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Chapter 28

Iran

A Clash of Two Legal Cultures?

Reza Banakar and Keyvan Ziaee

I. Introduction

Since the 1979 Revolution, the clerical regime in Iran has been limiting the legal profession's autonomy by preventing members of the Iranian Bar Association (IBA) from freely electing their Board of Directors and, by establishing a new body of lawyers – the Legal Advisers of the Judiciary – to contest the IBA's professional monopoly. Clerics have even attempted to bring the legal profession under the control of the Ministry of Justice and merge it with the legal advisers. The IBA's struggle to remain a civil society organisation independent of the judiciary offers a vantage point from which to explore the role of the legal profession in Iranian society and the legal system of the Islamic Republic. Why does the Iranian judiciary oppose an independent legal profession, and why does the profession refuse to capitulate? What are the implications of this ongoing conflict for the legal order of the Islamic Republic, whose political elite consists mainly of Islamic jurists? What are the socio-cultural consequences of undermining the integrity and autonomy of the legal profession? These questions will guide our inquiry.

After discussing the IBA's development before and after the 1979 Revolution, we describe how practising attorneys view the IBA, advocacy, legal practice, legal services and their troubled relationship with the judiciary. They recount the obstacles they encounter within a politicised judicial order and explain how they preserve professional integrity within a legal system that lacks the public's confidence. We conclude by arguing that the Islamic Republic's attempt to subordinate the legal profession to administrative and ideological control by the judiciary reflects the clash of two legal cultures. Iranian judges reconstruct and apply Islamic jurisprudence (*fiqh*) as part of their efforts to deliver substantive justice within a codified legal system, while IBA attorneys understand and seek to practise law consistent with the ideals of due process, certainty and uniformity in legal decision-making.

This study is based on semi-structured approximately hour-long interviews with 23 men and 18 women conducted in Farsi in Tehran between 2012 and 2016: 32 IBA members, four legal advisers of the judiciary, four judges (three retired), and one managing director of a law firm. A number of shorter interviews (26 in total) asked ordinary Iranians about their knowledge of lawyers' work and views on and experience of legal services.

II. The Evolution of the Legal Profession in Iran

A. The Legal Profession's Early Years

The contours of a legal profession began to take shape when a modern judicial system gradually emerged following the 1906 Constitutional Revolution. The 1911 Law of Judiciary Organisation laid the foundation for a secular judicial hierarchy inspired by the European civil law tradition, especially the French legal system. It defined the function of judges (distinguishing them from prosecutors¹) and introduced the First Charter of Attorneyship, which required lawyers to pass a Bar examination before entering legal practice (Nayyeri 2012: 3). The first Bar Association, established in 1921, enjoyed neither financial nor legal independence, operating under the Ministry of Justice, which also issued, renewed and revoked attorneys' licences.² The new judiciary, wary of an organised body of attorneys, neither tolerated an independent Bar Association nor encouraged the growth of the legal profession (Mohammadi 2008: 71). The Minister of Justice, Ali Akbar Dāvar, a Swiss-educated lawyer and influential statesman during Reza Shah's reign (1925–41), was an exception. He appointed a committee that drafted new laws, compiled legal codes, established courts and selected judges from qualified Islamic jurists and government officials.³ He not only regarded advocacy favourably but also considered a Bar Association, capable of organising and training competent lawyers, to be essential to the effective operation of a modern legal system. He thus actively encouraged 'the formation of the association of lawyers, albeit under the auspices of the

¹ Prior to 1906, Iran had a dual court system consisting of secular *urf* (or *orfi*) courts, dealing with matters of public order, and Sharia courts, largely concerned with religious matters and private law disputes. Neither distinguished between judge and prosecutor. For a discussion see Banakar 2018.

² Iranian Bar Association Union (2003) 'Complete *History of Law Practice in Iran*' (Tārikhcheye Kāmele Vekālat dar Iran) www.iranbar.com/pe191.php.

³ 'Dāvar, Ali-Akbar' *Encyclopaedia Iranica* at www.iranicaonline.org/articles/davar-ali-akbar.

Ministry of Justice' in 1930 (Enayat 2011: 133). Dāvar is widely considered the architect of the modern Iranian legal system.

The Law of Attorneyship, adopted in 1937, granted legal personality to the Bar Association for the first time. Although it was now considered financially independent, some organisational arrangements, such as the appointment of its Board of Directors, remained under Ministry of Justice control. Another 15 years had to elapse before the IBA was granted full independence. Dr Mohammad Mosaddeq, the Prime Minister of Iran at the time and himself a lawyer, signed the 'Bill of Independence of the Iranian Bar Association' in 1953, terminating the judiciary's administration of the IBA. The Law of Independence stipulated that the IBA was an independent body with a legal personality, to be established in the jurisdiction of every Provincial Court. The IBA consisted of a General Assembly, a Board of Directors elected by attorneys through ballots, and 'Attorneys' Disciplinary Prosecutor Office and Disciplinary Courts' (Nayyeri 2012: 4). Initially, there were only three Bar Associations: the Central Bar Association in Tehran and the Tabriz and Shiraz Bar Associations.⁴ These operated as independent professional bodies for the next 25 years, electing their own Board members, granting and revoking licences, and processing complaints of lawyer misconduct without the interference of the judiciary until the 1979 Revolution.

B. After the 1979 Revolution

At the top of the political agenda of the Islamic groups that took power after the revolution was Islamisation of laws and legal institutions. A new Constitution was drafted requiring that all laws be consistent with 'Islamic criteria', after which the judiciary was dismantled and its members replaced by Islamic jurists and clerics.⁵ At the same time, 'all female judges were dismissed or assigned to clerical and administrative positions' (Tavassolian 2012: 2), many

⁴ According to the Iranian Bar Associations Union (2016), created in 2003 to coordinate local Bar Associations, the number has increased to 20.

⁵ Before the 1979 Revolution, Iran was a mixed jurisdiction whose private law melded ideas from the French Civil Code 1804 and Islamic law. Although the criminal law appeared Islamic, it had largely abandoned Sharia principles in favour of civil law institutions and procedures. Those areas of law, regarded as 'un-Islamic', such as criminal and family law, were fundamentally revised after the 1979 Revolution to conform to Sharia. Nevertheless, the legal system of the Islamic Republic continues to bear the hallmarks of its precursor, combining elements from Islamic and civil law traditions.

attorneys disbarred, and the majority of the IBA Board of Directors arrested and imprisoned (LCHR 1993).⁶ An attorney during this time recalled:

Many courts refused to allow attorneys to present cases and had put up a notice on their doors saying: ‘We are unable to receive lawyers’. This went on until the Constitution was amended in 1989, and article 35 stated that those appearing before any court had the right to be represented by attorneys.

The Supreme Council of the Judiciary reopened the IBA in 1984, although it revoked the right of members to elect its director.⁷ Instead, a new director was appointed directly by the judiciary to supervise the association (Nayeri 2012: 5–6). The decade following the 1979 Revolution, which coincided with the eight-year war of attrition between Iran and Iraq, was the hardest period for lawyers in Iran: many attorneys were purged, some were executed, and others fled the country or went into hiding. The courts denied defendants legal counsel and made arbitrary judgments, systematically violating the principles of Islamic law as well as the human rights of the political opponents of the regime. During this time, lawyers were too intimidated to appear before the courts. As the Iran-Iraq war ended and the internal political situation stabilised, a Bill was submitted to Parliament in 1990 declaring that parties to a lawsuit had the right to appoint ‘an attorney at law’, and all courts were obliged to receive them. This provoked an objection from the powerful Council of Guardians, which is responsible for ensuring the compatibility of all new legislation with the principles of Islam. Eventually, a compromise was reached by deleting ‘at law’ after ‘attorney’. By replacing ‘attorney at law’ (*vakīl-e dādgūstarī*) with ‘attorney’ (*vakīl*), Parliament established that legal representation did not need to be conducted by a qualified lawyer, or legal counsel, who had passed the Bar: anyone could represent any case in court. This view, which is consistent with Sharia, continues to inform the attitudes of many judges towards legal counsel.

With the victory of Mahmoud Ahmadinejad in the 2005 presidential elections, hard-line conservatives dominated the political scene once again and started to curtail the limited freedoms some civil society organisations, like the IBA, had enjoyed under president Khatami’s reformist government (1997-2005). The new government approved ‘the draft Bill of Formal Attorneyship, which [increased] Government supervision over the Iranian Bar Association’

⁶ There were no female judges in Iran until 1970, when five women were appointed to the bench. Only 45 of the 2053 district judges in 1976 were female (Butler and Levasseur 1976: 18, 30). We have no statistics on the number of attorneys at that time, but only 28 were women.

⁷ ‘Iranian bar association seeks greater independence’ (7 March) www.al-monitor.com/pulse/originals/2014/03/iran-bar-association-lawyer-independence.html.

(SRRI 2013: 7). An open letter signed by 35 Iranian human rights lawyers criticised the Bill for replacing the title ‘Bar Association’ with ‘Organisation of Attorneys’, demonstrating ‘the determination of the authorities to downgrade the position of the Bar from an independent body to a subordinate governmental organisation’ (IHRCC 2013). Moreover, the new Bill prescribed a ‘Supervisory Commission’, created by the Head of the Judiciary to administer ‘confirmation of the elections, suspension and revocation of the licences of all attorneys, including even the directors of the bar, appointment of the members of the Examining Committees, among other tasks (arts. 25-30)’. The Bill sought to increase governmental control over the IBA by allowing the judiciary to decide ‘who can become a lawyer, how they should be disciplined and whether or not they should be able to continue their practices’. This Bill was suspended before the 2013 presidential elections, but ‘several amended versions of the draft Bill were submitted to Parliament in September 2014’, reasserting the Islamic Republic’s commitment to curtail the IBA’s independence (SRRI 2015: 7–8).

Although this occurred during Ahmadinezhad’s term, the idea of the Bill originated in the judiciary, which often disagreed with him (Hujjati 2014). During his last days in office, he ordered his Cabinet to shelve the bill in what appeared to be an attack on the judiciary, producing a strong reaction. Sadeq Larijani, head of the judiciary, condemned Ahmadinezhad for acting on a ‘childish grudge’ rather than displaying statesmanship (ICHRI 2013). But this was not the end of the story. Immediately after Larijani’s retort, a member of the parliamentary commission reviewing the Bill declared it was still being considered. He explained that ‘the President’s viewpoint is not for the Bill to be completely removed from the review agenda of the Cabinet commissions [but to eliminate] certain articles in the Bill that allow the judiciary to interfere in the civil organisation of the legal profession’ (ICHRI 2013). In short, a revised version of this Bill was submitted to Parliament in 2015. The Legal and Judicial Commission of Parliament considered and rejected the Bill in July 2017 since it found no reason for amending the existing law (IRINN 2017). Thus, the status quo with the already existing restrictions on the IBA independence was restored.

C. The Legal Advisers of the Judiciary (Article 187)

One attorney told us that when the Islamic Republic confronts civil society organisations and associations like the IBA, which persist in questioning the legitimacy of the clerical regime, it resorts to a strategy of duplicating the defiant organisation. Given time and state support, the replica will assimilate the nonconformist organisation. This was how the clerical regime sought

to neutralise the IBA. A new body of lawyers was created by the judiciary in 2001 and ‘authorised to present cases in court’ under Article 187 of the Law of Third Economic, Social and Cultural Development Plan of 2000 (International Bar Association 2007: 9). This group is officially known as the Legal Advisers of the Judiciary. The Centre for Legal Advisers and Experts of the Judiciary trains and examines its own members and issues and renews their licences to practise.

IBA members referred to legal advisers somewhat disparagingly as ‘the 187s’, who had entered by the back door because their training and examinations were not as rigorous as those of the IBA. Legal advisers must pass one qualifying examination and complete a six-month pupillage, whereas IBA attorneys must pass several examinations and complete an 18-month traineeship under the supervision of a lawyer with more than 10 years’ experience. (As we shall see, the attorneys are also very critical of their own pupillage.) Some of our attorneys questioned the competence of the 187-legal advisers, calling their training insufficient to instil the skills to manage complex cases. Others felt that though advisers initially lacked skill, they improved over time and could perform as well as IBA attorneys. But all our IBA attorneys were concerned about legal advisers’ subordination to the judiciary, which according to them impeded the advisers’ professional autonomy. Many also wondered how legal advisers’ connection with the judiciary influenced clients’ choice of counsel:

Some clients opt for 187-advisors rather than for IBA attorneys, because they believe that their case will benefit from the advisors’ connections with the judiciary. This belief channels certain cases in the direction of advisors.

The Iranian government defended its decision to establish the legal advisers’ body, arguing that the IBA had used its monopoly on issuing licences to restrict the number of new entrants into legal practice. The IBA rejected this allegation, explaining that, under the Law of Conditions for Obtaining Attorney’s Licence Article 1, it was obliged to hold the Bar exam at least once a year (Nayyeri 2012: 13). Moreover, the number of trainees admitted annually was set by ‘a special Commission with only one member representing the bar’s interests’. Had the judiciary been concerned about the shortage of lawyers, they could have raised the number of IBA trainees ‘instead of creating a new breed of dependent lawyers’.

Unlike the IBA, which has an independent procedure for renewing licences, legal advisers’ permits are renewed with the approval of the judiciary. This was regarded as highly problematic by most of our interviewees. One attorney reported that ‘IBA members don’t fear their licences would be revoked at the end of the year because they might have defended a

dissident or given interviews, but the judiciary can revoke legal advisers' licences at will'.⁸ It is possible that some of the objections voiced by attorneys were partly motivated by the fact that legal advisers were perceived as competitors in a tight market for legal services. However, the attorneys were also genuinely concerned about legal advisers' professional autonomy and political independence from the judiciary. The International Bar Association (2007: 10–11) voiced similar unease about legal advisers operating under the control and scrutiny of the judiciary. According to them, it represented an encroachment on the independence of lawyers and the legal profession as well as an impairment of the autonomy and impartiality of the judicial system, ultimately, undermining 'public confidence in the law and in the work of lawyers'.

III. Working as an Attorney

Very few Iranian lawyers specialise in one area of law, and most take any case that comes along. This reflects the underdeveloped state of the market, which generates insufficient legal work in different areas to ensure a steady demand for specialised services. Nevertheless, the number of lawyers has tripled over the last decade, from 20,000 to about 60,000 (over 20,000 legal advisers and 40,000 IBA members).⁹ In addition, there are about 10,000 IBA trainees. In 2016, Iran's population was just over 80 million, which means that the ratio of population per lawyer (not including the judiciary and notaries) was 1:1,333. According to an attorney who used to work for the IBA's public relations arm, only 12,000 of the 20,000 registered lawyers were in good standing and regularly paid their dues; 4–5,000 of those were women.¹⁰

Several interviewees reported a mismatch between the conditions affecting lawyering and the requirements of Iranian society: 'It is true that the number of lawyers might be small considering the size of the population, but we must also remember that not many people use lawyers'. The attorneys argued that the quality of lawyering had deteriorated and lawyers were

⁸ See the case of *Nematollahi Gonabadi Order of Sufi Dervishes*. Two 187-legal advisers who had represented sufi dervishes had their licences 'revoked by the Legal Advisors' Centre, in September 2008' (Nayeri 2012). Although *Nematollahi Gonabadi* dervishes are Shi'a Muslims, the clerical regime does not approve their practices, which are inspired by Sufi philosophy. Their members are persecuted and their houses of worship destroyed by the Islamic Republic.

⁹ The figures are interviewees' estimates for Tehran (which has the highest density of lawyers); they tally with those provided by other interviews regarding the Central IBA, covering Tehran and a few neighbouring provinces.

¹⁰ A retired judge told us there were about 10,000 judges in 2016.

no longer respected because of a few ‘bad apples’. While most lawyers exhibited professional integrity, some acted as ‘chic brokers’ or classy agents, whose primary task was to negotiate and ‘fix’ deals – even at the expense undermining the law. Neither the public nor the authorities, and at times not even other IBA attorneys, trusted lawyers’ professionalism.

Attorneys also complained about the negative image of lawyers as fraudsters disseminated through soap operas produced by *Sedā va Simā*, the state-run television network, over the last decade.¹¹ True, one attorney said, there were fraudulent practitioners in the IBA, but they were a very small group compared to the overwhelming majority of attorneys who diligently served their clients and the law. He also pointed out that some judges violated their code of conduct, but ‘you would never find a TV series in which the judge breaks the law’.

A. Attorneys’ View of the IBA

The IBA is responsible for issuing and renewing licences, investigating allegations of misconduct against members, disciplining violations of its code of conduct, and providing workshops, courses and lectures for trainee lawyers. According to an IBA manager, in December 2016 the Central IBA (representing Tehran and a few other provinces in the north of Iran) had 28,694 members, 5,537 of them trainees. IBA statistics do not include gender, but all those we interviewed said the number of female lawyers has increased noticeably over the last two decades. Fewer than 20 per cent of members ever participate in the election of Directors which are arranged once every two years. One explanation is that attorneys feel alienated from their association, which they visit only to renew their licences or on the rare occasions when they are summoned to a disciplinary hearing. Otherwise, they have no idea about the IBA’s policy debates, concerns or plans. More importantly, they felt it avoided confrontation with the judiciary in order to ensure its survival and failed to oppose state officials who violated the rights of attorneys.

Some attorneys acknowledged that the IBA was constantly under political scrutiny and could not challenge the judiciary without jeopardising its limited independence. Others admitted that since the IBA was devoting all its resources to surviving, it had little time or energy to promote members’ welfare. Nevertheless, even those sympathising with the IBA’s

¹¹ We are dubious about the causal connection because not all Iranians watch soap operas, and not all watchers form a negative view of lawyers or even agree that they are shown in a poor light. For a discussion see Banakar and Ziaee 2018.

predicament and the political constraints under which it operated argued it should do much more to protect the legal rights of its members and ensure their general welfare.

Understandably, the IBA sees these problems differently. Amir Hussain-Abady explained that during his two terms on the Board of Directors, it had taken ‘every possible step available to it to uphold the IBA’s independence and safeguard the rights of its members’ (*Vekālat* 2011: 44). But since the IBA had to act discretely in seeking the release of detained attorneys, and the authorities often denied it a fair hearing or simply refused to grant any hearing, the Board appeared to do nothing to protect its members. This former Board member was admitting the IBA had very little symbolic capital to deploy in the field of power and had to work behind the scenes and through sympathetic political agents.

B. The Hostile Judiciary

‘The lawyer steps into the court,’ said a younger attorney in his early 30s, ‘and the judge thinks to himself: “here comes the enemy”’. An experienced female attorney agreed that ‘judges and attorneys [were] always set against each other’; both assumed a defensive posture, ‘raising their shields’ as soon as they faced each other in court, turning it ‘into a battle ground where a bizarre moral confrontation is played out between these two groups’. Attorneys were the underdog in this setting because they were ‘more vulnerable to the abuse of power’. Another attorney complained that not only the judges but also the entire court staff treated lawyers disrespectfully, something he had resisted:

I wrote a formal complaint last year and had it signed by 550 attorneys and submitted it to the Head of the Judiciary, which issued a directive urging the judges and court clerks to conduct themselves towards attorneys with due respect. But in practice, nothing happened. I can only guess that behind the scenes the judiciary approves of humiliating lawyers.

We were told repeatedly that the judiciary viewed IBA attorneys’ representations on behalf of defendants as obstructing the legal process. This negative view varied from court to court: although some judges would trust attorneys they knew, others would ‘call in your client, close the door behind them and tell them in confidence that they should get rid of you’. Several attorneys reported that the judge had either told their clients they did not need a lawyer or advised them to dismiss their legal representative in order to get a favourable judgment.

Our attorneys attributed judges’ animosity to either economic rivalry or legal and ideological training. Lawyers competed against each other and struggled collectively against 187-legal advisers in the market for legal services. Judges, by contrast, received a fixed salary.

Judges work very hard and have demanding duties, but they are paid less than some attorneys. Some judges joke about it openly, but others bottle it up and use it in court to make your life hell.

The retired judges we interviewed admitted the judiciary was hostile to lawyers, who they believed ‘fed parasitically on court decisions’, often earning considerably more than judges. However, they also claimed that hostility did not always have economic roots but could be provoked by what they perceived as attorneys’ ‘abuse of the law’ and ‘misrepresentations of right and wrong’.

Attorneys also attributed the tensions with judges to their different attitudes toward *fiqh* (Islamic jurisprudence). They argued that judges construed the law substantively, in light of social conditions and their understanding of justice and fairness, whereas attorneys were driven instrumentally to win their cases. The more experienced attorneys emphasised the ideological nature of legal interpretation and decision-making in Iranian courts, best revealed in authorities’ violations of defendants’ rights. They criticised judges’ attempts to construe the law in terms of *fiqh*, which precluded legal certainty about the outcome of cases. One senior lawyer argued that whereas defence attorneys had studied law, ‘most judges [had] studied *fiqh*’ and decided cases through *fiqh* ‘because of the conceptual training they [had] received at *howzah* (theological seminaries)’.¹² Judges regarded the procedural requirements of decision-making as ‘presentational’ (*tashrifātī*) and thus ‘superficial’. Their training encouraged them to make substantive decisions about what they believed to be right, preventing them from giving sufficient weight to the formal aspects of law. ‘If you object to them pointing out that correct legal decisions require following the correct legal procedures, they accuse you of looking for excuses to delay the proceeding’. Lawyers saw this as a form of ‘*qadi*-justice,’ a Weberian ideal-type of legal decision-making, which ‘knows no rational “rules of decision”’ (Weber 1978: 976). Notwithstanding our attorneys’ critique of the judiciary, it would be misleading to describe Iranian judges as Weberian *qadis* because they operate within a civil law system. In cases where they find themselves restricted by codified law, they turn to *fiqh* to safeguard the ideological framework that shapes their legal culture. The problem is that this methodology – employing *fiqh* within codified law – contains an ideological core not shared by the IBA attorneys we interviewed.

¹² Immediately after the 1979 Revolution, some Iranian judges were recruited from theological schools. But the new generation of judges have studied at law schools.

C. Fiqh

Sharia consists of primary sources, including the Qur'an and *Sunnah*,¹³ and secondary sources based on the consensus among Islamic jurists (*ijma*), analogy (*qiyas*) and reason (*aql*). The application of *ijtihad*¹⁴ enables Islamic jurists to employ independent reasoning to establish the secondary rulings of Sharia in accordance with the Quran and *Sunnah*. By contrast, *fiqh* reasoning makes interpretations consistent with what judges consider to be the requirements of time and place.¹⁵ In the context of Iranian law, however, the doctrine of *maslahat-e nezam*, ie expediency of the state, overrides all doctrinal considerations and effectively paves the way for secularisation of the Islamic Republic.¹⁶

The notion of *fiqh* arose in many interviews when attorneys reflected on how judges decided civil and criminal cases or talked about the judiciary's negative attitude toward lawyers and lawyering. One interviewee blamed the harsh sentencing practices of Iranian judges on their tendency to reason through '*fiqh*'. Another argued that 'most of our judges have studied *fiqh*' and 'expect to hear arguments based on *fiqh*'. Because defence lawyers had 'studied law and made their case in a *legal* language... we fail to communicate, and I fail to convince [the judge] of the validity of my argument'. One judge expressed this somewhat differently, arguing that the Iranian legal system was a hybrid of Sharia and civil law institutions and procedures:

Iranian legal order is a civil law system, structurally speaking. [It is] based on codified law. But when it comes to Islamic processing of cases... it becomes a common law system. I mean, the judge has the same approach, method and leeway as a common law judge. ... We have the foundations of common law in Shari'a.

It is questionable whether Iranian law has a common law core. Moreover, the judge's analogy ignores the fact that criminal law in common law jurisdictions is statutory, not judge-made. Nevertheless, he draws attention to an important aspect of judicial work: Iranian judges,

¹³ *Sunnah* is the system of customary rules and practices of the Islamic community based on the teachings and practices of the Prophet Muhammad.

¹⁴ *Ijtihad* refers to independent reasoning of jurists in cases where a legal issue cannot be satisfactorily resolved by applying existing rules and precedents (Burns 2014: 31). *Ijtihad* requires a command of Arabic (which most Iranians lack) and a mastery Islamic theology and jurisprudence. For an Iranian judge to reach the stage of *ijtihad*, he must become a recognised theologian and expert in exegesis of the sources of Islamic law.

¹⁵ Iranian law consists of 'a mixture of pre-Revolutionary sources, regulations laid down by new organs of State and materials drawn from Shi'a law, generating certain contradictions and confusion' (Owsia 1991: 37–38).

¹⁶ Ayatollah Khomeini (2006: 217) introduced the concept of *fiqh-ul maslahe* (expediency of *fiqhi*) into Shi'a jurisprudence in an attempt to address internal conflicts between Islamic jurists and the elected government. For a discussion of *maslahat-e nezam* and the secularisation of the sacred, see Ghobadzadeh (2013).

a few of whom have reached the stage of *ijtihād* (ie are recognised as Islamic jurists who may develop the law) are expected to manoeuvre between codified law and *fiqh*.

Part of Iranian law, such as family law, is linked to *fiqh*, whose application in other areas such as criminal law (which is directly formed by Sharia) is the subject of ongoing deliberation (Mousavian 2005). The new penal code, which became effective in 2013, draws its evidentiary requirements for the proof of crime from *fiqh*, including ‘judge’s knowledge’ in addition to confession, witness testimony and sworn oath. The knowledge of the judge is the insight or intuition he gains as he considers the evidence. The judge can disregard evidence submitted on oath because he believes it to be unreliable and instead base his judgment on his knowledge of the case. He can disregard codified law in search of the substantively correct decision. One of our attorneys described a divorce case in which the wife had claimed a substantial *mehrieh* (dowry), an amount specified in the marriage contract, payable by the husband to the wife on her request, typically in the event of divorce. Searching for a way to avoid paying *mehrieh*, the husband turned to an Ayatollah, a senior cleric and *mujtahid* well known for his hardline politics, requesting a religious ruling (*fatwa*) on *mehrieh*.

In contravention of the codified family law, which recognises *mehrieh* without restricting its amount, [the Ayatollah] issued a *fatwa* declaring payment of *this* [substantial] amount of *mehrieh* to be prohibited and treated as sinful (*harām*). The judge...disregarded the codified valid family law and, instead, made a ruling based on [the Ayatollah’s] *fatwa*.¹⁷

Whereas Iranian judges might explain this as the leeway permitted by *fiqh*, the attorney representing the wife saw it as an arbitrary decision violating codified law. He felt it was unjust because he had no way of anticipating that a *fatwa* would restrict *mehrieh* and a judge would adopt this religious ruling to override codified law.¹⁸

D. The Selection and Training of Judges

To explore the roots of this hostility, we need to consider how Iranian judges are selected and expected to behave. According to the 1982 Law on the Qualifications for the Appointment of Judges, only a man who has faith, is just, and possesses ‘a practical commitment to Islamic

¹⁷ A *fatwa*, issued by an Islamic jurist (a *mufti*, a Grand Ayatollah or a so-called *Maraj’ e-Taghlid*), normally consists of a verdict on a question or a response to a specific circumstance that has not previously been subjected to legal scrutiny. It is not binding ‘on the person or persons to whom [it is] addressed, unless it is issued by a court in a case under its consideration, in which case the decision would carry a binding force’ (Kamali 2012: 162).

¹⁸ The overwhelming majority of attorneys we interviewed were critical of family law and claimed that they avoided family law disputes. For a discussion on Iranian family law see Banakar and Ziaee 2018.

principles and loyalty to the system of the Islamic Republic' may be considered for appointment as a judge or prosecutor (Official Gazette 1982). The candidate also must be recognised as *mujtahid* by the judiciary.¹⁹ If not enough applicants have reached *ijtihad*, the judiciary may select judges from law school graduates, religious seminaries (*howzah*) and theological faculties (Tavassolian 2012: 2–3). In the early 1980s, when the judiciary was purged, some clerics were appointed to the bench even though they had been trained at religious seminaries, where they were taught to construe Sharia through the ideological lens of the Islamic regime.²⁰ Today, however, most judges have been trained at law schools, although one attorney noted important differences between the outlooks of lawyers and judges.

When discussing judges with colleagues, we wonder where they studied law; obviously not in the same schools as we did. Their overall understanding of the law and the way they construe it is strikingly different from our understanding and interpretations of it, but you must consider one thing: in Iran, a judge's interpretation in certain cases may be guided by his personal inclination. ... Some legal decisions appear to have been made in an arbitrary way. The judge can always say that it is *his* interpretation of the law. And you can't argue with the judge.

Several attorneys made similar statements about the judges' tendency to base their decisions on 'personal opinion'. What they perceive as arbitrary decision-making, however, is one of the consequences of the application of *fiqh*.

Candidates for judgeships are carefully vetted by the Supreme Selection Council and Ministry of Intelligence through the *gozinesh* (selection) process (IHRDC 2015: 37). Moreover, to ensure judges' adherence to the ideologically correct interpretation of Islamic jurisprudence, the judiciary has been operating a special school for training judges since 1982. The recruitment procedure through *gozinesh* and subsequent training create a socio-politically homogeneous body of men, which contrasts sharply with the more diverse group of attorneys. A female lawyer explained that although she could not 'claim that membership of the IBA [was] socially and politically homogeneous', she was certain 'that all judges belong to one group. The IBA attorneys might be religious or secular, republican or royalist and so on, but judges share the same basic ideological and religious views'. Several attorneys maintained that judges come from the 'lower classes' or social groups without influence before the revolution, which was why they had a chip on their shoulder. A female attorney described judges as 'a very conservative group of people', who 'were brought up in very traditional and religious

¹⁹ A *mujtahid* is an Islamic scholar who has reached the stage of *ijtihad*.

²⁰ The Iranian government recruited 1,000 judges from graduates and students of theological seminaries in 1980, a number that had risen to 2,000 by 1989 (LCHR 1993).

environments or [had] moved from small villages to cities and become judges’, in contrast with IBA attorneys, who were mainly from middle-class backgrounds.²¹

Another interviewee offered a different view of judges, arguing that the IBA attorneys’ training was ‘scientific,’ whereas judges’ training involved ‘a lot of ideological, political and theological instruction’. Although this instruction had been moderated over time, judges’ training continued to differ from the IBA attorneys’ scientific approach to law. This attorney added that judges also were distinguished by their religiosity: ‘they have to be religious to get into the system’. Another attorney, who teaches law school part time, claimed she could ‘spot’ potential judges among her students by a ‘mindset’ that disposed them to joining the judiciary. According to her, however, not all judges came from a religious background. Some ‘had failed the bar exam and couldn’t become attorneys’, which tainted their attitude towards attorneys.

Our interviews with IBA attorneys reflect only *their* views of a dysfunctional relationship with judges. It is reasonable to assume the judiciary experiences the daily functioning of courts differently. Only four of our interviewees had had served on the bench, and two were practising as attorneys when interviewed. One pointed to the caseloads, explaining that the number of cases judges must decide every month had increased perhaps tenfold compared to when he presided in pre-revolutionary courts (Banakar 2016: 67). Judges who agreed to speak to us insisted there were no differences between IBA attorneys and legal advisers, who were treated equally and with due respect. However, one expressed frustration with ‘some defence lawyers who come up with irrelevant arguments which take the court’s time and delay proceedings’. His court processed 120 cases per month; on the day he was interviewed he was hearing six, not a heavy caseload compared to some family courts, which can hear up to double that number, according to the Attorney General (ISNA 2017). But when asked about the nature of his caseload, this judge said only about 10 per cent were straightforward cases, while 90 per cent were complicated and time-consuming.

Most of our cases are voluminous, and since we are inundated with work, we don’t get the time to study them carefully before the hearing. We go through them summarily when we set the date for hearing cases, but otherwise we use our general overview of cases together with the details which are discussed when they are heard in court, to make a judgement.

The IBA attorneys were critical of judges for not reading cases before a hearing, blaming this lack of careful consideration for many strange and incorrect legal decisions.

²¹ For a more comprehensive description of female attorneys see Banakar and Ziaee 2018.

E. Corruption

Many attorneys we interviewed talked openly about corruption, suggesting it was widely discussed both within and outside the legal system. A young attorney saw corruption as an inescapable part of legal practice, saying in a matter-of-fact tone that ‘in a lawsuit which is worth billions of Toman,²² you won’t get anywhere without lubricating the wheels of justice’ by paying off officials and judges. ‘As soon as the value of your case exceeds an amount, you have to pay’. Another attorney claimed that she had had ‘a few cases where the judge directly asks for money to deliver his judgement’. The senior judges were often not involved in this type of bribery, but the others were all corrupt, especially court experts (*karshenas-e dadgah*). A few attorneys refrained from accusing all judges of corruption, stressing that some could not be bribed while adding that corrupt judges severely undermined the public’s confidence in the entire system. Others insisted the entire legal system was ‘corrupt through and through’ and the judiciary responsible for corrupting the legal profession.

If there are corrupt attorneys, it is because they are forced into corruption. If our judges decided cases on the basis of the law, you couldn’t resort to bribery. But that’s not the case and when litigating a lawsuit, you are afraid that the other party might have paid off the judge.

A female attorney explained that upholding the code of professional conduct in an environment where corrupt practices are the norm exerts enormous social and psychological pressure on attorneys: ‘Everyone thinks there is something wrong with you if you insist on working with integrity and refuse to lie or take bribes’.

One attorney argued that officers of the courts and those who run the judicial system were poorly paid. Because judges ‘know that some clients pay large legal fees for some of the private lawsuits they process’ they often ask how much attorneys are charging, expecting to receive ‘their share of legal fees’. Corruption can take more subtle forms, mediated by informal networks. Cronyism is endemic. One interviewee explained: ‘even attorneys can get their work done more quickly if their cousin happens to work in the courts’. Corruption had reached such proportions that the legal system could no longer feign ignorance. Recently, a few judges have been accused and fired and a few others transferred. The Attorney General acknowledged the scale of the problem by publicly admitting that some judges ‘become corrupt after serving a few years on the bench’ (ISNA 2017).

²² In December 2017 a billion Toman (10 billion riyal) was worth approximately US\$277,000.

F. Clients and Their Attitudes towards Legal Services

Our attorneys all mentioned that many Iranians who retained their services had little understanding of what a lawyer could reasonably achieve in their cases. Most were ‘convinced that their claim was right and the other party was in the wrong, so they would get very upset if you told them that they should pay back an amount of money or pay compensation to the other side’. Clients often expected a lawyer to ‘perform a miracle’, and ‘if you failed, they would turn on you, accusing you of all sorts of things, and saying that you haven’t done a thing for them, that you are incompetent or have colluded with the other side and so on and so forth. Then they would refuse to pay their remaining fees’, forcing many lawyers to get as much of their fees upfront as possible.

Our interviews suggested several explanations for the negative attitudes towards legal services. The idea of retaining legal counsel is unfamiliar to Iranians, most of whom do not seek lawyers’ advice when they encounter a legal problem but rather turn to friends and family.²³ We found repeated references to *farhang* (culture) and assertions that ‘Iranians have not developed a culture of law’. One interviewee argued that people had not internalised ‘the culture of using lawyers’ and would not approach them for advice, even when they knew they might lose property or business. However, interviews with members of the public revealed that some had become highly sceptical of lawyers, holding them in low esteem because of past experiences. This is consistent with studies from other countries finding that clients became disappointed when lawyers failed to meet their expectations (Hengstler 1993; Galanter 1998).

There is a broader cultural explanation for this collective behaviour: Iranians do not readily trust people they do not know (Banakar 2016). According to one legal adviser, official statistics show that only 7 per cent of those who appear in court are represented by a lawyer; and there was general agreement among those we interviewed that relatively few people retain legal representation when appearing in court. To avoid paying fees and entrusting business or private matters to a stranger, people turn to family and acquaintances, most of whom do not know the law well enough to resolve legal problems. An attorney said people consult anyone they think can draft a petition, and ‘sometimes they come to me with a complete package full of advice – advice from people who don’t know the law – and ... it is very difficult to convince them of what needs to be done in their case’. Another attorney said ‘clients aren’t likely to trust

²³ This point was raised by almost all the lawyers we interviewed, eg interview 2:1:18 in Banakar (2016: 92).

lawyers they don't already know, and if they turn to a lawyer they don't know, they keep secrets from him/her, [thereby] jeopardising their own case'.

G. Female Lawyers

Four main observations based on our interviews may help to understand the gendered dimensions of the Iranian legal system: (1) a number of female assistant judges (*dādyār*) serve in some courts, especially those dealing with custody cases, but all presiding judges are male, whereas lawyers are both male and female; (2) Iranian law is seen by most attorneys as biased against women, although it does not differentiate between lawyers by gender; (3) male lawyers are more easily accepted by the judiciary (although not necessarily more respected); (4) female attorneys, especially younger ones, are treated badly by police officers and court officials.

Within the legal system, we were told, no one openly objected to female lawyers.

No, it is subtler than that. In a lawsuit I had recently, my opposite was a female lawyer. I didn't really have a case and expected to lose, especially since she submitted a convincing argument. Then, something happened which I couldn't make sense of and still wonder about. The presiding judge – and he is a very decent and respected judge – suddenly turned against the female lawyer and decided in my favour. It was almost as if he just wanted to make a point to the female attorney that in his court *he* decided.

Another male attorney saw little subtlety in the treatment of female lawyers, claiming that 'the all-male judiciary' saw them not as lawyers but as 'sexual objects'. A young female attorney, who combined practising and teaching law, did not see the discriminatory treatment of female lawyers as specific to the legal system:

Even when I teach at the university, I see students taking male lecturers more seriously. ... Also, clients think that male lawyers are more capable and can do things that women lawyers can't, [which is why clients] trust female attorneys less. You find the same thing in courts. Judges hear male lawyers differently.

A female 187-legal adviser, who also argued categorically that judges treated male and female attorneys differently, claimed she had often heard from female colleagues that:

The judge had interrupted their presentation during the hearing and told them, for example, 'Be quiet! Your voice wrecks my nerves', or 'First, go out and fix your *hijab*, then come and speak'. I saw this myself in a hearing when the judge made a gesture with his hand telling a woman lawyer to be quiet.

She added that although judges verbally abused both male and female attorneys, abuse directed at female lawyers targeted their gender.

Women lawyers also face cultural obstacles external to the legal system. According to one interviewee, social attitudes to women in public life have improved, but many – both men and women – continue to hold traditional views of gender roles:

[Iranian] men don't like to see their wives succeed in their careers. They believe that a woman who earns a living and is publicly successful in her work must fail in her private life. A very traditional view of gender roles prevails, and a lot of people believe that the man is the breadwinner in the family. That is why a lot of women don't take their careers seriously and why many female lawyers discontinue their practice as soon as they get married and have children.

Although the numbers of female law students, trainees and lawyers aged 25–35 years old have increased, few women remain in practice. The prevailing gendered social attitudes to women in the public sphere hinder many female lawyers from pursuing a successful public career, whilst simultaneously undermining the public's confidence in their competence. One of our male attorneys said: 'society doesn't normally believe enough in female lawyers' ability to put its trust in them'. Several attorneys reported that many clients were wary of entrusting their cases to female lawyers. 'Even women trust male lawyers more than female lawyers'. The public believed that 'women can't successfully handle a case which needs a show of aggression, confronting the other party and the judge, making connections and paying bribes and so on'.

H. Law Firms

Most 'law firms' do not have a corporate structure or partners and associates but are groups of sole practitioners working side by side. A few corporate law firms are operated by small groups of international lawyers, often educated and trained abroad, associated with foreign international law firms, dealing exclusively with shipping and international trade law.

Iranian attorneys are reluctant to work collectively. One international lawyer explained: 'lawyers who have worked as sole practitioners and have been their own boss and managed their business as it suits them throughout their career, find it very difficult to work in a law firm which runs like an office and where you have to prove your worth'. What appear to outsiders as law firms often are just a handful of lawyers who have come together 'either because they are friends and know and respect each other, or because they have a common interest'.

There are two types of organisation. The first, officially called a 'legal bureau' (*moassess-e hūghūghī*), is a recent innovation created by managers who may not be lawyers. These act primarily as middlemen, providing 'lawyer-on-demand' services by allocating cases to a loose network of freelance lawyers. The IBA attorneys we interviewed were very critical

of these forms, claiming no self-respecting lawyer would work for them. Our respondents said legal bureaus were managed unprofessionally, exploited trainee lawyers or new entrants desperate for work, and allowed unethical practices, such as giving potential clients misleading information. Managers, who often were not experienced lawyers and thus neither understood law practice nor were constrained by lawyers' professional codes of conduct, would promise anything to attract clients. The IBA attorneys saw the rise of legal bureaus as yet another effort by the judiciary to undermine their legal work. The second category of law firm is operated collectively by younger lawyers to strengthen their network of business contacts, improve access to the legal market, create a higher profile that attracts clients and, most importantly, share expenses. The IBA attorneys viewed this type of law firm positively, and many thought the IBA should help them overcome obstacles. But they generally agreed that as long as Iranian lawyers did not specialise (partly a function of the underdeveloped market) there would be little incentive to create law firms.

I. Legal Education and Training

Legal education leading to an LLB involves four years of intensive study of some 70 subjects. Because the curriculum 'reflects the religious nature of its legal system', it includes not only municipal and international law (organised along lines similar to Western curricula) but also subjects like Islamic education, Islamic morality, Islamic revolution, the history of Islam and even Arabic (Talaie 2004–05: 120, 127).

All our interviewees criticised the curriculum for devoting too much time to theory instead of helping students acquire legal skills. We heard repeatedly that they 'learn the academic basis of the law but not the practical reality of working as a lawyer', and 'anyone who studies law at university in Iran leaves without knowing the first thing about legal practice'. Some of the IBA attorneys were also critical of Islamic jurisprudence and Arabic,²⁴ feeling that neither was relevant to legal practice. This is surprising since mastering Islamic jurisprudence, which requires familiarity with Arabic texts, is essential for grasping how judges employ *fiqh* in forming a judgment and passing sentence. One attorney who teaches part time explained that law schools were aware of their failings, which could be addressed by

²⁴ Farsi (or Persian) is an Indo-European language, whereas Arabic is Semitic. Although they have borrowed vocabulary from each other, and Farsi uses a variant of the Arabic alphabet, they differ radically in grammar, syntax and morphology.

introducing clinical programmes; but the volume and number of subjects in the required curriculum left no time for teaching practical skills. Since 2007, Mofid University in Qom has been offering clinical programmes, but they remain embryonic. Some respondents contrasted the limited training of attorneys to the systematic training of judges, who regularly attend court hearings during their pupillage and continue their training on the bench by attending special courses and workshops.

After obtaining a law degree, those intending to practise must complete an 18-month pupillage and pass a qualifying examination. The pupillage must be served under an established practitioner with at least ten years' experience. Each month pupils must attend a lecture organised by the IBA as well as two court hearings, which they must report in writing; they must also write a research-based dissertation.

In practice, a senior member of the IBA said, this training scheme left much to be desired.

The training period consists basically of attending certain courts a number of times. ... If I am not mistaken, one month is family courts, then it is juvenile courts, then revolutionary courts, three months in the court of appeal, several months in private law courts and so on. ... I have seen very few courts which allow pupils to attend and observe and discuss matters with judges. Instead, courts send trainees off to the archives and give them a case to read and write a report. ... This doesn't provide sufficient training. The IBA... helps with teaching specialised skills to lawyers. There are also lectures and mooted workshops, but these revolve around academic themes and don't help much with developing your practical skills.

The negative attitude of judges was seen as an obstacle to teaching legal skills to IBA trainees. Some judges show their reluctance to have IBA pupils attend their hearings by instructing the court clerk to send them to the archives to read cases. By contrast, trainee judges enjoy the total support of presiding judges, who encourage them to observe court sessions and discuss legal issues. IBA trainees are dependent on their supervisors' willingness and ability to show them the ropes, but supervisors differ in how they mentor pupils. To make matters worse, there are no standards for mentoring and no assessment of pupils' progress.

Your supervisor might tell you that you may not attend client consultation sessions and you should not expect to have your own clients. I have come across supervisors who charged their pupils for a consultation. ... And no one would know if you have learnt anything during your pupillage. What counts is to pass your qualifying bar exam, which is also more theoretical and does not contain questions on legal practice. They might ask you to define, for example, various types of crime, but not how you would go about, say, winning a forfeiture case if your clients' property has been seized.

Attorneys were very critical of the IBA's pupillage programme, calling it a 'formality' that required 'going through the motions' rather than acquiring the skills needed to practise

law. As a result, lawyers begin their professional careers with very different experiences of advocacy and other legal work.

J. Codes of Professional Responsibility

While discussing the shortcomings of legal education, an international lawyer said:

There are Iranian lawyers who don't know what is meant by 'code of conduct'. ... When I was a student, we spent one whole term discussing the Islamic jurisprudence of the validity of family contracts, but no one even mentioned the code of conduct to us.

Interviewees admitted their sense of professionalism was weak, and few lawyers took the code of conduct seriously. Many attorneys disregarded the code for economic reasons. Many had entered the profession in the previous 10–12 years 'only to make money'. One respondent argued that in a legal system where judges do not perform their duties properly, lawyers will also fail in their professional duties. The obligation of zealous advocacy was not understood by the public, or even some lawyers and judges.

One thing which upsets me most is the attitude of my colleagues [the other attorneys] and the court staff. The judge in a way sees you as his opponent – you are up against him. Colleagues refuse to talk to you outside the court, because you have argued against them legally. They seem not to understand that you are *representing* your client and it's not a personal thing. ... In these situations, I think they violate our code of professional conduct.

This interviewee argued it was difficult to serve the interests of one's client and conduct oneself professionally within a legal system that did not recognise the lawyer's professional integrity. Confrontations could not be confined to clashes between the judiciary and IBA attorneys and spilled into the professional relationship between attorneys. 'Many colleagues think that the case they represent is their own dispute and get very personal. They lose their temper in the court and treat each other with disrespect'.

When asked about their professional code of conduct, none of our interviewees discussed the importance of due diligence, providing professional services of the highest standards, refusing to undertake work the lawyer was not competent to handle, confidentiality, or conflicts of interest. Instead, they talked about professional conduct in a politicised and morally corrupt legal system and in 'the context of the wider society, which has become morally uncertain and socially unstable'.

IV. Conclusion: The Clash of Two Legal Cultures

Concealed behind descriptions of a hostile judiciary lies a clash between two legal cultures over the most valuable symbolic capital of the juridical field – the authority to determine the law – grounded in political conflicts between reformist political groups seeking the separation of state and religion and supporters of the hierarchy. What is at stake is no less than the future of Iranian modernity played out as a confrontation between the judiciary and the legal profession. This clash is intensified by judges' bitterness over being deprived of the economic opportunities available to practitioners. The economic competition turns many judges against lawyers and corrupts the entire legal system. This is to be expected. A judicial system designed to embody an ideology to which it requires total commitment cannot avoid widespread cronyism. Corrupt practices have multiple causes, including judges' and attorneys' lack of autonomy, direct and indirect political interference in the enforcement of laws, private financial gain or bribery, and cultural practices promoting cronyism and informal networks of personal and family contacts.

One legal culture is created by carefully selecting judges from a socially homogeneous group of men and inculcating them with the political values of the Islamic Republic. This training includes understanding and enforcing the law in terms of *fiqh*, or Islamic jurisprudence, as developed by Shi'a jurists. The other legal culture is based on the jurisprudence of modern law schools, which see the law as a rule-based rational construct for decision-making. In the context of codified law and due process, Iranian judges' application of *fiqh* introduces an element of legal uncertainty and arbitrariness that many defence attorneys find difficult to anticipate and react to.

Our IBA attorneys are agents in the juridical field, competing with the judiciary for the 'monopoly of the right to determine the law' and access to legal resources (Bourdieu 1987: 817). But they are also members of the middle class and the intellectual elite in Iranian civil society – a segment that continues to argue for the rule of law in a country organised under clerical rule in accordance with Islamic ideology. This suggests a deep-rooted ideological schism between the IBA rank and file and the judiciary, reflecting the ideological division defining Iranian society at large. To describe this rupture in terms of modern/traditionalist or secular/religious dichotomies would overlook two points. The jurisprudence of the Iranian judiciary – however politicised, illiberal and repressive it may be – contains many innovative ideas challenging a traditional understanding of Sharia. Moreover, Sharia has always contained secular practices and a secularisation of the divine has been occurring since Khomeini

introduced the principle of *maslahat-e nezam* (expediency of the state), which overrides all religious doctrine.

In the ongoing contest for Iranian modernity, the legal profession has played, and will continue to play, a key role. Its struggle for autonomy questions the ideological hegemony of the clerical establishment, and its recent feminisation challenges the internal and external cultures of Iranian law. The socio-cultural and political obstacles confronting the legal profession may appear insurmountable. Independent lawyers are undermined by the Islamic Republic's judicial system and forced to pay the price for public distrust of the law and legal institutions, which is paradoxically related to the clerical regime's lack of legitimacy. Nonetheless, the IBA's continued insistence on, and fight for, independence, and the professional courage displayed by the generation of lawyers born after the 1979 Revolution, who refuse to surrender their fidelity to a broadly conceived notion of law and due process, offer grounds for optimism against all odds.

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