (Bayat, "Mahmoud Taleqani," 67), or "there is an apparent oxymoronic value in Khomeini's above-mentioned statement: in order to save Islam from the danger of the secular world ... the Islamic Republic needs to think outside Islam. It needs to become profane" (Ghiabi, "The Council of Expediency," 850).

by competing visions of the future.⁹ To sum up, this essay proceeds on the assumption that politics is formative of religion, but the role of religion is at the same time taken seriously. Religion was undisputedly a central component of post-revolutionary Iranian politics and of Khomeini's acts and writings. The point is, however, that his religion was inflected through political ambitions, associations, and sensibilities.

In what follows, I will first give a short account of Khomeini's major jurisprudential innovations in the 1979–1989 period. I will here rely on a periodization made by the Iranian theologian, historian of ideas, and philosopher, Mohsen Kadivar.¹⁰ Next, I will juxtapose these innovations with Schmitt's juridico-political ideas and finally, as already stated, the essay will close with reflections on what the juxtaposition of the two thinkers has yielded.

The public letter concerning state authority

One of Ayatollah Khomeini's most well-known *fatvas* (legal opinion on a point of Islamic law) originated in a dispute about a labor act, passed by the Majles (the Iranian parliament) in 1987 and sent for approval to the Guardian Council (*Shora-ye Negahban*), which according to Article 4 of the Iranian Constitution of December 1979 is charged with the responsibility to ensure that all laws and regulations are compatible with the constitution but also “based on Islamic criteria [*mavazin*].”¹¹ If entered into force, the act in question would among other things have placed restrictions on working hours, set standards for working conditions, created a minimum wage and made it more difficult for an employer to dismiss an employee.¹² Even before formally receiving the act for consideration, the Guardian Council made clear its objections. The proposition, it was argued, was incompatible with well-established provisions of Islamic law and jurisprudence because it sanctioned unwarranted interference in negotiations between two contracting parties. The then minister of labor and social affairs, Abolqasem Sarhaddizadeh, asked Khomeini in a letter about his opinion concerning the following question:

“Is it allowed to impose binding conditions on companies in exchange for public and state services and facilities such as water, electricity, telephone lines, [...] etc., independently of whether they have made use of these facilities in the past and continue to do so, or whether this is a recent situation?”¹³

Khomeini answered in a short announcement that it was legitimate for the state to impose conditions on the operations of private businesses.¹⁴ Lotfollah Safi, the then

⁹Cf. Schmitt, *Political Theology*, 37–38. Nota bene that this essay only adopts the Schmittian idea about the primacy of politics and does not subscribe to Schmitt's notion of the political as the opposition between collectivities of people whose members are ready to defend – by armed struggle if necessary – the group and its established “form of existence” against those who wish to negate their “way of life” (Schmitt, *Concept of the Political*, 27–28). For a critique of Schmitt's notion of the political, see Brännström, “The People.”

¹⁰About Kadivar see, Matsunaga, “Mohsen Kadivar.”

¹¹The Constitution of the Islamic Republic of Iran, Art. 4.

¹²On the many adventures of the act see e.g., Malek-Ahmadi, *Democracy and Constitutional Politics*, 63–80. For an overview of the factional political landscape in which this bill was presented to the Majles, see Ashraf, “Theocracy and Charisma,” 113–52 and Bakhash, “Islam and Social Justice.”

¹³Quoted in Schirazi, *The Constitution of Iran*, 211. Art. 1 of the bill legitimated it stating that: “All employers, employees and companies [...] that in one form or another make use of state facilities [...] are obliged to conform to this law” (Schirazi, *The Constitution of Iran*, 211).

¹⁴Khomeini, *Sahifeh-ye Emam vol. 20*, 430.

secretary of the Guardian Council and a distinguished jurist, asked Khomeini to clarify the extent of the authority of the Islamic state because his announcement could be interpreted in a way that “would open the door to those who intend to undermine the Islamic principles of trade and investment.”¹⁵ In response, Khomeini confirmed that the state was entitled to make demands on the private sector.¹⁶ During a Friday prayer sermon on 1 January 1988, President Ali Khamene’i offered a conciliatory interpretation of Khomeini’s opinion affirming that the regulatory authority of the state is to be exercised within the framework of divine law. Dissatisfied with the president’s attempt at mediation, Khomeini clarified his position in a public letter to him dated 6 January 1988:

From the statements that you made during the Friday prayer, it would appear that you do not subscribe to the view that state authority is absolute guardianship delegated by God to the Prophet and is the most important divine ordinance, taking priority over all other divine shari’a ordinances. You attributed to me the idea that state authority must be exercised within the limits set by divine ordinances. Your representation completely contradicts my original assertion. If state authority were to be exercised within the framework set by substantive divine laws, then the idea of divine government and the delegation of absolute guardianship to the prophet of Islam would have been something meaningless and superfluous [...] State authority is a part of the absolute guardianship of the Prophet of God, and is one of the essential ordinances of Islam, taking priority over all substantive shari’a ordinances [*ahkam-e fariyeh*], even prayer, fasting and *haji*. The ruler may demolish a mosque or a home to build a road and compensate the owner for his house; the ruler may shut the doors of mosques if necessary, and demolish a mosque that is the source of harm; the state may unilaterally annul religiously sanctioned contracts with people, if it discerns that the contract threatens the expedencies of the country and Islam. The state may suspend any matter—be it devotional or non-devotional—when it contravenes the best interests of Islam for the duration that it is so. The state may temporarily prevent *haji*, which is one of the most important Divinely imposed duties, if it is deemed contrary to the interests of the country and Islam. What is being said [about the limitations of state authority] is the result of lack of knowledge about the divine absolute guardianship.¹⁷

The 1979 constitution of the Islamic Republic

When Khomeini first formulated a theory of Islamic government and guardianship of the jurist in a series of lectures in 1970, he suggested that Islamic government was the same as the rule of divine law and that the *raison d’être* of this form of government was to make sure that the book and the *sunna* were effectively implemented.¹⁸ Khomeini also maintained that there would not be a legislative branch in an Islamic state because Islamic law is comprehensive and already covers every aspect of human life.¹⁹ However, as Khomeini during the decade leading up to the start of the revolutionary moment in Iran came to be increasingly affected by the ideas of a new generation of Muslim intellectuals and militant

¹⁵Quoted in Ghamari-Tabrizi, *Islam and Dissent*, 149. For the letter, see Khomeini, *Sahifeh-ye Emam* vol. 20, 434.

¹⁶He did in fact extend the scope of his earlier fatwa (see Khomeini, *Sahifeh-ye Emam* vol. 20, 435).

¹⁷Khomeini, *Sahifeh-ye Emam* vol. 20, 451–2, my trans.

¹⁸Khomeini argued that the very existence of a body of Islamic law testifies to the logical necessity of an Islamic state securing the realization of that law: “if we examine closely the nature and character of the provisions of the law, we realize that their execution and implementation depend upon the formation of a government, and that it is impossible to fulfill the duty of executing God’s commands without there being established properly comprehensive administrative and executive organs” (Khomeini, *Governance of the Jurist*, 21). See also e.g., Khomeini, *Governance of the Jurist*, 16, 18; Khomeini, *Velayat-e Faqih*, 21, 25–26.

¹⁹See e.g., Khomeini, *Governance of the Jurist*, 20–21, 29–30; Khomeini, *Velayat-e Faqih*, 29, 43–46.

activists who were deeply influenced by the global left anti-imperialist politics, he came to emphasize that the basis of authority of Islamic state was not only divine law but also the will of the people.²⁰ In statements and interviews given in Paris, where Khomeini resided the year before the collapse of the Pahlavi monarchy and his own return to Iran, he would speak on social justice, self-determination, anti-imperialism and an Islamic republic rather than an Islamic government.

The nature of the post-revolutionary political order was highly indeterminate when the “unthinkable revolution”²¹ in Iran did actually take place in the fall and winter of 1978-1979. Although Khomeini was the uncontested leader of the revolutionary movement, which consisted of a broad coalition of social and political groups, the theory that he had developed a decade earlier on the guardianship of the jurist did not figure at all in the rhetoric of the movement nor in the immediate post-revolutionary discussions about the future constitution of the Islamic Republic.²² Khomeini himself did not mention it at all. However, when struggles between groups espousing competing visions of post-revolutionary development soon broke out, the clergy and the anti-secular, anti-imperialist, anti-communist, and anti-liberal “Khomeinists”²³ made the rule of a guardian jurist the core item of their political agenda arguing that without it the Islamic quality of the new republic could not be guaranteed.²⁴ They managed to secure the adoption of a constitution, which stipulated that as long as the Twelfth Imam remained in occultation, a most qualified Islamic jurist, an Ayatollah authorized to deliver fatwas and holding the religious office of *marja-e taghlid* [source of emulation],²⁵ had the right to rule and exercise leadership.²⁶ The constitution gave, among other things, the Guardian Jurist the supreme command of the armed forces and the authorization to appoint jurists to the Guardian Council as well as the country’s supreme judicial authority.²⁷

Despite some opposition in the Assembly of Experts for Constitution²⁸ – the body tasked in the summer of 1979 to author a draft constitution – the constitution did also set up a legislative branch and stipulated that “the affairs of the country must be administered on the basis of public opinion expressed by the means of election ... or by means of referenda.”²⁹ The elected assembly was, however, as already mentioned, only authorized to legislate on the basis of Islamic criteria and the Guardian Council, the most important members of which would be Islamic jurists, was to supervise that the Majles acted in accordance with its mandate.

²⁰On the evolution of Khomeini’s thinking about political authority, see Ghamari-Tabrizi, “The Divine, the People.”

²¹Kurzman, *The Unthinkable Revolution*.

²²See Schirazi, *The Constitution of Iran*, 22–30; Kadivar, “Tarikhche-ye Velayat”.

²³The term is borrowed from Abrahamian *Khomeinism*.

²⁴See Schirazi, *The Constitution of Iran*, 22–30; Kadivar, “Tarikhche-ye Velayat”; Ghamari-Tabrizi, *Islam and Dissent*, 41–83.

²⁵A “source of emulation” is the rank of the highest religious authorities of the seminaries to whom the faithful may turn for consultation on questions of religion and jurisprudence. The faithful are free to choose for themselves the particular source of emulation they want to follow.

²⁶Art. 5 and 109. On the process leading up to the adoption of the constitution see e.g., Schirazi, *The Constitution of Iran*, 22–58 and Ghamari-Tabrizi, *Islam and Dissent*, 41–83.

²⁷Art 110.

²⁸See Schirazi, *The Constitution of Iran*, 52–55; Ghamari-Tabrizi, *Islam and Dissent*, 71–77.

²⁹The Constitution of the Islamic Republic of Iran, Art. 6.

Khomeini's jurisprudential interventions and innovations

Upon assuming the office of the Guardian Jurist Khomeini, like other officials in the Islamic Republic, was confronted with a host of issues and problems that Shi'i jurisprudence had not previously dealt with simply because the domain of modern state law far exceeded that of traditional Shi'i jurisprudence.³⁰ Khomeini had to devise what it would mean to respond to these issues in an Islamic way, while at same time also finding out how the inherited body of Shi'i jurisprudence should be interpreted and applied as the law of a modern state. According to Mohsen Kadivar, Khomeini's approach in tackling these challenges went through two phases, before culminating in a most innovative and consequential third.³¹

According to Kadivar, during a short initial phase, the ambition was that all legislation in the new Republic would draw upon Islamic sources (the book and the Sunna) and that religious law (as conventionally interpreted in seminaries) would apply throughout the institutions of state and social life.³² This proved soon to be anything but uncomplicated.

When the *Majles* began its work in 1980, the majority were revolutionary populists, holding egalitarian principles, favoring state interventionism, and being convinced that the spirit of Islam was in line with their commitments. They were confronted early on by decisions from the Guardian Council suggesting that the legislative bills they had approved contradicted religious law. The Council handed down such judgements in particular regarding social and economic legislation, which would interfere with the enjoyment of private property or with the freedom of contract.³³

To get its propositions through, the parliamentary majority justified its proposed land redistribution legislation, rent legislation and other legislation by invoking the principle of overriding necessity [*zarurat*] which it argued authorized it to issue secondary regulations, that is to say religious regulations that are temporary unlike the eternal primary rules and principles of shari'a.³⁴ The principle of overriding necessity and the notion of secondary regulations were items already existing in the arsenal of Shi'i jurisprudence but the parliamentary majority used them broadly and creatively, suggesting that for example "social needs," "the need for national self-sufficiency," "the need to prevent emigration from the countryside," or "the interests of the Islamic order," could activate the application of the principle of necessity.³⁵ The Guardian Council did not reject the idea that necessity could legitimate secondary regulations contradicting the rules and principles of *shari'a* but had a significantly narrower interpretation of which state of affairs could constitute overriding necessity.³⁶

Khomeini, who had spoken in favor of both radical redistributive justice and of a strict interpretation of Islamic law endorsed the parliamentary majority's power to decide on overriding necessity "in the broader interests of the community," but he did not "consistently support the implications of such a position."³⁷ When a number of influential

³⁰See Schirazi, *The Constitution of Iran*, 161–74.

³¹Kadivar, "Qalamrow-e Hokomat-e Dini."

³²*Ibid.*, 125.

³³See Schirazi, *The Constitution of Iran*, 175–222 and Bakhsh, "Islam and Social Justice."

³⁴See e.g., Bakhsh, "The Politics of Land."

³⁵In the words of Bakhsh "[t]raditionally, the concept of *zarurat* has been applied primarily to personal cases, to exigencies affecting the individual believer. For example, the prohibition against the consumption of pork might be waived for a Muslim facing starvation" (Bakhsh, "The Politics of Land", 196).

³⁶See e.g., Schirazi, *The Constitution of Iran*, 176–84; Bakhsh, "The Politics of Land", 196–8.

³⁷Bakhsh, "The Politics of Land", 198.

members of the clergy protested that parliamentary majorities lacked jurisprudential qualifications and should not be integrated into the process of interpreting religious law [*ejtehad*], Khomeini curiously proposed that a two-thirds majority was needed for the *Majles* to declare the existence of “overriding necessity.”³⁸ At the same time, he cautioned the members of *Majles* to vote in such a way so the Guardian Council would not have to reject them.³⁹

To recap, during the second phase in Kadivar’s periodization, legislation was exercised as a form of emergency rule by way of “secondary regulation” and with reference to “overriding necessity.” The precise nature of the authority that Khomeini had conferred on parliament through the qualified majority rule remained, however, uncertain. The Guardian Council continued to see itself as the final authority on questions of Islamic law and parliament had to accommodate the views of the Council even when legislating by two-thirds majority, which it did sparingly whether out of respect for the Council or because it lacked the necessary majority in the controversial questions at hand.⁴⁰

The continuing tensions between the *Majles* and the Guardian Council triggered the third, and according to Kadivar, most important, phase during which the notion of the expediencies of the political order [*maslahat-e nezam*] was introduced and made pivotal.⁴¹ The fatwa on labor law, dealt with above, initiated this phase during which the doctrine of the guardianship of the jurist transmuted into that of the *absolute* guardianship of the jurist [*velayat-e motlaqe-ye faqih*].⁴² Khomeini argued now that if the interests of the political order require it, the guardian jurist can issue state decrees with the force of divine law, which can override primary Islamic ordinances temporarily or permanently.⁴³

The first state decree that Khomeini issued after his letter to Khamenei ordered the creation of the Council for the Discernment of the Expediency of the Order [*Majma‘-e tashkhis-e maslahat-e nezām*] (hereafter the Expediency Council) tasked to mediate thorny disagreements between the Guardian Council and *Majles* on the Islamic quality of legislative bills on the basis of – as its name indicates – the expediency of the political order.⁴⁴

In the words of Kadivar, the absolute guardianship of the jurist is about the authority to legislate *within the framework of religion but in contravention of its ordinances*.⁴⁵ Kadivar points out that according to this view the absolute guardian may also act

³⁸See Schirazi, *The Constitution of Iran*, 181; Ghamari-Tabrizi, *The Divine*, 235. *Ejtehad* is the formulation of new decisions on the basis of the sources of law (the book and the Sunna), by means such as analogy and reason.

³⁹Bakhash, “Islam and Social Justice,” Schirazi, *The Constitution of Iran*, 181–2.

⁴⁰Bakhash, “Islam and Social Justice”, 10. See also Bakhash, “The Politics of Land”. As pointed out by Schirazi, the parliamentary majority and the government, which represented them, could also carry out their preferred policies without a legal basis, see Schirazi, *The Constitution of Iran*, 192–202.

⁴¹Kadivar, “Qalamrow-e Hokomat-e Dini,” 125–6.

⁴²Kadivar argues that a fourth phase in Khomeini’s response to the challenge of governing in the name of Islam might also be distinguished, a phase marked by the stress that he put on the importance of the elements of “time and place” in *ejtehad*. Kadivar suggests that Khomeini discussed this interpretive approach only in general terms and did not have the time to fully explain and put it to use. See Kadivar, “Qalamrow-e Hokomat-e Dini,” 126.

⁴³Schirazi argues that Khomeini’s fatwa must be seen as the consolidation and official sanctioning and recognition of a wide range of practises, including legislation, which had been, implicitly or explicitly, guided by the interests of the regime and which had been carried out ever since the birth of the Republic. See Schirazi, *The Constitution of Iran*, 237–47.

⁴⁴Khomeini, *Sahifeh-ye Emam*, vol. 20, 463–5. For an account of the position and activities of the Council in the post-Khomeini era see e.g., Ghiabi, “The Council of Expediency”.

⁴⁵Kadivar, “Qalamrow-e Hokomat-e Dini,” 126.

beyond the limitations set by the constitution because the “real constitution” of the Islamic republic is in the end nothing but the law of Islam.⁴⁶ Kadivar highlights some instances in which Ayatollah Khomeini did in actual fact act above and beyond the constitution. The prime example is the establishment of the Expediency Council.⁴⁷

On 24 April 1989, forty days before his death, Khomeini sent a letter to the then president of the Republic, Ali Khamenei, requesting the formation of a constitutional review council in order to attend to eight issues, some structural, some cosmetic.⁴⁸ The constitutional recognition of the Expediency Council was one of the issues, while another concerned the qualifications and authorities of the Guardian Jurist. A few days later, in a letter to the newly formed Council for the Reappraisal of the Constitution [*Shora-ye Baznegari Qanon-e Asasi*], Khomeini admitted that he had committed an error in requiring the Guardian Jurist to be a source of emulation. It would suffice for the Guardian Jurist to be a Shi’ite jurist authorized to interpret Islamic law (a *Mojtahed*). Elsewhere, Khomeini argued that a *Mojtahed’s* abilities must go beyond matters of jurisprudence, and include understanding of economic matters and political ideologies, political prowess and the capacity to defend the integrity of Islam in “the world of politics and deceit.”⁴⁹

The revision of the constitution was completed soon after Khomeini’s death in June 1989. The revised constitution codified the notion of the *absolute* guardianship of the jurist, dropped *marja’iyyat* (the quality possessed by a Source of emulation) as a qualification requirement for the Guardian Jurist, and formalized the authority of the Expediency Council.⁵⁰

The affinities between Khomeini’s and Schmitt’s juridico-political thought

Beyond legalism: jurisdictional authority and concrete orders

In his *Islamic Government* Khomeini had insisted that Islamic law is a comprehensive system, which also includes rules of government and administration.⁵¹ By the “comprehensiveness” of Islamic law it seems that he meant that there was an applicable divine legal rule to rely on in every conceivable situation in life.⁵² However, as we have seen, the inherited divine body of law not only proved to lack sufficient guiding capacity regarding a host of indispensable late modern issues, many divine provisions seemed in addition to be out of tune with the actual organization of society and the wishes of most people. Khomeini’s post-revolutionary jurisprudential innovations, which was developed in response to these problems,⁵³ did not abandon the idea that Islamic law

⁴⁶Ibid., 130–1.

⁴⁷Ibid., 131.

⁴⁸Khomeini, *Sahife-ye Emam*, vol. 21, 363–4.

⁴⁹Khomeini, *Sahife-ye Emam*, vol. 21, 289, my trans.

⁵⁰Khamenei, a junior cleric, had in contravention of the constitution been appointed to succeed Khomeini on a temporary basis before the amendment was ratified. After the constitution was amended, Khamenei’s position was made permanent.

⁵¹See for example Khomeini, *Governance of the Jurist*, 9, 15, 21; Khomeini, *Velayat-e Faqih*, 12, 20, 28–29.

⁵²See e.g., Khomeini, *Governance of the Jurist*, 20; *Velayat-e Faqih*, 29.

⁵³Ashraf argues that Khomeini developed his constitutional approach in response to concrete constitutional and jurisprudential problems that arose in the Islamic republic during its first decade of existence (see Ashraf, “Theocracy and Charisma,” 131–2).

is comprehensive, but instead the notion that the law is a collection of rules.⁵⁴ What might law be if it is not a collection of rules? Schmitt's theory of law offers an answer to that question.

It is often overlooked that a key claim in *Political Theology*, the book in which we find Schmitt's (in)famous definition of the sovereign as he who decides on the exception, is that law is comprehensive and able to provide answers even in the face of the most exceptional and unforeseen situations. Schmitt opens *Political Theology* with criticism of a legalist approach to law, which answers that "the law stops here" when confronted with "decisive" questions of state and constitution, such as whether a state of emergency is at hand.⁵⁵ He suggests that this impasse is unavoidable with a legalist understanding of law as a collection of rules laid down in the past, which can be interpreted and applied to concrete cases without taking into account the actual and concrete organization of social life and the conditions for law's realization.⁵⁶

The problem with the idea of law as a collection of rules is that rules cannot establish their own meaning in concrete historical situations. Rules are therefore inevitably underdetermined which means that juridical judgments, by logical necessity, cannot be mechanically derived from rules.⁵⁷ Schmitt argues that the most important legal question to ask, outside the realm of routine cases in which decision-making approaches the limit of pure repetition, is about who decides. His argument, in other words, is that at the end of the day, jurisdictional authority, rather than substantive correctness in any sense, settles differences in legal judgment.⁵⁸ Legal judgements favored by people without jurisdictional authority lack the force of law, and therefore, Schmitt contends, don't fulfill the conditions for law's realization, which requires mediation by the state.⁵⁹

For Schmitt, what has just been said does not implicate that the authorized decision-maker may do as he wishes. Legal rules and decisions are embedded in a particular "form of life," in a specific concrete order, characterized by foundational ideas and institutions, which stabilizes the meaning of rules as well as the possible range of legal decisions.⁶⁰ The normality that a concrete order maintains facilitates the answering of legal questions such as what should be considered fair, reasonable or required in various contexts.⁶¹ However, like rules, the meaning of normality in different social situations will be subject to disagreement and Schmitt, again, suggests that jurisdictional authority must be relied upon to solve conflicts about concrete cases.⁶²

⁵⁴He would thus insist late in his life that "Islamic jurisprudence is the actual and complete theory of managing humans from the cradle to the grave" (*Sahifehye Emam*, vol. 21, 289, my trans.).

⁵⁵Schmitt, *Political Theology*, 4 and 6. Schmitt does not use the notion of "legalism" but instead "constitutional liberalism", "normativism" or "legal positivism".

⁵⁶See for example Schmitt, *Three Types of Juristic Thought*, 29–40.

⁵⁷Schmitt was certainly not the first one to call attention to this fact (cf., for example, Kant, *Critique of Pure Reason*, 267–70 [A 131–6/B 169–75]), but his account of the problem particularly accentuates the impact of political conflict and societal transformations.

⁵⁸See for example Schmitt, *Political Theology*, 31–35.

⁵⁹Schmitt, *Political Theology*, 28.

⁶⁰For an elaboration of these themes see Schmitt, *Three Types of Juristic Thought* and chapter 2 of *Political Theology*, 16–35. See also Brännström, "Carl Schmitt's Definition" and Croce and Salvatore, *The Legal Theory*.

⁶¹See Schmitt, *Three Types of Juristic Thought*, 10–11, 19–24, 42–43, and 50.

⁶²Cf. Schmitt, *Three Types of Juristic Thought*, 81–83.

The constitution v. constitutional laws

Schmitt's arguments about concrete orders are related to his understanding of constitutions. For Schmitt, a constitution cannot be equated with constitutional laws that can be found in constitutional documents. The real, "positive," constitution is the particular form of political and social order which a constitution making power, manifesting the political unity of a people, puts into place through a fundamental and constitutive political decision.⁶³ From this viewpoint, constitutional laws are no more than an attempt to codify a political and social order, "a peculiar form of existence," which has already been endorsed by "the people."⁶⁴ In the words of Lars Vinx, "Schmitt's constitutional thought has a tendency to identify the authentic will of the people with the decisions of a pre-legal constituent power, allegedly unaffected by the pluralist division into several political parties."⁶⁵

A separation between the constitution in the Schmittian sense (an Islamic order which "the people" decided for through a revolution) and constitutional law (which codifies and embodies the Islamic order) is operative in the 1979 constitution of Iran. The lengthy preamble of the constitution thus declares that the Muslim community through the revolutionary process opted for a society based on an Islamic foundation.⁶⁶ The constitution of the Republic, the preamble asserts further, is an articulation of the political, social, cultural, and economic relations and institutions of the society, and is intended to strengthen the foundations of Islamic government. And Article 4 of the constitution, which declares that all laws must be based on the Islamic standards, does explicitly include the constitution itself.

The idea of Islam as the real constitution, animating constitutional law, was also articulated during the negotiations in the Assembly of Experts for the Constitution – the body tasked in the summer of 1979 to author a draft constitution for the Islamic Republic. Ayatollah Beheshti, the driving force behind the constitution, argued there that there is a general distinction between two types of social order that shape the political structure of nation states, the liberal democratic and the socialist, both of which are ideological orders even if the former disguises its ideology.⁶⁷ He continued that the Iranian social order and political structure in the making would commit to Islamic values outright in the same way that socialist countries like Bulgaria, China and the Soviet Union openly held ideological commitments.

Khomeini himself also made a distinction between the real constitution and constitutional law. Mohsen Kadivar has drawn attention to Khomeini's use of the phrase "apparent violation of constitution" which describes cases when constitutional laws have been sidestepped on Islamic grounds. There is thus a violation of constitutional law, but not of the real constitution, Islam.⁶⁸ We see here that what comes across as illegal from a liberal constitutional point of view can be anchored in the legal order with a Schmittian concrete order conception of law.

⁶³Schmitt, *Constitutional Theory*, 75–88.

⁶⁴*Ibid.*, 75.

⁶⁵Vinx, "Introduction", 11.

⁶⁶The Constitution of Iran, Preamble.

⁶⁷Ghamari-Tabrizi, *Islam and Dissent*, 68.

⁶⁸Kadivar, "Qalamrow-e Hokomat-e Dini," 132. See also Khomeini, *Sahifeh-ye Emam*, vol. 21, 217–8.

The sovereign leader as the guardian of the real constitution

The 1979 constitution did not bestow the Guardian jurist with a legislative function nor with the authority to exercise direct juridical powers. As Asghar Schirazi has pointed out in his study of the evolution of the post-revolutionary constitution, the authority of the Guardian Jurist, although “far exceeding a simple supervisory role,” did not “amount to the plenipotentiary authority” which is bestowed upon the leader according to the theory of the absolute guardianship of the jurist, nor “extend to the scale of power which Khomeini himself exercised in this capacity.”⁶⁹ Through Khomeini’s juridico-political innovations and interventions, the Supreme Leader, the Guardian Jurist, was authorized to define and defend the Islamic order and to resolve disagreements decisively. This is a change in an unmistakably Schmittian direction.

A broad agreement that the post-revolutionary Iranian society would be an Islamic order did not prevent disagreements about what that exactly entailed. The negotiability and openness of social orders is the exact reason why Schmitt insists that a concrete order must be tied to a hierarchy of authority that ascends to a personal leader to whom the members of an order are to show obedience and loyalty.⁷⁰ To avoid or resolve conflicts regarding the nature of the social order, which could potentially threaten the survival and prosperity of the political community, a sovereign person must be authorized to decide.⁷¹

Schmitt insists, that a political community committed to preserve and cultivate its way of life must have a supreme leader who can act as the “guardian of the constitution” and revitalize the existing social order by re/interpreting its foundational idea in the face of new developments and threats. Such a person, is to seen as an embodiment of “the concrete qualities of an order” and as representing the people, who are according to Schmitt united in some sense even if groups stand against each other in actual fact.⁷² As we have seen, the 1979 constitution of Iran assigned the task of guarding the real constitution (Islam) as well as written constitution to the Guardian Council, but during his time as the Guardian Jurist of the republic, Khomeini arrived at the conclusion that the survival of Islam as a way of life, the condition of possibility of which is an Islamic state, called for the personal leadership of a sovereign, who would make the interests of the Islamic political order an absolute priority. The Guardian Jurist is thus the guardian of the real constitution.

On juxtaposing Khomeini and Schmitt

Said Hajjarian famously argued that Khomeini’s interventions during the first decade of the Islamic Republic should be regarded as a more or less unavoidable effect of the transition of Shi’i jurisprudence from independent seminaries into the framework of a modern state.⁷³ If Schmitt’s ideas about concrete orders, jurisdictional authorities,

⁶⁹Schirazi, *The Constitution of Iran*, 13. Schirazi also points out how Khomeini, as the charismatic leader of the Islamic revolution, issued many of his early revolutionary decrees simply as the “Deputy of the [Hidden] Imam” and as the leader of the revolution.

⁷⁰Schmitt, *Three Types of Juristic Thought*, 50, 81–83, 94–95.

⁷¹See for example the Preface to the second 1934 edition of *Political Theology* (Schmitt, *Political Theology*, 1–4).

⁷²See Schmitt, *Three Types of Juristic Thought*, 50; Schmitt, “The Guardian of the Constitution,” in particular pages 171–3.

⁷³Hajjarian, “Farayand-e ‘orfi-shodan-e feqh-e”; Hajjarian, “Emam Khomeini”. See also Ashraf, “Theocracy and Charisma,” 139 and Namazi, “Ayatollah Khomeini” for similar arguments.

constitutions and sovereignty, could be presented as general clarification on how law, unavoidably, operates within the frame of the state, then Khomeini would have had no option but to become a Schmittian in his constitutional and juridico-political approach once he became responsible for adapting traditional Shi'i jurisprudence to state law.

The "transition-thesis" undeniably explains some features of Khomeini's interventions and innovations. As pointed out, Khomeini seemed to hold a rather rigid legalist view of law at the time of writing *Islamic government* but abandoned this outlook when he became the leader of a modern governmentalized state, which was not only preoccupied with do's and don'ts but with maximizing strength and productivity and securing the welfare of the population.⁷⁴ The task of creating a legal order for a modern Islamic state could not have been done through literal fidelity to a set of historical rules and principles that had evolved outside of the realm of state and politics.⁷⁵

The need to transcend literalist and legalist approaches to law in order to survive and prosper as a political community given the contemporary conditions of political and economic life, does however not dictate anything about how this should be done. There is, in other words, no logical necessity between the untenability of legalism and the promotion of absolutist leadership at the top of a hierarchical structure of jurisdictional authority, in which loyalty is guaranteed through personal nominations to office.⁷⁶ The Schmittian/Khomeinist claim about the comprehensiveness of law is in the last instance a preference for an order in which a faction of the people, represented by an absolutist leader and loyal to him, control disagreements and competing ambitions outside the realm of contentious politics and in which the sovereign leader conclusively resolves every constitutional question with a view to protect and advance the interests of the existing social order. The most critical problem raised by the way in which Schmitt/Khomeini suggest that foundational decisions of a political community are to be made is not about extra-legality, but about authoritarianism and about repressive rule by loyal factions claiming the represent the "real" people.

Khomeini chose the Schmittian path but there is a range of other alternatives for making Islam compatible with various modern arts of governing. One possibility, for example, is to abandon the idea that Islamic law is comprehensive, delimit the sphere of divine law proper, and make more space for democratic politics.⁷⁷ This is the approach promoted by Mohsen Kadivar and to him it is a way of protecting the integrity of Islam and emancipating religion from the state and its interests.⁷⁸ These practical positions are rooted in a theological standpoint according to which God did not demand the believers to organize themselves politically in the form of an Islamic state with a sovereign leader. In a different but related move, Abdolkarim Soroush, an influential lay theologian, also responds to the role of religion in the postrevolutionary republic by emphasizing the enigmatic core of Islam, distinguishing between religion as God intended it and

⁷⁴On the governmentalization of the state see (Foucault, *Security, Territory, Population* and *The Birth of Biopolitics*).

⁷⁵On the private law character of the traditional *shari'a*, which envisages "a conception of social order in which the state plays little or no significant role", (see Schirazi, *The Constitution of Iran*, 227–9).

⁷⁶Cf. Schmitt, *Three Types of Juristic Thought*, 50–51. See also Schmitt, *Political Theology*, 33–35.

⁷⁷Which road to take is of course not up to non-believers to decide on.

⁷⁸On Kadivar's position see Matsunaga "Mohsen Kadivar".

human knowledge about religion, and suggesting that the “true” meaning of shari’a is unknowable.⁷⁹

As we can see, criticism of the institution of the Guardian Jurist has not only been pursued with political arguments but also on the terrain of theology and theological positions, which is in turn reflective of political predispositions. This observation allows me to end this essay by going back to a point made at the beginning: when religion is deployed as a resource for shaping the future it is inseparable from politics.

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Notes on contributor

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⁷⁹On Soroush, see Ghamari-Tabrizi, *Islam and Dissent*, chapters 4, 7 and 8.

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