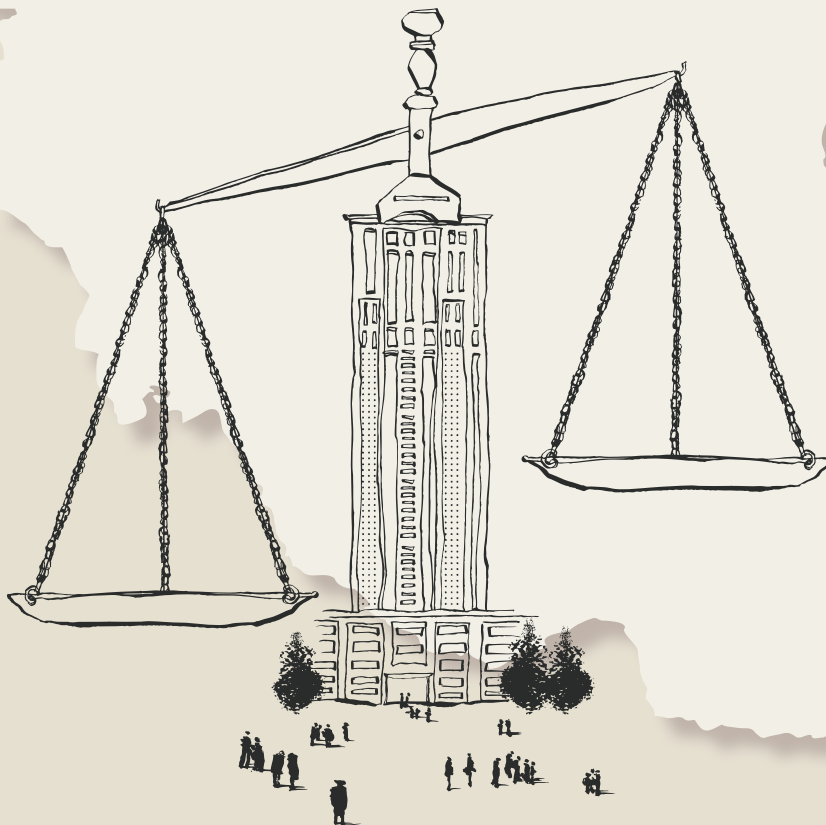


THE FUTURE OF IRAN: JUDICIAL REFORM

Reform within the Judiciary of Iran

By Nargess Tavassolian



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This working paper was produced for the Legatum Institute's workshop on Judicial Reform in May 2012. The workshop was part of 'The Future of Iran' project, which is designed to encourage Iranians to begin thinking about the challenges they will face if, or when, they suddenly find themselves in a position to carry out major political, social and economic reforms.

INTRODUCTION

Following the Islamic Revolution of 1979 and the change of the regime, the Iranian Constitution was adopted on October 24, 1979, and amended on July 28, 1989. According to Article 1 of the Constitution, the form of government is that of an Islamic Republic.⁽¹⁾ The twelver ja'fari school of shia was adopted as the official religion of the state.⁽²⁾ The Islamic Republic is based on the Islamic principles that are mainly presented in Article 2 of the Constitution. Therefore, previous laws were abolished and new laws, which were considered as more compatible with Islamic principles were introduced. This includes the Criminal Code.

The Constitution recognizes the principle of the separation of powers (i.e. legislative, judiciary, and executive). However, this separation is negated by emphasizing that all mentioned powers should function under the supervision of the absolute religious Leader.⁽³⁾

Article 156 of the Constitution describes the judiciary as, "an independent power which shall support individual and social rights and be responsible for ensuring justice". However, Article 61 of the Constitution restricts this independence by stating that: "The functions of the Judiciary are to be performed by the courts of justice, which are to be formed in accordance with the criteria of Islam." However, the criteria of Islam is not defined in the law.

Until 1989, the highest judicial authority was the Supreme Judicial Council which was made up of five religious legal authorities. In 1989, the Constitution was amended and the Council was replaced by the Head of the Judiciary. The Head of the Judiciary is charged with the duty of establishing a judicial organization to implement Islamic law and has the power to appoint, promote and dismiss judges. He is appointed directly by

the Leader of the Islamic Republic for a renewable term of five years⁽⁴⁾ The Minister of Justice is appointed by the President from a list of nominees proposed by the Head of the Judiciary and is responsible in matters concerning the relationship between the judiciary on the one hand and the executive and legislative branches on the other hand.⁽⁵⁾

With this introduction, this paper deals with three main questions: 1. Who can be a judge in Iran and what qualifications are needed?; 2. How are Iran's judges retrained?, and; 3. What can be the essential steps in bringing reform to the judicial system of Iran?

1. WHO CAN BE A JUDGE AND WHAT QUALIFICATIONS ARE NEEDED?

The Constitution provides for the required qualifications of judges to be laid down by the law in accordance with the standards of religious jurisprudence.⁽⁶⁾

According to the law on the Qualifications for Appointment of Judges, enacted on May 4, 1982, judges should be chosen among the male applicants of the following conditions⁽⁷⁾:

1. Having faith, justice and practical commitment to Islamic principles and loyalty to the Islamic Republic of Iran.
2. Legitimacy of birth (Tahaarat moled).
3. Having the Iranian citizenship and having completed the military service or having legal exemption from military service.
4. Having the ability to work and not being addicted to any kinds of drugs.
5. Having reached the level of ejtehaad⁽⁸⁾ according to the discretion of the Judiciary.

In the same code, it is mentioned that if there are not enough mojtaheds among the applicants, judges can be chosen from among the graduates of law schools, faculties of theology or the seminaries (howza) who have not yet reached the level of ejtehaad.

Following the 1979 Revolution, the government tried to make the Judiciary more in line with its own interpretation of Islam. Consequently, all female judges were dismissed or assigned to clerical and administrative positions. A number of qualified judges were also expelled because were deemed not to have commitment to the principles of the Islamic Republic of Iran.⁽⁹⁾

However, later on, female judges were allowed to serve as a judicial counsel or the investigative judge in some parts of the judiciary including the Special Civil Courts, the Administrative Court of Justice, the Office of the Guardianship of Minors, and in the prosecution; yet, they cannot issue verdicts on their own and only their advisory opinions are sought by the presiding judge⁽¹⁰⁾

Currently judges, based on their background education, are divided into two main groups: The first group are the graduates of law schools and the second group are the graduates of the seminaries (howzas) or the theology faculties. In the seminaries, the sharia (Islamic law) with the governmental interpretation is taught. Seminaries usually operate in the form of boarding schools. Students do not pay tuition fees and are often provided with subsidies.

Moreover, In January 1982, the Judiciary established a special religious/judicial school in order to train more religious judges⁽¹¹⁾. The graduates of the judiciary school were more easily accepted into the Judiciary. Law faculties are either governmental or private. Students need to take an entrance exam for either type. There is no tuition fee for the governmental universities but getting into them is highly competitive. Private universities on the other hand, are not as competitive to gain entrance but require a

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high-tuition fee. Within law faculties, codes enacted by the parliament in various realms (criminal, civil, family, etc.), along with some sharia laws, are taught.

The bachelor's degree in law takes four years to complete. Upon attaining the bachelor's degree, passing the judgment exams, and doing the apprenticeship, one can become a judge. In order to do a master's degree in law, one needs to pass the entrance exam. The completion period for master's degree is two years. Like the master's degree, upon passing an entrance exam, one can enter the PhD period of study, which takes three to four years.

It should be noted that according to a by-law issued by the Supreme Council of Cultural Revolution, candidates at the master's or PhD level, might be disqualified by the Central Selection Committee at the Ministry of Science on ideological or political considerations.⁽¹²⁾

It is worth noting that despite all the vocational restrictions imposed on women, almost 70% of law students are female, who later on become lawyers or legal advisers. However, the rate of unemployment is three-times higher in women than in men.⁽¹³⁾

GENERAL COURTS VERSUS SPECIAL COURTS

General courts deal with civil and criminal cases. There are also some special courts, which are named as special courts since they either deal with specific types of crimes or specific types of victims or perpetrators. The Revolutionary Court is an example of the first type and the Special Court for Clerics is an example of the latter.

Within the Revolutionary Courts, certain categories of offenses such as crimes against national security (including political and press crimes), narcotics smuggling, and acts that undermine the Islamic Republic are tried.

The Special Court for Clerics handles crimes allegedly committed by clerics or against the clerics. According to the by-law on the Special Court for Clerics,⁽¹⁴⁾ the Supreme Judge of the court is appointed by Iran's Supreme Leader.⁽¹⁵⁾ Other judges are appointed on the recommendation of the Prosecutor of the Special Court for Clerics and approval of the head of the judiciary.

On October 16, 1986, after disputes between the Islamic Consultative Assembly (majles) and the Council of Guardians,⁽¹⁶⁾ the consultative Assembly approved a law, which permitted the Supreme Judicial Council, to employ judges with minimum experience. The law stated:

“The Supreme Judicial Council is authorised to appoint persons who have been working in the Revolutionary Prosecutor’s office in judicial positions for more than three years as judges of the Prosecution Offices and Courts, without regard for the Legal Bill on Qualification of Judges provided that they possess at least the high school diploma or are approved by the Supreme Judicial Council, and provided that the candidates of either category are able to pass an examination on the Civil Procedure Code and the Islamic Penal Code.”⁽¹⁷⁾

In 1987, Hojatoleslam Rafsanjani, the Speaker of the Consultative Assembly, said: “The interpretation is that ... even if official approval from the Prosecutor’s office has been authorised for less than three years, a man may still be appointed as a judge.”⁽¹⁸⁾

Hence, with this law, judges with little formal education were allowed in the judiciary.

The Rule of Law Breached within the Judiciary

According to Article 2 of Iran’s Penal Code, “no commission or omission of an act shall be deemed an offense unless there is some punishment, security or correctional measures provided by the law”.⁽¹⁹⁾ This principle is called *nulla poena sine lege* (no penalty without law), and it is a principle accepted in all the legal systems of the world. However, this principle is breached in Iran’s Constitution. According to Article 167, “the judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatwa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.”

Hence, this article allows judges to issue verdicts on acts, which have not been assigned any punishment within the law. There are various and, sometimes, even contradictory fatwas on the same issue in Islam. For example in the case of apostasy, whereas some fatwas assign the death punishment (Khomeini and Fazel Lankaraani), the other (Montazeri) does not assign any worldly punishment to it. This principle is not only against the rule of law, but also considering that many judges appointed have very little formal education, is very dangerous.

TRANSFER OR REMOVAL OF THE JUDGES

According to Article 164 of the Constitution, “A judge cannot be transferred or re-designated without his consent, except in cases when the interest of society necessitates it, that too, with the decision of the head of the judiciary branch after consultation with the chief of the Supreme Court and the Prosecutor General. The periodic transfer and rotation of judges will be in accordance with general regulations to be laid down by law.” However, the “interests of the society” are not defined under Iranian laws.

Moreover, a year later in October 1991, the Assembly for the Determination of Exigencies passed a law regarding the formation of a High Tribunal for Judicial Discipline.⁽²⁰⁾ According to this law, judges may be recommended for dismissal on the basis of “religious considerations”⁽²¹⁾ by the Head of the Judiciary. The recommendation for dismissal is to be examined by a three person investigatory committee made up of the Judicial Disciplinary Prosecutor, the Parliamentary Deputy to the Minister of Justice and the Judicial Deputy to the Chief Prosecutor. After investigation, the committee sends its opinion to the High Tribunal.⁽²²⁾ The High Tribunal is composed of the Head of the Judiciary, the President of the Supreme Court, the Chief Prosecutor, the Judicial Disciplinary Prosecutor, and the Head of the First Branch of the Judges’ Disciplinary Tribunal. The High Tribunal issues its verdict by majority vote, but the Head of the Judiciary retains the right to veto⁽²³⁾. Religious considerations are not defined anywhere in law. This lack of definition and clarity makes the door open for arbitrary dismissal. The lack of any protections against arbitrary removal of judges, and dismissal without any judicial inquiry, has severely damaged the independence of the Iranian Judiciary.

2. HOW ARE IRAN’S JUDGES RE-TRAINED?

There is no continual retraining in the judicial system of Iran. Having said that, within the last few years, some seminars and workshops were organized for some judges.⁽²⁴⁾ However, these workshops are very few and only held in the centre of provinces. One of the deficiencies of the judicial system can be the lack of training sessions for judges. Few judges are sent for training outside Iran each year.

3. IF IT WERE POSSIBLE TO MAKE REAL REFORM TO THE IRANIAN JUDICIAL SYSTEM, WHAT WOULD BE THOSE STEPS THAT SHOULD BE TAKEN?

1. The first step would be the amendment of The Law on Qualifications for the appointment of Judges in order to abolish any discrimination specifically on the basis of sex and religion.
2. The second step, in my opinion, would be the removal of Article 167 of the Iranian Constitution, which allows judges to issue judgements based on their preferred fatwas, since as elaborated in this paper, there are different and even contradictory fatwas on the same issue in Islam. For example, whereas according to one fatwa, the punishment for one apostate is death, the other fatwa does not assign any worldly punishment to it. Article 167 of Iran’s Constitution is in clear breach of the rule of law.
3. The third step could be the reformation of the legal training of the seminaries. For example, whereas the law on the Qualifications for Appointment of Judges speaks of the mojtahed men, codified laws are not taught within the seminaries. One might reasonably doubt that how these mojtaheds could issue verdicts if they have not formally studied the law?

4. The fourth step would be to restrict the discretionary power of the Head of the Judiciary to appoint individuals who are not sufficiently qualified and educated in law, as judges.
5. The fifth step is making protections for judges against arbitrary dismissal on grounds that are not defined in law such as “the interests of society” or “religious considerations”. On the other hand, judges subject to disciplinary proceedings should be given a fair hearing. A decision to dismiss a judge should be subject to review by a body independent of the Head of the Judiciary.
6. The sixth step could be done through establishing different periods for re-educating judges and making them familiar with the different legal systems of the world.

CONCLUSION

This paper was written to address three questions: 1) Who are Iran’s judges and how are they appointed and dismissed?; 2) How are Iran’s judges retrained?, and; 3) What are the necessary steps, which need to be taken in order to make a real reform within the judiciary? The flaws of the judiciary and the problem in appointing and dismissing judges were discussed in this paper. The author argues that unless the provisions on the rule of law, appointment, dismissal and education of the judges and the wide discretion of the head of the judiciary are not amended, real reform cannot take place within the judiciary.

REFERENCES

1. Iran's Constitution, 1979, Article 1.
2. Ibid, article 12.
3. Ibid, article 57.
4. Ibid, Article 157.
5. Ibid, Article 160.
6. Ibid, Article 163
7. The Law on the Qualifications for the Appointment of Judges, Official Gazette No. 10800, 12/2/1361 (May 1982) at 7, can be viewed Online: <<http://rc.majlis.ir/fa/law/show/90547>>.
8. Mojtahehs: Members of the clergy whose demonstrated erudition in religious law has earned them the privilege of interpreting laws.
9. 'The justice System of the Islamic Republic of Iran', <<http://www.iranrights.org/english/document-93.php>>.
10. Online: Majlis, <<http://rc.majlis.ir/fa/law/show/91044>>.
11. To see the website of the school go to <<http://fjs.ac.ir/index.php?persian=content&categoryID=45>>.
12. 'Moral Selection Regulations for University Entrance Applicants', Online: <<http://www.ghavanin.ir/detail.asp?id=6918>>
13. 'Student Selection Criteria', Online: <<http://rc.majlis.ir/fa/law/show/99898.Article>>, Article B1; 'Regulatory Framework for Denial of Education', Online: International Campaign for Human Rights in Iran <<http://www.iranhumanrights.org/2010/12/regulations-student-report/>>.
14. <<http://www.iranhumanrights.org/2010/12/regulations-student-report/>>.
15. 'Justice for All: An Interview with Nobel Peace Prize Laureate Shirin Ebadi', Online: <<http://www.international.gc.ca/cfsi-icse/cil-cai/magazine/v04n01/1-1-eng.asp>>.
16. Approved by the Islamic Consultative Assembly on 9/8/1361 (Oct. 1982). Official Gazette N. 10987, 24/8/1361 (Nov.1982)
17. Bylaw of the Special Court of Clerics, 6th August 1990., Can be viewed Online at : <http://www.dadkhahi.net/law/Ghavanin/Ghavanin_Jazae/Aeennameh_roraniyat.htm>.
18. In a letter dated 14-71365 (October 1986), sent by the Speaker of the Islamic Consultative Assembly, Hojatoleslam Rafsanjani, to President Khamenei, Speaker Rafsanjani confirmed to the President that the Council of Guardian's interpretation [of the qualifications necessary to become a judge] had not been approved by the Assembly.
19. Official Gazette, No. 12160, 8/9/1365 (Nov. 1986), at 371.
20. Official Gazette, No. 12541, 20/12/1366 (Mar. 1987), at 962.
21. Iran's Penal Code, 1982; Online: Human Rights & Democracy for Iran A project of the Abdorrahman Boroumand Foundation <<http://www.iranrights.org/english/document-139.php>>.
22. Law on the Formation of the High Tribunal for Judicial Discipline, December 1991, Online: <http://www.adalatgazaee.com/index.php?option=com_mtree&task=viewlink&link_id=75&Itemid=0>.
23. Ibid, article 1.
24. Ibid, Article 1.
25. Ibid, article 2.
26. For example See Online: <<http://www.amoozeshghanoon.ir/?portal=MainPortal&modules=content&ref=113>> and <<http://www.sabadnews.com/economicnews/index.php?news=43219>>.

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