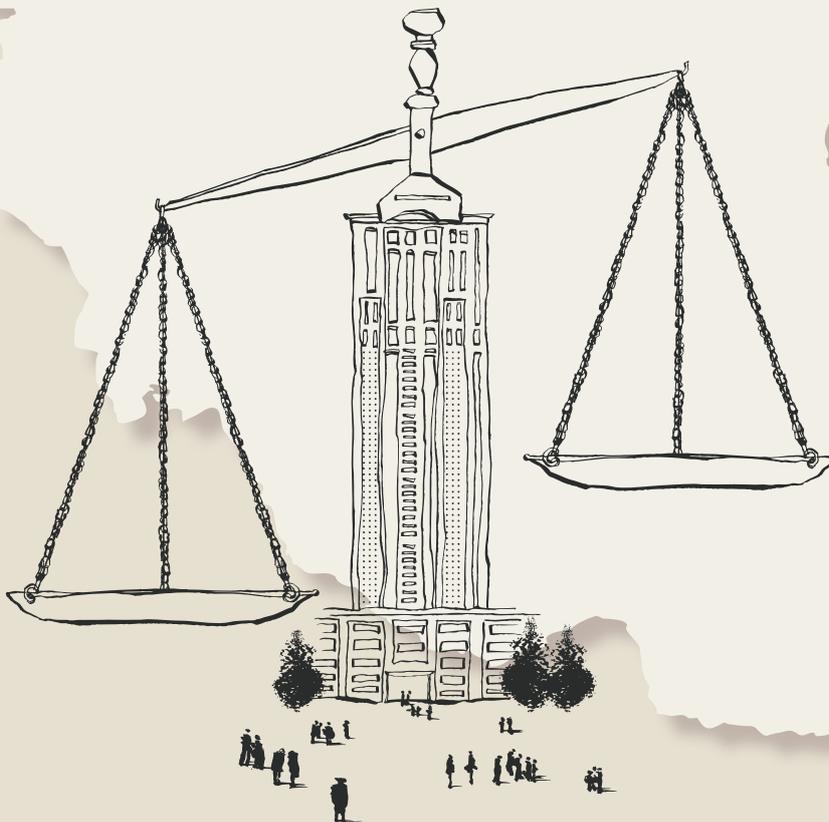


THE FUTURE OF IRAN: JUDICIAL REFORM  
**Who are the Judges in the  
Islamic Republic of Iran**

By Mehrangiz Kar



## THE FUTURE OF IRAN: JUDICIAL REFORM

# Who are the Judges in the Islamic Republic of Iran

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According to the Judge Employment Act, passed by the Iranian Parliament on March 5, 1955, 24 years before the Islamic Revolution of 1979, the first condition for becoming a judge in Iran was studying law inside or outside of Iran. In order to fulfill the second condition, the law school graduates had to gather a few years of practical experience working in the National Judicial System. Upon the completion of the two requirements, the individual was ready to perform as a judge in the Civil or Criminal Courts. However, in certain cases, such as endowment or validity of marriage and divorce and consanguinity, the religious school (seminary) graduates were performing as judges in order to settle the disputes in accordance with the Iranian Civil Law, which was in full compliance with the provisions of Shi'ite jurisprudence. The Seminary graduate could only perform as a judge in a limited scope of jurisdiction as the foundation of Iran's judicial system was built upon the law school graduates. Iran's judicial system was commensurate with Europe's achievements in the field. It was the efforts of prominent lawyers, the late Mr Davar and his fellow jurists, that led to the founding of the new system structure at the time of Reza Shah. Before that, those who studied in the seminaries (mullahs) held the monopoly on all judicial matters.

After the Islamic Revolution of 1979, the judge selection process was transformed by two executive moves:

1. Ayatollah Khomeini, the religious leader, issued a decree whereby the seminary graduates were invited to serve as judges. The ayatollah desired to change the country's judicial system, transformed during the Pahlavi era, as soon as possible. During the Pahlavi era, the religious judges presence in the judicial system was not strong, and Khomeini took steps to populate the judiciary with the seminary school graduates. To accomplish this task, Khomeini conveyed his command in a form of a "Sufficiency Duty". Based on the principles of Islamic jurisprudence (fiqh), Sufficiency Duty, meant that as long as the new Islamic Judiciary System required the service of judges educated in religious schools, it was obligatory for eligible individuals to accept the invitation.
2. In 1980, the Constitutional Law of Islamic Republic of Iran was approved, legally validating what Khomeini had asserted. According to Article 163 of the Constitution of the Islamic Republic: "The conditions and qualifications to be fulfilled by a judge will be determined by law, in accordance with religious criteria."

The new Constitution emphasized, "accordance with religious criteria", as a requirement of becoming a judge, allowing Islamic legislative structures to deprive women the right to become a judge and to pass and enforce a new legislation titled Judges' Appointment Conditions Act based on Article 163 of the Islamic Republic's Constitution. The Act was passed by the Parliament and judges were selected from the eligible men as described below:

1. Those who have faith and are just and possess a practical commitment to the Islamic principles and loyalty to Iran's Islamic Republic system.
2. Legitimacy of birth.
3. Iranian citizenship and completion of the mandatory military service unless a legally exempt.
4. Soundness of mind and ability to work and be clear of drug addiction.
5. Having achieved ijthihad with approval of the Judicial High Council or having a Judgment Permission from the Judicial High Council for those who are holding a bachelor degree in law or theology or a bachelor from the College of Judicial and Administrative Studies affiliated with Justice Administration or a degree from the College of High Judicial Studies of Qum or those seminary students who finished their classes and also passed two years of fiqh kharij and are certified by the Fiqhi Teachers' Association, if the Judicial High Council does not have enough qualified clergyman of Islamic jurisprudence available.

(Judges' Appointment Conditions Act approved on May 14, 1982, published in the Code Collection of 1982, Official Gazette.)

The Judge Employment Act of 1955 became ineffective. For the last 33 years judges have had to have the qualifications listed above. The most important point in the Act is declaring

a qualified clergyman of Islamic jurisprudence the main condition of becoming a judge. However, since enough clergyman judges were not available at the time of issuance, candidates who are not clergymen but graduates from law schools or judiciary studies were allowed to be appointed as judges after successfully passing the required judiciary training and becoming certified by the judiciary system. This group of judges, who are not qualified clergymen, are identified as “permitted judges”.

Accordingly, in the Islamic Republic of Iran, the position of a judge, with the specific understanding that he'll have the authority to sign under the final verdict, must be occupied by a man. A judge can have either a legal or seminary education, but if he is not a qualified clergyman he has to obtain permission from a government trusted clergyman in order to practice as a judge.

## **HOW CAN THE JUDGES' INDEPENDENCE BE GUARANTEED IN THE ISLAMIC REPUBLIC OF IRAN?**

In the Constitution of the Islamic Republic of Iran, the independence of the judiciary is prescribed as a principle. Article 156 of the Constitution clearly asserts:

“The judiciary is an independent power, the protector of the rights of the individuals and society, responsible for the implementation of justice, and entrusted with the following duties: investigating and passing judgement on grievances, violations of rights, and complaints; the resolving of litigation; the settling of disputes; and the taking of all necessary decisions and measures in probate matters as the law may determine; restoring public rights and promoting justice and legitimate freedoms; supervising the proper enforcement of laws; uncovering crimes; prosecuting, punishing, and chastising criminals; and enacting the penalties and provisions of the Islamic penal code; taking suitable measures to prevent the occurrence of crime and to reform criminals.”

With a review of this article, a question arises: based on the current judiciary, can the independence of the judiciary be guaranteed in Iran, or not? Article 157 of the Constitution prescribes: “In order to fulfil the responsibilities of the judiciary in all the matters concerning judiciary, administrative and executive areas, the Leader shall appoint a just mujtahid well versed in judiciary affairs and possessing prudence and administrative abilities as the head of the judiciary power for a period of five years who shall be the highest judicial authority.”

This article, in essence, alters and undermines the judiciary independency principle. Considering the points mentioned in the above article, how can the head of the judiciary maintain his independence and not follow the political and factional views of the focal centres of political power linked to the Supreme Leader's Office—the highest political authority in the country—while being directly appointed by the supreme leader.

The head of the judiciary has a wide range of power and authorities in the judiciary. According to Article 161: “The Supreme Court is to be formed for the purpose of supervising the correct implementation of the laws by the courts, ensuring uniformity of judicial procedure, and fulfilling any other responsibilities assigned to it by law, on the basis of regulations to be established by the head of the judicial branch.”

Therefore, the position of the Head of the Judiciary, is effectively an individual's exercise of absolute power appointed, controlled, and dominated by another individual possessing absolute power, whilst not accountable to anybody else except the individual who appointed him (Supreme Leader). High-level judicial issues in the country, in their entirety, are ruled by the Head of the Judiciary. Therefore, based on the Articles reviewed, there are no forms of guarantee to note for practicing and maintaining the principle of "independence".

## How can a judge successfully keep his independence and impartiality while forced to follow political and factional views of the Head of the Judiciary due to his job's instability?

Furthermore, the Islamic Republic of Iran's Constitution also blocks judges from remaining independent or to practice impartially. According to Article 158 of the Islamic Republic of Iran's Constitution, the Head of the Judiciary is responsible for the following:

- Establishment of the organizational structure necessary for the administration of justice commensurate with the responsibilities mentioned under Article 156.
- Drafting judiciary bills appropriate for the Islamic Republic.
- 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.

So, when the authority to appoint, dismiss, and transfer is in the hands of the Head of the Judiciary, how can any notion of judges' independence and impartiality exist? How can a judge successfully keep his independence and impartiality while forced to follow political and factional views of the Head of the Judiciary due to his job's instability? If a judge who practices in such unstable conditions, insisted on his decency or impartiality, then he will put himself in danger of dismissal, transfer or denial of promotion. Under such conditions, is there any possibility for the judge to find an opportunity to issue sentences based on his own ideas or understanding of law or knowledge?

In another occasion, the Constitution again stresses on dominancy of the Head of the Judiciary over judges. According to Article 164:

"A judge cannot be removed, whether temporarily or permanently, from the post he occupies except by trial and proof of his guilt, or in consequence of a violation entailing his dismissal. A judge cannot be transferred or re-designated without his consent, except in cases when the interest of society necessitates it, that too, with the decision of the head of the judiciary branch after consultation with the chief of the Supreme Court and the Prosecutor General. The periodic transfer and rotation of judges will be in accordance with general regulations to be laid down by law."

Therefore, the Constitution portrays the judge as a puppet in the hands of the Head of the Judiciary, which obviously denies judges' independence. The Constitution gives permission to the Head of the Judiciary to make decisions regarding a judges' dismissal or transfer based on

expediency, not law. In addition, the article explains that the basis for the expediency is no doubt aligned with their political belief.

Judges can use their power to impose oppression and also to consolidate theories and requirements dictated by the Supreme Leader's Office and other political focal centres. In such cases, there is no difference between the clergyman judges or judges graduated from law school—both are puppets.

### **THE CAPACITIES OF THE DEPENDENT JUDICIARY TO ACCEPT THE SECURITY FORCES' INTERVENTIONS**

The dependent (non-independent) judiciary has the capacity to accept the intervention of the security forces into legal matters. During the political crises, the security forces could employ the judiciary as a tool to repress the opponents and violate laws in order to weaken their political rivals. As the Head of the Judiciary is appointed directly by the Supreme Leader, he would be obedient to the leader's orders. Similarly, the judges who have no job security in such a system easily accept the intervention of the security forces.

A clear example of such a capacity was demonstrated during the post-2009 presidential election unrest in Iran, when the intervention of military and security forces was easily and clearly accepted by the judicial system. Both parties rushed to heed the call of the Supreme Leader in suppressing the voices of the protestors unsatisfied with the election result, through breaking laws and forcing violence upon the masses storming the streets.

While the civil movement of the masses was forming, Ayatollah Shahroudi's second term as the Head of the Judiciary was coming to a close and Ayatollah Sadegh Amoli Larijani was appointed to the position by the Supreme Leader. Once a Revolutionary Guard's commander, Sardar Naghdi was appointed as a consultant to the judiciary and it became clear that the Revolutionary Guards dominated the judicial system. The consequences of this dominance are shown in various ways such as, violent clashes with protestors, violating laws guaranteeing the rights for those accused of political crimes, dissatisfactory prison conditions, the incidents that led to the death of detainees, interrogation and obtaining confessions under pressures, denial of the right to have free access to a lawyer of the accused's choosing in order to prepare a defence, to name a few. All these tragic events clearly show that Iran suffers from having a dependent judicial system. It also became clear that the social and civil movements cannot grow stronger so long as Iran has a dependent judicial system where the military and security forces can easily reign.

It was a great experience for the younger generations, however; they learned their lesson and came to the conclusion that their efforts need to shift towards building an independent judicial system that the Constitution guarantees. Indeed, prior to 2009, tortures, mistreatments, inhuman interrogations and other crimes were taking place inside prisons. However, since 2009, violation of human rights started happening right in front of the nation—there is no room left to defend this inhumane regime anymore.

After being faced with such high levels of dependence from the judicial system in 2009, the experts agreed on this analysis:

"Since the judicial system is functioning under the direct leadership of the Supreme Leader and since the Supreme Leader's main task is to safeguard the regime, as a result, the judicial system in the Islamic Republic of Iran cannot be considered as a body which maintains the law but one that maintains the regime. Hence, there are no clear boundaries between the judiciary, Revolutionary Guards, the Basij, police and the intelligence services. And therefore, hidden and open interference and interventions is seen." (Mehdi Khalaji, "Judicial System and Rule of Law", BBC Persian, August 16, 2009.)

The above theory becomes easier to understand with examples from Ayatollah Khamenei's orders post-June 12, 2009. During a lecture in Tehran delivered on Sunday, December 13, 2009, Ayatollah Khamenei stated that the Islamic Republic of Iran is a "divine" regime. He added with referring to a Quranic verse: "You will see that the opponents will be wiped out, right in front of your eyes." (BBC Persian, December 22, 2009.)

It can be concluded that if the basis of Iran's judiciary was "rule of law" then the Supreme Leader of the country could not announce clearly and confidently that a huge number of the country's citizens will be "wiped out". A speech from the highest authority in the country shows that in this regime, priority is given to what the Supreme Leader wants, also known as "expediency", not enforcing "legal norms and rule of law". In a legal order with the above characteristic, there won't be any room for tolerating an independent judicial system. Furthermore, the judiciary cannot be capable of refusing co-operation with the powerful institutions under the leadership of the Supreme Leader or military and security forces. However, the structure of Iran's judicial system still appears comparable in appearance with countries where the rule of law is valued and upheld. Such similarities are the rayed remnants of the modern judicial system of the pre-revolution era, which misleads the international community and makes them analyse and critique this system with modern standards.

## INCONSISTENCY IN COURTS' VERDICTS

Article 167 of the Constitution of the Islamic Republic of Iran also creates discord in the country's legal structure in regards to issuing verdicts. According to Article 167, "The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatwa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement."

Legal experts have always criticized this article, identifying it as harmful to the principles of justice. This article gives free reign to judges to use Shari'a as an excuse and to justify their decision by saying that although certain actions or omissions of actions are not defined as crime in the penal code, based on their understanding of the Shari'a, it is in fact considered a crime and thus punishable. For instance, if the penal code does not stress on apostasy or denial of Islam by a Muslim to be a crime, it still can be. Or if the law is silent about stoning, the judge has to look into the fatwas and issue the sentence accordingly. If the Grand Ayatollahs issue a fatwas in their theological treaties (risalih) and confirm, based on Sharia law, that the punishment for apostasy is death and for adultery is stoning, then the judges are

obliged to apply these punishments even when they are not mentioned in the law. Thus, the principle of “legality” of punishment is ruled out.

Furthermore, having the capacity to make judicial precedent is one element that gives more credibility and strength to a legal system. While Article 167 has destroyed any hopes for such capacity, different opinions can be found in Islamic sources and fatwas about the same issue. So it is possible for two different sentences to be issued from two different courts on a single matter. Article 167 makes it very difficult, if not impossible, for the Supreme Court to review differing votes on similar cases in order to select one and include it in the Judicial Precedent Collection. The Supreme Court is unable to ignore a Grand Ayatollah fatwa on which a judge issued a sentence, and favour another Grand Ayatollah fatwa, on which a different judge issued a sentence, for a similar case. This is the disarray through which the sensitive task of making judiciary precedent, an element of legal stability and harmony in a judicial system, currently presides. It's been many years since the legal experts have addressed the necessity of resolving this problem in some way, and their efforts have not yet been effective.

On the other hand, as it was explained earlier, selecting judges from two different channels according to the 1982 Judges' Appointment Condition Act, the law school graduates alongside other seminary judges, both attempting to enforce Islamic rules based on their own interpretation, would damage the harmony between the courts' sentences and violate justice. Law school graduates are less likely to have deep knowledge about the basis of the Islamic jurisprudence and the seminary graduates are not familiar with, and do not believe in, elements of modern law. Such a cluttered legal system would cause discord in courts' sentencing. And, as long as this legal system remains, we cannot expect harmony in sentencing. The Supreme Court is also faced with serious problems in issuing judicial precedent votes because of this duality in this legal system's structure.

## **POSITION OF LAWYERS AND THE BAR ASSOCIATION IN THE JUDICIAL STRUCTURE OF IRAN**

Iran's judicial structural form, in some cases, has violated one of the constitutional rights of accused, the Right of Defendant. The Criminal Procedure Code of 1999 has weakened the right of the accused to have access to the lawyer of their choosing in various stages of proceedings. According to Article 128 of this law “The accused is allowed to have one lawyer with him/her, the lawyer cannot interfere during the investigation process, when the investigation process is over then the lawyer is allowed to present his/her materials to the judge if those materials would help to discover the truth or what he/she found necessary to defend the accused person or in order to enforce the Law. The lawyer's assertion would be reflected in the minutes.” This article has recognized and legalized the right for the attorney to be present during the investigation process. But, unfortunately this right became vulnerable when the article was amended with the Note: “If the case considered is a confidential one, or if the judge identifies that presence of another person except the accused would cause corruption, and also for crimes against national security, then the lawyer's presence depends on the court's permission.”

The Note to Article 128 was employed against reformists and their secular supporters, detained during the reform era, and also during the widespread repression of protestors after the 2009 presidential election, in order to obtain forced confessions during the investigation process in the absence of an attorney. Even in cases that are not considered political, press/security related, or confidential, in order to execute the above mentioned amendment and to prevent the lawyers from being present during the investigation process, the judges are using different mechanisms.

Dependent judges can create false sexual allegations or security issue for their targeted subjects and then by referring to the Article 128 Note, in order to follow the conservative and radical political central powers, they can avoid issuing permission for the lawyers to be

## How can the Iranian judicial system promote justice while the judges and the lawyers are not independent?

present during the investigation process. They can enter into the accused's personal realm and create false sexual allegations cases against them. As soon as they categorize a case under the Public Moral category then it is so easy for them to prevent anybody else, including the attorney, to be present during the investigation process with the excuse that the third party's presence may damage the accuser's, or other people's, honour. In some scenarios they fabricate false security cases such as "action against national security" and are therefore free to prevent attorneys being present during the investigation process.

The Note gives interrogators connected to the military and security forces the opportunity to have full control over the accused and to put them under physical and emotional pressure during the investigation, forcing them to give false confessions. At this stage, in order to end the torture, the accused will confess, against themselves and others, and the case will be sent to the court in accordance with repression policies. So, the attorney's position in the current judicial system is very unstable and vulnerable and has no guarantee of enforcement. In addition, there is no possibility in the Iranian judicial system of creating an impartial and independent body such as the Constitutional Court that could review claims to prevent violating the Constitutional Law. Article 168 of the Islamic Republic of Iran's Constitution orders the respect of the political and press security of the accused, but since the Constitution was approved in 1980, the principles detailed in this article have never been practiced and, essentially, the article has been abandoned.

The Iranian Bar Association became independent in 1954 but lost its independency and authority to observe and defend lawyers' Union Rights (hoquq-e senfi) after the Islamic Revolution of 1979. Currently, with all the laws passed through the Islamic Consultative Majlis, the Bar Association has lost its independency and hence does not have the capacity to assist lawyers representing those charged with the political and press security offenses. Also, if a lawyer runs in the Bar Association's Board of Director's election, they have to be approved by Disciplinary Court of Advocates and, if not approved, then their name will be removed from the candidate list. In such a situation, the qualified and noble lawyers who are members

of the Bar Association, cannot be the voice of those who refuse to be silent about Union Rights violation and the right to freely represent their clients. How can the Iranian judicial system promote justice while the judges and the lawyers are not independent?

## **SPECIAL AND ILLEGAL COURTS**

The principle of Legality of Courts has been violated by the judicial system. However, in Article 159 of the Constitution of the Islamic Republic of Iran, the legality of courts has been emphasized: "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." Article 57 has been interpreted in a way where it's possible to establish illegal courts and authorities. According to Article 57, "The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute wilayat al-'amr and the leadership of the ummah, in accordance with the forthcoming articles of this Constitution. These powers are independent of each other." In compliance with the provisions of Article 159 we can find no legal origin for establishing the Revolutionary Courts within Iran's judicial system. These

**This judiciary system has obviously failed and currently it just works for the benefits of certain individuals or groups.**

courts were established based on the will of Ayatollah Khomeini, the first Supreme Leader, and were allowed to disobey the official Procedural Code. On the other hand, 33 years after the Islamic Revolution, the original reason for establishing such courts no longer exists. But, the question is, based on which legal theories are these courts continuing to exist?

The Special Court for Clergy also has no legal basis in Iran. The existence and performance of this court was not predicted in the Constitution. The Supreme Leader of the time, Ayatollah Khomeini, ordered its establishment. The Special Court for Clergy deals with all crimes committed by the clerics, without being a subset of the judicial system. This court does not obey the official Procedural Code and no law supervises the court's performance. A group of trusted clergymen are appointed by the Supreme Leader to have the leading role in this court; they have their internal bylaws. Existence of these courts is a contradiction of the principle of "equality of citizens before the law". Justice can only be guaranteed through practice of equality before law as detailed in all international treaties and human rights declarations Iran is signatory to. Therefore, it is not possible to justify the existence of this court based on accepted legal and international principles. For many years this question has engaged many legal experts' minds: Why are the charges against the clergy reviewed by the Special Court of Clergy, which is considered illegal?

In addition, "special courts" are operating within the judicial system of Iran. The existence and performances of these courts also have no legal basis. The special courts, in fact, originated from the public courts that are considered legal. But some branches of the public courts are specified for particular cases and the courts' limits of competence are being identified by

the Head of the Judiciary, such as the special courts of the government employees or the media courts, the existence of which have no legal justification. In fact, the existence and performance of these courts are inconsistent with the Constitution. Also, these special courts contradict the principal of legality of courts and the jurisdiction of the courts. According to the Islamic Republic's Constitution only one special court has been identified, the special courts of armed forces.

## CONCLUSION

According to what was reviewed, the legal structure of Iran has challenges both in theoretical (legal) aspects and in practical (personalization) aspects.

1. Dependency of the judicial system and the judges is one of the most important obstacles promoted within the Constitution. Having such a structural obstacle, promoting justice, hoping for impartial judgments, and following the law cannot be imagined. In addition to the aforementioned, several other examples can be highlighted from Iranian law. Here, I will mention Note 1 of Article 128 of the Criminal Procedure Code of 1999 that gives permission to judges to prevent the attorneys from being present during the investigation process. Accordingly, the dependent judges can easily follow the propaganda of the central political powers and not allow the political and press accused and the prisoners of conscious to have access to lawyer. Also, the dependent Bar Association, affected by the judicial systems' dominance, is silent about this unjust judicial process. The independence of the Bar Association was removed by the legislation system of the Islamic Republic of Iran. Membership in the Bar Association is through an elective process, however, as described, it does not bring independence for this institution.
2. Violent actions against the accused can be studied as an example of the obstacles with personalized angle. Acting violently against the accused is not permitted by law, but when the perpetrators are not charged or punished, they are supported by law. Torture, physical and emotional pressure inflicted upon the accused to extract a forced confession, are examples of such violence. Such cruel behaviour has been practiced during the past 33 years despite Article 33 of the Constitution forbidding such acts. Therefore, in theory, the accused's rights are instructed to be respected but, in practice, based on the personal preferences and approval from the central powers dominating the judicial system, these principles are not being practiced. Article 168 orders the respect of the political and press security of the accused, but in practice, based on the personal preferences of the central powers, the "political crime" is not identified in the law and therefore the principles mentioned in Article 168 are muted. There are many other examples about this subject which are beyond the scope of this paper.

## SOLUTION

In order to fix the structural and theoretical obstacles in the judicial system, we need to change the current Constitution. Independence of the judicial system will happen when this Constitution changes. The articles regarding the judicial system have direct connections to those about the Supreme Leader. In such a harmonized collection, there is no recourse to practice the principles of independence of the judges and lawyers.

In addition, even if we imagine that the judicial system has its independence intact, it still has to practice the formal civil and criminal laws of the country. However, there are many elements in the law which are incongruent with personal freedoms and human rights. Shari'a has been identified as the main source of legislation as per Article 4 of the Constitution. Therefore, in many cases, punishments such as amputation, execution and lashings are presently suggested in Iran's body of law books, leaving the judges with no choice except to enforce them. Also, based on the same law, the age of criminal responsibility for girls is as low as nine. There are many examples of legalizing violence and discrimination.

The experience gained in the past 33 years concerning the unsuccessful function of the judiciary has proven that there is no way to find a solution within the current system. It is not possible to defend a system which does not respect human rights. Changing Constitutional Law is the only solution. This judiciary system has obviously failed and currently it only works for the benefits of certain individuals or groups.



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