

Human Rights in Iran Unit

University of Essex

Legal Research Series

**Rule of Law in Iran:
Independence of the Judiciary, Bar Association,
Lawyers and Iran's Compliance with International
Human Rights Obligations**

Ronda Cress, Catherine Kent and Mohammad Nayyeri

March 2014

EXECUTIVE SUMMARY

This legal research analysis belongs to a series of studies on human rights in Iran authored by the Human Rights in Iran Unit. The Human Rights in Iran Unit in the School of Law at the University of Essex focuses on the Islamic Republic of Iran (Iran)'s compliance with international human rights law. Each study tackles a distinct topic to measure international obligations against domestic law and practice and to identify underlying or systemic problems. The Unit seeks to provide an accessible account of the breadth and complexity of violations in Iran from the standpoint of international law, which may serve scholars, practitioners and anyone concerned with human rights in Iran.

This study considers the Islamic Republic of Iran's compliance with its obligations under international human rights law with respect to the independence and impartiality of the judicial system and the legal profession. The relevant treaty to which Iran is a State party is the International Covenant on Civil and Political Rights (ICCPR), which includes the right to a fair trial and due process of law under Article 14, the right to freedom of expression under Article 19 and freedom of association under Article 22. The UN Basic Principles on the Independence of the Judiciary are also examined. The study also analyses Iran's treatment of lawyers and the Bar Association in relation to applicable international law and assesses the impact of any violations on lawyers, both as individual rights-bearers and collectively as promoters and protectors of human rights.

The analysis demonstrates that Iran does not comply with certain long-established rule of law principles such as separation of powers, equal protection and due process of the law, right to a fair trial, right to an independent judiciary, as well as individual freedoms such as the rights to freedom of expression and association.

With regard to the judicial system, this study finds that Iran violates a number of key legal requirements of Article 14 of the ICCPR:

- **Independence and impartiality of the judiciary** - The Iranian Constitution provides that the judiciary shall be an independent institution that protects individual and social rights, upholding the separation of powers principle *de jure*. However, the Head of the Judiciary is appointed and supervised by the Supreme Leader who, under the Constitution, is the Head of State. This is a clear interference by the executive in judicial affairs.
- **Revolutionary Courts** - Following the 1979 Revolution and the establishment of the Islamic Republic of Iran ('IRI'), Clerical and Revolutionary courts were introduced. Neither court's establishment nor mandate is based in the Constitution but these courts have been institutionalised over the years. Revolutionary courts can hand down the death penalty and have jurisdiction over national security crimes or serious security-related crimes, including conspiracy, terrorism and espionage. Denial of access to a lawyer, arbitrary detention, convictions and sentencing are commonplace

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and a formal judgment is often not issued. It is clear that the Revolutionary courts routinely violate the right to a fair trial and the guarantees of due process contained in Article 14 of the ICCPR.

- **Independence and impartiality of individual judges** - The selection of judges is based on the *gozinesh* process, which involves extensive investigations into candidates' beliefs and prior political leanings rather than their professional competence and legal qualifications. If appointed, judges do not enjoy security of tenure because their employment is at the discretion of the Head of the Judiciary. This provides little incentive for judges to act contrary to the wishes of the Head of the Judiciary and diminishes the independence and impartiality of judges.

With regard to lawyers and the Iranian Bar Association, the analysis finds that Iran violates Articles 19 and 22 of the ICCPR:

- **Lawyers as individual rights-bearers** - Iran has continuously and systematically targeted human rights defenders, including lawyers, and their families. Such individuals face intimidation, arbitrary detention and restrictions of their right to freedom of expression and association. Human rights lawyers face international travel bans, lengthy detention without charge, convictions for propaganda offences and bans on practising law. Furthermore, lawyers defending lawyers are subject to intimidation and prosecution by the State. Defence lawyers have also been arrested simply for defending 'ordinary' criminal defendants or expressing critical views of the judicial process. The IRI fails to comply with Articles 19 and 22 of the ICCPR and uses national security as an unjustified pretext to suppress lawyers.
- **Lawyers as collective rights-bearers** - The IRI has taken steps to weaken the legal profession and Iranian Bar Association with respect to international standards since the 1979 Revolution. Since 1997, elections of the Board of Directors has been subject to candidates being confirmed by the Supreme Disciplinary Court for Judges. Candidates must satisfy, among other requirements, commitment to the IRI regime and a lack of membership or cooperation with politically or religiously opposed groups. This disqualifies a significant number of lawyers, particularly human rights defenders, prior to election and thus ensures that elected candidates are individuals are politically aligned with the Government.
- Furthermore, Article 187 legal advisors operate alongside lawyers and the Bar Association but fall under the direct supervision of the judiciary. Article 187 advisors require an annual permit from the judiciary, making it unlikely that the advisors will act in contravention to the judiciary's wishes for fear of revocation or non-renewal of their licenses. The judiciary's 2012 Bill of Formal Attorneyship threatens to completely eradicate the Bar Association's independence by placing it under the direct control of the Head of the Judiciary, who is in turn accountable to the Supreme Leader. The above is in clear contravention of Article 22 of the ICCPR.

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1. INTRODUCTION

Without an independent judicial system and independent lawyers, the rule of law and protection of all human rights is undermined. An independent judiciary and independent lawyers are crucial components of effective rule of law in any State. This legal research study examines the structure of Iran's judicial system, with particular emphasis on the operations of its Revolutionary Courts and their prosecutors, in light of Iran's obligations under applicable international human rights law. The study will also analyse Iran's treatment of lawyers and the Bar Association¹ in relation to applicable international law and assess the impact any violations have on lawyers, both as individual rights-bearers and collectively as guarantors of the rule of law and human rights defenders.

At the heart of the requirement for an independent and impartial tribunal is the desire to guard against the influence of the political branches, or administrative authorities subject to direction from the political branches,² which would result in decisions or treatment driven by interests other than the rule of law and human rights. Key legal principles, such as fair trial, independent and impartial adjudication of disputes, and the right to defend oneself in criminal proceedings, constitute the enabling framework for the protection and promotion of human rights. Without these necessary safeguards, individuals lack effective recourse for lapses in the rule of law and human rights violations and are exposed to further human rights violations by the State.

Rule of law principles are entrenched in international law. Fundamental notions of justice and the rule of law are not novel, nor are they unique to any one legal tradition: 'For instance, in the Western common law tradition, the right to trial by a court and the rights of the accused in criminal proceedings are derived from the general principle of due process of law, which itself can be traced back to the Magna Carta of 1215.'³ Similarly, some commentators believe that in Islamic jurisprudence, the notions of freedom, justice and equality "are inherent in the Islamic belief" and Islam contains universally accepted standards of due process of law.⁴ Thus, "[t]he principle of the legitimacy or supremacy of law is a general principle which is so deeply rooted in modern man's conscience that no civilised society can function effectively without it."⁵ Yet, States with various forms of government in all regions of the world struggle to uphold the principle of judicial

¹ Iran has 22 local bar associations comprised under the umbrella of the national Union of Bar Associations. See, e.g., M Nayyeri, 'Iranian Bar Associations: Struggle for Independence,' (Iran Human Rights Documentation Center, 2012), p. 2; International Bar Association Human Rights Institute (IBAHRI), Report, 'Balancing Independence and Access to Justice: a Background Report on the Justice System in Iran' (Oct. 2007), p.7. For the purposes of this study, the Union of Bar Associations is referred to simply as the 'Bar Association' or 'Iranian Bar Association.'

² M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel 2 ed. 2005), p. 319.

³ M Nowak (n 2), p. 305.

⁴ M Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publications, Inc. 1982), p.14.

⁵ O Abd-el-Malek al-Saleh, 'Right of the Individual to Personal Security in Islam,' in M Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publications, Inc. 1982), p.85.

independence.⁶ Iran is no exception, but the problems are acute and not well understood.

Iran is a party to several international human rights law instruments that contain due process of law guarantees, access to a tribunal, freedom of expression and freedom of association: the International Covenant on Civil and Political Rights ('ICCPR'),⁷ the International Convention on the Elimination of All Forms of Racial Discrimination,⁸ the Convention on the Rights of the Child⁹ and the Convention on the Rights of Persons with Disabilities.¹⁰ For the purposes of this study, the analysis is confined to application of the ICCPR because of its wider applicability and comprehensive provisions regarding the justice system and the freedoms relevant to the situation in Iran.

At first glance, Iran appears to employ long-established rule of law principles including the separation of powers, equal protection and due process of the law, right to a fair trial, and right to an independent judiciary, as well as individual freedoms such as the rights to freedom of expression and association. Many of these principles are enshrined in the Iranian Constitution.¹¹ However, the 1979 'Islamic Revolution' and the establishment of the Islamic Republic of Iran marked a shift away from both an independent and impartial judiciary and respect of the right to fair trial for the criminally accused under the jurisdiction of Iran's Revolutionary Courts. The continued use of the Revolutionary Courts – special courts initially created to handle anti-Revolutionary crimes, which still hears, among others, crimes against national security – has been accompanied by an increasing number of lawyers themselves being arrested or convicted for representing criminal defendants in these Courts or for promoting human rights in Iran. Thus Iran's institutional structure, subsequent legislation and practice appear to be inconsistent with Iran's international legal obligations.

This study outlines the twentieth century development of Iran's judicial system and the Bar Association. It also sets out the key international legal principles and applies them to the situation in Iran. Specifically, article 14 (independent and impartial judiciary and fair trial rights), article 19 (right to freedom of opinion and expression) and article 22 (freedom of association) of the ICCPR are examined. Relevant provisions of UN instruments specific to the judiciary, prosecutors and lawyers are also considered.

⁶ S Shetreet 'Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure', in S Shetreet and C Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012), p. 52.

⁷ International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ratified by Iran on 24 June 1975, see United Nations Treaty Collection website at: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>), Articles 2(3), 14, 19, and 22.

⁸ International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195 (ratified by Iran on 29 August 1968, see UNTC website), Articles 5 and 6.

⁹ Convention on the Rights of the Child (1989) 1577 UNTS 3 (ratified by Iran on 13 July 1994, see UNTC website), Articles 9, 12, 13, 15, 16, 37 and 40.

¹⁰ Convention on the Rights of Persons with Disabilities (2006) 2515 UNTS 3 (ratified by Iran on 23 October 2009, see UNTC website), Articles 12-14, 21 and 29.

¹¹ See, *inter alia*, Arts. 24, 27, 34-37, 156, 159 and 166 of the Iranian Constitution.

2. OVERVIEW AND BACKGROUND

2.1 Necessity of an Independent and Impartial Judiciary and Legal Profession

2.1.1 Judiciary

The basic function of the judiciary is to adjudicate disputes between two or more parties without bias.¹² Therefore, the judiciary as an institution and its individual judges must be insulated from the influence of the executive and legislative branches or any other inappropriate sources in order to prevent abuses of power by any branch “to the detriment of a free society.”¹³ Indeed, the principle of an independent judiciary originates from the theory of separation of powers that forms the basis of the modern constitutional State.¹⁴ In the context of individuals versus the State, the function of the judiciary as a neutral arbiter of disputes becomes even more meaningful due to the outright imbalance of power in favour of the State. The judiciary must act to “hold the scales of justice evenly between the humble citizen and the mighty government” as well as between citizens.¹⁵ For this reason, the independence of judges and lawyers is considered to be the “bedrock of the rule of law”¹⁶ and nowhere is this more relevant than when an individual’s human rights are at stake.

Without impartial and independent adjudication, “there is no substantive protection of human rights . . . and no good government or civil order. The rule of law requires judicial independence as a precondition.”¹⁷ Both an independent and impartial judiciary and an independent legal profession “are prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and that that there is no discrimination in the administration of justice.”¹⁸ Judges, prosecutors and lawyers are the three fundamental pillars necessary for maintaining rule of law, ensuring protection of human rights, and preventing impunity for human rights violations.¹⁹ Judges play a critical role in upholding human rights because they hold “the ultimate decision over life,

¹² S Shetreet ‘The Mt. Scopus International Standards of Judicial Independence: The Innovative Concepts and the Formulation of a Consensus in a Legal Culture of Diversity’, in Shetreet & Forsyth (eds.) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) p. 475; S Shetreet (n 6) pp. 40, 58.

¹³ OHCHR and International Bar Association (IBA), ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,’ HR/P/PT/9 (2003) p. 115.

¹⁴ A Cooray, ‘Standards of Judicial Behaviour and the Impact of Codes of Conduct,’ in S Shetreet and C Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) p. 349; S Shetreet (n 6) pp. 19, 51.

¹⁵ Cooray, *ibid*, p. 349.

¹⁶ Declaration on Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, Commission on Human Rights Res. 2004/33 (19 April 2004), para. 2.

¹⁷ S Shetreet (n 12) pp.475-76.

¹⁸ Declaration on Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, Human Rights Council Resolution 23/6 (7 June 2013), preamble.

¹⁹ OHCHR and IBA (n 13) pp. 150, 158.

freedoms, rights, duties and property of citizens.”²⁰ They must be able to render justice impartially and independently according to applicable national and international law.²¹ Prosecutors must also be independent and impartial and “willing resolutely to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity.”²²

2.1.2 *Legal profession*

Like the judiciary, lawyers serve a key function in protecting human rights and upholding the rule of law and the right to a fair trial.²³ Judges, prosecutors and lawyers alike are entitled to exercise the rights to freedom of expression and freedom of association like any other citizen.²⁴ Unlike with other citizens, though, these rights “acquire specific importance in the case of persons involved in the administration of justice.”²⁵ Furthermore, lawyers and bar associations represent the frontline of defending human rights and have played a “seminal role in mobilising public opinion to defend the rule of law and judicial independence”.²⁶ In so doing, lawyers “must be granted all the due process guarantees afforded by domestic and international law” and must be allowed to perform their professional duties in an atmosphere free from governmental pressure, harassment, physical attacks, corruption and other kinds of intimidation.²⁷ An independent legal profession bolsters the ability to create and sustain an independent judiciary by protecting lawyers’ professional interests and by “protecting and strengthening the integrity and independence of the legal profession.”²⁸ The collective function of bar associations is important in this sense because it “transcends the individual rights” of the lawyers to serve as a check against governmental abuse of power and fulfils the role of ‘social watchdogs.’²⁹ On their own, lawyers may not be able to

²⁰ Basic Principles on the Independence of the Judiciary (Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders), endorsed by GA Res. 40/32 (29 November 1985), preamble.

²¹ OHCHR and IBA (n 13) p. 115.

²² *Ibid*, p. 116.

²³ Basic Principles on the Independence of the Judiciary (n 20) Principles 8-9; Basic Principles on the Role of Lawyers (Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders), welcomed by GA Res. 45/166 (18 Dec. 1990) Principles 23-25; Guidelines on the Role of Prosecutors (Eighth U.N. Congress on the Prevention of Crime and Treatment of Offenders), welcomed by GA Res. 45/166 (18 Dec. 1990) Principle 8; International Commission of Jurists (ICJ), ‘International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners’ Guide No. 1’ (2007) p.63.

²⁴ ICJ, *ibid*, pp. 37, 67.

²⁵ *Ibid*, p.67.

²⁶ T Jillani, ‘The Challenge of Judicial Independence and the Experience of Pakistan’, in Shetreet and Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) p. 438.

²⁷ *Ibid*, pp. 150-151.

²⁸ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/64/181 (2009), para. 19; S Shetreet (n 6) p. 22.

²⁹ IBAHRI, *Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law* (2011), available at:

effectively safeguard and advocate for human rights and fundamental freedoms in society at large. This realisation is particularly evident with regard to mass, flagrant or systemic violations, and likely explains the UN General Assembly's frequent reference to the rights of human rights defenders "individually and in association with others" throughout the UN Declaration on Human Rights Defenders.³⁰

If any one of these "fundamental pillars" fails or is prevented from upholding their duties within the system, there will be serious risks of creating a culture of impunity, increasing human rights violations, violence and overall deterioration in the administration of justice.³¹ As the Office of the High Commissioner for Human Rights (OHCHR) and the International Bar Association have stated:

It is therefore indispensable that States assume their international legal duties derived from the various sources of international law, whereby they must permit judges, prosecutors and lawyers to carry out their professional responsibilities independently and impartially without undue interference from the Executive, Legislature or private groups or individuals.³²

In addition, "human rights and fundamental freedoms are all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure."³³ As is evident, a fair and independent judiciary and legal profession are critical for the rule of law and protection of human rights.

2.2 Brief History of Judicial System and Lawyers in Iran: 1900s to Present

The current legal framework of the judiciary must be understood in the context of twentieth century developments. The struggle for an independent and impartial judicial system in Iran has been ongoing since Iran's constitutional revolution in the early twentieth century.³⁴ Although the strength and independence of the judiciary and legal system varied over the ensuing decades, the systems are considered to have been relatively independent (or more probably 'semi-independent') for much of the period between the Constitutional Revolution and the 1979 Revolution.³⁵ This period saw the establishment of secular courts at the county, regional, and provincial levels and a

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f31793c1-2fb7-449e-9f4e-6af14f332262>, pp. 21-22, referencing European Court of Human Rights decision *Tarsasag a Szabadsagjogokert v. Hungary*, App. No. 37374/05 (14 April 2009), para. 27.

³⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms GA Res. A/RES/53/144 (8 March 1999).

³¹ OHCHR and IBA (n13) p. 116.

³² OHCHR and IBA (n 13) p. 158.

³³ Report on the Independence of the Judiciary and the Protection of Practicing Lawyers, UN Doc E/CN.4/Sub.2/1993/25 (30 July 1993), para. 1.

³⁴ E Abrahamian, *Tortured Confessions: Prisons and Public Recantations in Modern Iran*, (University of California Press, 1999), p.22; K Lahidji, 'The Future of Iran: Judicial Reform. The History of the Judiciary in Iran,' (Legatum Institute, 2012), p.1.

³⁵ Lahidji, *ibid*, p. 12.

Supreme Court at the national level.³⁶ Shari'a, tribal and guild courts were abolished and modern legal training was required of all lawyers and judges.³⁷ Judicial precedents became more centralised and uniform, a judicial hierarchy was developed and observed and procedural rules and principles – including the principle of judicial independence – were implemented.³⁸ Independent public prosecutor offices were created, the right to criminal defence was recognised and various rules and procedural codes were put in place to safeguard public order.³⁹

This general trend was also reflected in development of the legal profession. In 1911, the First Charter of Attorneyship was adopted, requiring lawyers to first take qualifying examinations in order to practice law.⁴⁰ Lawyers established the Iranian Bar Association in 1930, although it had limited independence.⁴¹ The Association gained full autonomy in 1953 pursuant to the Law of Independence.⁴² The government and Justice Ministry no longer had oversight of the Association and members elected their governing board of directors.⁴³ The 1953 Law of Independence also placed the responsibility of granting and revoking law licenses with the Association.⁴⁴ Lawyers' Disciplinary Courts and Prosecutors' offices were in charge of resolving professional misconduct of lawyers, which insulated lawyers from interference by judicial authorities.⁴⁵ This period oversaw the structural changes to move the Iranian judiciary and legal system into the modern era. Overall, the judiciary and legal profession still had to operate in the context of a ruling Pahlavi monarchy associated with significant human rights violations, especially against dissidents and political opponents.

The 1979 Revolution ushered in drastic changes to the country and especially to the justice system.⁴⁶ The Islamic Republic Party ('IRP'), formed shortly after the prior Pahlavi monarchy was overthrown, established the Islamic Republic of Iran and with it, "waves of Islamisation and revolutionising institutions hit all parts of society including the judicial and legal system[s]. The idea of the rule of Islamic Shari'a and reestablishment of Shari'a courts was raised by revolutionary forces and hardliner clerics," led by the Head of the Judiciary installed at the time, Ayatollah Mohammad Beheshti.⁴⁷ The new Islamic Republic was headed by the Revolution leader, Ayatollah

³⁶ *Ibid* p.3; Abrahamian (n 34) p. 26.

³⁷ M Kar, 'The Future of Iran: Judicial Reform, Who are the Judges in the Islamic Republic of Iran', (Legatum Institute, 2012), p.1; Abrahamian, *ibid*, p. 26.

³⁸ M Nassiri 'Iran's Judicial System after the Revolution,' *Legatum Institute* (Iran Nameh, 1995-96), p.1.

³⁹ Nayyeri (n 1) p. 3; *Ibid*, pp. 1-2.

⁴⁰ Nayyeri (n 1) p. 3.

⁴¹ *Ibid*.

⁴² *Ibid*, p.4.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, pp. 4-5, incorporating Articles 15-17 of the Law of Independence.

⁴⁶ S Irfani, *Revolutionary Islam in Iran: Popular Liberation or Religious Dictatorship?* (Zed Books Ltd. 1983), p.182.

⁴⁷ Nayyeri (n 1) p. 5. The swift and widespread Islamisation of the country particularly impacted elections, higher education, women and religious minorities. See S Irfani (n 46) pp. 198-203, 204-209, and 211-12, respectively.

Ruhollah Khomeini, who instituted subsequently became a relatively unique but central element of the new Islamic Republic, *Velayat-e Faqih* or the rule of an Islamic jurist.⁴⁸

2.3 Overview of Iran's Judiciary and Legal System

2.3.1 Iran's Power Structure: Guardian Council and Supreme Leader

The judicial system must be understood in relation to Iran's political and constitutional power structure. Under Iran's Constitution, the 'Guardian Council' has broad supervision over the *Majlis* (the Parliament) and monitors all legislation to ensure its compliance with the Constitution and Shari'a law.⁴⁹ The Council is comprised of twelve jurists, six of whom are appointed by the Supreme Leader of the Islamic Republic of Iran,⁵⁰ and six of whom are appointed by the *Majlis* from a list of non-clerical jurists put forth by the Head of Judiciary.⁵¹ The Head of the Judiciary is appointed and dismissed by the Supreme Leader.

The Supreme Leader is, formally speaking, selected and monitored by the Assembly of Experts, which is comprised of 86 popularly elected clerics.⁵² The Guardian Council vets candidates for election to the Assembly of Experts, the Presidency⁵³ and other government posts, such as Members of Parliament.⁵⁴ The Supreme Leader has immense powers under the Constitution, including: formulation and supervision over the execution of Iran's policies; supreme commander of the armed forces; appointment and dismissal of Guardian Council members, the heads of the judiciary, the commanders of the regular armed forces, the Revolutionary Guards (parallel armed forces established after the 1979 Revolution), the *Basij* (paramilitary forces under the control and supervision of the Revolutionary Guards) and the Islamic Republic of Iran Broadcasting group; and making all key decisions on security, defence and foreign policy.⁵⁵ This broad extent of Constitutional powers is matched by the significant influence and rule of the Supreme Leader in practice.

⁴⁸ Amnesty International (AI), 'Iran: Election Contested, Repression Compounded' (2009), p. 4; Islamic Republic of Iran (IRI) Constitution, Preamble, p. 3; see also, Kar (n 37) p.2.

⁴⁹ Report of the Special Rapporteur on the Right to freedom of opinion and expression, Ambeyi Ligabo, 'Addendum: Mission to the Islamic Republic of Iran', UN Doc E/CN.4/2004/62/Add.2 (2004), para. 19; IRI Constitution, arts. 94, 96. Indeed, actions by the *Majlis* have no legal validity without the approval of the Guardian Council except in approving representatives' credentials and electing the six jurists of the Council. IRI Constitution, art. 93.

⁵⁰ IRI Constitution, art. 107; see also Report of the Special Rapporteur on the right to freedom of opinion and expression (n 49), §16.

⁵¹ Special Rapporteur, *ibid.*, para. 19; AI, (n 48), p.5; IRI Constitution, art. 91.

⁵² AI, *ibid.*, p.5; Special Rapporteur, *ibid.*, para. 16, citing IRI Constitution, arts. 107, 111.

⁵³ The President is the head of government and is to be popularly elected every four years. IRI's Constitution makes clear that the President is subordinate to the Supreme Leader and has no input in matters directly concerned with the Supreme Leader's Office. Special Rapporteur, *ibid.*, para. 17, citing IRI Constitution, art. 113.

⁵⁴ Special Rapporteur, *ibid.*, para. 16; AI (n 48), p.5.

⁵⁵ IRI Constitution, art. 110; AI (n 48), p.5.

2.3.2 Head of the Judiciary: Eligibility and Role

The Constitution provides in article 156 that the judiciary shall be “an independent power that protects individual and social rights” and is responsible for implementing justice and performing typical judicial and administrative functions.⁵⁶ The judiciary is overseen by the Head of Judiciary, who is appointed by the Supreme Leader and is required to be a *Mojtahed* (highest level of expertise in Shi’ite Islamic jurisprudence) and to possess knowledge of judicial matters.⁵⁷ The Head of Judiciary is deemed to be “the highest authority of the judiciary”⁵⁸ and has the power to appoint and dismiss judges, define their jobs, make promotions and transfers of judges and make other administrative decisions.⁵⁹ The Head of Judiciary also appoints the Prosecutor General and President of the Supreme Court, both of whom also must be *Mojtaheds*.⁶⁰

2.3.3 Judges: Eligibility

Under Iranian legislation, eligibility for a judgeship appointment requires individuals to “have faith and [be] just and possess a practical commitment to the Islamic principles and loyalty to Iran’s Islamic Republic system.”⁶¹ Qualified clergymen who have been approved by the Judicial High Council are eligible to be judges. Alternatively, if not enough qualified clergymen are available, individuals with a bachelor degree in law or theology may become judges after completing the requisite judicial training and upon obtaining permission from a government-trusted clergyman. These judges are deemed “permitted judges.”⁶² Under the 1982 Law on the Qualifications for the Appointment of Judges, Shi’a Muslim women may be appointed as advisory judges but cannot preside over a court.⁶³ Additionally, potential state or otherwise authoritative employees (presumably including judges, prosecutors and some lawyers) must also satisfy the criteria set forth under the 1995 Selection Law based on Religious and Ethical Standards.⁶⁴ This selection process, known as the *gozinesh* process, involves the investigation by the Supreme Selection Council and the Intelligence Ministry into an applicant’s beliefs, previous political opinions and affiliations, and repentance of any former political opinions and affiliations.⁶⁵

⁵⁶ IRI Constitution, art. 156; Special Rapporteur (n 49) para. 21.

⁵⁷ IRI Constitution, art. 157; Special Rapporteur, *ibid*, para. 21.

⁵⁸ IRI Constitution, art. 157.

⁵⁹ *Ibid*, art. 158.

⁶⁰ IRI Constitution, art. 162; AI, ‘Iran: Violations of Human Rights 1987-1990,’ MDE 13/21/90, p.22.

⁶¹ Kar (n 37) p. 2, quoting Law on the Qualifications for the Appointment of Judges, approved on May 14, 1982, published in the Code Collection of 1982, Official Gazette.

⁶² Kar (n 37) p. 2, quoting Law on the Qualifications for the Appointment of Judges, approved on May 14, 1982, published in the Code Collection of 1982, Official Gazette.

⁶³ AI, Submission to the Committee on Economic, Social and Cultural Rights (Amnesty International Publications, 2012) available at:

<http://www2.ohchr.org/english/bodies/cescr/docs/ngos/AI_CESCRWG49_Iran.pdf> p. 5.

⁶⁴ *Ibid*, p. 4.

⁶⁵ *Ibid*.

2.3.4 Iran's Courts: Revolutionary, Military and Public

Iran's legal system is comprised of multiple, distinct courts based on subject matter: the Revolutionary Courts for, among others, national security crimes, military courts for handling crimes related to special military or police duties,⁶⁶ clerical courts for resolving issues related to the clerics and regular Public courts for ordinary criminal and civil matters.⁶⁷ In cases where a person is accused of several crimes involving multiple jurisdictions, the person is to first be tried by the court with jurisdiction over the most serious crime.⁶⁸ The Revolutionary Courts have explicit priority over the military and Public courts in cases where the allegations warrant the same degree of punishment.⁶⁹ Both the Revolutionary Courts and the Public criminal courts can sentence defendants to execution for certain offences⁷⁰ but only a single judge presides in the Revolutionary Court branches, whereas a Public court judge is surrounded by a panel of four advisors when dealing with capital offences.⁷¹

2.3.5 Revolutionary Courts

The Iranian Constitution does not provide for the establishment or the mandate of the Revolutionary Courts and clerical courts. The Revolutionary Courts were created pursuant to Ayatollah Khomeini's edict within just a few days of the Revolution with a Shari'a judge appointed as the Courts' head.⁷² Although initially intended as a temporary emergency measure to try high-level officials of the former regime, the Revolutionary Courts became institutionalised through the 1979 Administrative Regulations Governing the Revolutionary Courts and the 1992 Law on Public and Revolutionary Courts. Notwithstanding their origins and original purpose, the Revolutionary Courts are still in existence and operating today.⁷³ They have jurisdiction over national security crimes or "serious security-related crimes, such as offences against the internal and external security of the State, conspiracy, carrying arms, sabotage, use of terrorism, espionage and smuggling, or offences linked to illegitimate appropriation of wealth,"⁷⁴ as well as offences under Iran's anti-narcotics law.⁷⁵

⁶⁶ IRI Constitution, art. 172.

⁶⁷ IRI Constitution, art. 156.

⁶⁸ IRI Criminal Code of Procedure for Public and Revolutionary Courts, art. 55.

⁶⁹ *Ibid.*

⁷⁰ AI, 'Iran: Submission to the Human Rights Committee' (prepared for the 103rd Session of the Human Rights Committee 17 October – 4 November 2011), p. 41

⁷¹ IRI Criminal Code of Procedure for Public and Revolutionary Courts, art. 55.

⁷² Abrahamian (n 34) p.124; Lahidji (n 34) p.4; Special Rapporteur (n 49) para. 27.

⁷³ AI, 'Iran: Violations of Human Rights 1987-1990,' (n 60) pp. 23-24; Report of the Special Rapporteur on the right to freedom of opinion and expression (n 49), para. 27.

⁷⁴ Report of the Special Rapporteur on the right to freedom of opinion and expression (n 49), para. §27.

⁷⁵ AI (n 60) p. 41.

3. JUDICIARY

3.1 Applicable Law and Principles

Given the connection between a fair and independent justice system and the protection of human rights, it is unsurprising to find the former enshrined in multiple international⁷⁶ and regional human rights treaties.⁷⁷ Article 14, which concerns the right to a fair trial, contains procedural guarantees that often play a crucial role in the more substantive guarantees of other ICCPR rights.⁷⁸ Specifically, article 14 rights have a direct connection with the right to life under article 6, the prohibition against torture and inhuman, cruel or degrading treatment or punishment under article 7 and the right to liberty and security of person under article 9.⁷⁹ These substantive rights may be violated when an unfair trial results in a death sentence, where statements obtained through the use of torture or other illegal ill-treatment are allowed into evidence, or where persons are detained without trial for unreasonable lengths of time.⁸⁰ Accordingly, adherence to article 14 guarantees has a critical connection to upholding these three rights and others under the ICCPR. Article 14 subsections (1) to (3) are of particular relevance to this analysis.

3.1.1. *Article 14(1) – General Articulation of the Right to a Fair Trial*

The key requirements of Article 14(1) are: equality before the courts; public hearings and judgments; and a competent, independent and impartial tribunal established by law.

The right to a fair trial or hearing is an overall right encompassing all of the guarantees enumerated in article 14. Determining whether an accused received a fair trial requires an evaluation of the proceedings as a whole.⁸¹ This necessarily means the proceedings must be absent of “any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.”⁸² The right to a fair trial on a criminal charge arises from the date on which the State’s activities – whether it is an official notification of the charge or arrest – substantially affect the accused.⁸³ The right continues until the

⁷⁶ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984), arts. 12-15; Convention on the Rights of the Child (1989), particularly arts. 37 and 40.

⁷⁷ Eg, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art. 6 (1950) ETS 5, American Convention on Human Rights (1969) 1144 UNTS 123, Arts. 8, 25 and African Charter on Human and Peoples’ Rights (1981) 21 ILM 58 Arts. 7, 26.

⁷⁸ HRC, *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial* (2007) UN Doc. CCPR/C/GC/32, para. 58.

⁷⁹ *Ibid*, paras. 59-61.

⁸⁰ *Ibid*.

⁸¹ J Zhang ‘Fair Trial Rights in ICCPR’ (2009) 2(4) *Journal of Politics and Law*, p.43.

⁸² HRC GC 32 (n78) para. 25.

⁸³ Nowak (n 2) p. 318-19.

criminal proceedings are concluded.⁸⁴ The right also includes a temporal requirement, in that criminal proceedings should not be subjected to undue delays.⁸⁵

Equality

Equality pertains to a prohibition of discrimination, unless it is established by law and founded on reasonable and objective grounds,⁸⁶ without entailing “actual disadvantage or other unfairness to the defendant.”⁸⁷ The notion of equality also requires an “equality of arms,” which means that the same procedural rights should be afforded to both the prosecutor and the defendant. This includes the right to adequate access to counsel, to be present at hearings, adequate inspection of the records and evidence, and presentation and cross-examination of witnesses.⁸⁸

Public Hearings and Judgments

The UN Human Rights Committee (‘HRC’), the treaty body for the ICCPR, has made it clear that trials in all criminal matters “must in principle be conducted orally and publicly.”⁸⁹ The requirement of public hearings and judgments is an essential element of the right to a fair trial as it implicates the transparency of the legal process including the judiciary.⁹⁰ “Public” includes the media and any members of the general public who wish to attend.⁹¹ Public trials and hearings are important safeguards for the criminal defendant and society as a whole.⁹² Although all or part of the public may be excluded from hearings in exceptional circumstances, the requirement that the resultant judgment be made public (including the essential findings, evidence and legal reasoning) is nearly absolute.⁹³

⁸⁴ *Ibid*, p. 319.

⁸⁵ HRC GC 32 (n78) para. 27; *Gonzalez del Rio v. Peru*, Human Rights Committee Comm. No. 263/1987, U.N. Doc. CCPR/C/40/D/263/1987 (1990), para. 5.2.

⁸⁶ HRC GC 32, *Ibid*, para. 9; ICJ (n 23) p. 8.

⁸⁷ HRC GC 32, *ibid*, para. 13; *Dudko v Australia*, Human Rights Committee Communication No. 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), para. 7.5.

⁸⁸ Nowak (n 2) p.322; HRC GC 32, *ibid*, para. 13. See also, for example, *Weiss v. Austria*, Human Rights Committee Communication No. 1086/2002, UN Doc CCPR/C/77/D/1086/2002 (2002), para. 9.6; *Jansen-Gielen v. the Netherlands*, Human Rights Committee Communication No. 846/1999, UN Doc CCPR/C/71/D/846/1999 (2001), para. 8.2.

⁸⁹ HRC GC 32, *ibid*, para. 28.

⁹⁰ *Ibid*; Nowak (n 2) p.323.

⁹¹ HRC GC 32, *ibid*, para. 29.

⁹² *Ibid*, para. 28. In the context of limitations based on national security, see *Sultanova et. al. v Uzbekistan*, where the Human Rights Committee held that, although the accused was charged with acts threatening public security and public order, holding the trial *in camera* was not justified, particularly because the judge did not provide any justifications to the dismissal of several requests for a public hearing. Communication No. 915/2000, UN Doc CCPR/C/86/D/915/2000 (2006), para. 7.5.

⁹³ *Ibid*, para. 29; Nowak (n 2) p.323. The only allowable restrictions on publication of the judgment are ‘where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.’ See also ICCPR, art. 14(1).

Competent, Independent and Impartial Tribunal Established by Law

The UN Human Rights Committee has made it clear in interpreting article 14 that the requirement of a competent, independent and impartial tribunal is an absolute right that is not subject to any exception.⁹⁴ The terms “competent” and “established by law” refer to the tribunal’s jurisdictional power and ensure that such power is determined generally and independently in a given case, rather than arbitrarily.⁹⁵

The requirement that a judiciary be independent means the actual separation and protection from political interference from the other governing branches. Independence also entails issues of the appointment and removal of judges; the requisite qualifications they must possess; and guarantees surrounding their security of tenure.⁹⁶ States have positive obligations to take specific measures guaranteeing the independence of the judiciary, “protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”⁹⁷ A situation where the functions of the judiciary and the executive are not clearly distinguishable, or where the executive controls or directs the judiciary, is “incompatible with the notion of an independent tribunal.”⁹⁸

Impartiality of the judiciary has a subjective and objective limb.⁹⁹ The subjective aspect pertains to individual judges and the requirement that judges must not allow personal bias, prejudice or preconceptions about a particular case to influence their judgment.¹⁰⁰ Judges also must not have a personal stake in the matter before them (i.e. conflict of interest) or allow outside pressure, such as from the media, other government branches, or even other judges, to influence their decisions.¹⁰¹ The objective aspect refers to the court or tribunal as a whole as viewed by the public. While actual impartiality is imperative, the tribunal must also appear to a reasonable observer to be impartial in order to ensure public confidence and trust in the judiciary.¹⁰² For example, in *Castedo v.*

⁹⁴ HRC GC 32, *ibid*, para. 19; *Gonzalez del Rio* (n 85) para. 5.2 (right of an accused to be tried by an independent and impartial tribunal “is an absolute right that may suffer no exception”).

⁹⁵ Nowak (n 2) p.319.

⁹⁶ *Ibid*, p.321.

⁹⁷ HRC GC 32 (n 78) para. 19; see, also, Nowak, *ibid*, p.307.

⁹⁸ HRC GC 23, *ibid*, para. 19.

⁹⁹ *Ibid*, para. 21.

¹⁰⁰ *Ibid*. These two aspects are also described as the personal (judges) and the substantive (whole judiciary), as well as institutional (whole judiciary) and behavioral (judges) impartiality. See, respectively, Shetreet (n6) p. 44 and C Guarnieri and D Piana, ‘Judicial Independence and the Rule of Law: Exploring the European Experience,’ p. 115, in S Shetreet and C Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012).

¹⁰¹ HRC GC 32 (n 78) para. 21; Nowak (n 2) p.321. In addition, participation in a trial of judges “who, under domestic statutes, should have been disqualified cannot normally be considered to be fair and impartial within the meaning of Article 14.” *Karttunen v Finland*, Human Rights Committee Communication No. 387/1989, UN Doc CCPR/C/46/D/387/1989 at 108(1992), para. 7.2.

¹⁰² HRC GC 32, *ibid*, para. 21; Shetreet (n 6) p.33; Cooray (n 14) p.350.

Spain,¹⁰³ the UN Human Rights Committee considered the complaint of an individual who was not selected for a university post based on a points-based selection process.¹⁰⁴ Although the Committee could not conclude that the judge had acted partially, the Committee found a violation of article 14(1) on the basis that, because the reporting judge was an employee of the university, the applicant could “reasonably have harboured doubts as to the impartiality of the court”.¹⁰⁵ This case emphasises the need to ensure courts meet both the subjective and objective elements of impartiality.

These requirements under article 14(1) apply to all courts and tribunals, regardless of whether they are ordinary or specialized, civilian or military.¹⁰⁶ The UN Human Rights Committee notes with caution that, while military or special courts are not prohibited from trying civilians, such courts “may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.”¹⁰⁷ Accordingly, use of military or special courts to try civilians should only occur in exceptional cases where the State can show not only that these trials are necessary and justified by objective and serious reasons, but also that the ordinary civilian courts are unable to handle the trials with regard to the specific class of individuals and offences at issue.¹⁰⁸ Even if the State can meet these criteria, it is still obligated to ensure that the extraordinary courts fully comply with the requirements of article 14. The special character of the court does not warrant suspension, limitation or modification of the article 14 rights.¹⁰⁹

The UN Human Rights Committee further identified that such special courts established for certain categories of cases, such as terrorist activities, tend to operate with serious irregularities that may violate the right to a fair trial and the right to an independent and impartial tribunal.¹¹⁰ Examples include the use of “faceless” or anonymous judges,¹¹¹ exclusion of the public from the proceedings, exclusion of the accused or the accused’s representative from the proceedings,¹¹² restricting an accused’s right to choose one’s own

¹⁰³ *Maria Cristina Lagunas Castedo v. Spain*, Human Rights Committee Communication No. 1122/2002, UN Doc CCPR/C/94/D/1122/2002 (2008).

¹⁰⁴ *Ibid.*, para. 2.1-2.3.

¹⁰⁵ *Ibid.*, paras. 9.5-9.8.

¹⁰⁶ HRC GC 32, *ibid.*, para. 22. See also the Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc A/68/285 (2013), para. 93, where the Special Rapporteur reiterates, “The independence of military tribunals must be legally guaranteed at the highest possible level”.

¹⁰⁷ HRC GC 32, *ibid.*

¹⁰⁸ *Ibid.*, paras. 14, 22.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, para. 23. See also the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc A/63/223 (2008), paras. 23 and 25-26.

¹¹¹ See, for example, *Gonzalez del Rio* (n 85) para. 5.2. The Inter-American Court of Human Rights has unequivocally stated that the use of faceless judges is a “blatant violation of the right to a public hearing”. See, for example, *Castillo Petruzzi et al v. Peru*, Inter-American Court of Human Rights (1999) Ser. C No. 52, paras. 172-173 and 221.

¹¹² HRC GC 32 (n 78) para. 23, citing *Becerra Barney v. Colombia*, Comm. No. 1298/2004, §7.2, *Polay Campos v. Peru*, Comm. No. 577/1994, §8.8, *Gutierrez Vivanco v. Peru*, Comm. No. 678/1996, §7.1, and *Carranza Alegria v. Peru*, Comm. No. 1126/2002, §7.5.

lawyer,¹¹³ severe restrictions or outright denial of the right to communicate with one's lawyer,¹¹⁴ threats to lawyers,¹¹⁵ inadequate time to prepare a defence¹¹⁶ and severe restrictions or outright denial of the right to present witnesses or to cross-examine certain prosecution witnesses.¹¹⁷ The Committee has repeatedly expressed concern over the use of special courts¹¹⁸ and, on several occasions and in numerous cases, has recommended their abolishment.¹¹⁹

The Committee notes that a State's obligations under article 14 also apply to religious courts and to customary courts established by custom.¹²⁰ Judgments issued by such courts cannot be recognised as binding by the State unless the court has first met the basic guarantees under article 14. The proceedings before such courts also must be limited to minor civil and criminal matters and the option to challenge the decisions by either party must be a possibility, pursuant to an article 14-compliant process.¹²¹

The critical importance of an independent and impartial judiciary has been emphasised in numerous international soft law instruments. The UN General Assembly Basic Principles on the Independence of the Judiciary¹²² ('Judiciary Principles') are declaratory of generally accepted views and have been influential in assessing the independence of the judiciary.¹²³ These principles act as guidelines for securing and promoting the independence of the judiciary as promulgated by, among others, the UN Charter, the UDHR, and the ICCPR.¹²⁴ UN Member States are instructed to bring these principles "to the attention of judges, lawyers, members of the executive and the legislature and the public in general."¹²⁵

The Judiciary Principles require UN Member States to enshrine the guarantees in their constitutions or national law, and for all governmental and other institutions to respect and observe the independence of the judiciary.¹²⁶ The judiciary itself is tasked with deciding matters impartially, "on the basis of facts and in accordance with the law,

¹¹³ *Ibid*, citing *Gutierrez Vivanco* at §7.1.

¹¹⁴ *Ibid*, citing *Polay Campos* at §8.8 and *Carranza Alegre* at §7.5.

¹¹⁵ *Ibid*, citing *Vargas Mas v. Peru*, Comm. No. 1058/2002, §6.4.

¹¹⁶ *Ibid*, citing *Quispe Roque v. Peru*, Comm. No. 1125/2002, §7.3.

¹¹⁷ *Ibid*, citing *Gutierrez Vivanco* at §7.1.

¹¹⁸ ICJ (n 23) p.9, citing: *Roberto Zelaya Blanco v. Nicaragua*, Comm. No. 328/1988, U.N. Doc. CCPR/C/51/D/328/1988, *Concluding Observations of the Human Rights Committee on Nigeria*, U.N. Docs. CCPR/C/79/Add.65 and CCPR/C/79/Add.64, *Concluding Observations of the Human Rights Committee on Morocco*, U.N. Docs. A/47/40, paras. 48-79 and CCPR/C/79/Add.113, para. 18, *Concluding Observations of the Human Rights Committee on Iraq*, U.N. Doc. CCPR/C/79/Add.84 para. 15, and *Concluding Observations of the Human Rights Committee on Egypt*, U.N. Doc. A/48/40, §706.

¹¹⁹ *Ibid*, citing as an example *Concluding Observations of the Human Rights Committee on Gabon*, U.N. Doc. CCPR/CO/70/GAB, para. 11.

¹²⁰ HRC GC 32 (n 78) para. 24.

¹²¹ *Ibid*.

¹²² Basic Principles on the Independence of the Judiciary (n 20).

¹²³ OHCHR and IBA (n 13) p. 119.

¹²⁴ 'Basic Principles on the Independence of the Judiciary' (n 20) Preamble.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*, Principle 1.

without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹²⁷ More broadly, the Judiciary Principles prohibit any inappropriate or unwarranted interference with the judicial process.¹²⁸

The Judiciary Principles also stress the right of an accused to be tried by ordinary courts or tribunals that use established legal procedures and prohibit the creation of special courts that do not follow such duly established procedures.¹²⁹ Again, military, anti-terrorism and other special criminal courts are viewed with much scepticism and are usually subjected to a strict standard given the risk these extraordinary courts present to fair trial and other rights.¹³⁰

Regarding the selection and security of judges, the Judiciary Principles require that judges’ term of office, independence, remuneration, conditions of service, among others be adequately secured by law and that judges have a guaranteed tenure until a mandatory retirement age or other expiration term is reached.¹³¹ Selection and promotion of judges is to be based solely on objective factors, such as ability, integrity and experience.¹³² Standards of judicial conduct governing disciplinary, suspension or removal proceedings should be in place and an independent review process should be available for any such actions.¹³³ Moreover, assignment of cases to judges should be decided internally as an administrative function and not by outside influences.¹³⁴

Numerous reports and recommendations of the Special Rapporteur on the independence and impartiality of the judiciary and the independence of lawyers have been issued.¹³⁵ These provide further useful guidance on the law and principles relating to the judiciary. Several NGOs expanded upon the Judiciary Principles by drafting more comprehensive standards.¹³⁶

¹²⁷ *Ibid*, Principle 2.

¹²⁸ *Ibid*, Principle 4.

¹²⁹ *Ibid*, Principle 5.

¹³⁰ Nowak, M., (n 2) p. 311.

¹³¹ ‘Basic Principles on the Independence of the Judiciary’ (n 20) Principles 11-12.

¹³² *Ibid*, Principle 13.

¹³³ *Ibid*, Principles 15-20.

¹³⁴ *Ibid*, Principle 14.

¹³⁵ See, eg, Human Rights Council Res. 23/6 (n 18); Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, Human Rights Council Res. 2005/33; Report of the Special Rapporteur on the independence of judges and lawyers, Dato’ Param Cumaraswamy, U.N. Doc. E/CN.4/2001/65 (1 February 2001); Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, U.N. Doc. A/HRC/4/25/Add.1 (5 April 2007); Report of the Special Rapporteur on the independence of judges and lawyers, U.N. Doc. A/64/181 (28 July 2009).

¹³⁶ D Prefontaine and J Lee, *The Rule of Law and the Independence of the Judiciary* (The International Centre for Criminal Law Reform and Criminal Justice Policy, 1998) p. 5, referencing: Draft Principles on the Independence of the Judiciary (Siracusa Principles) 1981; Draft Principles on the Independence of the Legal Profession (Noto Principles) 1982; The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio Declaration of Bangkok); Union International des Avocats: The International Charter of Legal Defence Rights; International Bar Association: Minimum Standards of Judicial Independence 1982; International Convention for the Preservation of Defence Rights 1987; and, Beijing

3.1.2. Article 14(2) – Presumption of Innocence

The presumption of innocence until proven guilty, in accordance with the law guaranteed under article 14(2), continues until conviction. An accused may not be convicted if reasonable doubt of guilt exists and judges must conduct criminal trials without previously forming an opinion on an accused's guilt or innocence.¹³⁷ Indeed, article 14(2) requires all public authorities to refrain from prejudging the guilt or innocence of an accused.¹³⁸ Additionally, the length of any pre-trial detention or the denial of bail is prohibited from consideration in determining one's guilt.¹³⁹

3.1.3 Article 14(3) – Minimum Rights of the Criminal Accused

Article 14(3) provides for the minimum rights that must be afforded to persons charged with a criminal offence.

Regarding the prompt notification of the nature and cause of the charge as required by article 14(3)(a), the notification must include an exact legal description of the offence and the underlying facts giving rise to the charge. The provision of sufficient information enables the accused and their lawyers to prepare a defence.¹⁴⁰ To satisfy the requirement of promptness, notification of the nature and cause of the charge should be issued to the accused when the charge is formally lodged or directly thereafter.¹⁴¹ Notification may be stated orally to the accused but must subsequently be issued in writing.¹⁴²

The right to adequate time and facilities for preparation of a defence provided under article 14(3)(b) applies to both the accused and their lawyers at all stages of the trial.¹⁴³ This right is a critical element of the right to a fair trial and to the equality of arms.¹⁴⁴ Although the amount of time necessary to constitute 'adequate time' varies depending on the circumstances, it is clear that a few days is inadequate and is likely to result in a violation of article 14.¹⁴⁵ The reference to adequate facilities includes access to documents, records, evidence and all materials the prosecution intends to use against the

Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, adopted by the Sixth Conference of Chief Justices of Asia and the Pacific on 19/8/95. See, also, the Mt. Scopus International Standards of Judicial Independence (Mt. Scopus Standards) 2008.

¹³⁷ HRC GC 32 (n 78) para. 30; Nowak (n 2) p.330.

¹³⁸ HRC GC 32, *ibid*, para. 30.

¹³⁹ *Ibid*.

¹⁴⁰ Nowak (n 2) p. 331.

¹⁴¹ *Ibid*, p.332; HRC GC32 (n 78) para. 31.

¹⁴² *Ibid*, HRC GC 32.

¹⁴³ Nowak (n 2) p.332, citing *Little v. Jamaica*, Human Rights Committee Comm. No. 283/1988, paras. 8.3, 8.4.

¹⁴⁴ HRC GC 32 (n 78) para. 32.

¹⁴⁵ Nowak (n 2) p.332, citing *Little v. Jamaica* (n 143) paras. 8.3, 8.4.

accused (see also ICCPR article 14(3)(e)).¹⁴⁶ It also includes access to any exculpatory material, which encompasses not only material that establishes innocence but also any material of assistance to the defence.¹⁴⁷

The right to communicate with counsel of an accused's own choice under article 14(3)(b) entails prompt access to a lawyer. Lawyers should be allowed to meet with their clients privately and under conditions fully respectful of the confidentiality of the communications. Lawyers also need to be able to fulfil their duties to their clients "without restrictions, influence, pressure or undue interference from any quarter."¹⁴⁸

The general right to defence under article 14(3)(d) involves three distinct rights: the right of accused persons to be present at their trial; the right of accused persons to defend themselves in person or through legal counsel of their own choosing; and the right of accused persons to have legal counsel appointed, when the interests of justice require, without charge, if they cannot afford to pay for counsel themselves.¹⁴⁹ In addition, article 14(3)(f) entails the provision of a translator, if required, without charge. Defendants must be informed of each of these rights and must be given sufficient time to exercise them.¹⁵⁰ For instance, accused persons cannot defend themselves if they are not timely informed beforehand of the date and place of the trial.¹⁵¹ The appointment of counsel "where the interests of justice so require" is determined by the seriousness of the offence.¹⁵² In capital punishment cases, it is "axiomatic" that the defendant is entitled to the effective assistance of counsel at all stages of the proceedings, including appeals.¹⁵³ The State has the responsibility to ensure the fulfilment of this obligation.

Finally, the prohibition against self-incrimination under article 14(3)(g) means that accused persons cannot be forced to testify against themselves at trial or to confess to guilt. In this connection, authorities may not use any direct or indirect physical or undue psychological pressure in contravention of the prohibition against torture under article 7 of the ICCPR in an attempt to extract a confession. Domestic law must ensure that any confessions obtained under such circumstances are excluded as evidence against the accused, although such material can be used by the accused to prove the use of torture.¹⁵⁴

3.2 Application to the Situation in Iran

3.2.1. *Independence and Impartiality of the Judiciary*

Legislation pertaining to Iran's judiciary indicates adherence to the separation of powers

¹⁴⁶ *Ibid*; HRC GC 32 (n 78) para. 33.

¹⁴⁷ HRC GC 32, *ibid*, para. 33.

¹⁴⁸ *Ibid*, para. 34.

¹⁴⁹ *Ibid*, paras. 36-38; see also Nowak (n 2) pp. 337-40.

¹⁵⁰ HRC GC 32, *ibid*.

¹⁵¹ HRC GC 32, *ibid*, para. 36.

¹⁵² HRC GC 32, *ibid*, para. 38.

¹⁵³ *Ibid*.

¹⁵⁴ HRC GC 32, *ibid*, para. 41; see also Nowak (n 2) pp. 344-45.

principle. Article 156 of the Constitution explicitly states that the judiciary is an independent power. However, both Iranian legislation and the *de facto* situation suggest otherwise. As one commentator has stated:

Since the judicial system is functioning under the direct leadership of the Supreme Leader [whose] 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.¹⁵⁵

The Head of Judiciary himself is directly appointed by, and answerable to, the Supreme Leader. The Special Rapporteur on the independence of judges and lawyers and the Special Representative on the situation of human rights in the Islamic Republic of Iran have noted the Supreme Leader's influence over the judiciary with concern.¹⁵⁶ This followed the reported statement of Hadi Marvi (First Deputy to the Judiciary Chief Mahmoud Hashemi Shahroudi) that “judges must obey the Supreme Leader and have no independence in judgment.”¹⁵⁷ The influence of both the Supreme Leader and Head of Judiciary in the aftermath of the 2009 presidential election indicates judges' inability or unwillingness to defy the Head of Judiciary. It is reported that the judiciary acquiesced to the intervention of military and security forces to quell the public protests through the use of killing, mass arrests, arbitrary detention and torture.¹⁵⁸ Reports further indicate that the Iranian authorities used arbitrary detention and torture in an effort to repress dissent surrounding the 2009 presidential election.¹⁵⁹ The torture methods were reported to be “highly systematic” and used to extract information about persons or groups considered to be “anti-regime”, as well as to obtain confessions that were later used against them in legal proceedings, in contravention of the prohibition against torture and use of confessions under article 14.¹⁶⁰ Extensive use of arbitrary and incommunicado detention was also reported, with all persons allegedly being subjected to such tactics for political purposes.¹⁶¹ In the majority of the cases, there were no formal charges made, no judicial process and no access to a lawyer.¹⁶² Two of the accused were provided access to a lawyer but, allegedly, only after a forced confession had been obtained through the use of torture.¹⁶³ Further, a former commander of the Revolutionary Guard was appointed as a “consultant” to the judiciary, demonstrating the influence of the Supreme Leader on the judiciary.¹⁶⁴

¹⁵⁵ Kar (n 37) p. 6, quoting Mehdi Khalaji, ‘Judicial System and Rule of Law’, BBC Persian, August 16, 2009.

¹⁵⁶ Report of the Special Rapporteur on the independence of judges and lawyers, Dato’ Param Cumaraswamy (n 135) para. 116.

¹⁵⁷ *Ibid.*

¹⁵⁸ AI (n 60) pp. 17-21.

¹⁵⁹ Freedom from Torture, ‘Torture in Iran since the 2009 elections’ (March 2013), p. 8.

¹⁶⁰ *Ibid.*, pp. 8, 21.

¹⁶¹ *Ibid.*, pp. 8, 17, 21.

¹⁶² *Ibid.*, pp. 22-23.

¹⁶³ *Ibid.*, pp. 22-23.

¹⁶⁴ Kar (n 37) p. 5.

The reported systematic use of arbitrary detention, torture and deprivation of due process, as well as the use of “show trials,”¹⁶⁵ is not confined to the time period surrounding the 2009 presidential elections. To the contrary, the reporting indicates that this appears to be the *modus operandi* of the security forces and the Revolutionary Courts since the 1979 Revolution. Such treatment was considered persistent throughout the 1980s and 1990s, documented in multiple reports of the Special Representative on the human rights situation in the Islamic Republic of Iran during that period.¹⁶⁶ It is documented that immediately following the Revolution and the reestablishment of clerical judges, clerics held trials – often in the prisons – and ordered the summary executions of hundreds of the former regime’s officials and military.¹⁶⁷

The Iranian Courts have been known to deprive defendants of access to lawyers in the pre-trial phase and sometimes during trial.¹⁶⁸ This denial of the right to a defence lawyer contravenes article 35 of the Iranian Constitution, which guarantees the right to a lawyer, and article 128 of the Criminal Code of Procedure, which provides the right to a lawyer during the investigation phase. However, article 128 is subject to an exception that allows judges to exclude lawyers where they deem it necessary for purposes of confidentiality, prevention of corruption and for national security crimes.¹⁶⁹ This exception is frequently abused by investigating judges to prevent the presence of lawyers during the interrogation of a defendant, where the use of torture is often relied upon to exact confessions.¹⁷⁰ Revolutionary Court judges are said to often prevent lawyers from accessing client files on the basis that the lawyer is not properly ‘qualified’ to review certain files; the licensing Bar Association is the competent body to make such assessments, not Revolutionary Court judges.¹⁷¹

Public “recantations,” typically in the form of videotaped “confessions” that are then publicly broadcasted, are common tools used to intimidate prison detainees and members of the public who oppose the regime.¹⁷² Recantations of lesser-known individuals may be shown on closed-circuit television within the prisons rather than broadcast to the public at

¹⁶⁵ See, eg, IBAHRI, ‘IBAHRI concerned at lack of legality of mass trials in Iran’ (18 August 2009) (expressing concern about mass trial of over 100 individuals critical of the 2009 presidential elections, as well as some of the lawyers defending them).

¹⁶⁶ See, eg, Report on the human rights situation in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Reynaldo Galindo Pohl, U.N. Doc. E/CN.4/1989/26 (26 Jan. 1989); Final report on the situation of human rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Reynaldo Galindo Pohl, U.N. Doc. E/CN.4/1993/41 (28 Jan. 1993); Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Islamic Republic of Iran, U.N. Doc. A/55/363 (8 Sept. 2000).

¹⁶⁷ R Afshari, *Human Rights in Iran: the Abuse of Cultural Relativism*, (University of Pennsylvania Press, 2001), pp. 68-69.

¹⁶⁸ AI (n70) p.40; *Ibid*, p. 69.

¹⁶⁹ Kar (n 37) p. 7, discussing the Note to article 128 of the Criminal Code of Procedure.

¹⁷⁰ *Ibid*, pp. 7-8; see, also, IHRDC, ‘Witness Statement of Mahnaz Parakand’ (8 September 2012), paras. 26-28.

¹⁷¹ IHRDC, *ibid*, para. 22.

¹⁷² Abrahamian (n 34) p.5; Afshari (n 167) pp. 75-76.

large like those of well-known individuals. One commentator has stated that the purpose is “that of grand theatre staged by the authorities as positive propaganda for themselves and as negative propaganda against their real and imagined enemies.”¹⁷³ The authenticity or accuracy of these recantations is dubious and may be attributable to the use of torture. The use of such public recantations serves no legal purpose.

The Islamic Republic of Iran sometimes responds to reports of the above by pointing to the rights explicitly enumerated in the Iranian Constitution and laws, including certain fair trial rights, equality before the law, the prohibitions against torture and use of evidence obtained by torture, as proof that it has not violated these rights.¹⁷⁴ Undoubtedly, express enumeration of human rights in the Constitution and laws are incredibly important as a prerequisite to adequate protection of human rights. However, it does not automatically lead to actual implementation, respect and compliance with human rights in Iran. The problem is multifaceted: the Constitution’s general principles on human rights conflict internally with the general principle of *Velayat-e Faqih* and role of Shari’a; the rights are undermined by legislation passed on specific judicial issues; and the *de facto* implementation of the law is inconsistent with the rights in question.

3.2.2 Revolutionary Courts

The institutional structure of Iran also appears to be inconsistent with article 14 of the ICCPR. The Revolutionary Courts and Guard were originally established to deal with members and supporters of the former regime and to repress those individuals and groups who were instrumental in the Revolution but did not support the IRP.¹⁷⁵

In 1981, it was reported that an Islamic cleric of the Revolutionary Courts ordered the execution of fifteen girls demonstrating in support of then-President Abolhassa Banisadr after his removal from office for criticising the Supreme Leader and the IRP.¹⁷⁶ The girls were said to have been executed without any access to a lawyer or appearance at trial.¹⁷⁷ It is reputed that over 4,000 people, mostly supporters of the Mujahideen-e Khalq, have been executed by the Revolutionary Guard on the orders of Islamic judges.¹⁷⁸ By 1982, the estimates of the number of people executed since the 1979 Revolution continued to rise, with indications that victims were being executed under the pretext of being

¹⁷³ Abrahamian, *ibid*, p.6.

¹⁷⁴ See, eg, UN Human Rights Council ‘National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1,’ submitted by IRI (18 Nov. 2009) U.N. Doc. A/HRC/WG.6/7/IRN/1 (UPR Report), paras. 21-40, 61, 86; Human Rights Committee, ‘Consideration of reports submitted by States parties under article 40 of the Covenant, Islamic Republic of Iran, Addendum: Replies from the Government of the Islamic Republic of Iran to the list of issues (CCPR/C/IRN/Q/3) to be taken up in connection with the consideration of its third periodic report (CCPR/C/IRN/3),’ (12 September 2011), U.N. Doc. CCPR/C/IRN/Q/3/Add.1, §§68, 71-73, 86-90, 103, 116.

¹⁷⁵ Irfani (n 46) pp. 183-186.

¹⁷⁶ *Ibid*, p. 223.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*.

‘terrorists’ or threatening to the regime – a tactic that is still reportedly used today.¹⁷⁹ The term ‘terrorist’ came to connote ‘a general term for political dissidents – teachers, lawyers, students and journalists who subscribe to a particular ideology or outlook.’¹⁸⁰

In 1984, the UN Commission on Human Rights appointed a Special Representative to Iran to investigate human rights concerns.¹⁸¹ The representative’s mandate was to examine the treatment of minorities and discrimination against members of the Baha’i religion.¹⁸² The Representative noted the revolutionary authorities’ systematic nature of persecution against Baha’i through the use of arrest and execution of prominent figures, confiscation of assets and intimidation.¹⁸³ Of most importance to this study, the report also discussed the use of summary arrest and lengthy arbitrary detentions without formal charge, as well as the many execution orders issued by the Revolutionary Courts.¹⁸⁴ It was expected that if formal charges were brought, they were on vague and false grounds, such as being “agents of Zionism, collaborators with the Pahlavi regime, opponents of Islam, enemies of the Government and people of Iran and moral degenerates.”¹⁸⁵ The Special Rapporteur’s subsequent mandate was expanded to cover the general human rights situation in Iran, and the UN special procedures focused on human rights in Iran included both country-specific and thematic mandates.¹⁸⁶ Similar accounts of systematic abuses of human rights, torture, mass executions, lack of fair trial and due process echo the first report throughout the numerous Special Representative and Special Rapporteur reports since 1979, including those of the current Special Rapporteur.¹⁸⁷

This evidence suggests that these article 14 violations are not specific to any particular period for the Islamic Republic of Iran – any one particular Supreme Leader, Head of Judiciary or judge. Rather, they appear to be systemic. The apparent failure to operate a system respectful of separation of powers principles, including an independent and impartial judiciary, has perpetuated a justice system influenced by political power and interests, especially the views of the Supreme Leader and those directly appointed and

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, p. 224.

¹⁸¹ UN Commission on Human Rights Res. 1984/54 (14 March 1984)

¹⁸² See, eg, Human Rights Commission, ‘Treatment of the Baha’is in Iran, Note by the Secretary-General’ U.N. Doc. E/CN.4/1517 (31 December 1981).

¹⁸³ *Ibid.*, p.6.

¹⁸⁴ *Ibid.*, p.7.

¹⁸⁵ *Ibid.*, p.7.

¹⁸⁶ For a listing of the relevant Iran country-specific and thematic U.N. mandates and the accompanying reports, see the Iran Human Rights Documentation Center website, available at: <http://www.iranhrdc.org/english/news/features/3410-table-of-un-special-rapporteurs-and-representative-involvement-in-iran.html#.UWRfbr-R--T>.

¹⁸⁷ See, in particular: Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran, U.N. Doc. A/66/374 (23 September 2011); Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran U.N. Doc. A/HRC/19/66 (6 March 2012); Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, U.N. Doc. A/67/369 (13 Sept. 2012); Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, U.N. Doc. A/HRC/22/56 (28 February 2013). See also AI, ‘Iran, Annual Report 1983’ (30 November 1983) p.1; AI website section in Iran, available at: <http://www.amnesty.org/en/region/iran>.

influenced by him, such as the Head of Judiciary. Consequently, violations of the various fair trial rights under articles 14(1)-(3) of the ICCPR and the Judiciary Principles are prevalent, perpetrated by Revolutionary Courts, displaying many of the characteristics warned against by the UN Human Rights Committee.¹⁸⁸

3.2.3 *Independence and Impartiality of Individual Judges*

The weight of evidence suggests that individual judges in Iran are often not objectively independent or impartial. Their selection is based on the *gozinesh* process, which involves extensive investigations focused on candidates' beliefs and prior political leanings rather than solely professional competence and legal qualifications. If appointed, judges do not enjoy security of tenure because their employment is at the discretion of the Head of Judiciary who, under article 158 of Iran's Constitution, has broad powers of appointment, transfer, assignment and promotion of judges. While article 164 of the Constitution prescribes the grounds under which judges may be removed or transferred and the procedure for doing so, all of these decisions are subject to the Head of Judiciary's input. Therefore, there are few incentives for judges to act inconsistently with the views of the Head of Judiciary. This diminishes the independence and impartiality of judges, in contravention of article 14(1) of the ICCPR and the Judiciary Principles.¹⁸⁹

Furthermore, from 1994, judges in the Revolutionary and Public Courts fulfilled the role of both prosecutor and judge.¹⁹⁰ This undermined the opportunity of a criminal defendant receiving a fair trial as the judge determining guilt and sentencing was also the one who prosecuted the case.¹⁹¹ This arrangement violated the impartiality requirement under article 14(1) of the ICCPR, Judiciary Principles by adopting the Guidelines on the Role of Prosecutors (Prosecutors Guidelines).¹⁹² Although separation of the adjudicatory and prosecutorial functions was restored in the late 1990s, there is no indication that persons convicted and sentenced under the former framework have been released, compensated, had their convictions expunged or received any other form of judicial remedy.

¹⁸⁸ Although outside the scope of this research study, it is worth noting that, like the Revolutionary Courts, clerical courts exist outside Iran's official judicial system, issue death sentences and appear to be used "as a means of resolving factional struggles within the clerical leadership rather than as courts of law." AI (n 60) p.29.

¹⁸⁹ Kar (n 37) pp. 4-5.

¹⁹⁰ AI, 'Iran Country Report', presented at the 7th European Country of Origin Information Seminar, Berlin, (11-12 June 2001) Final Report, (1 Nov. 2001), available at: <http://www.unhcr.org/refworld/docid/402d04744.html> [accessed 21 November 2012], p. 68.

¹⁹¹ *Ibid*, p. 68.

¹⁹² 'Guidelines on the Role of Prosecutors,' (n 23).

4. LAWYERS AND BAR ASSOCIATIONS

4.1 Applicable Law and Principles

4.1.1 *Freedom of expression*

The UN Human Rights Committee has stated that freedom of opinion and expression under article 19 of the ICCPR is the “foundation stone” for a free and democratic society.¹⁹³ It is unsurprising that this right is at the core of the ICCPR and serves as a touchstone for all other ICCPR rights.¹⁹⁴ Article 19 encompasses both a private freedom (freedom of opinion)¹⁹⁵ and a public freedom (freedom of expression).¹⁹⁶ The private freedom to hold and form an opinion is absolute and cannot be limited or restricted in any way; any attempts to do so will violate the ICCPR.¹⁹⁷ The outward manifestation, or public freedom of expression, is the right to express one’s opinion and to actively seek, receive and impart information.¹⁹⁸ The scope of the right to freedom of expression in relation to form and content is broad, including verbal and written expression, assemblies and demonstrations, works of art, audio and visual media, etc.¹⁹⁹ It covers, among other things, discussion of private and public affairs and political, human rights and religious discourse.²⁰⁰

Unlike for the right to form a personal opinion, the State may limit the right to freedom of expression, but only in the precise manner and for the specific purposes set forth under article 19(3).

Regarding the manner of limitation, it must be established by law, accessible to the public and be sufficiently precise for individuals to regulate their conduct.²⁰¹ Because any restriction on the freedom of expression is a serious curtailment of human rights, any restriction that is not established through formal legislation or an equivalent method will violate article 19.²⁰² Incompatible methods of limitation include administrative provisions, vague statutory authorisations and traditional, religious, or other customary law.²⁰³ Such a legal limitation may not give unfettered discretion to those charged with

¹⁹³ HRC, General Comment No. 34, ‘Article 19: Freedom of opinion and expression’ (2011), CCPR/C/GC/34, § 2.

¹⁹⁴ *Ibid.*, para. 2; Nowak (n 2) p. 438 (citations omitted).

¹⁹⁵ ICCPR, art. 19(1).

¹⁹⁶ ICCPR, art. 19(2); Nowak (n 2) p.440.

¹⁹⁷ Nowak (n 2) p.440; HRC GC 34 (n 197) para. 9.

¹⁹⁸ Nowak, *ibid.*; HRC GC 34, *ibid.*, para. 11.

¹⁹⁹ Nowak, *ibid.*, p. 445; HRC GC 34, *ibid.*, para. 12.

²⁰⁰ HRC GC 34, *ibid.*, para. 11.

²⁰¹ Nowak (n 2) p. 460; HRC GC 34, *ibid.*, paras. 22, 25.

²⁰² HRC GC 34, *ibid.*, para. 24; Nowak, *ibid.*

²⁰³ *Ibid.*

enforcing it.²⁰⁴ Limitations are then subject to a strict test of necessity and proportionality.²⁰⁵

Regarding the purpose and effect, States may limit the right to freedom of expression only on the basis of protecting the rights and reputations of others and for the protection of national security, public order or public health or morals.²⁰⁶ The national security and public order limitations are often used by States as ‘justifications’ to target journalists or persons engaged in gathering and disseminating information on human rights situations, including judges and lawyers.²⁰⁷ States also may try to extend the notions of national security or public order so far as to curtail mere expressions of opinion or to justify “the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights” or for the arbitrary arrest and detention, torture or threats of any person.²⁰⁸

Thus, the limitations provision under article 19(3) must be strictly construed and any restrictions based on national security may only be imposed in “serious cases of political or military threat to the entire nation.”²⁰⁹ Consequently, repressive measures that are aimed at critics of a regime will violate article 19, despite a State’s attempts to justify such repression by labelling the expression as ‘subversive’.²¹⁰ Likewise, blasphemy laws and other prohibitions imposed for lack of respect for a religion or belief system contravene the right to freedom of expression.²¹¹ Individuals must be able to criticise all public figures, including heads of state, government figures and religious leaders.²¹²

4.1.2 *Freedom of Association*

Article 22 of the ICCPR provides for “the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests,” as well as for limitations on this right in certain circumstances.²¹³ The right to freedom of association is both a civil and a political right.²¹⁴ It safeguards an individual’s right to found or join an association and establishes the collective right of an association to perform activities on behalf of its members.²¹⁵ States have a negative obligation to refrain from interference with associations and a positive obligation to provide the legal framework for incorporation of associations as juridical persons.²¹⁶ States may require associations to register or to be licensed but cannot otherwise restrict the right to freedom of association except as prescribed by law and only as deemed necessary in a democratic

²⁰⁴ HRC GC 34, *ibid*, para. 25.

²⁰⁵ Nowak (n 2) p. 460; HRC GC 34, *ibid*, para. 24.

²⁰⁶ ICCPR, art. 19(3).

²⁰⁷ HRC GC 34 (n 197) para. 23; see, also, Nowak (n 2) pp. 463-66.

²⁰⁸ HRC GC 34, *ibid*; Nowak, *ibid*, p.445.

²⁰⁹ Nowak, *ibid*, p. 463-64; HRC GC 34, *ibid*, para. 30.

²¹⁰ Nowak, *ibid*, p. 450 (citing multiple Human Rights Committee cases).

²¹¹ HRC GC 34 (n 197) para. 48.

²¹² HRC GC 34, *ibid*, paras. 38, 48.

²¹³ ICCPR, art. 22.

²¹⁴ Nowak (n 2) p. 496.

²¹⁵ *Ibid*, p. 498.

²¹⁶ Nowak, *ibid*, p. 498-500.

society in the interests of national security, public order, the protection of public health and morals, or the protection of the rights and freedoms of others.²¹⁷ Associations can only be dissolved by the State where they present a political or military threat to the entire nation or engage in war propaganda against the State.²¹⁸

The African Commission on Human and Peoples' Rights ('ACHPR') has explicitly considered lawyers' right to freedom of association, which is worth setting out in this context.²¹⁹ The Nigerian government retroactively issued a Legal Practitioners' Decree establishing a new governing body ('Body of Benchers') over the Nigerian Bar Association. Under the Decree, the Body of Benchers would be comprised of 128 members, of whom 31 would be Bar Association nominees. The remaining 97 members would be the Government's nominees.²²⁰ The Body of Benchers was given broad discretionary powers, including authority over financial and disciplinary matters.²²¹ The Decree prohibited and criminalised attempts of bringing actions against the Body of Benchers to challenge its management of the Bar Association or the exercise of its power.²²² The African Court determined that the Decree was an impermissible interference with the free association of the Nigerian Bar Association because the new Body of Benchers was dominated by government representatives and had wide discretionary powers. Thus, the Decree contravened the Charter's preamble, in conjunction with the Judiciary Principles, and stood in violation of the right to freedom of association under article 10 of the African Charter.²²³ The African Court emphasized that government authorities should refrain from limiting the exercise of the freedom of association and "should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards."²²⁴

4.1.3 UN Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers

The UN Congress on the Prevention of Crime and Treatment of Offenders bolstered the General Assembly's Judiciary Principles by adopting the Guidelines on the Role of Prosecutors²²⁵ ('Prosecutors Guidelines') and the Basic Principles on the Role of Lawyers²²⁶ ('Lawyers Principles') in 1990, which reflect and expand on many of the fair trial, freedom of expression and freedom of association rights contained in the ICCPR.

²¹⁷ ICCPR, art. 22(2); Nowak, *ibid*, p. 506.

²¹⁸ Nowak, *ibid*.

²¹⁹ African Commission on Human and Peoples' Rights (ACHPR), *Civil Liberties Organisation v. Nigeria (in respect of the Nigerian Bar Association)*, Comm. No. 101/93 (1995).

²²⁰ *Ibid*, para. 1.

²²¹ *Ibid*, para. 2.

²²² *Ibid*, para. 3.

²²³ *Ibid*, para. 17. The ACHPR also found that the Decree violated Articles 6 (right to liberty) and 7 (fair trial rights) of the African Charter because it was retroactive and prohibited legal recourse (paras. 12-14).

²²⁴ *Ibid*, para. 16.

²²⁵ Guidelines on the Role of Prosecutors (n 23).

²²⁶ Basic Principles on the Role of Lawyers (n 23).

The Prosecutors Guidelines address a range of issues, including qualifications, selection and training, freedom of expression and association, roles in criminal proceedings and discretionary functions and relations with other government agencies or institutions.²²⁷ They state that qualified prosecutors should be selected on the basis of stated criteria, without partiality or prejudice.²²⁸ States must ensure that prosecutors are aware of the “constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognised by national and international law.”²²⁹ Prosecutors are to be “strictly separated from judicial functions” in criminal proceedings.²³⁰ Like judges, prosecutors must act impartially, objectively and in accordance with the law.²³¹ They should also “respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”²³²

Prosecutors are also tasked with giving “due attention” to prosecution of crimes committed by public officials, especially abuse of power and “grave violations of human rights and other crimes recognised by international law.”²³³ They must not use evidence they know or can reasonably believe was obtained by unlawful methods constituting a “grave violation of the suspect’s human rights” such as torture and cruel, inhuman or degrading treatment or punishment, or other human rights abuses, and must take all necessary steps to bring to justice those utilising such methods.²³⁴

The Lawyers Principles deem lawyers as the “essential agents of the administration of justice”²³⁵ tasked with “protecting the rights of their clients ... promoting the cause of justice” and upholding “human rights and fundamental freedoms recognised by national and international law.”²³⁶ States must ensure that lawyers are able to perform these functions “without intimidation, hindrance, harassment or improper interference” and can travel and consult with their clients freely.²³⁷ Lawyers must be given access to appropriate information, files and documents at the earliest possible time to enable them to effectively represent their clients and may not be prevented from appearing before the courts or administrative authorities to represent their clients, unless the lawyer has been disqualified in accordance with national law and in conformity with the Principles on Lawyers.²³⁸ Notably, lawyers are not to be “identified with their clients or their clients’ causes as a result of discharging their functions.”²³⁹ As such, States must ensure that

²²⁷ OHCHR and IBA (n 13) p. 147.

²²⁸ Guidelines on the Role of Prosecutors, (n 23) Guidelines 1-2.

²²⁹ *Ibid*, Guideline 2(b).

²³⁰ *Ibid*, Guideline 10.

²³¹ *Ibid*, Guidelines 12-13.

²³² *Ibid*, Guideline 12.

²³³ *Ibid*, Guideline 15.

²³⁴ *Ibid*, Guideline 16.

²³⁵ Basic Principles on the Role of Lawyers (n 23) Principle 12.

²³⁶ *Ibid*, Principle 14.

²³⁷ *Ibid*, Principle 16.

²³⁸ *Ibid*, Principles 19, 21.

²³⁹ *Ibid*, Principle 18; Report of the Special Rapporteur on the independence of judges and lawyers, (n 133)

lawyers are not prosecuted or threatened with prosecution or any other sanctions for fulfilling their recognised professional and ethical duties.²⁴⁰

4.2 Application to the Situation in Iran

4.2.1 *Lawyers As Individual Rights-Bearers*

Iran's apparent failure to ensure an independent and impartial judiciary and to safeguard the fair trial rights of criminal defendants has an adverse impact on the ability of lawyers to effectively defend those accused of crimes. Nevertheless, in addition to being prevented from fulfilling professional duties, it is clear that lawyers, and their families, are often targeted for trying to uphold human rights in Iran.

A wide range of UN bodies²⁴¹ and other organisations²⁴² have documented the “continuing and systematic targeting of human rights defenders, including, inter alia,

p. 5.

²⁴⁰ Basic Principles on the Role of Lawyers (n 23) Principle 16 and 20.

²⁴¹ See, eg, Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Islamic Republic of Iran U.N. Doc. A/55/363 (8 September 2000), para. 44; Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy' (n 133) para. 115 (discussing conviction, suspended prison sentences and 5-year suspension from the practice of law for Ms. Shirin Ebadi and Dr. Mohsen Rahami for charges of defamation and dissemination of false information); Report of the Special Rapporteur on the Right to freedom of opinion and expression, Ambeyi Ligabo (n 49) paras. 63-67 (expressing concern about the prosecution of lawyers for “dissemination of falsehoods” regarding statements made in court in defence of client and noting in particular the case of Mr. Nasser Zarafchan); Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran (23 September 2011) (n 192) paras. 46-48 (noting the prosecution of several lawyers who represented political and ideological defendants); Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran (6 March 2012) (n 192) paras. 50-51 (discussing the IRI's continued targeting of lawyers and subjecting them to harassment, arrest, detention and mistreatment for discussing their clients' cases with the press); Report of the Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, U.N. Doc. E/CN.4/2004/3/Add.2 (27 June 2003), paras. 49-52 (noting with concern the prosecution and sentencing of lawyers for fulfilling their roles as defence counsel by bringing to the courts' attention the ill-treatment of their clients and the malfunctions of the justice system).

²⁴² See, eg, ICJ, Press Release, 'Iran: ICJ Calls for the Stop of the Persecution and the Harassment of Human Rights Defenders and Lawyers,' (19 February 2007); Arseh Sevom, 'Attack on Civil Society in Iran,' (Report 2005-2010), pp. 26-31 (discussing attack on human rights defenders generally, and the specific cases of lawyers from the Defenders of Human Rights Centre: Ms. Shirin Ebadi, Mr. Abdolfattah Soltani, and Mr. Mohammad Ali Dadkhah); International Campaign for Human Rights in Iran, Blog Post, 'Iranian Lawyers Need Independence,' (26 Feb. 2012) and Press Release, 'Lacking Independence, Bar Association Remains Silent as Lawyers are Prosecuted,' (24 Aug. 2011); Center for the Defence of Human Rights, Joint Press Release of the International Federation for Human Rights and the Iranian League for the Defence of Human Rights, 'UN Special Rapporteur Should Intervene to Stop Suppression of Lawyers in Iran,' (9 Apr. 2011); Human Rights Watch, Joint Statement, 'Iran: Lawyers' Defence Work Repaid with Loss of Freedom,' (1 Oct., 2010) and 'Iran: Halt Moves to Curtail Lawyers,' (16 July 2009) available at: <<http://www.hrw.org/news/2009/07/16/iran-halt-moves-curtail-lawyers>>; IBAHRI, Press Release, 'IBAHRI calls for the release of Iranian lawyer Javid Houtan Kian,' (6 March 2011) and Report, 'Balancing Independence and Access to Justice' (n 1); Lawyers Rights Watch Canada, 'Letter to President

**Human Rights
in Iran Unit**

University of Essex

lawyers ... who endure intimidation, interrogation, arrest and arbitrary detention as a result of their activities...”, as well as the “[o]ngoing, systemic and serious restrictions of freedom of peaceful assembly and association and freedom of opinion and expression, including those imposed on lawyers...”²⁴³ It is reported that human rights organisations and civil society groups working within Iran are typically accused of some type of illegal activity, “such as publishing statements, writing letters to international organisations, and holding news conference” or “distributing propaganda against the state” as a basis to shut down the organisation.²⁴⁴ Those lawyers who continue to engage in advocating for human rights, either by direct work with or representation of these organisations, may be subjected to international travel bans, multiple arrests and interrogations,²⁴⁵ lengthy detentions without charge, high bails, use of secret evidence, conviction for offences such as ‘propaganda against the system’ unannounced changes to sentences, and bans on practicing law.²⁴⁶ Lawyers’ family members may also be targeted for harassment, mistreatment or even arrest as a way to pressure lawyers.²⁴⁷ Furthermore, the lawyers who defend the arrested lawyers may then in turn be prosecuted, as was the case with prominent lawyer and human rights activist, Ms Nasrin Sotoudeh.

Ms Sotoudeh is known for representing juvenile defendants sentenced to execution.²⁴⁸ She also represented lawyer and co-founder of Defenders of Human Rights Centre Shirin Ebadi.²⁴⁹ Ms Sotoudeh was detained in September 2010 and subjected to several months in solitary confinement in Evin Prison.²⁵⁰ Her husband and her defence lawyer were also summoned for questioning.²⁵¹ Ms Sotoudeh was convicted and initially sentenced to eleven years imprisonment for charges of “propaganda against the State,” “collusion and

Ayatollah Sayed Ali Khamenei Re: Mr. Abdolfattah Soltani, Lawyer,’ (8 Nov. 2005); Amnesty International, ‘Annual Report A-Z’ (2012), pp. 177-79, Press Release, ‘Iran Must Free Detained Human Rights Lawyer’, (12 September 2011) (regarding Mr. Abdolfattah Soltani), Urgent Appeal, ‘Iran: Fear of torture of detained Iranian lawyer: Javid Houtan Kiyani,’ (7 April 2011), Public Statement, ‘Iran: End Arrests of Defence Lawyers’ (16 Nov. 2010), Report, ‘Fears grow for Iran stoning case lawyer and son,’ (3 November 2010), Urgent Action, ‘Iran: Human Rights Defender Risks Torture: Shadi Sadr’, (17 July 2009), AI (n 60), Iran, Annual Report (1983) (noting the detention without trial of lawyer Mohammad Taqi Damghami); Iranian League for the Defence of Human Rights (FIDH), ‘Iran: Suppression of Freedom, Prison, Torture, Execution...A state policy of repression,’ (December 2011) (discussing generally the violations of multiple freedoms of Iranians, including lawyers)

²⁴³ Situation of human rights in the Islamic Republic of Iran, GA Res. 66/175 (17 Feb. 2012), para. 2(f), (l).

²⁴⁴ Sevom, (n 258) pp. 29-31 (discussing Iranian authorities’ treatment of the lawyers from the Defenders of Human Rights Centre: Ms. Shirin Ebadi, Mr. Abdolfattah Soltani, and Mr. Mohammad Ali Dadkhah, as well as other members of the Centre). See, also: FIDH, ‘Iran: Suppression of Freedom, Prison, Torture, Execution...A state policy of repression,’ (n 258) p. 35 (discussing same).

²⁴⁵ See, eg, Iran Human Rights Documentation Center, ‘Witness Statement: Shadi Sadr’ (13 June 2010), describing the arrests, blindfolding, and multiple interrogations of Iranian lawyer and women’s rights activist Shadi Sadr.

²⁴⁶ Sevom, (n 252) p. 29; FIDH (n 252), p. 37.

²⁴⁷ Sevom, *ibid*, pp. 30-31.

²⁴⁸ FIDH (n 252) p. 38.

²⁴⁹ AI Statement, ‘Iran Must Overturn Jail Sentence of Prominent Lawyer and Human Rights Defender’ (13 June 2012).

²⁵⁰ AI Appeal/Urgent Action, ‘Iran: Further information: Detained human rights lawyer sentenced’ (13 January 2011); FIDH (n 249) p. 38.

²⁵¹ AI Appeal, *ibid*.

gathering with the aim of acting against national security” and links to the Defenders of Human Rights Centre, which she denied.²⁵² She was also banned from practicing law and from leaving the country for twenty years.²⁵³ Following an appeal, her sentence was reduced to six years of imprisonment and a ten-year ban on practicing law and leaving the country.²⁵⁴

Ms Sotoudeh’s case does not appear to be an isolated incident. In the two-year period following the 2009 presidential election, it is reported that nearly fifty lawyers were subjected to persecution by Iranian authorities as a result of exercising their professional duties.²⁵⁵ Although the authorities tend to target those lawyers who defend human rights defenders, activists and prisoners of conscience, this is not exclusive.²⁵⁶ Defence lawyers may also be arrested simply for defending ‘ordinary’ criminal defendants or expressing critical views of the judicial process.²⁵⁷ In 2010, for instance, Javid Houtan Kiyan, the lawyer of an Iranian woman sentenced to death by stoning for adultery was himself arrested for alleged “links to ‘anti-revolutionary groups abroad’” and being in possession of forged identity cards.²⁵⁸ He was allegedly subjected to cigarette burns, repeated beatings, being soaked with water and then left in the cold.²⁵⁹ Reports suggest that he was sentenced to a year of imprisonment and a five-year ban on practicing law during a trial in which he had no access to a lawyer.²⁶⁰ In another example, three lawyers were reportedly arrested and sentenced to several months’ imprisonment for “propagating lies and creating public anxiety” after representing members of a religious minority group who were charged, and acquitted, with “acting against national security.”²⁶¹

4.2.2 *Lawyers As Collective Category of Human Rights Defenders*

In the aftermath of the Revolution, the Bar Association and lawyers were viewed as “a form of opposition to [the Islamic Republic of Iran’s] fundamentalist ideas”, so the Bar Association was closed down and a number of its Board members were arrested and imprisoned.²⁶² In a 1982 letter appealing to the international community, the exiled Iranian Lawyers Committee described this event, during which regime forces stormed the

²⁵² *Ibid*; FIDH (n 252) p. 38.

²⁵³ AI Statement (n 257); FIDH, *ibid*.

²⁵⁴ AI Statement, *ibid*.

²⁵⁵ FIDH (n 252) p.38.

²⁵⁶ *Ibid*, p. 37.

²⁵⁷ AI Statement, ‘Iran: Rights organisations condemn continued persecution campaign against lawyers in Iran’ (23 May 2011).

²⁵⁸ AI Report, ‘Fears grow for Iran stoning case lawyer and son’ (n 250).

²⁵⁹ AI Appeal (n 258)

²⁶⁰ *Ibid*.

²⁶¹ USCIRF Annual Report 2011, ‘Countries of Particular Concern: Iran’, available at: <http://www.unhcr.org/refworld/docid/4dbe90c3c.html>, last accessed 13 March 2013; see, also, FIDH & LDDHI, Joint Statement, ‘UN Special Rapporteur should intervene to stop suppression of lawyers in Iran’ (9 April 2011).

²⁶² Nayyeri (n 1) p.5.

Bar Association's premises and confiscated its records, library and funds.²⁶³ The Lawyers Committee's letter also explained that the right of lawyers to defend those facing Revolutionary Courts had been overruled, in contravention of the new Constitution, and that at least seven lawyers had been executed over the previous six months.²⁶⁴ The Lawyers Committee further detailed the alleged human rights abuses conducted by the new regime, including: denial of the right to defence; suppression of the legal profession's independence; acts of genocide against religious minorities and Iranian nationalities like the Kurds; massacres of professional groups defending human rights and "all those who resist the sectarian domination of a ruling sect"; arbitrary execution of over 8,000 innocent persons prior to February 1982, including teenagers and pregnant women; and, detention and inhumane treatment of thousands of innocent persons.²⁶⁵ The Islamic Republic of Iran also removed the law licenses of those deemed to be promoting subversive ideas against the ideals of the Revolution.²⁶⁶

Bar Association's Board of Directors

The Bar Association later reopened as a result of international pressure. However, in 1984 the Judiciary was given the power to appoint the Bar's Supervisor, putting a halt instead to the election of a Chairperson by the Bar's members.²⁶⁷ The Bar Association's ability to elect its Board members was set to be reinstated by the 1991 Law of Appointment of Attorney by Parties to a Lawsuit. However, the day before the election was to occur, the 1991 Law of Correction of the Bar Associations was adopted,²⁶⁸ which placed an indefinite hold on the elections and created a commission to remove lawyers who the commission determined to be connected with the former Pahlavi regime or with groups declared illegal.²⁶⁹

Following the election in 1997 of President Mohammad Khatami, the Bar Association was permitted to resume elections for its Board of Directors for the first time in nearly two decades, but was subject to the 1997 Law on Conditions for Obtaining the Attorney's License.²⁷⁰ The Law on Conditions requires that election candidates be confirmed by the Supreme Disciplinary Court for Judges following inquiries with the Ministry of Intelligence, the Revolutionary Courts, the police and other relevant judicial and law enforcement bodies as to whether a given candidate meets several enumerated criteria.²⁷¹ Among the requisite factors are the belief and commitment "to the rules and foundations of the holy Islam", the Iranian regime and the primacy of religious jurists and the

²⁶³ Irfani (n 46) Appendix 2, 'Appeal by Iranian Lawyers Committee, Subject: Suppression of the Iranian Bar Association,' p.261. This event is also mentioned in Nayyeri (n 1) p.6.

²⁶⁴ Irfani, *Ibid*, p. 261.

²⁶⁵ *Ibid*, p. 262.

²⁶⁶ Nayyeri (n 1) pp. 5-6.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*, p. 9.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid*, p. 10.

²⁷¹ *Ibid*, p. 11.

Constitution.²⁷² Candidates must also not be members of, or cooperate with, “apostate groups” or “misleading and anti-Islam sects and groups whose charters are based on denial of divine religions,” and must lack membership and support for “illegal and anti-Islamic Republic of Iran cliques”; candidates must also have no relationship with the former Pahlavi regime.²⁷³ As a result of the application of these broad and undefined criteria, numerous lawyers – particularly prominent human rights defenders – have been disqualified prior to every election for the Bar Association’s Board of Directors.²⁷⁴ Following the 2009 presidential election protests, the Head of the Judiciary attempted to unilaterally adopt the “Revision to the Regulations of the Law of Independence of the Bar Associations,”²⁷⁵ which would have further undermined the Bar Association’s independence.

Article 187 Advisors

The Government’s interference with the Bar Association extends past the elections of the Board of Directors. In 2001, a new body of lawyers termed “Legal Advisors of the Judiciary” was created pursuant to Article 187 of the 2000 Law of Third Economic, Social and Cultural Development Plan.²⁷⁶ The Article 187 legal advisors and their “Legal Advisors’ Centre” operate in parallel to lawyers and the Iranian Bar Association but they are under the direct supervision of the Judiciary.²⁷⁷ The required qualifications for such legal advisors, which are significantly less stringent than those of lawyers,²⁷⁸ bypass the normal requirements to be a licensed lawyer. The Legal Advisors’ Centre has its own examination, training and permit processes.²⁷⁹ However, legal advisors must renew their permits annually with the Judiciary’s approval, making it less likely that legal advisors will act in contravention to the Judiciary’s views for fear of revocation or non-renewal of their licenses.²⁸⁰

Bill of Formal Attorneyship

In 2011, the Legal Advisors’ Centre began attempts to integrate itself and its legal advisors into the Bar Association. This followed the Bar Association’s objection to the

²⁷² 1997 Law on Conditions for Obtaining the Attorney’s License. See also 1991 Law of Appointment of Attorney by Parties to a Lawsuit, Article 2, available at <http://rc.majlis.ir/fa/law/show/92825>. See also *ibid*, p. 10-11.

²⁷³ *Ibid*.

²⁷⁴ *Ibid*, p. 11.

²⁷⁵ *Ibid*, p. 15; see also Sevom, (n 252) p. 31; HRW, ‘Iran: Halt Moves to Curtail Lawyers’ (n 250).

²⁷⁶ Nayyeri, *ibid*, p. 12.

²⁷⁷ *Ibid*, pp. 12-13. The centre is called Markaz-e omur-e moshaveran-e gove-ye qazaeiyeh.

²⁷⁸ Article 187 legal advisors must sit for one exam and complete a 6-month traineeship, whereas Iranian Bar Association lawyers must sit for an entrance exam, complete an 18-month traineeship, and then sit for a final plenary exam. Nayyeri, *ibid*, p. 13.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*. Indeed, this has already been the case as, for example, two Article 187 legal advisors had their licenses revoked by the Legal Advisors’ Centre after it was revealed by the Ministry of Intelligence and Political and Security Affairs that they had represented members of a religious minority group; FIDH, ‘The Hidden Side of Iran: Discrimination against ethnic and religious minorities’, (October 2010) p. 24.

continuing existence of Article 187 legal advisors on the grounds that the law creating the advisors had expired in 2005.²⁸¹ Article 187 legal advisors began representing themselves as lawyers and the Legal Advisors' Centre was renamed in 2009 to the "National Association of Legal Advisors and Attorneys" to resemble the name of the Bar Association.²⁸² The Bar Association continued its resistance and objection to the Article 187 scheme, eventually supporting a Bill of Attorneyship, proposed by 153 Members of Parliament, that could resolve the conflict between the two organisations and bring the legal advisors under the supervision of the Bar Association.²⁸³ The Judiciary replaced the Parliament's Bill with its own Bill of Formal Attorneyship in 2012, which is currently still pending between the Commission of Government Bills and the Judiciary as of March 2014.²⁸⁴

The Bill of Formal Attorneyship is the most far-reaching of the laws targeting the Bar Association thus far as it threatens to completely eradicate the Bar Association's independence.²⁸⁵ Provisions of concern include the following:²⁸⁶

- The long-standing and historic title of the "Bar Association" will be replaced with the "Organisation of Attorneys", reflecting the determination of the authorities to downgrade the position of the Bar from an independent body to a subordinate governmental organisation;
- Articles 25 - 30 prescribe a dependent body called the "Supervision Commission", whose members would be appointed by the Head of the Judiciary. The Commission is empowered to supervise key affairs of the Bar Association and lawyers, including the competence of the lawyers and the election of the Board of Directors and confirmation of the elections, suspension and revocation of the licenses of all lawyers, including the directors of the Bar;
- Under article 122, ownership of the Bar Association's properties and assets will be conveyed to the abovementioned Supervision Commission;
- Under article 123, the decisions made by the Commission cannot be challenged in

²⁸¹ Nayyeri, *ibid*, p. 14.

²⁸² *Ibid*. The Bar Association strongly objected to this renaming and filed a complaint in the Court of Administrative Justice. Although the Court did not nullify the name change, the Centre's new name has been abandoned in practice.

²⁸³ *Ibid*, pp. 14, 16.

²⁸⁴ Iran Human Rights Documentation Centre (IHRDC), Statement from a group of Iranian lawyers, 'In defence of "independent legal practice" in Iran' (25 February 2013), p. 2, available on the IHRDC website: <http://www.iranhrdc.org/english/news/1000000251-in-defence-of-independent-legal-practice-in-iran.html#.UUZd96XOW-R>; Nayyeri, M., (n 1) p. 14. In fact the Commission of Government Bills had made some positive changes to the Bill under the Ahmadinejad presidency. But after Rouhani came to power in June 2013, the Committee ignored the changes and sent the Bill back to the Judiciary for possible modification.

²⁸⁵ Nayyeri (n 1) p. 14.

²⁸⁶ IHRDC (n 292) pp. 2-3.

judicial and administrative bodies in many cases, such as revocation of the licenses of lawyers and, in those cases, shall be deemed final;

- The President of the Bar Association currently issues lawyer’s licenses; under the new Bill, lawyers’ licenses shall be issued with the signature of the Chairperson of the Organisation, which must be approved by the judicial authority, the Chief Director of the Justice Administration of the Province (article 42), for the issue to be valid. Similarly, the procedure of taking the professional oath cannot be carried out without the presence of the Chief Director of the Justice Administration. There is no consequence or complaint procedure for his refusal to attend;
- According to article 48 of the new Bill, “competent bodies” are empowered to suspend or bar lawyers from practicing law. Currently, according to the Law of Independence of Bar Associations, this is the exclusive role of the Disciplinary Court for Attorneys. If this article is adopted, Public and Revolutionary Courts, for example, will be able to directly suspend and disbar lawyers.

The new Bill of Formal Attorneyship was drafted without prior consultation or agreement of the Bar Association, whose opinions have not been taken into account.²⁸⁷ It closely resembles the 2009 Revised Regulations of the Law of Independence of the Bar Associations, which were later suspended following persistent objections by the Bar Association.²⁸⁸ If passed, the Formal Bill of Attorneyship will place all aspects of the Bar Association under the direct control of the Head of Judiciary, who in turn is accountable to the Supreme Leader.

The experiences of lawyers and the Bar Association since the Revolution demonstrate Iran’s lack of compliance with articles 19 and 22 of the ICCPR. Iranian authorities’ vague assertions that lawyers are ‘threatening national security’ or promoting ‘subversive’ or ‘anti-revolutionary ideas’ fail to meet the criteria of foreseeability and sufficient precision necessary for acceptable restrictions on the right to freedom of expression. Engaging in professional duties and promoting human rights does not constitute “serious cases of political or military threat to the nation” as indicated by the UN Human Rights Committee. To the contrary, the patterns displayed – arresting and interrogating lawyers and their family members, and convicting and imposing arbitrary sentences, including bans on practicing law – suggest that Iran uses national security as a pretext to suppress lawyers.

This is supported by Iran’s interference with the Bar Association. The pending Bill of Formal Attorneyship presents a challenge to the independence of the Iranian Bar Association in contravention of article 22 of the ICCPR, the UN Basic Principles on the Role of Lawyers and Iran’s own Constitution.

²⁸⁷ *Ibid*, pp. 2-3; see, also, Nayyeri (n 1) pp. 17-22.

²⁸⁸ Nayyeri, *ibid*, p. 17.

5. CONCLUSION

An independent and impartial judiciary and legal profession are fundamental to the rule of law and the protection of human rights. This legal research study sets out Iran's obligations under articles 14, 19 and 22 of the ICCPR and other applicable instruments, such as the UN Guiding Principles on the Independence of the Judiciary and Role of Prosecutors and Basic Principles on the Role of Lawyers, which provide for the right to a fair trial by a competent, independent and impartial tribunal established by law and the rights to freedom of expression and association.

Prior to the 1979 Revolution, Iran had a semi-independent judicial system and a fully independent Bar Association. The fundamental structures and processes were in place, though these were challenged by the Pahlavi monarchy and its violations of the rule of law and human rights. Following the Revolution and a new Constitution for the Islamic Republic, the Supreme Leader and his direct appointee, the Head of Judiciary, heavily influenced the legal system. Islamic judges were reintroduced, Revolutionary Courts were established and legislation targeting the independence of the legal profession was enacted. Despite its international obligations, Iran has continued the use of the Revolutionary Courts for alleged crimes against national security. Violations of the right to a fair trial have occurred under the Revolutionary Courts at all stages of proceedings against those brought within its jurisdiction, including lawyers. The guarantees for rights that do exist in the Constitution are undermined by specific legislation on the judiciary and legal profession. Furthermore, both Iran's institutional structure and the situation in practice fail to comply with its international legal obligations.

Iranian lawyers and human rights defenders have been subjected to harassment, persecution and, in a number of instances, to prosecution and conviction for conduct that reflects the peaceful exercise of their rights to freedom of expression and of association. The Islamic Republic of Iran has also taken steps that resemble attempts to undermine the independence of the Bar Association, from outright abolishment of the Association to the drafting of the Bill of Formal Attorneyship and establishment of the Article 187 advisors. This restricts the Bar Association's collective function to protect its members and the rule of law and to promote human rights and the rule of law.

Annex – Article 14 of the ICCPR

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*order public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.