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**Understandings of the Rule of Law in various Legal Orders of the World**
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# Rule of Law in Iran

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*Although having some significance within Iranian legal science the principle of the rule of law (hākemiyat-e qānun) and the aspects generally associated with it remain largely absent from Iranian constitutional doctrine. Instead the latter is characterised by the prevalence of the rule of Sharia (hākemiyat-e shari'at) in its specifically Shiite interpretation of the so called velāyat-e faqhih, i.e. the guardianship of a senior religious scholar over all execution of state power in order to ensure its compatibility with Sharia. The principle of velāyat-e faqhih and its repercussions run like a red thread through the Iranian constitution and supersede all traces of hākemiyat-e qānun.*

## *I. The Principles of* hākemiyat-e qānun *and* velāyat-e faqhih

Historically the idea of the rule of law (*hākemiyat-e qānun*) in Iran has been in constant conflict with arbitrary monarchical power on the one hand and with the principle of the rule of *Sharia* (*hākemiyat-e shari'at*) on the other (Rezaei: 2002, 55 et seq.). While the decades between the Constitutional Revolution of 1906-11 and the Islamic Revolution of 1979 saw some progress in the direction of the rule of law (cf. *inter alia* Arjomand: 2008, 47 et seq.; Arjomand 2010) the establishment of the Islamic Repub-

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lic in 1979 led to an explicit primacy of the rule of *Sharia* based on article 4 of the Iranian constitution (IC)[1].

In order to ensure the rule of *Sharia* the constitution of 1979 establishes the principle of *velāyat-e faqhih* (cf. article 5 IC), i.e. the guardianship of the supreme scholar of Islamic law (*faqhih*)[2] (cf. Khomeini: 1981 27 et seq.; Tellenbach: 1985 159 et seq; Momen: 1995, 196; Hāshemi: 2003, 23 et seq.; Moschtaghi: 2010, 185 et seq.). According to the principle of *velāyat-e faqhih* only a *faqhih* is equipped both with a comprehensive knowledge of the *Sharia* and moral and ethical superiority, which are necessary to ensure a just execution of state power in accordance with the *Sharia*. Hence, the most qualified *faqhih* is the only person deemed suitable for leadership. While systems based on the rule of law rely on a system of mutual checks and balances, the rule of *Sharia* in the form it has found in Iran primarily relies on the 'religious-legal' qualifications of certain officials charged with the supervision of state power. Consequently, the competences of the supreme *faqhih* or simply the 'Leader' as he is referred to in the Iranian constitution are hardly restricted and he has the final word on any matter he deems important enough to deal with (cf. article 110 IC).

Due to the primacy of the rule of *Sharia* only scarce traces related to the concept of rule of law are visible in the Iranian legal system, like for in-

[1] Article 4 IC: 'All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle is absolutely and generally binding to all articles of the Constitution as well as to all other laws and regulations and the *foqhohā* of the Guardian Council are judges in this matter.'

[2] The term *faqhih* (pl. *foqhohā*) means 'expert' in Arabic. At least in the Shiite *ğafari* school of law it is used as a synonym for the term *moğtahed* referring to a religious scholar who is accepted as an expert on the interpretation of Islamic law. Prerequisite for obtaining the rank of *moğtahed* are extensive studies of Islamic law at the end of which a person is awarded by its teacher the license (*eğāze*) to issue independent interpretations based on the application of his rational powers. The teacher has to be a *moğtahed* himself. For details on the process how to become a *moğtahed* in detail see Devin J. Stewart, Islamic Legal Orthodoxy, 1998, 223 et seq.; On peculiarities of the terms *moğtahed*, *faqhih* and *eğtehād* refer to Momen: 1985, 186 et seq.; Hāshemi: 2003, 113.

stance a formal separation of state power. However, even these remnants are overshadowed by the rule of *Sharia* and the repercussions of the principle of *velāyat-e faqhih.*

*II. The Principle of the Rule of Law in the Iranian Context*

The principle of the rule of law (*hākemiyat-e qānun*) is neither mentioned in the Iranian constitution nor in standard text books on Iranian constitutional law (cf. Hāshemi: 2002 - 2003). However, the concept enjoys some prominence in scientific discourse in particular concerning criminal law.
The reception of ideas connected to the rule of law can be traced back to the constitutional revolution of 1906-11 and its demand for the establishment of a parliament and for the introduction of a constitution limiting and controlling the administration of state power. Legal reforms of the following decades, which were supported and often initiated by a western educated elite, saw an ever expanding corpus of codified laws combined with the establishment of a formal system of courts bound by these laws in order to ensure legal certainty. However, the influential religious establishment remained ambivalent to these reforms which threatened their traditional position as the main administrators of justice.

Following the victory of the Islamist fractions after the overthrow of the monarchy in 1979 the new constitution established the absolute supremacy of the rule of *Sharia* (*hākemiyat-e shari'at*) in article 4 IC, demanding all laws including the constitution to be based on Islamic rules.

Nevertheless traces of the rule of law are still visible in the Iranian constitution. For instance the Iranian constitution separates three different branches of state power, i.e. executive, legislative and juridical authority (cf. article 57 IC), and declares the latter to be an independent branch of public power (article 156 IC). It furthermore establishes guarantees for the independence of individual judges (article 164). According to article 167 IC judges are bound by law. Following this provision they may not refrain from issuing verdicts and have to base these on codified law. They may refer to sources of Islamic law and advisory opinions of a

*faqhih*, a so called *fatvā* (pl. *fatāvi*) only in case of absence of codified regulations. Article 159 promulgates that courts are the only official body competent to hear law suits and provides that their establishment and organisation has to be based on law.

Article 169 IC seems to promulgate the principle of *nulla poena sine lege* by providing that no act or omission may be regarded as a crime with retrospective effect on the basis of a law framed subsequently.

*III. The Supremacy of Islamic law or the Rule of Sharia enshrined in the Iranian Constitution*

As already mentioned, article 4 IC establishes the absolute supremacy of Islamic law (in the interpretation of the Shiite *Jafari* school of law, c.f. article 12 IC) for the Iranian legal system by providing that all laws and regulation including the constitution have to comply with Islamic law (Moschtaghi: 2010, 131 et seq; Hāshemi: 2002, 83 et seq).

As a peculiarity of Iranian constitutional law due to its decisively Shiite character (cf. article 12 IC) the rule of *Sharia* in Iran relies strongly on the principle of *velāyat-e faqhih* (see above) to ensure the conformity of state power with *Sharia*. This specific form of the rule of *Sharia* is somehow diametrical to the concept of the rule of law. Because whereas the latter concept is based on the perception that the control of public powers is ensured best by institutional means, i.e. by a separation of different branches of state powers and the establishment of a system of mutual checks and balances, the principle of *velāyat-e faqhih* relies exclusively on the supervision of state powers by an individual (article 57 IC), elected for lifetime and attributed with special moral and intellectual qualities (cf. article 109 IC), which are supposed to enable him to ensure the conformity of the execution of public powers with justice which in the Islamic context is synonymous to conformity with *Sharia.*

*IV. Repercussions of the Rule of Sharia*

Due to the absolute primacy of the rule of *Sharia* its repercussions are imposed on all remnants of the rule of law within the constitution. Consequently, the formal separation of powers is overshadowed by the

comprehensive supervisory power of the Leader (article 57), which is implemented by an effective system of agents situated in all branches of public power and public agencies (Buchta: 2000). Moreover, rather than being restricted to mere supervisory functions, the Leader also holds the most powerful and highest public office in the state (articles 5, 113 IC) and has the final decisions on all basic issues of the Islamic republic (cf. the non-conclusive and sometimes rather vague catalogue of his competencies in article 110).

*Legislation*

The legislative competences of the parliament are severely limited by articles 4, 72 IC prohibiting any legislation in variance to the rules of the official Shiite school of Islamic law. The control of this limitation of legislation lies with the six *foqhohā* of the so called Guardian Council (*Shurā- ye negahbān*) who are appointed directly by the Leader (article 91 IC) without any involvement of others branches of state power. The *foqhohā* may reject any bill based on its perceived inconsistency with Islamic law (articles 5, 96 IC).

Moreover, based on article 99 IC the Guardian Council is also competent to supervise elections and referenda. Based on this provision the Council holds itself competent to review the suitability of all electoral candidates. This review in the past has led to the rejection of the majority of candidates prior to elections (for instance prior to the presidential election of 2009 out of 476 men and women only 4 men were allowed to participate in the elections). From a rule of law perspective, it is especially concerning that the Council deems itself neither obliged to give reasons for disqualifying candidates nor to offer legal arguments for vetoing legislation (Arjomand: 2010).

The legislative role of the elected parliament is further diminished by the Expediency Council (*mağm'a-e tashkhis-e maslehat-e nezām*), a kind or arbitration commission between parliament and the Guardian Council (Moschtaghi:2010, 307) which under certain conditions, remaining open to the interpretation of the Leader, also wields legislative power (Hāshemi: 2003, 552 et seq).

*Executive branch of Power*

The executive branch consists of the President and his ministers. Both the President (article 122 IC) and his ministers (article 133 IC) are accountable to parliament. Since the Leader in spite of his wide competencies is not regarded as part of the executive, he does not share in its checks and balances.

The executive may issue decrees when explicitly provided by law or in order to facilitate the implementation of laws and to organise their departments (cf. article 138 para. 1 IC). Executive decrees may not be at variance with the laws. In case of decrees based on article 138 IC this prerequisite can be controlled by the Speaker of Parliament (article 138 para. 3 IC).

*Administration of Justice*

The Courts have to refrain from applying any executive decrees which are inconsistent with Islamic law or have been issued by a breach of executive competences. The annulment of such decrees can be requested by an appeal to the Tribunal of Administrative Justice (*divān-e adālat-e edāre'i*) (article 170 IC).

While the ministers are appointed by the President and have to stand a vote of confidence by parliament the Head of the Judiciary is appointed directly by the Leader for a term of five years with the possibility of re-election and without any consultation of other branches of state power. After efforts in the 1990s to change the judiciary system to some kind of pre-modern Kadi system excluding the right to appeal have failed, the Iranian justice system of today is once again characterised by a multi tired system of courts with the possibility to appeal most decisions of lower courts (for details on the limitation to the right to appeal cf. Abghari: 2008, 71). Also the division of labour between public prosecutors and judges during criminal proceedings has been restored.

Courts of first instance are General Courts and Revolutionary Courts. The first enjoy general competence while the competence of the latter courts is restricted to charges of narcotic crimes and security related offences. Proceedings before the Revolutionary Courts have been subject

to intensive critique by NGOs and human rights treaty bodies of the United Nations due to the infringements of basic principles of fair trial (e.g. Human Rights Watch: 2009; CCPR: 1993, 3 para. 12,).

In spite of article 159 IC which declares the judiciary to be the only institution competent to adjudicate law suits and complaints and renders the establishment of courts dependent on a formal bill of law there are Special Courts of the Clergy (*Dādgāh-e Vizheh-ye Ruhāniyyat*) in existence that are operating outside the judiciary and are situated under the direct supervision of the Leader. These courts adjudicate transgression of members of the Shiite clergy. Their actions are highly problematic from a rule of law and human rights perspective in particular because they may issue criminal sanctions although they are primarily bound by Islamic law rather than by parliamentary legislation (in detail Künkler: 2010).

Another problematic factor are vaguely defined crimes like Enmity to God (*mohārebeh*) and Spreading of Corruption on Earth (*mofsed fel'arz*) which provide judges with a wide margin of discretion and hence render their obligation to base their verdicts on codified law as rather superficial. The latter problem is increased furthermore by the prevailing perception of article 167 IC within the judiciary according to which judges may refer to sources of Islamic law and to *fatvā* (pl. *fatāvi*) in case of absence of codified laws even in criminal cases. This enables judges to base criminal punishment solely on a *fatvā* in case of absence of formal legislation. Similar possibilities are also enshrined in several penal laws (e.g. article 638 Law on Islamic Punishments; cf. also article 18 and 42 of the Procedural Code of the Special Courts of the Clergy).

Finally it should be mentioned that if a substantive understanding of the rule of law is applied, encompassing ideas like human rights and equality by law (e.g. Secretary-General of the United Nations: 2004, para. 6), the Iranian legal system shows additional structural deficits. For instance Iranian citizens are discriminated based on gender and religious affiliation. Because whereas article 19 IC stipulates that all Iranians, whatever their ethnic group or tribe, enjoy equal rights and neither color, race, languages, nor the like, do bestow any privilege, religious affiliation is intentionally excluded from the provision. Religious mi-

norities in Iran are *inter alia* barred from access to most of the higher public offices (cf. Moschtaghi: 2010). The situation of so called 'unofficial minorities', i.e. religious minorities which are not recognized by article 13 ICE is even worse. For instance members of the Baha'i religion, the largest non-Muslim minority in Iran, are even excluded from higher education (cf. Human Rights Watch). Regarding the equality of men and women, the guaranty of equality between them in article 20 IC is restricted to equality according to the rules of Islam. Hence, due to the prevailing interpretation of Islamic law Iranian women are subject to widespread discrimination both by law and by its application (cf. for details Parhisi: 2010).

## *V. Conclusions*

Rather than adhering to the rule of law Iranian constitutional doctrine gives absolute preference to the rule of *Sharia* and its specific Shiite component, the principle of *velāyat-e faqhih*. Hence, beside a formal separation of powers and the adoption of the principle of nulla poena sine lege hardly any aspects regularly associated with the rule of law have been incorporated into the Iranian legal system. Moreover, these two principles are rendered rather ineffective by the repercussions of the rule of *Sharia* and *velāyat-e faqhih*. Moreover, when applying a substantive approach of the rule of law there are structural deficits in the Iranian legal system concerning equality between Iranian citizens and the protection of human rights. Hence, one has to conclude that at present the rule of law remains largely absent from the Iranian legal system.

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