

Ramin S. Moshtaghi, Die menschenrechtliche Situation sunnitischer Kurden in der islamischen Republik Iran

Summary

The Human Rights Situation of Sunni Kurds in the Islamic Republic of Iran – The Problems of Realising Human Rights in a Legal System Characterised by the Primacy of Religious Law

The thesis focuses on the human rights situation of Sunni Kurds in the Islamic Republic of Iran (I. R. Iran). Since Sunni Kurds belong both to an ethnic and a religious minority in a legal system strongly influenced by Shiite Islam, the situation of their human rights provides a vivid example of the problems minorities and their members face in legal systems characterised by a primacy of religious law.

The first part of the book offers an overview of the history and the present situation of the Kurdish minority in Iran, thereby demonstrating its characteristics as an ethnic, linguistic, national and to a large extent also a religious minority. Due to the status of both Kurds and Sunnis as minorities, the I. R. Iran is obliged to grant them the internationally established rights of minorities and their members.

After providing a short overview over the international instruments for the protection of minorities and their individual members, the second part of the thesis focuses on the rights of minorities in Shiite (*ḡafari*) law, the state religion of the I. R. Iran, and Iranian domestic law.

While the *ṣarī'a* unequivocally prohibits any discrimination between Muslims based on ethnic, linguistic or national affiliation, there are no rules regarding the protection of minorities against involuntary assimilation. However, as long as minorities rights do not lead to substantive inequality between Muslims, Islamic law does not inhibit the state from introducing rights to enable the members of minorities to enjoy and develop their cultural identity.

The situation of religious minorities in Islamic law on the other hand is quite different. The *ḡafari* school of Islamic law provides multiple rules discriminating against *Sunni* Muslims. Although there are voices within the community of Shiite religious scholars (*ulamā*) propagating brotherhood between Sunnis and Shiites in the name of Islamic unity, these are rather political statements which have failed until the present day to reform any of the discriminations of Sunnis in *ḡafari* law.

From an international law perspective the Iranian Constitution also features multiple deficits regarding the human rights of the members of minorities. In particular, neither freedom of religion nor equality between the adherents of different faiths is guaranteed sufficiently.

Due to these discrepancies, the relation between Islamic law and the Iranian constitution on the one hand and international law on the other hand is analysed in detail.

According to Iranian domestic law *ḡafari* Islamic law enjoys absolute primacy followed by the constitution and parliamentary laws. In consequence, according to article 4 of the Iranian constitution both the constitution and all laws and regulations have to be based on *ḡafari* law. Regulations of international treaties to which the I. R. Iran has become party share the rank of parliamentary laws, which means that international treaty obligations according to domestic law rank below both *ḡafari* law and the constitution.

Concerning the relationship between Islamic law and international law, there are fundamental differences between both systems and they share points of contact only in a few individual aspects. Hence, from the perspective of Islamic law, international law can only be recognised in individual aspects which are common to both systems, like the principle of *pacta sunt servanda* for instance. Nevertheless, the practice of all states with majority Muslim population has found itself more or less completely reconciled with international law rather than Islamic law. One of the few instances when Islamic law is invoked to reject international obligations concerns obligations following out of the universally guaranteed human rights. In particular the I. R. Iran has invoked Islamic law trying to deny its international obligations concerning human rights even in cases where it has failed to raise any reservations when joining the international treaty in question, e.g. the International Covenant on Civil and Political Rights (ICCPR).

From the perspective of international law, Islamic law lacks any direct implication on international law. Rather Islamic law is part of domestic law and domestic law has to be adjusted to the international obligations of a state and cannot be invoked as an excuse for failing to fulfil these obligations. Therefore the only option for Islamic states to prevent being obliged to fulfil treaty obligations inconsistent with Islamic law is to declare reservations upon signature and/or ratification. The I. R. Iran has declared a reservation only upon its accession to the Convention on the Rights of the Child (CRC) and the validity of this reservation is disputed due to its vagueness. Hence, the I. R. Iran cannot invoke Islamic law to justify its breaches of the human rights relevant in this thesis.

In the third part of the thesis individual infringements of internationally protected human rights of the members of the Kurdish and Sunni minorities are analysed in detail.

Iranian law excludes Sunni citizens from most senior public offices. In particular they are excluded from all posts reserved for clerics but also from those higher public offices which are open for laymen, as for instance the office of the president of the republic. The only position which is open for Sunnis in law and in fact is the position of a deputy of parliament. Most of the exclusions of Sunni citizens from access to public offices are stipulated by *ǧafari* law. These provisions are inconsistent with the freedom of religion, the right to access or eligibility to public offices and the prohibition of discrimination as established by international law. Hence the I. R. Iran is obliged to eliminate the human rights violations of its citizens and to adapt its domestic law to its international obligations.

However, there are not only deficits of the human rights situation of Sunni Kurds concerning their integration into state and society, rather there are also infringements of their rights to enjoy and develop their cultural identity. Although the constitution in article 15 explicitly allows for the teaching of minority languages in schools and there are strong arguments for the perception that the norm also entails an obligation of the state to provide for mother tongue education, the state effectively prevents any instructions of Kurdish language both in private and public schools. This is incompatible with the international obligations of the I. R. Iran, in particular with articles 27 ICCPR and 30 CRC.

Moreover, the Iranian administration regularly bars Sunni citizens from building and maintaining mosques for their own. In some areas with a Shiite majority population, like for instance the capital Tehran, authorities completely inhibit the construction of mosques by Sunnis.

Finally, the compulsory instructions in schools serve as a tool for the propagation of the official religion and pupils of Sunni faith are heavily indoctrinated in Shiite Islam when attending school. Any propagation of a certain faith during compulsory instructions is incompatible with the freedom of religion of the pupils adhering to a different faith and the right of their parents or guardians to ensure the religious and moral education of their children in conformity with their own convictions. Due to the very specific guidelines for the curriculum of private schools these institutions share the mentioned deficits of their public counterparts. Private schools are in particular obliged to use the official school-books which are characterised by excessive propagation of the state religion. Although there are some accommodations for pupils of Sunni

faith both at private and public schools, these accommodations only effect religions instructions, while in the I. R. Iran also other topics like history, Persian etc. are characterised by the propagation of Shiite Islam. Moreover, the accommodation of religious instructions for Sunnis is far from being sufficient, because in particular the teaching materials provided neither allow for objective and neutral instructions *about* religions in general nor for instructions *in* the individual Sunni schools of law. Hence, even these accommodations are not sufficient to ensure instructions in compliance with the internationally protected human rights of Sunni pupils and their parents or guardians.

Due to the lack of mother tongue education and the unrestrained propagation of the official faith pupils have to bear a strong pressure for assimilation, a situation which is incompatible with the internationally protected minority rights of the members of the Kurdish and Sunni population. It is interesting to note that these particular infringements of human rights, different to the problems concerning access to public offices, are not directly attributable to *ḡafari* law. Therefore they are also incompatible with the Iranian constitution. Nevertheless, one cannot fail to notice that the characterisation of Sunnis as second class citizens prevailing in *ḡafari* law provides an atmosphere in which human rights violations of Sunni citizens which are not stipulated by *ḡafari* law tend to be disregarded by the authorities.

In conformity with the established rule of customary international law every state has to adjust its domestic legislation to its international obligation. Hence the I. R. Iran is obliged by international law to eliminate the infringements of internationally guaranteed human rights of its Sunni and Kurdish population immediately, even in cases where such changes affect basic constitutional principles. Therefore the obligation also includes amendments to the constitution which according to the prevailing perception within the Shiite *ulamā* are incompatible with *ḡafari* law.

Due to the fact that most of the infringements of human rights of Iranian citizens of Sunni faith are either directly attributable to *ḡafari* law or at least indirectly promoted by its discriminating rules, one has to conclude that religious equality and freedom cannot be realised fully in a legal system which like the Iranian model does not only establish a religion of state but furthermore tries to converge religious law with domestic law by introducing the absolute primacy of religious law. Although there are attempts by a minority of members of the Shiite *ulamā* to accommodate *ḡafari* law to international human rights standards, the problem that every religion necessarily has to differentiate between its

followers and adherents of other creeds will remain. However, a differentiation on such a basis is prohibited in particular due to the internationally guaranteed freedom of religion and the prohibition of discrimination on grounds of religious affiliation. Hence, the incompatibility of Iranian law with the human rights of the members of its religious minorities can only be eliminated by restricting the orientation of the legal system on religious law in a way that guarantees that at least the core content of human rights have to enjoy primacy under all circumstances and their protection has to be guaranteed irrespective of the provisions of *ḡafari* law.

The establishment of a constitutional model which, like the Iranian example, to a large extent integrates religious law of a certain faith into its legal order is compatible with the international obligations of a state to guarantee the human rights of its citizens only if these postulates are implemented. By introducing these conditions a state legitimised by religious principles does not necessarily turn into a secular state. However, it has to ignore the primacy of religious law insofar as it has to guarantee the equality of its citizens irrespective of their religious affiliation.