

Democracy Activity Brief  
6-8 February, 2006  
FRIDE-IWA Workshop

FRIDE  
FUNDACIÓN  
PARA LAS RELACIONES INTERNACIONALES  
Y EL DIÁLOGO EXTERIOR

# The Relationship between Shari'a and the Rule of Law in Iran

## About FRIDE

FRIDE is an independent think-tank based in Madrid, focused on issues related to democracy and human rights; peace and security; and humanitarian action and development. FRIDE attempts to influence policy-making and inform public opinion, through its research in these areas.

*On February 6-8, 2006, the Institute of World Affairs and FRIDE co-sponsored a workshop in Madrid dedicated to enhancing dialogue between Iranian and Western scholars around the narratives of democracy, rule of law and Shari'a. The workshop assembled 30 American, European and Iranian academics, policy makers, analysts and practitioners to discuss the interplay of modern law and Shari'a in the context of the Iranian political system.*

*In light of current developments, Iran's process of political reform stands at a fragile juncture. After the 1979 revolution Iran's society and politics were profoundly 'Islamised'. The clergy assumed key roles in politics and society, but perhaps most importantly in the judiciary, contributing to the formation of the post-revolutionary legal system. Although Iranian society has witnessed significant internal transition since then, any consistent reform process will, it is widely argued, require the participation of religious authorities in order to provide legitimacy. There is an*

*important segment of Iranian society, primarily represented by legal scholars, which is well versed in both Islamic and modern law. These experts research, teach and practice Islamic law within the context of real politics. This group is likely to play a vital role in any potential change in the Islamic Republic, in relation to the concept of the rule of law and the protection of human rights.*

*The workshop was organised around six main sessions. The first four sessions focused on historical and domestic considerations of the rule of law in Iran while the last two sessions placed the previous discussions in the context of Iran's new political reality and its relation to other international actors. A final session concentrated on identifying possible avenues for reform and developing guidelines for further future discussions. The workshop managed to move beyond theoretical discussions of Iran's rule of law system to pinpoint specific problem areas and contradictions which need to be addressed.*

Iran's experience with constitutionalism dates back to the 1906 constitutional revolution. Since then there has been significant competition between Islamic classic jurists, on the one hand, and secular intellectuals and modern Islamic jurists, on the other hand. This competition has seen itself reflected both in differing attempts to provide solutions to the issue of political authority and in the establishment of a justice system, and more specially, a criminal justice system. Despite these 100 years of constitutional history, participants highlighted problems of non-compliance with the Constitution as reflected in issues related to political prisoners, vetting of the electoral process and the polycentric structure of power (over one hundred councils legislate in parallel to the legislature).

Additionally, some claimed that the rule of law and basic human rights are not observed widely enough in the Iranian constitutional system. Why this non-constitutional tendency as an Iranian nation? One explanation pointed at the theory of religion underlying the Constitution and a political legacy characterised by a polycentric structure of power; that is, a combination of traditional religious attitudes with an authoritarian political culture. Furthermore, some claim factionalism has replaced a common national interest, because Iran has failed in state- and nation-building.

---

## The Issue of Political Authority

Iran is characterised by its embrace of the Shi'a branch of Islam which, in contrast to its Sunni counterpart, devolves all political authority to the Imams (Imam-e ma'sum). The infallible Imam is the only legitimate governor and yields three types of authority: the authority of fatwa (decree on a jurisprudential matter); the authority of qaza (religious judgment); and the authority of hokumah (the divine right to rule and govern). This tripartite authority is referred to as "the general and absolute authority of Imam" (velayat-e aam va motlaqah-e Imam) in the Shiite Fiqh<sup>1</sup>. The problem of political authority arises with the attempt to determine how

---

<sup>1</sup> Shi'a Fiqh can be defined as a religious knowledge system in a Muslim community which regulates citizen's lives, their political action and their relationship with the state.

Shi'a life should be regulated during the Occultation of the Shiite Twelfth Imam. Two main religious jurisprudence (Fiqhi) paradigms evolved based on their differing views of the role of the Shiite mujtahids in the age of the Twelfth Imam's Occultation (329 H to now): The Sheikh Ans\_ri School and the Javaheri School. The *faqih*s belonging to Sheikh Ans\_ri school, who were dominant during the Constitutional Movement, denied the political supremacy of *faqih*s during the Occultation of the Shiite Twelfth Imam and then codified the Constitution of Iran irrespective of the direct presence of *faqih*s in the government. They agreed to have minimal supervision in the process of legislation. On the other hand, Imam Khomeini and his pupils, who were of the Jav\_heri school, enforced the present Constitution of the Islamic Republic of Iran (1357/1979) on the basis of the theory of "the political sovereignty of *faqih*" and the extensive presence and control of *faqih*s in governmental institutions.

Imam Khomeini's dual concept of the Faqih's divine right and the people's sovereignty in the public sphere is the expression of the regime's two main pillars, Islamism and Republicanism, as both enshrined in the Constitution. The pillar of Islamism is based on a specific maximalist interpretation of religion which sees Islam as a rule for everything. Islamism as interpreted by officials of the system embodies an orthodox duty-oriented and, some claim, non-democratic attitude towards human life. The *faqih*s on one hand are to respond unconditionally to the authority of Shari'a and, on the other, are charged with a "governmental order", oriented towards achieving the nation's Exigency/ good. The question then becomes, who is to define the nation's interest? Islamism is reflected in:

**Article 4**, stating that laws must be based on Islamic criteria (with compliance to be judged by the Guardian Council, which monitors all legislation in the country).

**Article 2**, stating that the Islamic Consultative Assembly cannot enact laws against Islamic principles.

**Article 96**, stating that the Guardian Council will establish, by majority vote, whether or not the legislation passed by the Islamic Consultative Assembly is in conformity with the precepts of Islam.

**Article 177**, stating that the Islamic nature of the system cannot be amended or changed in the Constitution.

**Article 167**, stating that whenever there is no law or the law is ambiguous, judges must refer to authoritative sources and authentic fatwas.

Republicanism is expressed in the rule of law, participation of the nation in self-determination in the public sphere, administration on the basis of the people via elections, and lawmaking by the people through the majlis. Relevant articles include:

**Article 56**, stating the absolute sovereignty of god and self-determination of man as established by god.

**Article 177**, stating that the principles related to voting and republican principles in general may not be amended.

Notwithstanding the principle of Republicanism, there still exist traces of a despotic system in the Constitution, as reflected in the granting of certain

extra-legal authorities to various officials. Article 113 is an example of this as it bestows upon the President the responsibility of implementing the Constitution, which, in fact, lays bare the tendency not to be governed by general rules. Additionally, in an attempt to resolve some of the issues that had not been resolved by the Ansari School, such as the protection of the religious dimensions of state regulation, while preserving the democratic essence of society or the resolution of the contradiction between Shari'a and the interests of the nation in the modern nation state, several parallel institutions have emerged: the Islamic Consultative Assembly and the Guardian Council; the Guardian Council and the Nation's Exigency Council; the Office of Leadership and the Assembly of Leadership Experts elected by the people.

Some participants in the conference pointed out the contradiction between theocracy and democracy and referred to the constant friction between the majlis and the Guardian Council as proof of this. Others regarded the failure of reconciling religious jurisprudence and democracy as a consequence of there being no procedure to define the public good. Still others claimed that, the current structure of power is not compatible with the rule of law, but rather contrary to any modern rule of law. In the opinion of some, the campaign started by Khatami in the name of the rule of law nine years ago was counterproductive because by focusing on the form of the law, without looking at its context, it helped foster a culture of obedience to power. Khatami did not address the structure of power nor did he question the system. There should, they suggested, be some focus on the content of the law, there is a need for a fundamental paradigm shift, a revolution in Islamic jurisprudence which would change power based law

into rights based law. A different explanation given for the shortcomings of the system was an incomplete evolution of Shari'a. According to one theory put forth, during colonial rule Shari'a was suppressed and an amalgam of Western laws were put in place. Its natural evolution was therefore interrupted by outside forces. After independence, there was a return to the frozen body of law and the Iranian Constitution is proof that the fiqh is not complete, but rather a work in progress.

---

## The Judicial System

The rise and fall of modern law, in both substantive and procedural aspects, has been driven by the relative successes or failures of Islamic classic jurists, on the one hand, and secular intellectuals and modern Islamic jurists, on the other hand. The area of criminal law has been one of the main battlefields between Islamic and secular jurisprudence and a marked difference can be perceived between pre- and post-revolution criminal justice systems. After the revolution, an Islamic model of criminal justice was accepted. The change was not only in terms of substance, with Shari'a gaining sovereignty in criminal law, it was also reflected procedurally: judges are to be Islamic jurisprudence experts, male and Muslim, the public prosecution office is removed, the possibility of reference to religious sources is introduced and the religious system is accepted.

The issue of judicial independence was discussed at length. There was a specific attempt to examine

whether the principles of impartiality, lack of interference and respect for judicial decisions rendered, as inherent to independence of the judiciary, could be said to hold true in the Iranian legal system. Does the Iranian judiciary meet international standards of the principle of independence of the judiciary? Despite the fact that judicial independence is grounded in the Constitution, as reflected in Article 57<sup>2</sup> among others, there are frequently gaps between formal principles and their implementation. For example, it is widely acknowledged that the independence of judicial powers is subject to arbitrary interference by the supreme leader. Additionally, it was concluded that there are certain elements of the system that are unconstitutional or go against international standards: some courts do not adhere to the duly established procedures of the legal process; in some cases, because of lack of adequate resources, the judiciary is not properly enabled to perform its function; and the judiciary is not completely free from interference of parties to a case and the government in relative cases.

In terms of the courts, **Article 159** states that the courts of justice are the official bodies to which all grievances and complaints are to be referred. The formation of courts and their jurisdiction is to be determined by law. Courts in Iran can be classified into 5 types: General Courts (Criminal and Civil Courts), Islamic Revolutionary Courts, Military Courts, Press Courts and Special Courts for Clergy. Aside from the General Courts, only two kinds of special courts are established in the Constitution: the

military and press courts (articles 168 & 172). The IRC were established in 1979 by the Revolutionary Council to adjudicate offences regarded as threatening to the Islamic Republic including crimes against security, narcotic crimes, economic crimes and official corruption. The legitimacy of the IRC was therefore questionable. In 1995, the IRC were established by the "Act of Establishment of General and Revolutionary Courts". The special courts for clergy are not explained or described in the Constitution nor in any laws. They are under the jurisdiction of the leader and established by his decree. Therefore they are in violation of the Constitution

Regarding the judicial appointment process, international standards require that in the selection of judges there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origins, property, status of birth, except that a requirement that a candidate for judicial office must be a national of the country concerned/in which s/he is practicing. **Article 158** of the Iranian Constitution states that it is the duty of the head of the Judiciary to elect and/or appoint judges. The head of the judiciary branch is responsible for the employment of just and worthy judges, their dismissal, appointment, transfer, assignment to particular duties, promotions, and carrying out similar administrative duties, in accordance with the law. However, in practice, according to the Article of Selecting Judges Act: "Judges are selected from male applicants who met the following conditions: (1) are believers in Islamic justice and obligations, and remain loyal and obedient to the Islamic Republic of Iran; (2) Taharat Movled or are born by legal parents; (3) are nationals of Iran; (4) enjoy full physical and mental health and

---

<sup>2</sup> Article 57 of the Iranian Constitution states that the powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive which function under the supervision of the absolute wilayat al-'amr and the leadership of the Ummah.

are of sound mind, and are not narcotic drug addicts; (5) have permits for judgement or Ijtihad degree and/or a B.A in Law or Theology”.

According to international standards, judicial independence is secured by giving judges long, and sometimes lifetime, tenure thereby hindering their removal. Regarding immunity from the threat of losing their jobs and professional security within the ranks of judges, the judiciary should be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and should not be compelled to testify on such matters. **Article 164** states that a judge cannot be removed, whether temporarily or permanently, from office and/or the post he occupies except by trial and proof of his guilt, or in consequence of violations entailing his dismissal. A judge cannot be transferred or redesigned without his own consent, except in cases where the interest of society necessitates and requires 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 the general regulations to be laid down by law. In practice, there is a discordance between the formal, established laws and their implementation.

Another specific problem that was discussed was the problematic nature of Article 167 of the Constitution which states that in the absence of codified laws Iranian judges have to deliver their judgment on the basis of authoritative Islamic sources and authentic fatwas. The question then becomes, whose fatwas? And what are authentic sources? This article neither satisfies the requirement of modern natural systems

that rules satisfy the principles of generality, promulgation, minimising the use of retrospective laws, clarity, lack of contradiction, possibility of obedience, constancy through time, consistency between the word and the practice of law; nor does it uphold the Shiite procedural principle of Qubh al-`iqab bela bayan which states that in the absence of a prior explicit expression of the promulgated law, no punishment is morally and legally justified. The ambiguities inherent in fatwas and their limited accessibility for the general public explain these failures.

---

## Human Rights

### Issues: Women's Rights and Equality before the Law

One of the most important features of “rule of law” in every society is the generality of laws where no discrimination or exception is permitted. In the case of women’s rights, it could be argued that within Iran there is discrimination. Although Iran is party to some of the most important international instruments on human rights such as the Covenants on “Civil and Political Rights” and “Economic, Social and Cultural Rights”, the Convention on the Rights of the Child and the Convention on Elimination of Racial Discrimination, it has not ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). On several occasions Iran

has considered ratifying the Convention and the Sixth Parliament in 2003 agreed to sign it. However, the Guardian Council rejected the CEDAW on the grounds that it conflicted with Shari'a; it remains unratified. Within Iran there are those that defend ratification with reservations for some articles (namely those related to the nationality of women, equality before the law and family law) as most Islamic countries have done. Others reject ratification given the contradiction between CEDAW's defence of non-discrimination and the Iranian civil code based on Shari'a which defends the natural desirable separation between men and women and their different functions. In any case, ratification would not be enough as the issue of implementation would most probably be problematic.

The structure and organisation of the justice system also tends to disadvantage people who show differences in appearance, speech, behaviour, ideology or values from those holding positions of power. While there are judicial and police reform programmes at the national and regional levels designed to overcome this structural inequality, they have not yet succeeded in doing so. The profile of those working in criminal justice agencies does not reflect the class, racial, cultural and religious composition of the general population. This lack of active participation of cultural minorities in the process of criminal justice administration and policy making, hinders equality before the law for Iranian society. Therefore, the promotion of equality before the law and equal access to criminal justice require a systematic examination of the implicit cultural assumptions embedded in the laws and the legal system in order to identify the manner in which they may unintentionally act to disadvantage certain groups of people. Efforts should be made to ensure

that membership of the judiciary, police and other legal professions is not drawn from a narrow ideological group, as this fosters perceptions of bias. The success of a criminal justice system depends not just on legal measures and law reforms, but also on its acceptance by the general community. Does a Shari'a-based justice system recognise this diversity? The fluid nature of Islamic law, which relies on consensus makes this difficult. There is no codified Islamic law. Should the basis for discussion be Shi'a or Sunni principles? Within Shi'a, which schools? There is great variety of interpretation.

---

## Conclusion

Addressing the title of the workshop, "Shari'a and the Rule of Law", participants argued that the legal system should be regarded as one among many ways of exercising the rule of law, which is per se a neutral concept. The problem arises from the fact that the term 'rule of law' as used at the international level is indeed value-based and relates not only to the literal meaning of the term but also indirectly suggests a pre-defined content of the law, based on a set of values that are claimed to be universal. Participants contended that a debate on Iranian reform must be based on a conception of the rule of law as a neutral concept. There is a need to distinguish between values on the one hand, and models/ways of implementation, on the other (objectives vs. modality). The question of the rule of law should be regarded as an empirical rather than a normative question. So we could say that Iran has rule of law in the empirical sense and what is being debated is the merit of the system in

Iran, its morality and its effectiveness. The debate is on reform of the system and on issues of interpretation.

In order for Iran to become a fuller part of the international community, there is a need to develop a common understanding of the meaning of “rule of law” and “democracy”. Often, while referring to the same concept, differing terms are used. In the same way that common terms are sometimes used with differing meanings. It would be a useful start, participants suggested, to define who means what when they say what.

Additionally, all agreed that reform should come from within. Some defended the argument that Islam provides all the instruments (Ijtihad and others) for

reform, which could remodel the current system into a contemporary state based on Islamic principles in a modern reading. Others spoke of the need to forge a Constitutional Culture through nation- and state-building. Most agreed that there needs to be a greater focus on the rights of citizens.

Participants argued that the international community needs to reconsider its general policy approach towards Iran, taking more into account the particular Iranian context, the country’s importance as a regional power and the resources it has to offer. The current debate on Islamism and how to ensure people’s participation and rights within an Islamist-led system is not at all new; to think that it is new is a common Western misconception, and one that unhelpfully colours policy responses.

© Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) 2006. All FRIDE publications are available at the FRIDE website: [www.fride.org](http://www.fride.org)

This document is the property of FRIDE. If you would like to copy, reprint or in any way reproduce all or any part, you must request permission. The views expressed by the author do not necessarily reflect the opinion of FRIDE. If you have any comments on this document or any other suggestions, please email us at [comments@fride.org](mailto:comments@fride.org)

# [www.fride.org](http://www.fride.org)

Felipe IV, 9 1º Dcha. 28014 Madrid — SPAIN. Tel.: +34 915 22 25 12 — Fax: +34 915 22 73 01. Email: [fride@fride.org](mailto:fride@fride.org)