With the declaration of the establishment of the Islamic Republic of Iran, it was foreseeable that the clergy intended to dominate Iran’s judicial system because one of the most important functions of the clergy before the Constitutional Movement and during the transformation taking place in the judicial system under the reign of the Pahlavis, was their control of the justice administration. Nevertheless, modernism in Iranian law was introduced with the express or implied consent of the fully qualified mojtahed or clergies. Although the Civil Code of Iran (which constitutes the basis of determining the relationships of members of society with each other) is generally influenced by the Islamic law, the clergies themselves did not deem it appropriate to have the Islamic criminal law implemented in Iran, or to have its judicial system put in place (which was incompatible with the circumstances of the day) the way the Islamic jurists intended.

With the ratification of the constitution of the Islamic Republic of Iran and the culmination of legal grounds for the dominance of all economic, social and legal aspects of Iran by the government, the judicial organization of Iran was gradually transformed. In this article some of its outcomes and causes will be reviewed on the basis of laws and regulations that have been enacted and implemented during the last twenty years.

LEGAL ANALYSIS OF IRAN’S JUDICIAL SYSTEM

The purpose of Iran’s mashrooteh or the Constitutional Revolution was to establish law and order in Iran. This popular demand sought to establish a National Consultative Assembly and promulgation of laws by the people’s representatives, and was also indicative of transgressions and injustices committed by the government functionaries and Islamic jurists who implemented willful laws and regulations against the people. For the materialization of this populist ideal, the Constitution of the Constitutional Movement put in place courts of justice as the source of resolution of public grievances. Although Article 71 of the Constitution, as amended, said: “Administration of justice in sharia matters rests upon fully-qualified mojtahed or Islamic jurists.” Article 74 had stipulated that: “No court may be held unless provided by the law.” Therefore the fully qualified Islamic jurists could not hold court independent of the judicial system. Thus the constitution law of the Constitutional Movement, borrowing from European models, founded an independent judicial system in Iran.

The Iranian society made the following achievements as a result of separation of judicial organization from religion:

1. Judicial precedents throughout Iran became centralized and uniform, and the issuance of unlawful judgments was prevented;
2. Principles of law related to inherent and relative jurisdiction of courts were precisely implemented, and judicial hierarchy was observed;
3. Recognized principles of procedure, such as the rule of independence of judges, rule of res judicata, basing of judgements on the enacted laws and refraining from making ex post facto laws were identified and implemented;
4. The Faculty of Law was founded at the Tehran University and students were sent to European countries to study their laws, and religious teachers in judicial positions were gradually replaced by modern educated judges;
5. Independent public prosecutor’s offices were established for the purpose of defending public rights;
6. The Bar Association was established and right of defense for accused persons was created;

7. Provisions of Criminal Procedure Code and Civil Procedure Code were implemented;

8. Iran’s fundamental laws, such as the Civil Code, Criminal Code, Registration Act, Commercial Code and Civil Procedure Code, which safeguarded rules related to public order, such as statutes of limitations in lawsuits, claim of payment of interest, and adducing of evidence to prove a case were compiled and implemented; and finally

9. Judges’ disciplinary court and prosecutors’ office, which were charged with protecting the honor and dignity of judges in Iran, were established.

At the beginning of transformation of laws of the justice administration, many clergies, who did not accept the new judicial policies, avoided occupying judicial positions. Nevertheless, first-rate Islamic jurists, who were familiar with the circumstances of their times and who scrupulously implemented the enacted laws of Iran within the framework of the Civil Procedure Code, which was unprecedented in Islamic law, continued to occupy important judicial positions.

By emphasizing the Iranian idealism and nationalism and the need to annul capitulation or consular jurisdiction (judicial privileges accorded to foreign citizens living in Iran), the issue of drafting of Iran’s laws within the framework of acceptable principles of international law was considered as the most important achievement of the government of Reza Shah. To that end the government charged a group of lawyers with the task of drafting such laws, and then appointed some of the same lawyers in judicial positions to replace the religious judges.

Although the regime of consular jurisdiction was annulled by virtue of the Treaty of 1921 concluded with the Soviet Union, other European countries refused to terminate their consular courts on the pretext that the judicial system of Iran was not acceptable to them. After the success of Ali Akbar Davar in creating a modern judicial system in Iran and the ratification of the Civil Code, Commercial Code, and Criminal Code in accordance with the principles of international law, at last the government of Mokhberolsaltaneh Hedayat officially announced the annulment of capitulations in May 1928.

After the appointment of law graduates who often did not have sufficient knowledge of Islamic law, it was felt necessary to appoint mujtahed or Islamic jurists in certain judicial positions in order to decide issues that had to be judged in accordance with the principles of sharia law. For that purpose the Sharia Courts Act was ratified in December 1931, and the competence of religious judges was restricted to sharia matters, such as the dissolution of marriage and divorce, and the religious proof of parentage.

Iran’s judicial organization pursued its efforts to transform and modernize itself over several decades. After the events of August 19, 1953, and the de facto overtake of the judiciary by the king, the inherent jurisdictions of courts martial and security courts expanded; various types of special courts, such as the Commission on the Implementation of the Nationalisation of Water Act, the Nationalization of Natural Resources Act, and Municipal Courts Act (for exercising oversight on the enforcement of municipal regulations) and the Guilds Courts Act were established. Those measures that were taken to expand the influence of the Executive on the judicial organization weakened the judicial system. Moreover the government, by making an imprudent decision of granting judicial immunity to the United States’ military personnel, sidelined the valuable achievements of Iran’s modern judicial organization. Nevertheless, on the eve of the Revolution, the judicial organization of Iran had succeeded in attracting the services of a substantial number of honorable and educated lawyers within the judicial system of Iran.

**RETURN TO PERIOD OF RELIGIOUS ADJUDICATION**

Essentially the judicial organization of every country also plays the role of guarding its political system. Especially after the victory of each revolution the leaders of the new system establish courts or institutions to punish their political opponents and the officials of the previous regime, though they know full well that courts and revolution are at odds with each other. Under the Islamic law, judges or fully qualified Islamic jurists, while acting as judge with extensive powers, are not bound by the principles and standards that we referred to above as the achievements of legal modernism in Iran. For that reason the sharia judges upon filling positions in revolutionary courts simply issued final judgments, without considering the principles of non-sharia or secular law and sometimes participated in the implementation of those judgments as well. Of course at the beginning of the revolution the main issue was the suppression of political opponents and the supporters of the previous regime. Thus with the establishment of the revolutionary courts, which carried out this mission, there was no need to change Iran’s legal system.

Following the hostage crisis and the Iran–Iraq war, unexpected opportunities opened up for the government of the Islamic Republic of Iran to set aside nationalist and liberal leaders, and to implement sharia laws on the basis of the new constitution. Article 4 of the Constitution of the Islamic Republic of Iran provides that:

“Iran’s judicial system must be based on principles of sharia.”

Nevertheless, the Establishment of the Public and Revolutionary
Courts Act, which was proposed for the purpose of adapting Iran’s judicial system to rules of sharia, was ratified years later, that is, in August 1995. This Act, the ratification of which was opposed even by some Islamic jurists as well, is entirely at odds with the rules of law.

It seems that several years’ delay in bringing about organizational changes in the justice administration was caused by the fact that the implementation of such an Act by the professional judges of the justice administration did not seem practical; the government waited for the new generation of judges faithful to the new system to be gradually trained. In fact the revolutionary courts, which have gradually expanded in terms of judicial and administrative staff, constitute the main core of the justice administration of the Islamic Republic of Iran in judicial positions even at the level of the Supreme Court.

The Islamic civil procedure code consists of topics of discourse such as conditions of appointment of a judge, impartiality of witnesses, sharia evidence, methods of filing of complaints, writing and the method of implementation of judgments, family disputes, a deceased person’s property and estate, and disputes as to paternity of children. (3) The most important characteristic of the Islamic civil procedure code is the extensive authorities granted to the sharia judge based on his right to interpret religious and legal matters independently. In this respect it is somewhat similar to Common law. At the same time, in case an enacted law is inconsistent with the principles of sharia law, the judge may disregard the law. Nevertheless, on the basis of the constitution of the Islamic Republic of Iran, this right seems to have been delegated to the Guardian Council. (4) But in practical terms, the right to interpret allows the Islamic judge to implement extensive and unspecified criminal law. For instance, according to Section 103 of the Islamic criminal law (ta’azirat, or punishment having maximum and minimum limits): “Anyone who encourages people to corruption or fornication and facilitates the same shall be condemned to imprisonment ranging from one to ten years.” This section does not define the material and intellectual elements of the crime of corruption. In other words, the lawmaker should have initially defined corruption and then the method of encouragement of the same so that the punishment could have constituted a legal basis. Following this section we encounter its Note that provides: “In case the above act has causality to public decency, and he commits that act with the knowledge of its causality, he shall be punished as mofsed fil erz or corruptor on earth.”

The revolutionary courts, which constitute the skeleton of Iran’s judicial organization, consist of judges of different religious ranks. Moreover, contrary to general organization of the justice administration, these courts have a prosecutor and an unspecified number of administrative employees and an executive body. With the establishment of many law faculties throughout Iran as well as a law faculty affiliated to the Ministry of Justice, the administrative personnel of the revolutionary courts succeeded in obtaining academic diplomas from these faculties, and the Ministry of Justice has appointed these same administrative employees in judicial positions. One of the other reasons of fundamental change in the judicial organization of Iran is that after the approval of Islamic penal code the educated professional judges in practice refrained from issuing judgments involving punishments stipulated by Islamic penal code. Thus before the reorganization of Iran’s judicial system, the government used clergies and religious students for years to fill in positions in branches of criminal courts and appointed the former judges as advisor of the branch.

**FUNDAMENTAL PROBLEMS OF IRAN’S JUDICIAL ORGANIZATION**

These problems may be summarized as follows:

1. The ever-increasing volume of lawsuits, which itself is the effect of economic and social issues and the promulgation of laws and regulations which inherently create litigation. Of course one may not ignore the disproportionate increase in Iran’s population after the revolution. But the ratio of increase in population to increase in litigation, especially criminal cases, is not justifiable. Moreover, with the increase in general poverty, family disputes and criminal complaints arising from harassment of women, children and family members have exponentially increased.

2. Government and banks, on the pretext of protecting the credibility of cheques, have transformed the issuance of Dishonored Cheques Act in such manner that presently the mere act of issuing a post-dated cheque is considered a kind of fraud and may be criminally prosecuted. The issuer of a cheque without funds, usually a borrower who has issued a post-dated cheque for guaranteeing payment of his debt, is required to pay the amount stipulated in the cheque on the date of its maturity or else he would be necessarily sent to prison. Prosecution of such a crime does not require proof of bad faith or intent of fraud on part of the issuer. In most cases the complainant, who is the lender or the purchaser of such a cheque, had knowledge that the issuer on the date of issue of the cheque had no funds in his account with the bank, otherwise he had no need to take a loan.

3. Another problem of the judicial organization is the annulment of the provisions of the Civil Procedure Code concerning the demand of late payment interest from debtors. This encourages every debtor not to pay his debt.
unless a final judgment is issue and execution proceedings are commenced. Moreover, with the annulment of the provisions related to the statute of limitations of lawsuits, the door for forgotten claims has also been opened. These claims have added to the bulk of pending cases. The ability to adduce evidence such as the testimony of witnesses and oath, whose credibility is arguable under secular law, has increased further complications to these pending cases. Finally, offenses such as dealings in video tapes and prohibited music cassettes, installation of satellite dishes, sale and purchase of small amounts of foreign currency, poor hijab, drinking of alcohol in private, which is not harmful to society, have afforded sufficient excuse to prosecute the perpetrators and to interfere in the private lives of people. The prosecution of perpetrators of such offenses also adds every day to the workload of the judiciary.

4. Control of certain administrative or even judicial positions by persons who have close relationship with the dealers of lawsuits has resulted in the fact that fictitious claims are filed, shorter dates of hearing are obtained, evidence is tampered with, unlawful evidence is secured and superficial roadblocks are created in the enforcement of judgments. The outcome is that the general public has lost faith in the judicial organization.

5. One of the moral and social problems arising after the revolution is the government’s indulgence in prosecuting crimes arising from dealings in government authorities. Those who engage in this profitable trade euphemistically call their unlawful incomes a reward, consultancy fee or gift to charitable institutions or mosques. With the decline in the credibility and prestige of judicial positions, applicants and claimants feel no shame in resorting to bribery. Those who engage in this profitable trade euphemistically call their unlawful incomes a reward, consultancy fee or gift to charitable institutions or mosques. With the decline in the credibility and prestige of judicial positions, applicants and claimants feel no shame in resorting to bribery.

6. The most important weakness that has occurred in the judicial system in this period is the partisan implementation of law and clear bias in favor the government’s supporters. The main cause of this corrupt practice is the close cooperation of the judicial organization with the intelligence organizations, revolutionary institutions, security forces and the administration. In other words, the judicial organization of Iran does not independently pursue and prosecute those involved in corruption in government institutions whose actions are occasionally published in the media as well. But if the government itself wishes to prosecute an employee, their file is submitted by the police officials to the court.

7. Dissolution of prosecutors’ office is the clearest change brought about in the judicial organization by virtue of the Establishment of Public and Revolutionary Courts Act. At the same time, no convincing explanation has been given as to why the prosecutors’ office is not compatible with the principles of sharia. Some believe that the reason to decide to dissolve the prosecutors’ office is the fact that the accused persons who made an admission or confession at the prosecutor’s office denied it before the judge. The judge, according to principles of sharia, was required to disregard such admissions. For that reason the judicial organization decided to assign the functions of prosecutor’s office to judges. Clearly, such opinion has no legal basis. According to the Civil Code of Iran, admissions made before the assistant to the prosecutor in his capacity as an official functionary are tantamount to a binding official document, unless the admission or confession was extracted by threat and coercion which is not admissible in any event, whether it was obtained before a judge or an assistant to the public prosecutor. Perhaps a more acceptable justification is that the judge, as opposed to a prosecutor, may punish an accused person who is not willing to tell the truth. For this reason if the prosecutor holds the position of a judge, he will have the right to punish such accused person. In fact, after the dissolution of the prosecutors’ office, the important issue of prosecuting persons accused of having committed public crimes and corruption in government offices was assigned to the government itself. Naturally government officials will never press criminal charges against themselves and their employees. Even after the dismissal of such government official it is possible that those prosecuting the crime may not have access to accused persons, witnesses and sufficient evidence. Although with the dissolution of public prosecutors’ offices the position of public prosecutor general or attorney general has been maintained, the person occupying such position seemly engages in other miscellaneous functions, such as participating in commissions and meetings of plenary sessions of the Supreme Court.

8. Naturally the corruption prevailing in administrative and judicial organisations has caught up with the profession of lawyers as well. Some of the lawyers are constrained to help propagate corruption in order to protect the rights of their clients. Others share their legal fees with the government officials who have the right to refer lawsuits of their respect department so that such files may be referred to them. Thus some of the attorneys-at-law, by creating such improper and occasionally unlawful relationships, have intensified the disorder prevailing in the justice administration. With the establishment of faculties of law in cities and even in remote areas, some of the young law graduates of Iran, who find it difficult to get a proper job, often try to get membership of the Bar Association. But the government has created new hurdles even for the new law graduates in the way of
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1. Discrepancies in the criminal law of Iran.

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courts, manner of indictment, making the accused person
issues such as prosecution and trial before the revolutionary
courts, manner of indictment, making the accused person
acceptance as a trainee lawyer. Long wait times, quota
for joining the Bar Association and, most important of all, making sure of their faithfulness to the system, are among
such intricate hurdles.

9. Limited budget allocation to the judicial organization and
low salary and benefits of judges may be considered as the
main cause of financial corruption in the judicial organization
of Iran. Moreover, during the “construction period” in
which huge sums of foreign loans were made available to
the government, a wealthy class faithful to the ruling
class of Iran emerged which was able to pay, to achieve its
objectives, unlawful sums of money to bribe judges and administrative staff of the justice administration. For that
reason, the scope of corruption in the judicial organization
has reached such level that no amount of increase in the
salary of judges and administrative staff, in all likelihood,
will have a bearing on the reform of the judicial organization.
Perhaps fundamental changes in the judicial organization,
basic review of creative laws, together with employing of young but experienced law graduates, may be a solution to
resolve the problems, and may save Iran’s judicial system
from its present state of chaos and disorder.

TRANSFORMATION OF PENAL LAW IN IRAN
AFTER THE REVOLUTION

Issues such as prosecution and trial before the revolutionary
courts, manner of indictment, making the accused person
understand his charges, provisional arrest lasting a long period
time, trials held in camera by the revolutionary courts, the
method of issuance of judgments, proportion of crime with
punishment, and the unlimited authorities of judges and prison
officials are beyond the scope of this brief article. We have no
choice but to address only the fundamental transformation in
various aspects of criminal justice, and certain legal and judicial
discrepancies in the criminal law of Iran.

1. Deviation from the doctrines of nullum crimen
sine lege and nullum paena sine lege

Although according to Article 169 of the Constitution of
the Islamic Republic of Iran, “No act or omission of an act
may be regarded as a crime retroactively by virtue of a law
enacted thereafter,” the revolutionary courts of Iran have
altogether ignored these important doctrines accepted by
all advanced legal systems of the world. “Crimes”, such as “corruption on earth”, and “war against God”, may be
understandable for the Islamic jurists, but they had neither
any place in the pre-revolution laws nor have they been
clearly defined in the enacted post-revolutionary laws.

Nevertheless, they constitute the basis of charges laid before
and punishments handed out by these courts. What is meant
by the doctrine of nullum crimen sine lege (there is no crime
except in accordance with law) and nullum paena sine lege
(there is no punishment except in accordance with the law)
is that an enacted law must precisely define the criminal act
and the intention to commit the same so that the judges
may not abuse their legal authorities. The provisions of Book
five of the Islamic Penal Code (ta’azirat), Chapter three of
the same Code, the State Punishments Act, chapter two
of the Islamic Penal Code concerning war against God and
corruption on earth as well as the Punishment of Saboteurs
of Iran’s Economic System Act and other penal laws which
were hastily ratified on an ad hoc basis, are among the laws
and regulations which have failed to clearly and precisely
define these crimes.

2. Retrospection of Criminal Punishments

The fact is that there is no instance where the provisions
of penal laws of Iran have made it retroactive. But, among
the decisions of the plenary sessions of the Supreme Court,
which are tantamount to law by virtue of the Judicial
Precedents Act, there is one instance of retrospection of
criminal law. This decision of the Supreme Court relates
to punishment of exporters who signed a foreign currency
contract prior to 1993 but no judgement of criminal
condemnation was issued against them. In 1993 the
Export-Import Act was ratified and Section 13 of this Act
annulled the provisions related to obtaining of foreign
currency contract from exporters. Naturally, from the date
of ratification of this Act criminal prosecution of violators
of foreign currency contracts was annulled because Section
11 of the Islamic Punishments Act provided that if a crime
was abolished by virtue of a subsequent Act, its former
perpetrators were also exempt from punishment. In 1995,
the Expediency Council again made foreign currency
regulations subject to penal provisions. Since the Council
of Ministers too had reinstated the obtaining of foreign
currency contracts at the proposal of Bank Markazi,
vioations of these new provisions may be considered as
subject to penal punishments. But the enforcement of
penal provisions related to violation of foreign currency
contracts with respect to violators prior to approval of the
Council of Ministers’ decree and approval of the Expediency
Council is in fact retrospection of penal laws. Nevertheless
the Supreme Court, on the grounds that the Export-Import
Act of 1993 was enforceable only in that year, found that
violators of foreign currency contracts prior to 1993 were
subject to criminal prosecution. In this decision the Supreme
Nevertheless, under Section 7 of Iran’s penal law, the penal laws of each country have been designed and promulgated for the purpose of maintaining law and order of the territory of that particular country. The only exception to this rule is the case where a person engages in conspiracy, espionage or hatches a plot for the purpose of breaching security or overthrowing a foreign government. In such cases the penal law of a country may claim its legitimate interests in pursing the perpetrators of such crimes outside of its territory, even if all the acts committed have taken place overseas.

4. EXTRATERRITORIAL IMPLEMENTATION OF IRAN’S PENAL LAWS

Penal laws of each country have been designed and promulgated for the purpose of maintaining law and order of the territory of that particular country. The only exception to this rule is the case where a person engages in conspiracy, espionage or hatches a plot for the purpose of breaching security or overthrowing a foreign government. In such cases the penal law of a country may claim its legitimate interests in pursing the perpetrators of such crimes outside of its territory, even if all the acts committed have taken place overseas.

Nevertheless, under Section 7 of Iran’s penal law, the provisions of that law are enforced in respect of acts committed by Iranian citizens overseas after the return of the accused person to Iran. Needless to say that the Iranian citizens during their stay overseas (with the exception of certain countries in matters of personal status) are subject to laws, including penal laws, of the country where they reside. No government can claim legitimate interests in respect of enforcement of its penal laws overseas vis-à-vis its citizens. For instance, if an Iranian citizen overseas issues a post-dated cheque, without any intent of fraud, and the cheque is not honored on the date of its presentation to the bank, he shall be subject to criminal prosecution in Iran, even if no crime has been committed under the laws of the country where the cheque was issued. In this example, and in similar cases, it is not known how a cheque without funds drawn on a foreign bank, or such similar cases, will affect the public order of Iran as a result of which such Iranian citizen, upon his return to Iran, should be prosecuted on this ground. Moreover, under the laws of Iran, accused persons may be condemned to criminal punishment in absentia, without their presence in Iran.\(^{(5)}\)

5. CONSTITUTION’S ROLE IN TRANSFORMING THE JUDICIAL SYSTEM

After the revolution, the provisional government appointed a committee and charged it with the task of drafting Iran’s constitution. The draft constitution, which was submitted to the Constitution’s Assembly of Experts, was basically a law without a political philosophy and influenced by the democratic laws of Western Europe. For that reason it was ignored by various revolutionary factions.

Iran’s religious leaders, who were supported by Ayatollah Khomeini himself, believed that since the people had voted for the creation of an Islamic republic, the constitution of Iran must reflect the peoples’ wishes. But the idea of creation of a religious government was not palatable for the liberal intellectuals who considered themselves as the brain of the revolution; they could not reconcile it with the social circumstances of the day. Thus the religious groups found the leftist groups more in harmony with their views of creating a religious leadership with full authorities. Thus the final draft of the constitution was ratified in consultation with leftist factions and radical religious groups and by combining three different theories in the area of Iran’s economic organization. The first draft of the constitution included less government involvement in Iran’s economic issues. Its drafters believed that economic policies are in a state of change naturally and in light of society’s resources and requirements. Thus the duty of regulating economic policies should be assigned to ordinary legislators, and the constitution should deal exclusively with the political organization of Iran. Of course issues such as natural rights of individuals, orderly adjudication, freedom of speech, equality of people before the law, separation of powers, peoples’ right to choose government officials, and prohibition of state from interfering in peoples’ private and everyday affairs are envisaged by the constitutions of all countries. Thus the drafters of the constitution have also included these issues but the exercise of this right was made subject to the rules of sharia which has weakened the liberal structure of the constitution.
The most important objective pursued by the religious groups was to subject the exercise of political sovereignty to rules of sharia. Article 4 of the constitution provides: "All laws and regulations, including civil, criminal, financial, economic, administrative, cultural, military, political or otherwise, shall be based on Islamic principles. This article shall apply generally to all the articles of the constitution and other laws and regulations. It shall be decided by the Islamic jurists of the Guardian Council whether or not such laws and regulations conform to this article."

In addition to this, the constitution includes certain special rules regarding the judicial organization of Iran. We will refer here to some of the most important ones below.

1. **RESTITUTION OF UNLAWFUL PROPERTY**

   Article 49 of the Constitution has required the government to expropriate or restitute property belonging to individuals in cases where such assets were acquired by unlawful activities. Unlawful activities defined by the law consist of usury, illegal seizure, bribery, embezzlement, abuse of endowed property, unlawful use of government contracts, and other cases of unlawful use. The practice of expropriation of property of individuals who were considered politically rejected commenced from the beginning of the revolution and was justified on the basis of this Article of the Constitution. Gradually, with the decrease in influence of the revolutionary elements, the government has tried to limit this practice to individuals who were politically opposed to the government. The Enforcement of Article 49 Act has practically limited the application of this article to the officials of the previous regime who, in most cases, had neither accumulated substantial wealth nor committed unlawful acts set forth by the law. The purpose of this Act is to exempt unlawful wealth accumulated after the revolution. But it seems that the said Article 49 requires no enforcement law because it has charged the government with the duty to restitute the assets acquired unlawfully and to return it to its original owners, whether such unlawful assets were acquired before or after the revolution.

2. **OWNERSHIP OF LAND UNDER THE CONSTITUTION**

   Article 47 of the Constitution provides that: "Private ownership acquired legitimately shall be respect. Regulations thereof shall be determined by law." Certainly the text of the article is ambiguous and very broad. However, what must be scrutinized most is the meaning of the term "legitimate". Obviously the law intended to protect ownership that was acquired in accordance with the principles of sharia; ownership based on legal grounds of ownership was not enough.

   Restitution of government assets acquired by individuals unlawfully did not require a provision under the constitution. The government may acquire such assets through regular judicial methods. In fact the actual purpose of enacting this Article is to make its provisions retrospective. In other words, the constitution intended to nationalize such assets even if the title deed was lawfully issued to individuals.

   Laws that were approved by the Parliament for the implementation of this Article were considered against the rules of sharia by the Guardian Council. Nevertheless, since the promulgation of such laws was intended by Ayatollah Khomeini, the Expediency Council was established to determine the interests of the government in case of conflict with the rules of sharia. Certainly the need to promulgate laws for the implementation of Article 47 is one of the important reasons for the establishment of the Guardian Council.

3. **THE ISSUE OF BAN ON USURY**

   Under Article 43 of the constitution usury transactions are also considered unlawful. Article 49 requires the government to restitute assets acquired through usury. In the religions of Islam and Judaism, usury transactions between their followers have been considered unlawful. However, usury transactions with the followers of other religions seem to be permissible. Gradually, when banking became an integral part of domestic and international trade, the idea of acceptance of interest in a legal way became a vital issue for the Islamic countries. Iran, too, along with other Islamic countries, inclined to accept interest. It was argued that interest was actually the cost of obtaining a loan or money. The ban on interest was limited to cases where the borrowers obtained loans for their living expenses and were abused by usurers who charged heavy interest to them. Nevertheless, the Judicial High Council as well as the Guardian Council declared that the provisions of the Civil Procedure Code concerning the charging of late-payment interest and the setting of the maximum rate of interest (rate of legal interest) were usury thus unenforceable.

   Regretfully this opinion resulted in undesirable consequences for the judicial system and economy of Iran. Debtors, realising that there was no penalty for late payment, avoided to pay their debts. Even state corporations and city councils sometimes refused to pay their debts until a final court judgment was issued. The practical consequence of this problem was an unacceptable number of lawsuits filed by both the creditors and debtors.

   Lenders, by resorting to penal provisions of the Issuance of Cheque without Funds Act, force borrowers to sign and submit post-dated cheques with back-breaking interest
charges. This arrangement provides creditors with the opportunity to file criminal cases against civil debtors and threaten them with arrest. Thus the courts of Iran are faced with the issue of ever-increasing number of criminal complaints for the recovery of civil debts; these claims constitute the bulk of penal lawsuits.

4. RESOLUTION OF LEGAL DISPUTES WITH FOREIGNERS

Article 139 of the constitution provides: “The settlement of disputes concerning public or government property or its referral to arbitration shall in each case be contingent upon the approval by the Council of Ministers and shall be notified to the Majlis (Parliament). Cases in which the party to a dispute is an alien as well as important internal matters shall also be approved by the Majlis. Important matters shall be laid down by law.” Iran’s active participation in the arbitration proceedings before the Iran–US Claims Tribunal has forced the government to resolve its disputes generally through arbitration. Nevertheless, the Guardian Council, despite a few limiting rulings, has failed to render a uniform ruling on the implementation of Article 139 of the constitution. For that reason, lawyers, at the request of their clients, have given varying legal opinions on the credibility of the condition of referral of foreign disputes by the government to arbitration. There is a strong likelihood that foreign investors would insist on the issuance of a final ruling by the Guardian Council. So far most government contracts have been concluded with foreign contractors who are not worried about the legal credibility of their contracts. As long as payments are made by the government they will continue their work. However, given the fact that Iran needs foreign and domestic investment at a large scale, not only Article 139 but also other laws and regulations that are against judicial security, must be reviewed.

CONCEALMENT AND RULE OF LAW

The doctrine that all covert or secret rules, decrees, agreement and judicial decisions are null and void is the most important tool for participation by the people in their destiny, a reference to which has also been made in the laws of the Islamic Republic of Iran.

1. APPROPRIATION OF PUBLIC ASSETS AND INCOMES

By virtue of Article 52 and 53 of the constitution, Iran’s annual budget must be ratified by the Parliament, and all payments must be effected within the limits of credit allocations. Articles 54 and 55 have created State Audit Office under the supervision of the Judiciary for the purpose of supervising Iran’s income and expenditure. The requirement of the Parliament’s approval is related to this discussion because, firstly, according to Article 69 of the constitution, the Parliament’s deliberations must be open and its full report must be published through radio and official Gazette for public information. Secondly, not only the Parliament’s deliberations must be published but also every approval that bears the title of law must be enforced only after 15 days after its ratification as stipulated under Section 2 of the Civil Code. If the law itself provides for its immediate enforcement, it is not enforceable until before its publication (i.e., its becoming public knowledge). Even the budgets of state corporations, which enjoy relative independence, are made public under the Annual Budget Act; the incomes and expenditures of public assets by the state corporations are under the supervision of the State Audit Office, that is, it is open to public knowledge and must be published for public information.

The constitution of the Islamic Republic of Iran stipulates other provisions for preventing concealment by the Administration and creating liabilities away from the public’s eyes. For instance, Article 77 provides that all international conventions, protocols, treaties and pacts shall receive approval by the Parliament.

The purpose of approval of such international treaties by the Parliament is not that merely its sections should be scrutinized by the Judiciary because many international treaties, especially multilateral treaties, cannot be amended by the signatory governments. The main objective is that by putting up every protocol or treaty before the Parliament for deliberation and their approval by the Legislature, the said document is published in the official Gazette and is thereby made public. Thus the competent government official of Iran, assuming that they enter into negotiations with foreign parties and reach agreement with them, may act on those international commitments when they have made its purport public through approval by the judiciary, and have exposed it to public opinion.

Along the same line, Article 80 of the constitution provides that: “The government may give or take loans or grants-in-aid, whether domestic or foreign, with the approval of the Parliament.” Thus all government loan contracts or the contracts concluded by the government and guaranteed by the Central Bank, must receive approval by the Parliament. It may be said that the Parliament would in any case approve such contracts because in certain cases the government is forced to take foreign loans. Perhaps this argument may be true, but the main purpose of approval by the judiciary is to make government commitments public and to bring the terms of those contracts to public scrutiny.
Thus the constitution of the Islamic Republic of Iran has made it a necessary condition in all cases related to public assets and government commitments that they be reported to or approved by the Parliament. Any commitment signed without making it public and having it approved by the Parliament has not yet been created, and thus cannot be enforced. Since the President is responsible for the implementation of the Constitution and is the Chief Executive under the provisions of Article 113 of the constitution, he may ask government agencies not to implement any approval that has not been published.

2. THE DOCTRINE OF OPEN TRIALS AND JUDGMENTS

Some of the most important means of securing social justice and enforcement of law are open trial, making the accused person understand the charges laid against him and finally the notification of judicial decisions. Article 165 of the constitution provides that trials shall be conducted openly and the presence of people therein shall be allowed unless the court decides that it would be contrary to public morals or public order or in private lawsuits where the parties to it request that the trial be held in camera. One fails to understand how the executive power has so far enforced the judgments of the revolutionary courts which have not been notified to the accused person or to the defendant in the case or his attorney and where the accused person has no knowledge of the counts of his charges or the grounds of the judgment! Of course the judges who have failed to observe the provisions of law and have deliberately harmed the rights of individuals are considered as guilty and guarantor by Article 171 of the Constitution. But the government too is responsible for indemnifying the losses suffered by individuals if it has put to force and effect judgments that have not been served and that have been rendered without observing the formalities of law. The president may, in cooperation with the judiciary, and for the purpose of preventing demand of indemnity from the government and carrying out his responsibility of proper enforcement of the Constitution, stop the enforcement of judgments that have not been served.

Since many of the judgments rendered by the revolutionary courts are not based on legal grounds, or are not supported by acceptable evidence, and the legal formalities stipulated by the Constitution have not been observed in the court proceedings, the condemned party may, within the legal respite (which commences after the service of the judgment), apply to the Supreme Court for the quash of such judgments. Nevertheless, so far the Supreme Court has not quashed the judgments issued by the revolutionary courts which are clearly in contravention of the provisions of law. Since the revolutionary courts do not formally notify their judgments to the condemned parties, the Supreme Court refuses to review such cases on the pretext that it has no access to such judgments.

NEED FOR JUDICIAL PROTECTION

One of the most important functions of the government is to provide judicial protection. Of course at the beginning of every revolution governments cannot, or do not wish to, give priority to the implementation of this function because, on the one hand, the transfer of political power and changes in the rules and regulations of court procedure, both in terms of substantive law and the judicial system, require time. On the other hand, since a secondary consequence of judicial protection is the decrease in power and supra-legal authorities of the centres of political power and decisionmaking, leaders of a revolutionary system are not interested in providing judicial protection. The truth is, if the period of transfer of power exceeds a reasonable period of time, absence of judicial protection in society shall result in the decline or stoppage of private investment and escape of capital from the country. Judicial protection is the selfsame impartial and smooth implementation of due process of law the elements of which may be described as follows:

1. Public access to impartial and independent courts which act exclusively, and without any prejudice, in accordance with the laws and regulations which have already been approved by legal authorities.

2. Orderly approval and implementation of penal provisions for punishing acts that disturb society’s public peace, and of civil provisions for the purpose of guaranteeing the enforcement of contracts individuals have concluded in accordance with the provisions of law; fair indemnification of losses suffered by individuals in terms of their life, property or prestige; protection of rights acquired by natural persons and legal entities.

3. Limiting government authorities in matters such as arrest and detention of individuals, inquiry and interference in their private matters, seizure of their property, and charging them with crimes in accordance with transparent laws and regulations and judicial decisions.

4. Appointment of independent public prosecutor or district attorney for exercising oversight on the enforcement of law in such a manner that they are able to deal directly with breaches of law committed by government functionaries and others, and also to deal with the information lodged by citizens in a manner that no one is legally prosecuted
without legal evidence, or an influential person is able to escape punishment of a crime by resorting to powerful politicians or by concealing evidence of his crime.

Upon a cursory review of enforcement of law in Iran one may say that so far the government has clearly failed in discharging its duty of providing judicial protection because, after the passage of over two decades, the revolutionary courts continue to function. Since there is an overlapping in the jurisdictions of these courts and the courts of law, peoples’ rights are always in jeopardy. Moreover, revolutionary courts practically disregard many of the recognised rules of procedure, such as open trial, right of defense, making the accused person understand the charges laid against him, and the right to protest against judgments and decisions. As we stated earlier, judges and officials who enforce the judgments of the revolutionary courts are subject to separate rules and regulations. On the other hand, very powerful semi-judicial authorities, such as the state punishment courts, have been established in Iran which are not necessarily subject to Iran’s judicial organization. The same applies to tax, customs and municipal commissions, and many other semi-judicial authorities whose decisions have a bearing on people’s acquired rights more than the decisions issued by the courts of law. In respect of substantive law too, one may say that the main problem is bias and partiality in the enforcement of law. For instance, while the usury transactions are null and void under the provisions of the constitution, the issuance of Cheques Act, with the penal sanctions, strongly enforces post-dated cheques, which in most cases is tantamount to usury transaction. Or, while heavy rates of taxation on higher incomes have been fixed in an ascending manner, and in certain cases are an impediment to private investment, in practice, with certain exceptions, enforcement of tax provisions has become subject to opinions and decisions of assessment authorities. As a result, no measure has been taken to adjust wealth through the enforcement of the same regulations.

Finally, the judicial system of Iran, where it takes a long time for the restitution of one’s rights, which has no independent public prosecutors’ office, where criminal and civil lawsuits are ever on the increase, which lacks precise rules separating the jurisdictions of various judicial authorities, where it is possible to peddle influence in the course of judicial proceedings, where there is bias in the enforcement of law and prosecution of accused persons, shortage of competent judicial staff, absence of special courts to deal with small claims, shortage of financial credits, increase of corruption in offices serving processes and enforcing judgments, meddling by legal middlemen in lawsuits, and finally extensive willful authorities of process-servers, such as bailiffs and those enforcing judgments, have decreased judicial protection to such extent that private investors consider referral of their disputes to arbitration or acceptance of jurisdiction of foreign courts as the only way to safeguard their contractual rights or, instead of relying on the law, rely on the enforcers of the law.

In other words, the acquired rights of individuals and important rules regulating economic relations and investment in Iran are essentially subject to various types of decisions and circulars which sometime cancel out each other and which are continually issued by influential centres and institutions, such as the Central Bank, Ministry of Commerce, Ministry of Economic Affairs and Finance, municipalities and Environmental Protection Organization, and are enforced in a biased and particle manner.

Moreover, such regulations and circulars, which are often not published and are not brought to public scrutiny, have granted extensive rights to administrative officials who often clearly abuse their authorities. Thus the judicial protection in Iran is not only dependent upon the reform of its judicial system but also requires fundamental changes in administrative structure and the repeal of a number of substantive laws, by-laws, and circulars which have made the restitution of one’s rights extremely difficult with the unconceivable expansion of bureaucracy.

FUTURE OUTLOOK

A brief review of the transformation of Iran’s judicial system and legal organization after the revolution speaks of the ever-increasing discredit of this key system of Iran. This discredit has recently forced the government to take certain decisions to guarantee legal security and investments. Among these measures are the decrees of the Expediency Council concerning the protection of foreign investment and the establishment of insurance companies and financial institutions in Iran’s free trade zones. [6]

But the establishment of a special legal system in free trade zones is defeating the purpose because, on the one hand, it causes disproportionate growth of activity in those zones and, on the other, weakens the national and judicial sovereignty of Iran. Nevertheless, grant of special privileges to foreigners by virtue of investment contracts and the establishment of a separate legal system in free trade zones prompt one to ask the question: Why should investment throughout Iran by the Iranian citizens not be subject to the same laws and regulations?

Transformation of Iran’s judicial system, especially with the extreme and ever-increasing need for investment, whether domestic or foreign, and the need for judicial protection continues to require special priority. But any reform and change in Iran’s present judicial organization and economic system itself requires fundamental transformation and ultimately creation of a new judicial system in Iran. Based on such fundamental transformation, including in the civil procedure code, substantive...
laws, organization of courts, organizations of serving process and enforcing judgments, prison organization, state employees’ penal tribunal, especially the recruitment of competent judges and administrative staff, may hopefully create a new, advanced and efficient judicial and legal system.

FOOTNOTES:

1. Article 2 of the imperial Constitution of Iran, as amended, also emphasized that the laws of Iran must conform to the provisions of sharia law. Nevertheless, Islamic jurists familiar with the current circumstances did not oppose the laws creating the justice administration, rules of procedure and secular penal law on the grounds that those laws were not in conformity with the rules of sharia; they did so by resorting to the excuse that the new justice administration of Iran was composed of non-sharia judges. Seyed Hassan Modarres is quoted to have cleverly said, while commenting on the tabling of the Statutes of Limitations bill, that since the clerics generally do not believe in the competence of secular judges, it is okay if they themselves refuse to hear certain claims.

2. See *Adjudication in Islam*, speeches of Hojjatol Islam Mohammad Sanglaji.

3. Under the provisions of Article 4 of the constitution of the Islamic Republic of Iran, the jurisconsults of the Guardian Council shall decide whether or not the enacted laws are in conformity with the rules of sharia.

4. In light of opinions of certain fully qualified Islamic jurists, one may claim damages on the basis of the rate of inflation. Courts have generally accepted this view. Nevertheless, with the annulment of regulations concerning late-payment interest by the Guardian Council, it may result in the issuance of contrary decisions by the courts. Moreover, the purpose of payment of late-payment interest is to collect a penalty from the debtor so that people may not refuse to pay their debts on maturity.

5. The Single Article Act of 1960, contrary to principles of penal laws, authorized courts to hold trials in absentia and issue judgments of condemnation in penal matters against accused persons who had left Iran. Since only the crimes against the security of Iran had an extraterritorial aspect in the former Criminal Code, the main consequence of the promulgation of this Act was that those opposing the government did not return to Iran.

6. Under the provisions of the constitution of the Islamic Republic of Iran, the Expediency Council does not have the authority to make laws. Thus the chance of annulment of such decrees or the courts’ refusal to implement the same is not small, especially as some of these decrees seem to be inconsistent with the constitution of the Islamic Republic of Iran too. Nevertheless, the Council’s decrees are put to force and effect by the courts. In certain cases even the plenary session of the Supreme Court has invoked them. In terms of law, notwithstanding the fact that the making of law by this institution is against the constitution, the Expediency Council as a non-elected body, does not have the power of legislation, especially as its meetings and deliberations are held in camera, as opposed to those of the Parliament. The public in general remains uninformed of the reasons for the promulgation of those decrees.

Source: Iran Nameh