

Engaging Iran in Narratives of Democracy, Rule of Law and Shari'a

Roxane Farmanfarmanian

Donner Scholar of Transatlantic Relations, Centre of International Studies, University of Cambridge

Even as negotiations regarding the nuclear issue command public attention, the need to continue a constructive dialogue with the Islamic Republic of Iran concerning questions of human rights and the rule of law remains a critical aspect of engagement. Legitimizing change in the eyes of Iranian society can only take place within the structure of its existing legal system, and through recognised actors as wielders of official power. Furthering any agenda that includes notions of human rights and democracy-building remains constrained, therefore, within that segment of Iranian jurisprudence in which the meaning and scope of Shari'a and Constitutional law are actively being debated. In Iran, that segment, despite the religiously conservative leanings of the current President, Mahmoud Ahmadinejad, remains unexpectedly vibrant, and the elasticity of interpretation broader than might be expected.

The observation made by J.S. Schacht in 1964 in his *Introduction to Islamic Law*, that "*fiqh* remains an important, if not the most important element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas" still rings true today.¹ *Fiqh*, the system of religious ethical commands and precepts that under girds the Shari'a code, and which is therefore a normative system, has no single accepted interpretive form, and as such, is a malleable legal doctrine. According to M. Fatemi of the Faculty of Law at Tehran's Shahid Beheshti University, in order to appraise the justifiability of a normative system, the social norms of conduct can "be judged independently by reason".² This suggests that the opportunity for change within the Iranian system lies in the development of critical new approaches to existing jurisprudence according to three criteria:

1. Re-examining the terms of debate to clarify the basic assumptions that may themselves contribute to confusion and reduce progress in aligning Shari'a with a coherent procedural system of legal codes and procedures - rule of law. In the dialectic that currently is taking place in Iran concerning procedural rules of law, the problematic is often expressed in terms of the regulation of social order, Shi'a duties, and justice. To determine where the jurisprudence of Shari'a and the principles and praxis of rule of law can be brought into greater alignment. However, the definition of the substantive aims of each needs to be examined and agreed upon. In the case of the rule of law, formal general legal rules need to be specified so as to obviate confusion within the debate concerning which code is being addressed: e.g. natural law, customary law, human rights law or some other code of governance. The same applies in the determination of the procedural aspects of Shari'a, which, in the absence of codified law, according to article 167 of the Iranian Constitution, draws upon "authoritative Islamic sources and authentic fatwas". However, debate concerning which fatwas and whose fatwas must be considered authoritative continues, implying that there is still no procedural moral principle based on the explicit expression of promulgated law by which to justify legal practice, leaving it open to individual interpretation and

¹ J.S. Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, repr. 1986), p. 1, quoted in S. M. G. S. Fatemi, 'Who is a Refugee? Comparison of a Misconstrued Concept in International Human Rights, Shi'i Fiqh and the Iranian Legal System', *International Journal of Human Rights*, Vol 9 (2) June 2005, pp. 183-223.

² Fatemi, *ibid*, p. 196.

possible abuse. This suggests that questions such as justice (and justice-seeking), need to be codified into content neutral procedures to establish a functional basis upon which Shari'a law can be brought into alignment with the Shi'ite principle of '*qubh al-'iqab bela bayan*', which disallows punishment unless it is morally and legally justified through the explicit expression of established law. The discourse of preference that establishes authority for certain fatwas over others, must be recognised as the operative mechanism for establishing such codification, since precedence is not a legally recognised aspect of legal rule-making in Shari'a law.

2. Identifying those issues in which contradictions within the codification of Constitutional law reveal openings for liberal legal interpretation. For example, the Constitution is based on two separate legal principles. Article 4 establishes Islam as the basis of the Iranian system, that is, no laws or regulations may contravene Islamic criteria. In addition, Article 177 states that this aspect may not be changed and is not amendable. However, a second legal principle is codified in Article 6, which establishes the Iranian polity as based on public opinion. This is further guaranteed by Article 56, in which self-determination is granted by God as a divine right. These two pillars, Islamism and Republicanism often lead to contradictions in practice, and are the basis of intense debate concerning the maximalist view of Islamic legal rules (in which the duties of believers are privileged) versus the maximalist view of the state (in which the rights of citizens are privileged). This suggests that the discourse of political culture is ongoing, and that opportunity to further republicanism as a legal framework for ensuring such principles as social justice, minority rights, and the role of representative decision-making can be encouraged.
3. Focusing on issues which are already showing areas of the law to be adaptive to the necessities of social justice. Iran is already party to several important international instruments on human rights, such as the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. At the same time, reforms in the civil code have led to significant legal progress, such as in the area of marriage contracts, which now allow women to litigate in the event of divorce, and in which women judges now are included as consultants within judicial proceedings. Iran, however, is not party to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), the Council of Experts having ruled that this is counter to Shari'a law. Nonetheless, CEDAW has prompted widespread discussion within Iranian society, highlighting contradictions that exist between traditional and modern socialisation as expressed in the laws of rights and duties. The former rejects accession based on the idea that separation between men and women is desirable, and that CEDAW's central concept of non-discrimination simply is not applicable to Islamic interpretation of the different functions of men and women in society. The latter argues for accession on the grounds that it would necessitate obligation to international norms and engage Iran as a participant in the safeguarding of international women's rights. In this debate, the approaches of other Islamic nations, such as Egypt and Jordan, in acceding to CEDAW but with reservations, can be revealing, and despite their utilisation of Sunni legal rules that are different than those of Shari'a used in Iran, could offer important ideas. However, much of the legal critique that decision-makers in Iran in fact receive concerning theoretical and methodological legal approaches in other Islamic states is too frequently processed through Western media and legal discourse, rather than being exchanged directly. This can and should be remedied, as an inter-Islamic sphere for legal dialogue can be expected to offer not only opportunities for new approaches to thinking, but procedural mechanisms by which such approaches can be implemented indigenously.

Iran is a country that is experiencing rapid changes in such key areas as legal doctrine, religious interpretation and political reform. A robust discourse both surrounds these changes and gives them direction. To be part of that discourse, such that Iran's process of interlacing modernisation and democratisation within the structure of Shari'a law can take place as part of a larger dialogue on international legal norms, involves both an understanding of the jurisprudential questions that are being debated, and a willingness to engage with those legal issues which are viewed as important within Iran at the moment. Furthermore, in view of today's War on Terror, it is clear that any system, Iran's included, that recognises itself to be insecure due to outside pressure, becomes internally less tolerant and flexible. Thus, engagement can and must serve not only to influence the nature of the debate that is currently addressing the relationship between Shari'a and the rule of law in Iran, but to ensure constructive contact at a variety of levels.

Recommendations:

- Identify those areas where Shari'a jurisprudence and articulated legal principles and practices - rule of law - manifest common, universally accepted structures and praxis.
- Construct critiques of existing legal discourse that focus on the relationship between rule of law and Shari'a, rather than on political misuse of law.
- Address those issues in which internal debates of Shari'a law reveal areas of improvement in social justice, such as family law and women's rights
- Legitimate change through dialogue within the religious intellectual cadre
- Facilitate greater exchange of legal critique among different Middle East systems, which can offer each other concrete theoretical and methodological models despite their being differentiated by Shi'a versus Sunni jurisprudential approaches.

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