

Adineh Abghari. ***Introduction to the Iranian Legal System and the Protection of Human Rights in Iran.***

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The book is one of two volumes¹ published by the 'Human Rights in International Law and Iran' project of the British Institute of International and Comparative Law. This project primarily aims at fostering the dialogue on

human rights between international and Iranian legal scholars, practitioners, and intellectuals. Although this is a worthwhile aim and the book is the first comprehensive introduction to the Iranian legal system written in English by a jurist, the book unfortunately falls short of expectations. The author is an Iranian lawyer and has been a research fellow at the British Institute of International and Comparative Law. It is widely uncritical, partly faulty, and sometimes the English version is hard to comprehend without reference to the Farsi text or prior knowledge. For instance the term *Imām-e djome* is translated by the English word *Friday*. Thus, a reader of the English version might get the impression that *Imām-e djome* is the Persian equivalent of Friday, the famous companion of Robinson Crusoe, whereas, in fact, the term refers to Muslim preachers of the Friday sermon. Due to mistakes and shortcomings like this, the book gives the impression rather of a working paper than £50 worth of final work.

The book is structured into four parts ('Introduction to the Political System of the Islamic Republic of Iran'; 'The History of the Judiciary in Iran'; 'The Sources of Iranian Law'; 'The Judicial Structure and Fundamental Rights and Freedoms in Iran').

The first part provides an introduction to the political and constitutional system of the Islamic Republic of Iran (IR Iran). In accordance with Iranian constitutional doctrine, the office of the Leader (*rahbar*) is addressed as a fourth branch of state power. Hence, there are four chapters, one on each of the branches of state power, i.e., the legislature, the executive, the judiciary, and the Leader. It is rightly claimed that the Leader enjoys superior power in the Iranian Constitution as he supervises all other state organs.² However, it would have been interesting to include details on the representatives of the Leader that are embedded in the various

¹ The second is entitled *Sourcebook of International Human Rights Materials*. It is a practical guide describing the international legal framework of human rights.

² Cf. Art. 57 of the Iranian Constitution of 15 Nov. 1979, including amendments of 28 July 1989, Official Gazette (*ruznāme-ye rasmi*) No. 12957, English text in A.P. Blaustein (ed.), *Constitutions of the Countries of the World* (2006), ix.

organs of all the other branches of state power as well as in public institutions. This system of representatives is of particular importance, since it is precisely this system which provides the Leader with the necessary instruments to implement his supervisory authority in practice. For these details the reader should refer to Buchta's book on the political system of the IR Iran, which still provides the most detailed and lucid introduction to the factual distribution of state power in Iran.³

Concerning the legislative branch, the elaborations of the author are slightly contradictory. First, she describes the Islamic Consultative Assembly (*maǧles-e shorā-ye eslāmi*) as the sole legislative authority. However, later on in the text she correctly remarks that the Expediency Council (*maǧm'a-e tashkhis-e maslehat-e nezām*)⁴ also wields legislative power in exceptional cases.⁵ Nevertheless, the section concludes with the statement that the function of the Expediency Council 'is arbitration and not legislation' without any further explanation. Although arbitration may be the focal point of the Council's tasks it nevertheless also acts as a legislative organ. In

fact this infringement of the power of the legislature has been criticized in Iranian literature.⁶

It is moreover hardly acceptable for a British publication that the problematic role of this council, both in the process of legislation and during elections, is not criticized, either in the section on the Guardian Council (*shurā-ye negahbān*)⁷ or during the elaborations on the different general elections for public positions in Iran. In fact, the reason for the establishment of the Expediency Council is that the Guardian Council made extensive use of its veto power and vetoed parliamentary legislation for its alleged incompatibility with the Constitution or Islamic law. The fear of a permanent blockade of the legislative process (in the parliamentary period between 1988 and 1992 nearly 40 per cent of the bills passed by the parliament were rejected by the Guardian Council⁸) is the reason for the establishment of the Expediency Council, rather than – as the author claims – the intention to reduce the influence of the Leader in the legislative process (at 15). This is supported by the very wording of the relevant directive of the then Leader, Ayatollah Khomeini.⁹ Moreover, the Guardian Council notoriously infringes the right to eligibility in general elections by large scale disqualification of candidates mostly based on political and discriminatory grounds.¹⁰ For instance in

³ W. Buchta, *Who Rules Iran – The Structure of Power in the Islamic Republic* (2000).

⁴ The Expediency Council was originally established by an order of the late revolutionary leader Ayatollah Khomeini in the late 1980s. In the course of the extensive amendment of the Constitution, several Arts concerning the Council were integrated into the Constitution. According to Art. 112 of the Constitution its main responsibility is to arbitrate a solution if a legislative draft is rejected by the Guardian Council due to its divergence from Islamic law or the Constitution. However, in exceptional cases the Council may also pass legislation. This competence, which is based on the rather vague Art. 110 No. 8 of the Constitution, is criticized in the Iranian literature for infringement of the powers of legislation. Cf. M. Hāshemi, *Hoquq-e asāsi-ye jomhuri-ye eslāmi-ye irān* (1383/2003), ii, at 552 ff.

⁵ For instance there have been cases in which the Expediency Council has passed legislation without any involvement of the Islamic Consultative Assembly and the Guardian Council based on Art. 110 No. 8 following the wish of the Leader (*rahbar*) due to the urgency of the matter: *Ibid.*, ii, at 552 ff.

⁶ *Ibid.*

⁷ The Guardian Council is established by Art. 91 of the Iranian Constitution. Its main responsibility according to Art. 96 of the Constitution is to determine the compatibility of all legislation passed by the parliament with Islamic law and the Constitution. To facilitate this competence all legislation has to be passed to the Council prior to its enactment and may come into force only if the Council determines that it is in accord with both. Moreover, the Council is obliged to supervise all elections and referenda in the Islamic Republic of Iran.

⁸ Buchta, *supra* note 3, at 59.

⁹ Directive of Ayatollah Khomeini dated 17 Nov. 1366 (6 Feb. 1988) to be found in Hāshemi, *supra* note 5, at 541.

¹⁰ Cf. Human Rights Watch, Iran, 'Clerical Leaders Foreclose Free Elections', 11 June 2005, available at: www.hrw.org/english/docs/2005/06/12/iran11114.htm.

2005 the Guardian Council allowed only six out of the 1,014 candidates who tried to register for the presidential election to participate; it excluded, *inter alia*, all 89 female candidates.¹¹

Finally, what is missing in the introduction to the political system of the IR Iran is any mention of the fact that all Iranian citizens of non-Shiite creed¹² – approximately 10 per cent of the population¹³ – are excluded from most higher-ranking public offices. For instance, Article 115 of the Constitution excludes all non-Shiite citizens from the presidency of the IR Iran.¹⁴ According to this provision, a candidate, among other criteria, must belong to the official school of Islamic Law (*mazhab*) of the country and has to be a ‘follower of the correct faith’ (*mo’men*). These limitations on eligibility are repeated in Article 35 of the Law on the Presidential Elections.¹⁵ Since Article 12 of the Constitution establishes the Shiite *ḡafari* School of Law as the official school of Islamic Law (*mazhab*) of the Iranian state, all citizens who do not belong to this School of Law, which includes both non-Muslims and

non-Shiite Muslims like Sunnis, are excluded by law from eligibility. Moreover, according to the understanding of the *ḡafari* School of Law, only followers of this School are considered to be ‘followers of the correct faith’ (*mo’men*). In fact the term *mo’men* has traditionally been applied by the *ḡafari* School of Law to distinguish Shiite from Sunni Muslims.¹⁶ Since this School of Islamic Law is the basis of interpretation for all laws and the provisions of the Constitution, the criterion of *mo’men* serves as an additional barrier for the eligibility of non-Shiite candidates.

The part on the history of the judiciary in Iran is divided into chapters on the pre-Islamic period, the period following the conquest of Iran by Islam, and the contemporary period. It provides an overview of the evolutionary and revolutionary legislative reforms which led to the present Iranian court system. With respect to the Iranian Constitution of 1906/07, the author errs on the role of Islam in the Constitution. She misinterprets Article 2 of the supplementary law to the Constitution, which provided: ‘[a]t no time may the enactment of the national Consultative Assembly . . . be at variance with the sacred precepts of Islam and the laws laid down by the Prophet’. Rather than giving priority to religious criteria over codified legislation, as the author claims, this provision established a limitation on legislation.¹⁷

There are also some problems of terminology and translation in this chapter. For

¹¹ Human Rights Watch, ‘Access Denied: Iran’s Exclusionary Elections’, 2005, at 2, available at: www.hrw.org/backgrounder/mena/iran0605/iran0605.pdf; also note 10. Prior to the parliamentary elections in 2008 more than 2,000 out of 7,597 applicants were disqualified from eligibility.

¹² This includes both followers of other Islamic belief and non-Muslims.

¹³ Cf. A. Amor, Special Rapporteur on the Question of Religious Intolerance, *Report*, 9 Feb. 1996, UN Doc. E/Cn.4/1996/95 Add. 2, 8, at para. 28.

¹⁴ Another problematic aspect of Art. 115 of the Constitution (IC) is the exclusion of women from the presidency. The Guardian Council, which is competent for the supervision of the presidential elections according to Art. 99 IC, excludes female candidacies by its interpretation of the criterion that a candidate must belong to the *raḡol* (sing. *reḡal*), because the Council interprets the term as encompassing only men. Cf. for this problem Hāshemi, *supra* note 5, at 270 f.; Buchta, *supra* note 3, at 31 ff.

¹⁵ *Qānun-e entekhābāt-e riāsat-e ḡamhuri-ye eslāmi-ye irān*, 5 Apr. 1364/1985, Official Collection of Laws (*maḡmu’u’-e ye qavānin*) (1364/1985), at 107 ff.

¹⁶ Cf. the canonical jurist Ibn Babuya, according to M. Momen, *An Introduction to Shi’i Islam* (1985), at 157 ff.; W. Buchta, *Die iranische Schia und die islamische Einheit 1979–1996* (1997), at 79; Kadivar, ‘Goft o gu-ye Mahnāme āftāb ba Mohsen Kadivar’, 27 *Journal Āftāb* (1382/2003) 4; E. Kohlberg, *Non-Imāmi Muslims in Imāni Feqh, Jerusalem Studies in Arabic and Islam* (1993), xvi, sect. 99 ff.

¹⁷ Cf. on Art. 2 of the supplementary law to the Constitution and the differences between the role of Islam and Islamic law in the Constitutions of 1906/07 and 1979 Arjomand, ‘Islam and Constitutionalism since the Nineteenth Century’, in S.A. Arjomand, *Constitutional Politics in the Middle East* (2008), at 33.

instance, it is highly questionable to what the author refers when she explains that, before the Islamic revolution in 1979, many laws were adopted following the models of foreign legal systems especially the 'Roman-German legal system based on the French legal system'. In fact, mostly laws of French and Belgian origin were used as models for legislation during the reign of the Pahlavi Shahs.

The next part deals with the sources of Iranian law and the present structure of the Iranian judiciary. It also includes a short introduction to Islamic law, focusing on the Shiite *ḡafari* school of law, the state religion of the IR Iran.¹⁸ Unfortunately, for readers not familiar with the details of Shiite-Islamic law, these elaborations are much too cursory to provide them with the necessary understanding of this rather complex matter. Furthermore, many special terms of (Shiite) Islamic law are not explained. For instance, it is unclear for people not familiar with Shiite Islam to whom the expression 'the Fourteen Impeccant Leaders' (at 67) refers. It should have been mentioned that this term in Shiite vocabulary refers to the Prophet Mohammad, his daughter Fatima, and the 12 Shiite *Imāms*.¹⁹

Concerning the structure of the Iranian judiciary, a comprehensive and interesting overview of the present court system is given which includes the substantive reforms of the beginning of the decade. As far as I am aware, there are no comparable elaborations on the Iranian court system in English. While the Iranian discussion on the illegality of the Revolutionary Courts due to the lack of a sufficient legal basis for their establishment is mentioned, nothing is said about the various

infringements of due process rights, especially by the Revolutionary Courts and the Special Courts of the Clergy, which have been criticized heavily by NGOs and various bodies of the United Nations.²⁰ In the chapter on the judicial professions, the widespread exclusion of female candidates from most judicial positions within the judiciary is at least mentioned. Furthermore a detailed elaboration on the legal professions in Iran, in particular the bar association and its history, are given.

The final part of the book is on fundamental rights and freedoms in Iran. Although this part is relatively critical of the Iranian legal system as it provides an overview of the multitude of discriminations against women, there is no word on other infringements of human rights. The numerous discriminations against religious minorities in the IR Iran are not mentioned. The author fails to mention the shortcomings which include exclusion from public offices mentioned above and the prevention of the construction of Sunni mosques²¹ to

¹⁸ Cf. Art. 12 IC.

¹⁹ In Shiite Islam the *Imāms* are the only legitimate successors to Mohammad as spiritual and worldly leaders of the Islamic community. According to the doctrine of the *ḡafari* school of law there are 12 *Imāms*, the cousin and son-in-law of Mohammad, 'Ali Ibn Abi Tālib, and 11 male descendants springing out of his marriage with Fatima, the daughter of Mohammad. For further information refer to Momen, *supra* note 16, at 147 ff.

²⁰ Cf., *inter alia*, Amnesty International, *Annual Report: 2001: Iran* (2001); Amnesty International, Iran, 'The Revolutionary Court must end arbitrary arrests', 11 Apr. 2001, AI Index MDE 13/015/2001; Copithorne, 'Report on the Situation of Human Rights in Iran', 28 Dec. 1998, E/CN.4/1999/32, at para. 48 ff; Human Rights Committee of the United Nations, 'Concluding Observations of the Human Rights Committee: Islamic Republic of Iran', 3 Aug. 1993, CCPR/C/79/Add.25, at para. 12.

²¹ Amnesty International, Iran, *Human Rights Abuses against the Kurdish Minority* (2008), at 8; Minority Rights Group International, *State of the World's Minorities* (2008), at 149; M.C. Copithorne, 'Report on the Situation of Human Rights in Iran', 10 Aug. 2001, UN Doc. A/56/278, 14, at para. 74; M.C. Copithorne, 'Report on the Situation of Human Rights in Iran', 8 Sept. 2000, UN Doc. A/55/363, 11, at para. 71; A. Amor, 'Report on the Question of Religious Intolerance', 9 Feb. 1996, UN Doc. E/Cn.4/1996/95 Add. 2, 12, at para. 50; Human Rights Watch, *Religious and Ethnic Minorities – Discrimination in Law and Practice* (1997), ix, No. 7, at 22; *Annual Report of the United States Commission on International Religious Freedom* (2007), at 212.

the denial of the right to education of Bahai'i students by barring them from attending university studies.²² Nor does the author address the infringements of the freedom of expression by censorship and restrictive press laws,²³ or the violation of the freedom of association and assembly.²⁴

A positive aspect of the book is its bibliography, which provides a thorough and comprehensive overview of Farsi literature on the Iranian legal system. Concerning the list of laws in the bibliography, it would have been beneficial to cite their sources and the exact dates when they were passed as these data facilitate research substantially. The extensive appendix to the publication encompasses a graphic on the structure of the Iranian judiciary, the internet addresses of Iranian legal institutions, a list of the most important international conventions that Iran has joined, the Iranian Constitution, the Law on the Establishment of the General and Revolutionary Courts, and finally an excerpt from the third economic, social, and cultural development programme of the IR Iran concerning the activities of so-called legal advice offices including the relevant implementation procedures.

The book provides the first comprehensive introduction to the Iranian legal system in English. However, for Iranians there are lots of Farsi books which are more detailed and as or even more critical of the human rights deficiencies of the Iranian legal system. Due to its rather uncritical approach, it is advisable for international scholars to use the book only in combination with the relevant reports of NGOs and human rights treaty bodies which highlight problematic aspects of the Iranian legal system. The author of the book is an

Iranian lawyer, so the mentioned shortcomings may be due to understandable concerns about her personal and professional future in Iran. However, this excuse can hardly be made for the British Institute. Even though the aim to foster dialogue between Iranian and international experts on human rights is highly praiseworthy, it seems questionable whether a book which is in parts less critical than scientific publications in Iran can really promote this aim. Fortunately, other scientific dialogues between Iranian and international lawyers exist which are more outspoken as to the deficiencies of the Iranian legal system.

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²² *Inter alia* Amnesty International, *International Report 2008*, at 159; Human Rights Watch, 'Iran: Allow Baha'i Students Access to Higher Education', 20 Sept. 2007, available at: www.hrw.org/english/docs/2007/09/20/iran16906.htm.

²³ Amnesty International, *supra* note 22, at 157; Human Rights Watch, 'You Can Detain Anyone for Anything', 6 Jan. 2008, xx, No. 1(E).

²⁴ Human Rights Watch, *supra* note 23.