

Constitutional Coherence and the Legal Status of the Bahá'í Community of Iran

By Salim A. Nakhjavani

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The drafting and adoption of constitutions are vital, hopeful, fraught, symbolic, profound and complex processes in the transition from a past of conflict to the promise of a better future. But where dichotomies between constitutional aspirations and lived experience are allowed to fester over years, unchecked and uncorrected by genuine democratic inclusion and participation,¹ the concentric ripple effects of a nation's process of transition become disturbed and chaotic. Currents of impatience, despair, and sometimes even social violence build around entrenched structures of social injustice. Whilst collective efforts to construct a viable and attractive alternative take shape, the vast potentialities of that constitution-making process, that milestone of transition, are left unrealised. The course to the horizon mapped in that document, so distant from the experience of a wearied population, fades into obscurity.

1. Constitutional Coherence as a Process Norm

This brief reflects on the current Constitution of Iran in relation to the case of its indigenous Bahá'í community. Drawing on the South African experience of constitution-driven transition, it brings to the foreground a normative principle of *constitutional coherence* as one requiring the systematic attention of the three interdependent branches of government, the community at large and, indeed, each of its individual members. This coherence is not outcome-oriented – that is, one that demands the immediate accessibility of means to fulfil lofty constitutional promises and aspirations – but rather implies a number of characteristics at the level of *process*, beyond the traditional scope of rule of law principles. How and to what degree do the legal frameworks, rights, freedoms, responsibilities, institutions and methods inculcated within the constitution cohere with the lived experience of the people? What is being learnt about the means to strengthen this coherence? What are the characteristics of consultative and collaborative approaches that genuinely widen the circle of inclusion and invite the wholehearted participation of a diverse body of individuals in decision-making within a given society? How are the indispensable and interrelated characteristics of flexibility and immutability within the legal system reflected in constitu-

tional values and norms? And by what means is reflection on lived experience in widely different social contexts within a nation channelled into the holistic and structurally-just interpretation and application of constitutional principles, beyond the adversarial contestation of parties to litigation?

2. Unfulfilled Constitutional Promises: An Object Lesson

In the case of South Africa's much-lauded transition from the 'total system'² of apartheid to democratic constitutionalism, the nation's Interim Constitution of 1993 describes itself as "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all".³ Despite the worldwide regard in which the finalised South African Constitution of 1996 is held, both in the South and the North, local views have become increasingly disillusioned. Twelve years into the democratic dispensation, in 2006, one scholar observed unequivocally, "[i]t is abundantly clear that the [South African] society suffered the replacement of racial apartheid with what can be accurately considered to be class apartheid".⁴ The following year, another warned of a "neoliberal assault on poor communities".⁵ Eighteen years on, in 2012, another stated plainly:

It is [...] time for South Africans to acknowledge, in all sincerity, that the transformation has been a disappointing one – a huge failure, in fact. We replaced the immoral and inhumane system of apartheid with an immoral and inhumane politico-economic system. [...] It is time for South Africans – black and white – to ask penetrating questions about what went wrong during the transformation process.⁶

² Aletta Norval, *Deconstructing Apartheid Discourse*, Verso, pp. 103-104.

³ Interim Constitution (South Africa), Act 200 of 1993, postscript.

⁴ Patrick Bond, "Ten Years of Democracy: A Review", in Amanda Alexander (ed.), *Articulations: A Harold Wolpe Memorial Lecture Collection*, Africa World Press, 2006, p. 37.

⁵ Tshepo Madlingozi, "Post-Apartheid Social Movements and the Quest for the Elusive 'New' South Africa", in *Journal of Law and Society*, 2007, vol. 34, no. 1, p. 97.

⁶ Solomon Johannes (Sampie) Terreblanche, *Lost in Transforma-*

¹ See generally Susan Marks, *The Riddle of All Constitution*, Oxford University Press, 2003.

Today, despite all its collective strengths and the instrument of a well-drafted Constitution entrenching justiciable socio-economic rights alongside civil and political rights, and a generally strong and independent judiciary, South Africa remains one of the most unequal societies in the world. The lack of coherence between aspiration and reality is propelling, within public discourse, a striking loss of faith not only in partisan politics and social institutions, but *in the Constitution itself*.

3. Sketching Aspects of the Iranian Constitution

The Constitution of the Islamic Republic of Iran,⁷ heralded a radical break from a lamentable and outworn order. Approved with more than 98% of affirmative votes in a national referendum in 1979, eight months after the revolution that ended the regime of the Sháh, it includes the longest preamble of any constitution in the world.⁸ Despite the verbosity, its noble aspirations were explicit from the outset: “[to] advance the cultural, social, political, and economic institutions of Iranian society based on Islamic principles and norms, which represent an honest aspiration of the Islamic *Ummah* [that is, the Muslim community of belief and practice]” and “to establish an ideal and moral society on the basis of Islamic norms”.⁹ The remainder of the preamble comprises a laudatory narrative of the revolutionary movement, its struggles and sacrifices, and the principles of Islamic government – chief among these the *veláyat-i-faqih* [rule of the jurist, that is, the ‘Leader’, a senior member of the Muslim clergy], alongside commentary on the position of women, the nature of Islamic economy, the branches of government, the armed forces and the media.

The Constitution itself comprises 177 Articles, so a comprehensive review falls beyond the scope of this brief. Noteworthy from a comparative constitutional perspective, and for present purposes, are its characterisation of the transcendent character of human reality in Article 2, its value-based appeals to humanity and universalism in Article 152 of the Chapter on ‘Foreign Policy’, and its striking absolutism, reflected in Article 177, on amendment:

Article 2: The Islamic Republic is a system based on faith in [...] the wondrous and exalted status of human beings and their freedom, which must be endowed with responsibility, before God. [...]

Article 152: The Islamic Republic of Iran considers human happiness throughout human society as its ideal. It considers independence, freedom, and the governance of justice and truth as the right of all the people of the world. Consequently, while it completely abstains from any kind of intervention in the internal affairs of other nations, it supports the struggles of the oppressed for

tion, KMM Review, 2012, p. 124.

⁷ This brief relies on the most recent English re-translation of the Iranian Constitution published by the International Society for Iranian Studies, in *Iranian Studies*, 2014, vol. 47, no. 1, pp. 159-200.

⁸ Vladan Kutlešić, “Preambles of Constitutions: A Comparative Study of 194 Current Constitutions”, in *Annals of the Faculty of Law in Belgrade*, 2010, vol. 58, no. 2.

⁹ Constitution of the Islamic Republic of Iran, 1979, as amended, available at <http://www.wipo.int/edocs/lexdocs/laws/en/ir/ir001en.pdf>, last accessed at 13 November 2016 (“Constitution”).

their rights against the oppressors anywhere in the world.

Article 177: [...] It is impossible to change the content of the articles which concern the Islamic nature of the system; establishment of all the laws and regulations on the bases of Islamic criteria and the faith and aims of the Islamic Republic of Iran; the form of the government as a republic; the sovereignty of the command [of God] and religious leadership of the community [of believers]; administration of affairs with reliance on general referendums, and the official religion and ideology of Iran.

One recent discourse analysis of the preamble of the Iranian Constitution, read in the broader socio-political context, illustrates how the text seeks to influence the construction of national identity by cleaving a dichotomy between the new republic and two opposing forces: both an *external* ‘West’ and an *internal* ‘other’. The following illuminating insight about the Constitution emerges:

On the one hand, the different discourses of national identity are counter-hegemonic [...]. The perceived hegemony of the imperial powers is being resisted [...]. On the other hand, the anti-imperialist discourses are also hegemonic as they all prescribe political, cultural and moral values [as] the *only* way of bringing the Iranian nation out of ‘decline’. They are also expected to be adopted by the nation. *In this sense, many of the nationalisms are exclusive*.¹⁰

It is precisely this inbuilt exclusivity, founded on the construction of the community and its institutions in relation to an illusory ‘other’ that robs the Iranian Constitution of the generative force needed to build and sustain the “ideal and moral society” it seeks to establish. The precarious constitutional and legal position of the Bahá’í community – the largest religious minority of that nation – provides a case in point.

4. The Iranian Constitution and the Lived Experience of the Bahá’í Community

The Bahá’í community of Iran recognises Bahá’u’lláh¹¹ as the latest but not the last in an unbroken chain of “Divine Educators” or “Messengers”, progressively revealed to humanity, whose essence has the same divine origin. As such, Iranian Bahá’ís are said to uphold the sanctity of all major world religions, including Islam, and the divine station of each of their “Founders”. The belief of Bahá’ís calls them to learn to apply science and religion as complementary systems of knowledge, to eschew the divisiveness of partisan politics, to obey the civil authorities, to work selflessly for the betterment of society, and to contribute to the peaceful development of their country.

Their sustained persecution by the Iranian government has been amply documented by United Nations organs, agencies, treaty bodies and experts.¹² After cycles of detention, torture and extrajudicial execution, banning of elected administrative

¹⁰ Shabnam Holliday, *Defining Iran: Politics of Resistance*, 2011, Ashgate, p. 74 [emphasis added].

¹¹ A title meaning ‘The Glory of God’.

¹² Bahá’í International Community, “UN Reports”, available at <https://www.bic.org/focus-areas/situation-iranian-bahais/united-nations-documents-referencing-bahai-community>, last accessed on 13 November 2016.

bodies, vilification of Bahá'ís through the media, desecration of cemeteries and holy places, identification through the keeping of official lists and continued denial of access to higher education, the most recent iteration of the systematic targeting of the Bahá'ís of Iran has taken the form of economic apartheid.¹³

One of the most significant ways that the Iranian Constitution legitimises the oppression of the Bahá'í community is simply by denying the existence of the community as a religious minority. Article 13 of the Iranian Constitution provides:

Article 13: Zoroastrian, Jewish, and Christian Iranians are considered the only recognized religious minorities. They may exercise their religious ceremonies within the limits of the law. They are free to exercise matters of personal status and religious education and they follow their own rituals.¹⁴

This provision legitimates much of the documented patterns of persecution to which the Bahá'ís are subjected. On this basis, the Bahá'ís are denied the freedom of religion and belief, in both its individual and collective dimensions. Other laws and regulatory instruments refer back to Article 13 of the Constitution, stating that the rights set out in the legislation are available to those who belong to Islam and these three recognized religions. As such Bahá'ís are excluded from the benefit of most legal and constitutional protections.

The diffusion of Article 13 across the Iranian regulatory framework works grievous injustice in individual cases. In 2014, for instance, a prospective university student who placed 113th out of more than a million applicants in the national university entrance examinations was denied access to higher education on the explicit basis that she did not hold “[b]elief in Islam or one of the religions specified in the Constitution”.¹⁵

A similar pattern emerges in Article 26 of the Constitution, which provides:

Article 26: The political parties, associations and trade unions, Islamic associations, or associations of the *recognized religious minorities* are free to exist on the condition that they do not negate the principles of independence, freedom, national unity, Islamic criterion, and the foundation of the Islamic Republic. No one can be prevented from participation in these gatherings or forced to participate in one of them.¹⁶

This Article complements the discriminatory effect of Article 13: those religions that are not on the approved list are barred from forming associations of any description.

Article 49 of the Constitution makes provision for the government to confiscate “illegitimate wealth”:

¹³ “BIC Calls on President Rouhani to end Systematic Economic Oppression”, *Bahá'í World News Service*, 6 September 2016, available at <http://news.bahai.org/story/1119>, last accessed on 13 November 2016.

¹⁴ Article 13, Constitution, see *supra* note 9.

¹⁵ Bahá'í International Community, “Iran switches tactics in efforts to conceal how it prevents Baha'is from entering university”, 24 September 2014, available at <https://www.bic.org/news/iran-switches-tactics-efforts-conceal-how-it-prevents-bahais-entering-university>, last accessed on 13 November 2016.

¹⁶ Article 26, Constitution, see *supra* note 9 [emphasis added].

Article 49: The government is responsible for confiscating illegitimate wealth resulting from usury, usurpation, bribery, embezzlement, theft, gamble, misuse of Islamic government endowments, misuse of government contracts and transactions, uncultivated lands and others belonging to the public, houses of ill repute, and other illegitimate sources. The government shall pass on this wealth to the rightful owner and in case such an owner is not identified it must be deposited in the public treasury. This ruling must be carried out by the government after investigation, research, and proof through Islamic law.¹⁷

The use of this power of confiscation is monitored by the special ‘Article 49 Courts’. In practice, these Courts regularly use their power to arbitrarily confiscate property and assets belonging to both the Bahá'í community and individual Bahá'ís merely on the basis of their religious affiliation and practice, often leaving Bahá'ís destitute.¹⁸

The current policy of the Iranian government towards the Bahá'ís was set out in a 1991 secret memorandum of the Supreme Revolutionary Cultural Council, ratified by Iran's Leader Ali Akbar Khamenei, which stated that “the Government's dealings with them [the Bahá'ís] must be in such a way that their progress and development are blocked”.¹⁹ This policy reflects the nature of the government's treatment of the Bahá'ís, which is characterised by a desire to appear fair and equitable at first glance while denying Bahá'ís fundamental rights in reality. It is an approach illustrated, in that same statement, by the apparent guarantee that Bahá'ís must enjoy “the means for ordinary living in accordance with the general rights given to every Iranian citizen” but only “[t]o the extent that it does not encourage them to be Bahá'ís”.²⁰

The practice of this inherently contradictory statement can be seen not only in the concrete steps set out in that same statement – expulsion of Bahá'í students from university, propaganda strategies to counter Bahá'í teachings, denial of the right to employment, destroying the Bahá'ís' cultural roots – but also in laws, regulations and administrative practices enabled by the Constitution and implemented by the Government, such as the stringent limitation on burial of the dead to far-flung areas of each province, making it impossible to obey Bahá'í burial principles. These laws, regulations and administrative practices demonstrate an irreconcilable tension: a desire to appear to abide by the rule of law on the one hand and, on the other, an intent to eliminate the Bahá'í community as a viable entity.

The result is an institutionalised policy of discrimination against the Bahá'ís, which allows the Iranian government to claim it is merely upholding the rule of law – whereas in real-

¹⁷ Article 49, Constitution, see *supra* note 9.

¹⁸ See e.g., “Letter of 46 Bahá'í Citizens of Iran to the Judicial Authorities”, available at <https://hra-news.org/en/articles/letter-46-bahai-citizens-iran-judicial-authorities>, last accessed on 13 November 2016.

¹⁹ “Decision of the Supreme Revolutionary Cultural Council”, 25 February 1991, p. 22, para. A3, available at <http://news.bahai.org/documentlibrary/TheBahaiQuestion.pdf>, last accessed on 13 November 2016.

²⁰ *Ibid.*, para. C2.

ity it is upholding the rule of discriminatory laws it has crafted and enacted “in such a way their [the Bahá’ís] progress and development are blocked”.²¹

Not surprisingly, this fundamental incoherence in lived reality of constitutional principles, then, builds a social edifice whose foundation cannot rest on truthfulness. The following extract from a 2012 statement by the Bahá’í International Community details the expression of this systematic policy of denial:

For three decades, notwithstanding incontrovertible evidence of the Iranian government’s persecution of Baha’is, when its representatives are called to account in international forums, they have categorically denied this persecution. Recently, government representatives made the following public statements: Dr. Mohammad Javad Larijani, Secretary-General of the Iranian High Council for Human Rights: “no Bahá’í in Iran is prosecuted because he is Bahá’í”; Mr. Seyed Mohammad Ali Pourmousavi, Director General for political affairs of the Ministry of Interior: “the totality of the religions and the Sufis and the Bahá’ís are given equal treatment by the law and they enjoy their rights as citizens; they’re not discriminated against”; and Mr. Khosro Hakeemee, Deputy Secretary-General of the Human Rights High Council: “the Bahá’ís community, as far as livelihoods are concerned, they are doing very well. They are very well off.” Sadly, these types of comments are not only the lot of Bahá’ís. In an interview not long ago, the same Dr. Larijani also asserted that “there are no political prisoners inside the Islamic Republic of Iran”.²²

The Iranian Constitution presents a paradox, then, because the persecution of the Bahá’ís contravenes not only the Constitution itself but the religious standard of the provisions of the Qur’án, as quoted in Article 14 of the Constitution:

Article 14: According to the Qur’an: “Allah forbids you not, with regard to those who fight you not for (your) faith nor drive you out of your homes, from dealing kindly and justly with them. For Allah loveth those who are just” (80:8), the government of the Islamic Republic of Iran and Muslims are required to treat the non-Muslim individuals with good conduct, in fairness and Islamic justice, and must respect their human rights. This principle is valid for those persons who have not conspired

or acted against Islam and the Islamic Republic of Iran.

Finally, it should be noted that while the Islamic Penal Code provides recourse for the deprivation of constitutional rights and individual freedoms, this remedy has proven unavailable in practice to the Bahá’ís of Iran:

Article 570: Any official and agent associated with State agencies and institutions, who unlawfully strips members of the public of their personal freedom or deprives them from their rights provided in the IRI Constitution, shall be sentenced to two months to three years’ imprisonment, in addition to dismissal from the service and prohibition of employment in state offices for one to five years.²³

5. Concluding Remarks

The brief review above, contrasting the documented, lived experience of systematic persecution of the Bahá’ís of Iran with explicit constitutional principles, attests to the prevailing lack of coherence in the application of the principles of the Iranian Constitution. Setting aside the question of incompatibility of an array of Iranian laws and administrative practices with international human rights law, the experience of South Africa’s transition suggests that the system-effects of this incoherence can only result in a weakening of the influence of that Constitution in shaping the social reality of Iran. What can readily be expected, then, is the efflorescence of creative and indigenous alternatives to build a just social order, founded on genuine, inclusive democratic participation of all citizens of that country.

Salim A. Nakhjavani is based at the School of Law of the University of the Witwatersrand where he researches and teaches legal writing and professional ethics. He is an admitted Advocate of the High Court of South Africa and has served in legal advisory and prosecution functions at the International Criminal Court, the United Nations Office of the High Commissioner for Human Rights and the Extraordinary Chambers in the Courts of Cambodia.

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²¹ *Ibid.*, para. A3.

²² Bahá’í International Community, “Over 30 years of Systematic Persecution of the Bahá’ís in Iran”, available at <https://www.bic.org/statements/over-thirty-years-systematic-persecution-bahais-iran>, last accessed on 13 November 2016 [original footnotes omitted from quotation].

²³ Article 570, Islamic Penal Code, available at <http://iranhrdc.org/english/human-rights-documents/iranian-codes/1000000351-islamic-penal-code-of-the-islamic-republic-of-iran-book-five.html>, last accessed on 13 November 2016 [this brief relies on the most recent translation of the Penal Code prepared by the Iran Human Rights Documentation Centre, a non-governmental organisation].