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INTRODUCTION	only with

inheritance law, and outside this field he uses limited sources¹ and makes errors as a result.

This survey is intended only to provide an outline of contemporary

The Iranian diaspora is one of the largest such populations in the world.

Iranian family law, focussing on those aspects that are most likely to be relevant to readers outside Iran, for instance in dealing with migrants whose marriages and divorces, inheritance rights and custody disputes. This naturally means that immigration staff, employers, social welfare bodies and others may purported marriages or divorces were effected under Iranian law, or who might stand to inherit under Iranian law. It is also limited because I have need to know something about Iranian law, and not only in a narrowly legal sense. The law is part of the legal system, which in turn is part of the system although I have tried to use the most recent information.

of government, and how it functions is in part determined by cultures and customs. This paper will attempt to convey something of what Iranian

The political framework of the law

family law is and how it functions in Iran, without claiming to provide the detailed and authoritative information that would be required to give advice on a particular case. Far more detailed, current and authoritative information is available from legal professionals within Iran.

The most striking features of the constitutional framework are the extensive division of powers, to the point of disorderly contradiction, the weak position of parliament, which is no more than a subordinate organ with Iranian law contains many features which are quite different to western limited powers to propose legislation, and the principle of *valáyat-i faqih*. law and to the forms of Islamic law employed in Sunni countries. One The latter gives a senior *faqih* (expert in Islamic law) absolute political might for instance be confronted with a man who admits having been married and fathering a child, has no divorce papers, but claims he is single power, as the 'Leader' (*rahbar*), and it makes the Executive and Legislative branches of government as a whole subordinate to the judiciary. In and has no duty to provide support because the marriage was 'only for a Khomeini's The Islamic State, the function of parliament is planning, not month'. There may be a daughter who claims to be destitute, although her legislation. The ruling circles and institutions today – that is, those deceased father was a major landowner. Or a husband who says he has to associated with the office of Leader, the Guardian Council and the judiciary use his savings to pay his ex-wife for the housework and breastfeeding she – work with a conception of the law which is the same as the *Sharf ah*: it is did while they were married. Or a couple who claim to have married each the law given by an ongoing *Shf ah* tradition of exegesis and expansion of other, in secret and without witnesses. No knowledge of the Islamic law Islamic law, and is not parliamentary legislation. There are others, notably practised in other countries would prepare one for the unique features of most of the reform-minded parliamentary parties and some departments of Iranian family law evident in these four cases: there is an institution of government, who operate with a different conception of law, but these have 'temporary marriage', daughters do not inherit land, wives are entitled to be

little ability to legislate and no power to influence jurisprudence. paid for doing housework and breastfeeding their own children, and Further constitutional details are not relevant here,² but it is important to marriages may be legally binding without witnesses. However there is no note that the supremacy of the judiciary extends to the position of judges adequate summary of Iranian family law published in English. Those even in lower and family courts vis-a-vis legislation and government available in French are out of date, suppose that the Civil Code will apply to regulations.³ It is also relevant to note that the law in Iran functions within the exclusion of *Sharf ah* law, and focus narrowly on the position of women. The one outline available in German is intended for legal professionals and is based only on legislation, which as we will see is only one source of Iranian family law. Nasir, who claims to provide the first

Chiefly al-Hilli, one of the authors used here.

See Schirazi, Constitution.

thorough English-language treatment of Shī'ah law¹ actually deals in detail

3

In Friday Prayers in Tehran (an important occasion for public announcements)

Ayatollah Yazdi, a member of the Guardian Council and former head of the judiciary, cited the relevant constitutional provisions to remind judges that they

Islamic Law, xv.

should not follow cabinet rulings that they considered to conflict with Islam. "The

1

2

an ethic of governance in which law in the western sense has only shallow operational within the framework of the ordinances of God, the extent of

roots. Personal relationships (rabteḥha) are more important than external

God's sovereignty and the absolute trusteeship given to the Prophet would

norms (zabteḥha) in guiding the administration of the country.¹ The result

be a meaningless phenomenon devoid of content."¹ The state's freedom of is a decidedly ad hoc approach to making and applying law.

action is thus identical to the freedom of action of God. It follows that state

The formal sources of law are:

law can over-rule the Sharī'ah and everything else (including individual - edicts of the leader;

rights for example). This principle has been used to pass and enforce - constitutional law;

regulations that contradict the Sharī'ah, but none of these have been in the

- rulings of the Council of Guardians and of the Expediency Council (which realm of family law.² Naturally it has been vigorously opposed by the more

Schirazi translates as 'Assessment Council'), the Council of Ministers, the orthodox 'ulamá.

Supreme Council of Justice, and the Council of the Cultural Revolution;

On the other hand, Article 4 of the Constitution provides that

"All laws

- legislation of the Majlis (parliament) including ratified international and regulations must be based on Islamic principles. This article applies

agreements, so far as the parliamentary legislation or agreements are generally to all the articles of the Constitution and other laws ...

the

confirmed by the Council of Guardians or the Expediency Council;

religious jurists of the Guardian Council [will decide] whether or not

such

- regulations promulgated as subordinate legislation by various government laws ... conform to this article."3 The generality of this reference,

to

departments;

principles (mavazin) rather than specific ordinances (ahkam) provides the

- primary Islamic sources (the Qur'án and Sunna, the latter including

Guardian Council with the absolute right to veto new law which they commentaries and rulings of the twelve Imams) and secondary commentary consider not to be in accordance with the spirit of the Sharf ah. They

have

and fatwas (legal opinions) based on these;

exercised this recently with respect to cases where the Sharf ah obviously

- and to some extent established customs and the rulings of superior courts.

has nothing to say, for instance in relation to the procedures for registering

The existence of multiple law-making bodies can lead to contradictions:

the publication of a newspaper. The Guardian council is an independently five councils and the Leader can make laws, and all are superior to operating body, but may be considered as an aspect of the judicial branch,

parliament. In fact there were two other councils, also superior to which in practice constitutes a conservative political faction.

parliament, that have had legislative powers, but neither have created

Khomeini and other leading jurists have emphasised that the ahkam legislation relevant to family law and neither is active now, so we need not

must be implemented in law, and article 72, which specifically gives the

consider these. There is also a Security Council which is not formally a

Guardian Council the right to veto parliamentary legislation, refers to both

legislative body, but is superior to parliament. Its brief includes fighting principles and ahkam, specific religious laws. The Guardian Council has

'cultural invasion' from the West and restraining 'social immorality', 2 so it is used this to reject an amendment raising the age at which girls can marry.

not inconceivable that it might issue rulings relevant to family law.

On this occasion, they have interpreted accordance with the Sharf ah in the

The validity and order of priority of some of these sources is being

strictest sense: the law must be identical to the ahkam. A more liberal vigorously debated. In January 1988 Khomeini declared that an Islamic state had the right to disregard Islamic ordinances when passing resolutions and laws. Government itself is the most important ordinance of God, thus

Text cited in Schirazi, Constitution 230.

the state can annul all other Islamic ordinances, even prayer, fasting and the

2

Schirazi, Constitution 63 - 81. Laws contrary to the Sharī'ah as understood by the

pilgrimage to Mecca. He argued that "If the powers of the state were [only]

Guardian Council have been those that limited the private ownership of land,

regulated labour relations, imposed taxes in addition to the khoms, nationalised

mineral resources, allowed the televising of sports showing men with bare arms and legs, and permitted the trade in caviar. Laws contrary to the constitution and in

judges enjoy full authority to annul such cabinet rulings, which are beyond the accordance with the wishes of the Guardian Council have also been passed under

legal rights and authorities of the executive body." (IRNA report, April 20, 2001). This principle. These include breaking the state monopoly on foreign trade

See Schirazi, Constitution 298 ff.

stipulated in the constitution (Schirazi, Constitution 67).

2

3

Schirazi, Constitution 97.

See Islamic Propagation Organization, Constitution.

3

4

interpretation would be that no civil law may permit or require something minimum age for marriage, a proposal that has been made by parliament but which is forbidden by the Sharī'ah. Since a girl who marries at 15 has not rejected by the Guardian Council as contrary to the Sharī'ah.

broken the Sharī'ah, on this reading the proposed law was not contrary to

Precedent, including rulings of superior courts on analogous cases, is

the Sharī'ah. The choice of a strict or liberal interpretation of conformity to not binding in theory. However Mir-Hosseini reports that in Tehran the Sharī'ah lies with the Guardian Council in each case.

head of the first Special (family) Court exercises tutelage over all the other

Article 170 of the Constitution states that judges "shall refrain from the courts in the city.¹ Legal opinions from authoritative jurists (mujtahids), execution of any government decrees or regulations which should prove which may have arisen as court rulings, are in principle binding as part of

contrary to Islamic laws and precepts or should lie beyond the jurisdiction the secondary Islamic sources, but the situation in Sharī'ah Islam is

of the Executive. This makes individual judges even in lower courts the complicated by the fact that a fatwa (opinion) is valid only during the arbiters of the appropriateness of laws and of the limits to the Executive lifetime of the authority who issues it. According to this rule, the opinions power, and again makes the Shar'ah superior to state law. Even the head of of Ayatollah Khomeini, as Leader (Rahbah) and as legal expert,² are no the judicial branch does not have the authority to require judges to follow longer valid. Yet his prestige is such that a court may well follow them. his directives, or to dismiss or reassign them. In Iran, every judge is a From the above we can draw the tentative conclusion that, at least as sovereign. The result is a chaotic slow and unpredictable judicial system, regards family law, the Shar'ah generally takes priority over parliamentary which the government does not have the power to reform. At the lowest legislation, pre-revolutionary Islamic legislation is generally valid, and level, the lack of clarity means that the judge has considerable freedom to individual judges have considerable latitude for interpretation. decide what the law is in any particular case. Mir-Hosseini's observations indicate that in Tehran in 1980 'secular law' (i.e., the civil code) had greater Administration of the law weight, but by 1985 the balance in the same courts had shifted to applying Shar'ah law.

The political framework within which the legislature and judiciary operate Some theoreticians have proposed that the tension between the priority in Iran is quite unique, and a considerable hindrance to the good of the state and of the Shar'ah should be resolved in favour of the former, administration of the law and of the land. by declaring that any law passed by an Islamic state becomes ipso facto part of the Shar'ah.¹ This is a shift from a theocratic to a caesaropapist theory of - Legislation the state. A more limited argument which has actually been applied and The Preamble to the 1983 Civil Code specifies that enactments passed by even institutionalised, in the Expediency Council, is the principle common the Majlis must be signed by the President within five days and passed to to all Sunni schools of Islamic law, allowing public interest to be taken into the Government, which is required to publish the text within forty-eight account in determining the immediate Shar'ah requirements. The odd thing hours. Legislation comes into force 15 days after publication, unless the about the latter argument is that Shi'ah jurists have traditionally rejected the legislation itself specifies otherwise. No legalisation may be retrospective, principle of maslahat as a Sunni innovation.² Striking as these arguments unless special provision unless the legislation itself specifies otherwise.³ are in the development of Iranian legal theory, neither appears to have been

The numerous other legislative bodies and the decrees of the leader are not applied to issues of family law thus far. It will be interesting to see whether subject to procedural requirements.

The Expediency Council considers that maslahat justifies raising the

Schirazi, Constitution 171. Brown, 'Islamic constitutionalism' provides an historical overview of the developing theory regarding the relationship between Marriage on Trial 25.

Sharfah and government.

Khomeini was interested primarily in philosophy rather than law, but did qualify

It does have Quranic roots, in the concept that 'necessity makes legal' (Qur'an as a jurist and published a collection of opinions on various questions (See

2:173, 6:145). For a discussion of the adoption of the principle of maslahat in Khomeini, A Clarification of Questions).

contemporary Iran see Schirazi, Constitution 233 - 244.

CC Articles 1 to 4.

5

6

- The judicial system

marriage; maintenance disputes; the custody of children and visiting rights;

The highest judicial body is the Supreme Judicial Council, mandated by paternity; disobedience (of the wife); guardianship of minors; maturity;

article 157 of the Constitution (1979) and charged with the appointment,

remarriage; and the conditions in marriage contracts. The judges in family suspension, promotion and dismissal of all judges. This body has

courts must themselves be married, and must have a working experience of declaratory powers that amount to legislation. It has for instance declared

at least four years. They are assisted in their work by female counsellors

that extortion in the sale of necessary goods, obstructing roads (i.e.,

and must give judgement in consultation with them.¹

demonstrations), and spreading rumours (freedom of the press) are criminal

The constitution includes a striking provision making judges personally

offences.¹ Since the Council issues orders directly to both prosecutors and

responsible for material or moral damages as a result of an error by a

judges, such declarations amount to law. The Council has also drafted

judge.² Although it is said that "in cases of a government mistake, the loss

is

articles and submitted them to the Majlis for ratification.

recompensated by the government", since the judiciary are completely

The Ministry of Justice is responsible directly to the Leader, but the

independent it is not clear how the government could ever bear the

Minister of Justice is appointed by the President. The Minister has very

responsibility. In any case, the claim would have to be argued in the courts

limited powers.

before the same judiciary, and it is not surprising that the procedure seems to be unused. There are many categories of courts, including criminal courts, a Court of Cassation, Revolutionary Courts, Press courts, Special Courts of the

Clergy, children's courts and, not least, the Special Civil Courts, which are

law gives judges considerable freedom. The administration of justice is also in effect family courts. The Special Civil Courts are presided over by highly politicised at present, with the judiciary in effect constituting a Shari'ah judges and are empowered to deal with familial disputes relating to conservative political faction, and factions within the judiciary representing

marriage, divorce, annulment of marriage, dowry, maintenance of the wife and other dependants, custody of children and inheritance.² Mir-Hosseini provides a picture of the way these courts operated in divorce cases in

- The legal profession

Tehran in 1987, with some statistical information about the types of cases

Proceedings in the Special Civil Courts that hear matters of family law are arising, in *Marriage on Trial*, 58-83.

informal. Litigants do not normally have a solicitor. They may choose to do so, but judges in the Civil Courts appear to look on this unfavourably.

Petitioners do however use professional scribes who have desks in or near the court building. These not only write the petitions in courtroom language but also give advice to litigants.³

the aim of the reform — to simplify and speed up the judicial process.

The Iranian Bar Association is an autonomous democratic professional association. It issues certificates to practice law to its members, subject to an examination. The licence is granted for three year periods, for practice in

family law, but in rural areas family law is the province of the general court.

a particular region.⁴ Only persons holding such a certificate can claim to be The jurisdiction of the family court covers permanent and temporary

a barrister or solicitor (there is no distinction). The Bar Association also has

marriage; divorce, cancellation and annulment of marriages; dowry and disciplinary courts for cases of misconduct, but does not have a code of engagement gifts; the payment of the wife for housework during the conduct. Attorneys are permitted to advertise, and do in fact advertise in

1

Amin, The Civil Code 50.

Ansari-Pour, 'Iran', 239-40.

2

2

Mir-Hosseini, Marriage on Trial 25. Mir-Hosseini's book is a comparative Islamic Propagation Organization, Constitution, Article 171.

anthropology of the family law systems in Iran and Morocco. She provides a

Mir-Hosseini, Marriage on Trial, 25, 30, 31.

detailed picture of the administration of family law up to about 1990.

Ansari-Pour, 'Iran', 238-9.

7

8

newspapers and on English-language web sites devoted to current affairs.

- Traditional Shī'ah law as compared to Sunni law

Attorneys are required either to have an LLB or higher degree in law, or to

Shī'ah approaches to traditional Islamic law (Sharī'ah) differ in some hold a BA in Islamic law or its equivalent from the Islamic seminaries.¹

respects from those current in the four main Sunni schools of law in the Foreign lawyers are not permitted to practice in Iran.

same period. Shī'ah law is also known as the Ja'fari school of Sharī'ah,

There is a category of second class attorneys who may not appear at the

because of the importance of the sixth Imam, Ja'far as-Sādiq in its High Court and may act only in a particular region of the country. There are development.

also a small number of 'legal aides' who are admitted only to the peace

From the earliest times there have been marked difference in Courts.² These are analogous to magistrate's courts for minor offences and inheritance law between Shī'ah and Sunni schools, and the Twelver Shī'ah

also function as small claims tribunals in civil cases. In the latter role they institution of temporary marriage (mut'a) is not accepted in Sunni schools.

might conceivably be involved in family disputes.

The laws concerning the making of the marriage contract are quite different

Fischer gives the courses and some texts used in the department of

in Shī'ah traditional law, but those regarding the forbidden degrees and Islamic Law at the University of Tehran before the revolution. This covers

other impediments to marriage are almost identical to those of the Sunni Shafi'ite and Hanafite law as well as some of the same texts that are used in schools.

the madrasahs in Qom which train judges.³

In general the effects of modernism were also felt a generation or two

Article 163 of the Constitution states that the qualifications and later than in Egypt and Turkey, creating some differences early in the legitimacy of the judiciary shall be determined by law in conformity with twentieth century. Since the 1979 revolution, the situation has been the principles of fiqh (Islamic jurisprudence). Following the 1979 reversed, with some changes being made in the traditional Sharī'ah revolution, as the `ulamá moved to displace judges whose training was in provisions regarding divorce which in any other Muslim country would be civil law, and as all female judges were dismissed, it was necessary to politically impossible.

appoint students from the seminaries as judges.⁴ The level of knowledge

References below to fiqh or Shī'ah Sharī'ah should be taken as referring

required for judges has since risen. A law school for the training of judges specifically to the Ithna-Asharī (Twelver) school of Shī'ah Sharī'ah, which

was established at Qom immediately after the revolution.⁵ The difficulty of is the state religion in Iran and differs markedly on legal questions from the

having judges whose training differs from that of attorneys has also been

Zaidīya and Ismā'īlī branches of Shī'ah belief. Within twelver Shi'ism,

reduced by giving each judge a clerk who is a graduate in secular law from there seems to be no systematic difference between Iranian, Iraqi and a university. ⁶

Lebanese opinions, and a good deal of movement of scholars and books between the three.

Shī'ah law

Like the Sunni Sharī'ah, Shī'ah Sharī'ah is in principle a private law, in

two senses. It says very little about government and the administration of the state (but a good deal about family matters), and it treats legal issues as a balance of rights and duties between individual actors.¹ The latter causes Manner of Taking the Attorneyship Licence Act, 1997.

Amin, *The Civil Code*, 54.

3

1

Religious Dispute to Revolution, 250-1, 147-9 respectively. Fischer perhaps

The shari'ah is thus frankly unsuitable to be what it has become in Iran, the basis

over-estimates the similarities, since the book which he says is the text for for a state legal system and the charter of the government of a state.

Throughout

Qur'anic law, Banu Amin Isfahani's *Kanz al-`irfan* is not even listed in

Islamic history, in Iran and elsewhere, jurists have generally been prevented by

Tabá tabá 'i's bibliography (*An Introduction to Shī'í Law*), while Kolayni's

al-Kafi rulers from intervening in the affairs of government, so it is not surprising that the law system the jurists produced is unsuited to the task of government.

In this

know the work thoroughly before beginning.

respect it is strikingly similar to the law — the Halakha — produced by Jewish

Schirazi, Constitution 66.

scholars during the period in which the Jewish people had no state. For a Mir Hosseini, Islam and Gender, 247-8.

devastating treatment of the unsuitability of the Halakha as the basis of state law,

Mir-Hosseini, Marriage on Trial, 25.

see Gershon Weiler, Jewish Theocracy, Leiden, E.J. Brill, 1988.

9

10

some tensions where state organs claim an interest in matters such as

It will be noted that these are relatively late, compared to the systematic marriage, divorce, inheritance and the custody of children. In addition to the collections of Sunni hadith. The science of hadith criticism was only question of whether the particular law that the state desires is compatible established for Shi'ism by 'Allám al-Hillí (1250-1325), and is borrowed with the Shar'ah, it is difficult to legitimate any state involvement in these from the methods already used by Sunni scholars.¹ So far as I am aware, no

questions. In contemporary Iran it is the Guardian Council which most translations of these Arabic sources are available. These four sources have clearly presents a vision of law and society in which government has little been compiled by Muhaqqiq al-Hillí (1205-1277), whose work on fiqh, role, while parliament and the government itself see a proactive role for an Shará'ih al-Islám, is still an essential text in seminary courses on law.

2

Islamic government in an Islamic society, and the Expediency Council as its

Fortunately it is available in a French translation, which has been used here.

name suggests is concerned with finding ad hoc solutions to keep 'the system' operating.

3) Consensus (ijma'). This means, the consensus of the whole community whose views can be ascertained, meaning in practice the available Shi'ah

- The sources of traditional Shi'ah law

authors and sources, including at least one of the Imams. Since the views of Imams are, for Shi'ah Muslims, part of the hadith, this source is scarcely

The sources of Shi'ah law are:

different to the sunnah.

1) The Qur'án, which is the same as the edition authorised by 'Uthman that

4) Reason is recognized as a source of law, although its application is in is used by the Sunnis. Early Shī'ah sources considered that some words of practice limited to solving obscurities and contradictions in the law, and the true Qur'ān were deleted by `Uthman. The deleted phrases are listed in applying general principles to new cases. Analogy (qiyas) is formally the Bihār al-Anwār, an important 17th-century collection of hadith: all refer rejected as a source of law, where this involves speculation as to the general to the question of the succession to Muhammad, and have no relevance to principle underlying a specific rule, but not where it involves the analogical family law.¹

application of a known principle.³ However many of the rules which in Sunni law are based on analogy have been developed with identical effect in

2) The Sunnah of the Prophet and the Imams as recorded in the four Shī'ah law using reason. The principle of ihtiyāt (see below) gives much the canonical collections of hadith, and in Nahj al-Balaghah, the collection of same results as analogy, without the need to explicitly suppose that the Alī's letters and sermons. The four hadith collections have been reason for a legal rule can be known. Since `Allām al-Hillī, reason, systematised in works such as the Bihār al-Anwār, which is now available supported by the Qur'ān, traditions and consensus, has been used by Shī'ah

in searchable electronic format, replacing the original collections for most jurists to arrive at legal decisions. The process is known as ijtihād., and the purposes. The rulings of the Imams have been codified in four early person who practices it is a mujtahid.

systematic collections: the sources underlying these have to some extent

The principles⁴ governing ijtihād are:

been lost. The four collections are -

1) Bará'a: allowing the maximum possible freedom of action. A doubtful Kulayni (d. 329/ 940 AD): al-Kafi (The sufficient) obligation may be disregarded if it cannot be confirmed by a scrupulous Ibn Babawayh al Qummi (d. 381/991) Man la Yahduruh al faqih (Self-search of the primary texts.

study jurisprudence)

2)

Ihtiyāt: Prudence. Where the object of an obligation is uncertain and it Hasan al Tusi (d. 460/1067) Tahdhib al akham (Best selection of principles), and

Istibsar (Enlightening the people)

1

Momen, Shi'i Islam 185.

Momen, Shi'i Islam, 95, 201.

Emmay, L'Institution Juridique, 8-9.

According to E mam y, L'institution Juridique Du Mahr, 6-7 and Mo men, Momen, Shi'i Islam, 172.

may be applied in two different cases, it should be implemented in both.

legislators, and the second is used as a layman's handbook. 1 The Guardian

3) Istisháb: The existing state (for example, the existence of a right) is

Council (20/11/82) has ruled that no law may contradict Khomeini's works, regarding as continuing as long as there is any doubt that the legal situation but this position may not be universal even as a theory. Although Khomeini has changed.

championed the concept of *valiyat-e fuqaha*, he was not a *fiqh* specialist.

4) *Ta'adol* or *Tarajih*: where two traditions are of equal weight (given the

His works do not employ the tradition methods of proof from the citation of validity of their transmission and the credibility of their contents) but sources and the reasoning is brief or non-existent. This would make it contradict one another, there is a free choice as to which to apply.

difficult for a judge to extend them by analogy. Many of his positions on Another principle suspends the application of the law where its

'new questions' (those not covered in the traditional *fiqh* books) have not in implementation would probably or certainly expose the believers to a fact been followed.² Mir-Hosseini reports that Khomeini's works were the difficulty or burden disproportionate to that envisaged by the law.

most frequently used source in 1985-9. This must be attributed to the

According to Mir-Hosseini, the traditional *fiqh* books referred to most political situation at the time, rather than intrinsic merit, and may not frequently in the Special Civil Courts are those by *Muhaqqiq al-Hillí* (d. continue.

1277 CE) and *Shahid-i Awwal* (d. 1384), both of which have been

Khomeini's successor as Leader, *Khamane'i*, does not have the highest translated into Persian.¹ The first of these has been translated from the level of qualification in *fiqh* (jurisprudence of the *Shar'ah*): judges would Arabic by A. Querry, and is used here as a standard for traditional *Sh'ah* be correspondingly more likely to disregard his rulings.³ The contemporary *fiqh*. *Al-Hillí* is concerned with moral and ritual duties as much as with *mujtahid* generally recognized has being most highly qualified and a 'point what we would call 'legal' questions. He also deals with some issues that are of imitation' (*marja-e taqlíd*) is *Ayatollah Montazeri*, who has been placed most unlikely to arise today, either because of other legal changes or under house arrest by *Khamane'i*. His rulings are therefore under a shadow, because of changes in society. Examples include the marriage and divorce although he has a sizeable following as both *fuqaha* and *marje-ye taqlíd* of slaves, or the father who gives one of two daughters in marriage without (point of imitation).

specifying which.

The late *Ayatollah Motahhari* represents a moderately progressive The traditional *fiqh* is very extensive and detailed. Its rulings are

school of thought, in comparison to Khomeini. His ideas, notably his book mentioned here only where the issue is one which might plausibly arise in System of Women's Rights in Islam have given rise to a school of 'Dynamic contemporary family law either outside Iran (for example, in the case of an Jurisprudence' which seeks to adapt particular fiqh rulings while retaining emigrant couple who claim to be validly married under Iranian law) or the concept that fiqh principles are unchangeable. Mir-Hosseini has where one part of the family is in Iran. Slavery can therefore be omitted, as described the school, and presented interviews with some of its leading well as issues that arose in a time when polygamy was more common — proponents, in Islam and Gender.⁴ Motahhari's views are available in how to divide the dowry when two wives are married simultaneously for a translation, and have been cited below alongside those of Khomeini. As single stipulated dowry, for example.² There are thick volumes of fiqh Mir-Hosseini shows, however, contemporary figures in the school have devoted to cases which, in the modern world, are scarcely conceivable. The gone considerably further than Motahhari in willingness to modify discussion of temporary marriage can be much abbreviated (since one is not likely to leave the country during the term of the contract).

Schirazi, 'Constitution', 166.

- Recent Shī'ah fiqh

Schirazi, 'Constitution', 169. Some of these might theoretically be considered

Khomeini's books, particularly the Tahrir al-Vasila and Towzih al-Masa'el part of 'family law'. Khomeini proposes for instance that marriage with extraterrestrial creatures is permitted if they display reason and understanding. The

(Clarification of Questions), are commonly consulted by judges and age of majority should be judged by observing whether they ejaculate or display

hard pubic hairs.

For a list of fatwas issued by Khomeini, see Schirazi, 'Constitution', 79.

None of

Marriage on Trial, 31.

these are relevant to marriage and divorce.

2

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Emami, L'institution Juridique 32-34.

Especially in part II, 'The neo-traditionalists'.

13

14

traditional fiqh. The discussion with Ayatollah Jannati shows that freedom

The years since have seen a series of islamisation programmes and law of discussion and willingness to entertain new ideas had increased markedly reviews which have produced little, since the bodies involved have even over the five years between 1992 and 1997. The theoretical position of

conflicting interests. Broadly speaking, laws from the first period of this school may well have gained sufficient adherence, for instance in the codification, from 1910 to 1935, were largely based on the Sharia in any circles of the Expediency Council, to enable legislative changes such as case, and many remain in force. This includes the Civil Code, and the 1937 raising the minimum age of marriage.

Marriage and Divorce Act, which will be dealt with below. Of later laws Modernists, and especially feminists, are now questioning the very use which were felt before the revolution to be contrary to the Sharî ah, some of fiqh as a source of law, arguing that it is the product of interpretations of have been annulled, but others have been retained — in cases of necessity

the Qur'ân and Sunnah by an exclusively male scholarly tradition which has 'the Sharî ah' has proved to be a very flexible concept.

frequently been hostile to women. Katajun Amirpur outlines the positions and interpretive strategies of some leading feminist critics of traditional fiqh The Civil Code

in 'Islmaischer Feminismus in der Islamischen Republik Iran.' These views are seen as sufficiently important to warrant serious discussion from the

- History and form

conservative side, but given the conservative hold on the Guardian Council

Iran's first civil code (Huquq-i madani) was drafted and enacted between and the judiciary they will not be permitted to affect legislation or court

1928 and 1936, under the inspiration of Shî ah Sharî ah law and to a lesser

practice in the near future. In August 1998 a bill was passed which in effect extent the Code Napoleon and Belgian and Swiss codes. It closely follows bans the propagation of feminist ideas in the press.

the Sharî ah. European influences are confined largely to provisions regarding nationality and domicile, and procedures for the ratification and Pre-revolutionary laws

publication of legislation.¹ The formal structure of the code, arranged in books and numbered paragraphs, has remained the same since, and many Following the revolution, the Guardian Council took the view that the articles have remained unchanged.

compatibility or otherwise of existing laws with the Sharî ah should be

The English translation of the code by Amin is acceptable, and up to decided by the Guardian Council on a case-by-case basis, the laws

date to 1982, but it is clear that his interest lies more in commercial law. continuing in force until they were annulled or replaced. The Supreme

Some passages of the family law sections are almost incomprehensible. A Court had wanted to annul all laws from the Pahlavi period. After some

German translation of the relevant articles is included in Bergman and delay, Khomeini declared in August 1982 that judges should give their

Ferid, pages 15 to 34. The translation is not always sensitive to the Islamic

verdicts based on the laws of the sharia and not the current laws. He

and patriarchal context.

threatened violence against the Guardian Council, and declared that obeying Pahlavi laws should be a criminal offence.¹ This provided the Supreme

- Scope of application

Court with the justification for instructing judges, individually, to use the

Article 6 of the Civil code specifies that "laws relating to personal status,

shari`a and to determine in each case whether the law was in accordance

such as marriage, divorce, capacity and inheritance, shall be observed by all

with the shari`a. Doubtful cases were to be referred to the Supreme Court or

Iranian subjects, even if resident abroad." Iranian laws also apply to the

the Office of the Imam. The Guardians Council rejected the Supreme

guardianship of minor children who are Iranian nationals.² In marriages of

Court's circular, but complied with Khomeini's decree so far as the laws of

mixed nationality, Iranian law applies where the husband is Iranian and,

stipulated criminal punishments (hodud) and retaliation for personal injuries

where paternity is certain, this extends to the children.³ Iranian

nationality is

(qisas) went. It did not comply with respect to family law.

Amin, *The Civil Code*, pp. 1 - 3.

Article 965.

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Schirazi, 'Constitution', 163.

Articles 963 and 964.

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defined in articles 976 to 990, and will not be considered further here,

the rights of followers of other sects will be preserved." It is not known

except to say that it is based on a mixture of patrilineality and long-term

whether this has been put into effect: the constitution contains provisions

residence, and that the rights of non-nationals to own property in Iran are

for other institutions which were not immediately given effect.

tightly restricted.

Claims and lawsuits are to be pursued in the country in which they are

- Religious minorities

initiated, but where one party lives within Iran the competent court is the

Article 13 of the Constitution recognizes Iranian Zoroastrians, Jews and

court in the place where this person lives. If both parties live outside of

Iran, Christians as minority religious groups. They are entitled to

apply the

the court in Tehran is responsible, working through the consulate in the

teachings of their own religion in matters of personal status. It appears that country concerned.¹ The fact that a claim or case is being pursued in a they do so, through marriage officiators and 'courts' within their own foreign court does not nullify the competency of an Iranian court to hear the communities, the results of which are registered by the state.

However the case.² The decisions of foreign courts are not automatically given effect personal status laws of these communities must withstand the test of 'public within Iran and may not be enforced if they are contrary to public morals or order'. In concrete terms, the adoption of children in religious minorities is order.³

recognized (but not among Muslims), and members of churches that do not

Article 962 recognizes the capacity of foreign nationals in Iran to make recognize divorce cannot be divorced.¹

contracts, but specifically excludes family law and inheritance where the Iran's largest religious minority, the Bahá'ís, have their own laws

person concerned would not possess full legal capacity in accordance with regarding engagement, marriage, divorce, the writing of a will and the law of his or her own country. This would appear to prevent foreign inheritance, and a system of local and national elected assemblies nationals who would be regarded as minors in their own countries from empowered to rule on cases. However the Bahá'í Faith is not a recognized

marrying in Iran. Article 970 gives diplomatic officers resident in Iran the religion: its followers are regarded as heretical Muslims or as apostates, and

right to carry out marriage formalities only where both parties are their own its assemblies have been dissolved. Bahá'í marriages are not recognized, so

nationals, and in accordance with the laws of their own countries. Such that Bahá'í children are regarded as illegitimate and cannot inherit. They are

marriages must still be registered in Iran.

not regarded as being protected by Article 14's guarantee of human rights

Article 12 of the Constitution makes Shí'ah Islam the state religion in for non-Moslems.²

perpetuity, but recognizes the Hanafí, Shafí'í, Málekí, Hanbalí and Zaidí

The specific situation regarding the registration of marriages, and thus

schools, allowing followers of these schools to perform religious rituals

inheritance, may be changing. Maurice Copithorne, UN special rapporteur according to their own teachings. This presumably applies to the ritual form on Human Rights has stated in his report on Iran that questions about a

of engagement and marriage agreements. It also says that, in matters of spouse's religion are no longer asked when a marriage is registered.³ "religious instruction and personal status (including marriage, divorce, inheritance and the framing of wills) and the cases relating thereto [these 5 The Marriage and Divorce Act of 1937

schools] are considered to be official in courts of law. In every region where the followers of any of these sects enjoy a majority of the particular sect

This act, promulgated in 1931 and revised in 1937, contains some [sic] the local regulations will be formulated according to precepts of jurisdiction of the councils of that region of councils with the assurance that On this point see Bergmann and Ferid, *Internationales Ehe- und Kind schaftsrecht*, 7. For the general legal status of non-Muslims see also Abdol-

Karim Lahidji, 'Legal Status of Non-Muslims in Iran' (in Persian), *Iran Nameh*

Bergmann, Alexander and Murad Ferid, *Internationales Ehe- und Kind schaftsrecht*, 19, 1-2 (2001).

Kind schaftsrecht, 36: article 7 and note to article 7 of the Family Protection Act, See, for example, Muhammad Takakoli-Targhi, 'Anti-Baha'ism and Islamism in Iran, 1941-55' and Reza Afshari, 'The fate of Iranian Baha'is', both articles in CC Article 971.

Iran Nameh 19, 1-2 (2001)

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CC Articles 972-5.

Agence France Presse, 18 October 2000.

17

18

provisions that are still valid. These concern particularly the registration of in effect function under a variety of regimes according to the contract marriages and divorces. Other articles have been taken over bodily in the conditions which were in force at the time of the marriage. It is hardly surprising that divorce courts require the presentation of the actual marriage translation of the relevant articles is included in Bergmann and Ferid,

contract before they will entertain a case. Marriage contracts from before *Internationales Ehe- und Kindschaftsrecht*, pages 34 and 35.

the 1967 Act seldom contain stipulations relevant to the woman's right of divorce. Where there are none, a woman can appeal to the articles of the The Family Protection Act of 1967

Civil Code which stipulate the grounds for a judicial divorce: sexual incapacity, insanity, failure to support the wife or ill-treatment.¹

Among the more important pre-revolutionary amendments was the Family

The Family Protection Law was fiercely opposed by the conservative Protection Act of 1967,¹ which in effect abolished unilateral divorce (talaq).

ʿulamá, including Khomeini, before the revolution. Following the

Divorces were decided by the courts that issued permits for the registration

revolution the law was annulled by ministerial decree, in February 1979.

of divorce, known as certificates of the impossibility of reconciliation. If

the But in October of the same year the Revolutionary Council passed the Bill

couple had not reached mutual agreement, the court could issue a

on Special Civil Courts which said that the pre-revolutionary ordinances of

certificate, with the grounds available to women being the same as those

civil law were to be enforced again.² At the same time, pressure was being available to men, except that women had additional grounds in the failure of

brought to bear on Khomeini by women who had supported the revolution, the husband to support his wife, his taking another wife, or failing to treat

and he issued an opinion allowing women to make use of a right of divorce co-wives equally. The second and subsequent marriages of a man were

acquired through these secondary contractual conditions, and allowing those

made conditional on court permission. The latter provision applied also to

whose marriage contracts did not contain such provisions to request a temporary marriages (see below).

judicial divorce in cases of mistreatment. It was not until 1982 that all the

From the point of view of the wife, the changes extended the grounds

provisions of the 1967 law were reinstated through a Ministerial Order. The

on which she could petition for a judicial divorce to include:

Ministry of Justice at that time ordered that 12 secondary contractual

- her husband's imprisonment for five years or more,

conditions were to be written into marriage documents and that the registry

- contracting a disease injurious to family life,

offices were to invite persons getting married to sign them, but left the

- taking a second wife without her permission,

couple free to decline.³ From subsequent debate it appears that not only

- abandoning family life, or

couple, but also courts and registry offices have rejected these conditions,

- being prosecuted for a crime dishonouring the family.

and chosen to apply traditional forms and Sharî ah norms.

The conditions on which a court could grant a man permission to take a

This order contained an additional provision, that in the event of a second wife were that he should be financially capable and able to fulfil the divorce the husband should pay the wife half of the wealth acquired during rule of impartiality in his treatment of his wives. Rather than enforce such their marriage unless the court ruled that the divorce was due to the wife's

conditions by legislation, the legislation required them to be written into refusal to fulfil her marital duties or because of sexual misbehaviour on her

marriage contracts as secondary conditions. While the Sharī'ah accepted the part.

legality of such conditions as negotiated between the marriage partners or

Parliamentary attempts to make the order enforceable were blocked by their representatives, it did not provide any justification for the role that this the Guardian Council. In 1992 the Expediency Council largely over-ruled implied for the state in what had been a private contract.

the Guardian Council by issuing legislation providing a basis for judicial Because the law was operationalised by ordering that the conditions divorce on the grounds of the breakdown of the marriage, and also stating should be printed in contracts, rather than by legislation, existing marriages CC Articles 1121, 1122, 1125, 1129, 1130.

Schirazi, Constitution, 217.

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For discussions see Mir-Hosseini, Marriage on Trial 54-58.

Schirazi, Constitution 217.

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that after the divorce the wife may apply for payment of compensation for The Family Protection Act of 1975

any work which she undertook during her married life but which the shari'ah does not define as obligatory. This would include both nursing children and

Many articles of this Act have been cancelled by subsequent articles

doing housework. Where an amount cannot be agreed on, the courts are included in the post-revolutionary revision of the Civil Code, but more than empowered to fix an amount in settlement, taking the blame for the

half remain valid. A German translation of the relevant articles is included breakdown into account. The same Expediency Council law permits the

in Bergmann and Ferid, Internationales Ehe- und Kindschaftsrecht, pages presence of a woman in marriage courts and says that the divorce only

35 to 36d. The extended grounds of divorce provided in the Family becomes effective when the husband has returned the dowry and the

Protection Act of 1967 are incorporated into article 8 of this Act.

furniture and fitting the wife has brought to the marriage, and has paid any maintenance required of him. Both of these provisions are contrary to

Post-revolutionary legislation

traditional Shî ah views of the Sharî ah.

The Special civil courts Act in effect re-instates some of the provisions of the Family Protection Law of 1967. The latter had been annulled following the revolution, leaving the Civil Code and the Sharî ah in effect. The 1979 Act requires court permission for the registration of a divorce unless it is determined by mutual agreement (Special Civil Courts Act, Article 3/2).¹ The court is required to refer a divorce petition by a husband to arbitration, in accordance with a Qur'ânic verse recommending arbitration by two arbiters, one from the husband's family and one from the wife's.

In 1982 new marriage contracts were printed, in effect establishing a new legal regime. The contract requires the husband to pay his wife, upon divorce, half of the wealth he has acquired during the marriage, providing the divorce has not been initiated or caused by any fault of the wife. It delegates the right of divorce to the wife, through the intermediary of the court, where any of the following conditions have occurred:

- the husband fails to support the wife or fulfil other duties for at least six months.
- the husband's maltreatment of the wife to the extent that the continuation of the marriage is intolerable to her
- the husband has contracted an incurable disease that could endanger her.
- the husband's insanity, where the Sharî ah does not otherwise provide for the annulment of the marriage.
- the husband's failure to comply with a court order to abstain from an occupation which is repugnant to the wife and her position.
- the husband has been sentenced to a prison term of five years or more.
- the husband is addicted to a harmful substance detrimental to family life.

As cited in Mir-Ho sseini, Marriage on Trial, 55.

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- the husband has deserted family life for six months or more without just
MARRIAGE
cause.

- the husband has been convicted of any offence repugnant to the family and position of the wife, including offences involving hadd punishments (fixed
Definition and character
corporal punishments for some serious crimes) and discretionary
punishments.

Muhaqqiq Al-Hillî, among the most prominent of traditional Shî ah jurists,
- the husband's failure to father a child after five years of marriage.

begins his treatment of marriage by saying it is of three sorts: enduring
- the husband's disappearance, where it continues for six months after the
marriage, marriage for a fixed period, and marriage and sexual union with
date of the wife's application to the court.

female slaves.¹ The last of these is no longer relevant and is omitted here.
- the husband has taken another wife without the consent of the first, or has

Marriage for a fixed period will be treated in a separate section below, failed to treat his wives equally.

indicating differences from the marriage which we will call 'permanent', These stipulations are only valid if the husband has initialled each i.e., marriage that continues until death, divorce or annulment. clause, and not all do so.

In traditional law, marriage (permanent and temporary) has been A 1982 amendment to article 1130 of the Civil Code enables a judge to regarded as a means of legitimating sexual relations and determining issue a divorce where the marriage entails hardship and harm (‘asr va paternity, and as a private contract between the parties. Muhaqqiq al-Hillí haraj) for the wife. In effect this means that a woman married before 1982 defines marriage as "a contract whose object is domination over the vagina, can win a judicial divorce if she can establish grounds analogous to those without the right of its possession."² Marriage is also seen as a religious above.¹

obligation, since it is a means of preserving morals, and permanent marriage in particular has a sacramental character not possessed by other Current legislative proposals

contracts. The sacramental character is evident in the insistence that the marriage and divorce formulas should be pronounced in Arabic and in the The age of majority, which had been 18 years under the Pahlavi regime, past tense (they are performative utterances), and that the contract should was lowered after the revolution to 15 years for boys and 9 years for girls.² not be conditional and is not annulled simply by failure to perform.³ In October 2000 the Iranian parliament passed a bill that would require

Modernist marriage legislation in other Muslim countries has court approval for the marriage of boys under 18 or girls under 15.³ This emphasised the social role of marriage. The civil code of Iran does not say legislation has been rejected by the Guardian Council. It is likely that it will how marriage is viewed, but article 10 of the constitution states be passed again without substantial changes by parliament, will be rejected "Considering that the family unit is the fundamental unit of Islamic society, again by the Guardian Council, and so referred to the Expediency Council all relevant laws, regulations and planning provisions must serve the for a decision.

purpose of facilitating the establishing of families and safe-guarding the Parliament has also launched a review of the country's legal system and sacredness of the family institution and strengthening family relations on a review of laws passed since the revolution.⁴

the basis of Islamic Law and ethics. This implies at least that marriage is a concern of state as well as a contract between the parties. Article 21 requires the government to guarantee women's rights, to create favourable al-Hillí, Droit Musulman I.639.

Mir-Ho sseini, Ma rriage on Trial, 32, citing the P ersian tra nslation of Sha ráyi`

Mir-Ho sseini, Marriage on Trial, 65.

al-Islam, vol. II, p. 428. Since I do not have the Persian translation, I cannot locate

Bergmann and Ferid, Intern ation ales E he- u nd K indsc haftsre cht, 6.

this in my own French translation (Droit Musulman). It is in any case not in the

AFP report, October 29.

book on marriage.

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AFP report, October 28.

See E mam y, L'institution Juridique 14.

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conditions for fostering "the character of women and the assertion of her is equivalent to a relationship through marriage means that a man may not

material and spiritual rights", and particularly to support pregnant women

marry his own daughter born out of wedlock, and a legitimate and

and mothers responsible for children. It mandates the establishment of a

illegitimate child of the same man may not marry. This is in accordance

special Court for Family Protection, and specifies that the state may assign

with the Hanbalite and Hanifite, and contrary to the Shafi`ite position.

guardianship of a child to a worthy mother if no legal (that is, male)

guardian is available.¹ The provisions of the civil code itself are, as we will

- Through a wet nurse

see, largely in accordance with traditional Shî`ah Sharî`ah as formulated in

Article 1046 (based on Qur`án 4:22) stipulates that a foster

relationship

a traditional society. The provisions above are a recognition that the state

created by wet nursing is equivalent to a blood relationship, provided

that:

also has an interest in registering and regulating marriage, divorce and the

1) the woman's lactation is due to a legitimate conception. Khomeini

adds

custody of children. They also reflect a desire to raise the status of women

that it is abominable to employ a wet nurse whose own child was born of

above that accorded them in traditional Shî`ah society.

fornication.¹

There is a tension as regards the concept of the relationship between

2) the milk is sucked directly from the breast

husband and wife in some articles, between a desire to be modern and a

3) The child has at least had full milk for 24 hours or for 15

consecutive

desire to preserve forms that are patriarchal and inherently unjust. Article 1103 of the Civil Code states that "husband and wife are bound to establish

friendly relations," and the following article says that they must cooperate

4) The child was less than two years old when nursed with each other for the welfare of their family and the education of their husband. If, therefore, a child takes during twenty-four hours some milk

children, but article 1105 says forthrightly that "the position of the head of the family is the exclusive right of the husband."

even if the two women have a common husband. Equally, if a wet nurse has

suckled a boy and girl at different times, when she was lactating from

Permanent impediments to marriage

pregnancies due to two different men, the boy and girl concerned do not have a milk relationship. The principle seems to be that the milk carries

- Through a blood relationship

some trace of the man responsible for the conception that initiated lactation.

Article 1045 stipulates the blood relations with whom marriage is forbidden

This would also explain the first condition: the fornicator has no part of the

"even if the relationship is based on mistake or adultery":

child conceived, and therefore no part in the milk that results.

1) parents and their ascendants

6) In addition to the above, Khomeini adds many more conditions, which

2) children and their descendants

are so improbable they can be omitted here. He also stipulates in great detail

3) brother or sister, and their descendants

the blood and milk relatives with whom a permanent impediment is created

4) sisters of a parent, grandparent or great grandparent.

by nursing.² For general purposes it would appear to be sufficient to apply

This is similar in broad lines to the forbidden degrees recognized in Sunni

the general rules that wet-nursing creates a milk relationship analogous to a

law, but leaves many questions to be answered by the judge, using the

blood relationship, and that this relationship includes the husband who is

Shî'ah fiqh. The stipulation that a relationship based on mistake or adultery responsible for the conception that initiated the lactation.

The requirements for the creation of a milk relationship here are much

stricter than in Sunni law. The first requirement appears to be unique to A decision of the Council of Guardians, dd. 26/7 /1360, rejected planned

Shfi'ah law. The second is also unique, although the issue was at least legislation allowing the transfer of the right of the guardianship of infants and

incapable children to their mothers, on the grounds that the ancestor should not

discussed in the Sunni schools. The third is stricter than any of the Sunni have guardianship of the inherited goods of a small child. It is not clear whether

this also affects the physical custody of the child, or only the child's inheritance.

See Mihrpur, Majmua, 91-92. The Family Protection Act of 1975 allows the Clarification 2488.

mother to serve as legal guardian of her child (article 15).

Clarification 2464-2486.

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schools: Hanafites and Malekites say that a single nursing, however short, create a right of inheritance or any other rights.¹

creates a milk relationship, and the Shafi'ites and Hanbalites say that five

Because nursing a child creates an impediment to marriage, a woman nursing sessions of normal length create a relationship. The requirement of may not nurse an infant girl to whom her husband is married, since she 15 consecutive feeds presumably comes from a hadith attributed to `A'isha, would then become her husband's mother-in-law, and thus unlawful to her who said that the Qur'an at first stipulated 10 feeds, and a later amendment

husband.² Where no such objection arises, she does not require her lowered this to five. The present text of the Qur'an contains no trace of husband's permission to nurse a child.

either verse. The fourth, that a milk relationship is only created by nursing in the first 24 months of life, is the same as in all Sunni schools of law.

- Through marriage

The surprising detail of treatment of milk relationships arises from the Article 1047 states that marriages between the following persons are custom, still prevalent at least in rural areas of Iran, of passing a sickly boy permanently prohibited:

child around available wet nurses in the belief that the milk of young

1) Marriage between a man and his mother-in-law or his grand-mother-in-mothers in particular has a medicinal effect.¹ One supposes also that women law of any degree, whether the relationship is by blood or milk; wishing to have their marriage annulled would find it convenient to

2) Marriage between a man and woman who has formerly been the wife of discover a forgotten milk relationship with their husband. Khomeini

this father or one of his grandfathers, or of his son or one of his grandsons;

suggests that women should be prevented from suckling any and every

3) Marriage between a man and females descending from his wife, provided child, since they may forget who they have nursed, resulting in improper that the husband and wife have already consummated the marriage.

marriages.² It is notable that there is no mention in the Civil Code of how

The last provision implies that in other cases it is the formalisation of a such a relationship is to be proved. This is perhaps understandable, since

marriage which creates the relationship of impediment. This is stated witnesses are not required in Shî ah fiqh even for a marriage. The question

explicitly by Khomeini.³ This, and the exception in the case of a man and of course is whether the testimony of women alone can be taken as evidence

his wife's daughter by another man, are both in accord with Sunni fiqh. in this case, given that a child is not likely to be given the breast in the

Khomeini adds to this the aunts of a man's father or grandfather, and company of men. Khomeini says that the testimony of two just men or four says that a man may not marry his wife's niece without the wife's just women is required, and they must be able to certify the details, but it is permission.⁴

also acceptable if the fact is generally known with sufficient certainty.³

Another stipulation mentioned by Khomeini (and not original to him) is - Through illicit sexual relations

that the milk should be pure and not mixed with something else.⁴ The

Article 1055 says "Sexual intercourse by mistake or by adultery if background here may be the custom among nomadic tribes of sealing a

preceding marriage is tantamount to the existence of marriage as far as peace between tribes or clans by sharing food in which mother's milk has

prohibition of marriage is concerned but cannot cause cancellation of the been mixed. By stating that this does not create a marriage impediment

former marriage." Khomeini says that illicit relations with a woman who is (which might appear obvious given the other conditions stated above), the

in the waiting period for a reversible divorce (i.e., the period in which the

jurists have effectively sanctioned this method of reducing conflict.

husband may cancel the divorce) creates a permanent impediment to

It should be noted that the milk relationship is equivalent to a blood

marriage, but not if the waiting period relates to a non-reversible divorce relationship only in terms of creating impediments to marriage. It does not

(i.e., a 'triple' divorce), or is the waiting period following a temporary

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Friedl, *Children of Deh Koh*, 85-7, 182.

Khomeini, *Clarification* 2490.

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Clarification 2489.

Clarification 2492.

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Clarification 2496.

Clarification , 2385.

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Clarification 2474.

Clarification, 2388, 2392.

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marriage or the death of the previous husband.¹ It would appear that it is not marriages, this creates a temporary impediment to further marriages.¹ the fornication, but the breach of the former husband's remaining rights,

Article 1049 forbids a man marrying the daughter of his brother-in-law which creates the permanent impediment. Khomeini adds that knowingly or of his sister-in-law unless his wife gives permission.

marrying a woman who is already married creates a permanent impediment

The period of waiting (iddeh), during which a woman is not permitted between her and the second husband.²

to remarry following the death of her husband, her divorce, or the end of a Article 1056 states that "one who perpetrates a shameful act on a boy temporary marriage can also be regarded as a temporary impediment cannot marry his mother, sister or daughter." Khomeini defines the act in specific to the woman.² This applies also where a woman has had sexual this case strictly as sodomy with penetration, and says that this cannot relations "by mistake", that is, outside of a valid marriage but where there function retrospectively to annul an existing marriage with the mother, were reasons that might have led her to suppose that there was a valid sister or daughter.³

marriage.³ The waiting period is discussed further in the section on divorce.

If a man divorces a woman twice and 'returns' to her (i.e., cancels the - Through li'an and multiple divorce

divorce before it becomes definitive), or if he remarries her each time after

Article 1052 states that a divorce by li'an, a solemn imprecation in which a the divorce, the third divorce creates an impediment to remarriage between man accuses his wife of adultery, involves a permanent bar to the that couple. This impediment can be removed if the woman marries a remarriage of the parties concerned.

different man, and that marriage is consummated. Consummation in this Article 1057 states that a woman who has been the wife of a man three case specifically includes penetration, and not merely being alone in privacy consecutive times and has been divorced each time is unlawful as wife to together. When the second husband dies or divorces her, and her waiting that man until she has contracted a permanent marriage to another man, has

period is over, she may remarry the first husband.⁴

consummated that marriage, and the marriage has ended in divorce,

A marriage that is in breach of a temporary impediment to marriage is annulment or the death of the husband. Khomeini allows remarriage 'If she invalid, and itself causes a permanent impediment to valid marriage marries another man' but elsewhere specifies that this entails actual between the couple.⁵ This is so even if the couple were not aware of the consummation.⁴

existence of the impediment, if the invalid marriage was consummated. An Article 1058 states that "The wife of a person who has been divorced invalid marriage that has not been consummated does not create a from him nine times, six of which were revocable divorce, will be illegal as permanent impediment according to the Civil Code, but does according to wife to that man for ever.

Khomeini.⁶

Temporary impediments

- Through religion

Article 1059 states that the "marriage of a female Moslem with a non-

- Through marriage

Moslem is not allowed."

Article 1048 of the Civil Code, and Khomeini's Clarification #2390, state that it is forbidden for a man to marry two sisters at the same time, even if

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Bábí and Bahá'í law allows only one a second marriage, for husband or wife,

both marriages are temporary. A man is permitted to marry four women but only where the first husband or wife has been shown to be infertile, and simultaneously, so where a man already has four valid permanent subject to obtaining the permission of the first partner (see Le Bab, Le Beyan Persan, W ahid 8 section 14; Bahá'u'lláh, Kitáb-i Aqdas, paragraph 63).

However

polygamy is not now practised in either community: the law is interesting chiefly

as an instance of the radical approach to sexual equality in these tradition s.

CC Article 1054.

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Clarification 2398.

CC Article 1157.

2

4

Clarification, 2402.

Khomeini, Clarification 2527.

3

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Clarification 2405, 2406.

CC Article 1050.

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Clarification 2401, 2527.

Clarification 2400.

29

30

Traditional Shî'ah fiqh has distinguished between islâm and imán,

If a husband becomes an apostate, the marriage is dissolved, and the becoming a Muslim and being a true believer. The latter includes belief in wife is obliged to observe the waiting period for widows. In both of the last

the sinless Imám and action in accordance with this belief. That is, imán cases, a return to (orthodox) Islam during the waiting period re-establishes

refers only to Shi'a Muslims, whereas islâm refers to both Sunni and Shî'ah the marriage.¹

muslims. This affects marriage, since by analogy from the fact that a Muslim woman may not marry a non-muslim, it is argued that a Shî'ah - during pilgrimage

woman may not marry a Sunni. A woman may not marry a man who is her

No valid permanent marriage can be contracted by a person who is inferior in faith, she may only marry her equal (kuf').¹ Khomeini appears to "wearing the pilgrimage garment", that is, between the time of ceremonially

reject this, saying only that a Moslem woman may not marry a non-

entering the status of pilgrim on approaching Mecca and the ablutions Moslem, and adds that a Moslem man may not marry an infidel woman in

following the hajj pilgrimage. This rule does not apply to pilgrimages to permanent marriage.² This is a modernising interpretation, both in including

Mashhad, Qom, Shiráz and other centres, which are a more important Sunnis as of equal standing, and by subjecting men to almost the same feature of Iranian Shî'ah life than the pilgrimage to Mecca. It is

however of

restriction as traditionally applied only to men.

interest because of the historical role it played in the development of the

Khomeini further defines the meaning of 'Muslim', through his

institution of temporary marriage.² Unlike the other kinds of temporary definition of apostasy, which occurs where a Moslem denies God or the

impediment, a breach of the hajj impediment only creates a permanent Prophet, or if his denial of an essential precept of the religion such as the impediment if it was 'knowing'.³

obligation to pray and fast implies a denial of God or the Prophet.³

Specifically this means that Bahá'ís are not counted as Moslems,⁴ although - special impediments

according to their own account they are monotheist and acknowledge the
Articles 1060 and 1061 state that the marriage of any Iranian woman with
a
Prophet: their laws of prayer and fasting however differ. By defining the
foreign national, and of certain Government servants and students
supported
status of Moslem by orthopraxis, Khomeini would also appear to exclude
by the Government with female foreign nationals, require special
the 'Ali-Ilahis and other 'extremist' Islamic sects who do not fast and
pray permission from the Government.
in the same way.

If the wife becomes an apostate before the marriage is consummated, or
Proposal and engagement

it has been consummated but she is past the menopause,⁵ the contract is
void. There is therefore no waiting period.⁶ If the marriage has been

- In the Civil code
consummated and she is pre-menopausal, she must observe a waiting period
Book VII of the civil code deals with marriage and divorce. It begins
as for a divorce. Incidentally, Khomeini betrays here that he expects people
without preamble with engagement. Article 1034 states that it is
permissible

who are non-muslims, by his definition, to be subject to Islamic family law.

to propose to any woman where there is no obstacle to marriage. In
contrast

to traditional Sharī'ah, it does not specify that a Moslem may not propose to
a woman who is already entertaining a proposal from another Moslem.

Fyzee , Outlines of Muhammadan Law, 45-6.

Article 1035 stipulates that a proposal, or discussions about a
marriage,

Clarification, 2396.

do not constitute a marriage even if all or part of the agreed dowry is
paid.

Khomeini, Clarification, 2447.

The specification is in Clarification Question 82, page 410, and in
Clarification

Appendix II.

5

1

Menopause is defined by Khomeini as 60 years or older for a seyyedah, a

Clarification 2449 and 2450. There is a distinction between the
apostasy of a

descendant of Muhammad, and 50 years for other women. However he also says

'born' Muslim, which is equivalent to the death of the husband, and
the apostasy

that if a woman says she is past menopause, she should be believed.

(Clarification of a convert to Islam, which is equivalent to a divorce.

2448, 2456, 2504).

See G ribetz, Strange Bedfellows.

6

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Clarification, 2448.

CC Article 1 053 , Kho meini, Clarification, 2407.

31

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So long as the marriage has not been formalised, either of the parties can

Marriage pre-conditions

withdraw, and the other party has no right to take action for damages.

Article 1037 deals with the restitution of any presents that have been -

Existing wives

given, or their equivalent value, when an engagement is broken. Restitution

As in traditional Shî ah law, a man is allowed up to four permanent wives at

is limited to presents 'which are ordinarily preserved', presumably excluding

any one time, concurrent with as many temporary marriages as he can

consumables. There is no right of restitution where the proposed marriage

afford. However it is rare for a man to have more than two permanent

does not take place because of the death of one of the betrothed (article

wives.

1038). There is no mention of fault in this section.

Article 6 of the Marriage and Divorce Act of 1937 requires that the
Article 1040 allows each of the parties to ask the other, in the context of
prospective husband must declare whether or not he already has a wife. This
an engagement, to produce a doctor's certificate showing that they are not
declaration is to be included in the marriage document. A man who lies may
suffering from serious contagious diseases. The Council of Ministers has
be imprisoned for between one and six months, if the wife lodges a
supplemented this with a resolution requiring notaries to demand from
complaint (article 7).

couples a certificate showing that do not suffer from thalassemia, before
registering a marriage.¹

- Age of marriage

The minimum age for marriage is now set at 9 years for girls and 15 years

- In the fiqh sources

for boys. Nevertheless a contract to marry (an engagement) for a child
Mir-Hosseini states that Shi`i hadith permit a man to look at the entire body
under that age is said to be valid with the permission of the guardian.¹ The
of a woman he intends to marry, ² on the grounds that in marriage a man is
legal effect of this in the present situation is not clear, since we have
seen

like a buyer and should see what he is buying. This would appear to be

that an engagement is not binding and there is no possibility of claiming
greatly overstated: Al-Hillí says only that a man has a right to see the hands
restitution for breach of promise. It would presumably mean that gifts

given

and face of his intended. He reports opinions extending this to the hair and on the betrothal of a girl child would have to be returned if the engagement the dressed body, but is himself only willing to extend such liberty in the was broken, whereas ordinary gifts would not.

case of non-Muslim women.³ Confusion may have arisen because al-Hillí's

In traditional fiqh there was no minimum age for marriage, which may following sections cover the rules regarding nudity and modesty in contexts

literally be concluded at birth, but there is a minimum age for other than a proposal for marriage. What interests Mir-Hosseini about this, consummation. Al-Hillí sets this at nine years. However Khomeini appears however, is not the precise degree of undress involved, but the fact that

to have no objection to intercourse with a girl below nine.² They agree that Sheikh Ansari, an 18th century jurist whose works are widely used, allowed if the marriage is consummated before that time, and the girl is injured as a

a reciprocal right to the woman, arguing that she has more need of it since result, this creates a permanent legal barrier to any further sexual she does not have the right to revoke the marriage at will.

intercourse.³ Below the ages of nine years for girls and fifteen years for Al-Hillí also stipulates that a loss of sanity or mental capacity after a boys, children are minors (sighr), although al-Hillí reports traditions proposition has been made renders the proposal, and the acceptance if there allowing puberty to be recognized for boys as young as 10 years of a certain has been one, void.⁴

height, and also states that puberty is determined by the appearance of pubic hairs. This contradicts his criterion of a fixed age, and should presumably

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Ansari-Pour, 'Iran', 242.

Civil Code Article 1041, in a note added to the article as of 29 December 1982.

2

2

Islam and Gender, 252.

See e.g., Khomeini, Clarification 2510.

3

3

Droit Musulman, I.642:16-17.

Al-Hillí, Droit Musulman, I.644 :30-31, endorsed by Khomeini, Clarification

Droit Musulman, I.648:51.

2410.

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34

be read as an optional criteria where the date of birth cannot be established.¹ to be actually present when the marriage is contracted. A woman thus has There is no fixed age for legal maturity in the traditional fiqh: it is premised the legal ability to make a contract, subject to having prior permission from on having attained puberty and 'discernment' (roshd) which is determined the father or grandfather if she has not been previously married. There on the testimony of two male witnesses, in the case of boys, or two witness seems to be no provision for verifying this permission, but this would not of either sex in the case of girls. They must testify that the person concerned normally be necessary, since the father or grandfather will have participated is not a prodigal, is capable of disposing of his or her goods as required by in the negotiations regarding the dowry and other conditions (specified in the work they do, and in the case of girls whether they engage in women's the marriage contract) and the ceremony normally takes place in the home work such as spinning and weaving.² In the Civil code maturity is 18 years, in which the bride is living, which would normally be that of her father or except that a person aged 15 years or more can demonstrate their maturity grandfather (fathers, not mothers, having legal custody of pubescent to a court.³ daughters).

Al-Hillí also notes differing views about whether the grandfather's right - Permission of the father or grandfather: the 'virgin' female lapses if the father has already died. The issue is whether the grandfather The term 'virgin' in this context applies to any previously unmarried girl or has the right in his own right, or through the father of the girl. He concludes woman, even if she has lost her physical virginity willfully or by 'accident'.⁴ that the grandfather retains the right even after the death of the father.¹

This Article 1043 of the civil code (as amended 29 December 1982) states discussion confirms what the wording of the civil code implies, that both that "The marriage of a girl who has not married previously is dependent on the father and the grandfather have the simultaneous right to authorise the the permission of her father or her paternal grandfather, even if she has marriage of a 'virgin'. This raises the possibility that both will marry her, but reached the full age of majority." to different husbands.

The earliest fiqh, from the time of al-Sharíf al-Murtadá (d. 436 AH), is Article 1044 of the Civil Code specifies that only the permission of the said to have allowed an adult virgin to arrange and conclude her own father or paternal grandfather is required: if they are under restraint for marriage.⁵ Al-Hillí agrees, but says that opinions on this point differ.⁶ some reason, there is no need for permission from the guardian. The Traditional Shí'ah fiqh, from the time of Ibn Bábúya (d. 381) has said that

conditions of 'restraint' are not specified, but traditional fiqh books have the grandfather takes precedence over the father, but if the father dies, the considered conditions such as insanity, being a slave, not being a Muslim, grandfather's right to jabr ceases. It must be supposed that the requirement being a known profligate and long-term absence. Khomeini refers only to to ask permission also lapses, since the two are linked: permission is their absence.²

required because the right of the father and grandfather to exercise jabr will cease at the girl's first marriage. Khomeini says that if an adult virgin

- Forced marriage (jabr) of girls wishes to marry, she should obtain permission from her father or paternal grandfather "as an obligatory caution", reflecting the uncertainty in the fiqh previously unmarried girl, and a child who has not attained the age of legal on this point.⁷

competence (rishd) is not capable of giving assent or refusing, there is in To anyone familiar with Sunni Islamic law, the absence of any effect a regime of forced marriage for young girls. A substantial portion of requirement for a wali is striking. The father or grandfather is not required the street children of Tehran are said to be girls who have fled from forced marriages. In some cases the father receives cash or drugs for the sale of his daughter.³

al-Hillí, Droit Musulman, I.469-70.

Al-Hillí stipulates that a girl who has attained the age of maturity

al-Hillí, Droit Musulman, I.470:9-12.

CC Articles 1209, 1210.

Al-Hillí, Droit Musulman, I.650.66.

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Ho ward , Mut'a Marriage, 84-5.

Droit Musulman, I.650.65.

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Droit Musulman, I.650:69-70.

Clarification, 2377.

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Kho meini, Clarification, 2376.

BCC W orld radio news report, December 2000.

35

36

cannot be married against her will,¹ and implies that a girl married while response has been received from the guardian to justify refusal." she is a minor can renounce the marriage on attaining her majority.² Yet he

also said that the requirement that an adult woman should consent is only

- Formal requirements

'probable'³ and he recognized that women who had attained the age of

The formal requirements of the Civil code¹ for the legal recognition of a maturity were in fact forced into marriage, since he says that she can refuse

marriage are that the "marriage takes place by offer and acceptance in to consent to a marriage contracted for her if the dowry is lower than that

words which explicitly convey the intention of marriage, the offer and customary for women of her status.⁴ The silence of a 'virgin' girl

acceptance being spoken by the man and woman themselves or by persons (presumably an adult virgin) is to be taken as assent.⁵ The Civil Code states

who are legally entitled to do so, and the acceptance must closely follow the that "if a person showing at first reluctance" – which is the customary

proposal "in accordance with custom." The stipulated conditions are that the behaviour expected of the prospective bride – "later authorises the making

person who makes the offer or acceptance (who is not necessarily one of the of the contract, the contract will be binding." This would allow silence to be

partners) must be sane, of legal age, and capable of forming a decision, and taken as assent, except, as the Code states, if "the reluctance is so acute

that the identity of both parties is known to the other.

that the reluctant person cannot be considered as having been in possession

According to Khomeini, the offer and acceptance should be spoken in of any intention."⁶ Khomeini also recognises the practice of forced

Arabic, and using the perfect tense (to emphasise that the act is completed marriage, specifying that the contract is valid if the couple later give their

at the time).² This requirement would explain the use of deputy who reads consent to the marriage and the terms, thus implying that the marriage is

the formula on behalf of one or both of the partners. Khomeini allows one otherwise invalid.⁷

person, who may be a woman, to read the formula for both partners.³

According to Khomeini, the form for a permanent marriage is that the

- Permission of the father or grandfather: minors and imbeciles

woman or her representative says 'I marry myself to you for a specified gift'

Al-Hillí states that no minor (male or female) can contract a marriage: only

and the man or his representative says 'I accept the marriage'.⁴

the father or a direct male ascendant can do so, or the magistrate in the

Al-Hillí allows either party to make the offer, and permits the use of absence of any male ascendant.⁸

other languages.⁵ Both al-Hillí and the Civil Code (article 1066) allow the exchange of offer and acceptance by clear signs where one or both of the

- Unreasonable denial of permission

parties are dumb.

According to article 1043 of the civil code, "if the father or the paternal

There is no mention of the possibility that one or both parties may give grandfather withhold the permission without justifiable reason, the girl can

their assent by post, but neither is there any requirement for either of the

refer to the Special Civil Court giving full particulars of the man whom she

partners to be present in person. Khomeini specifies the situation in which wants to marry and also the terms of the marriage and the dowry money neither partner has consented to a marriage at the time it was made on their agreed upon, and notify her father or her paternal grandfather through that behalf, but they consent after the fact. Such a marriage is then valid, Court of the foregoing particulars. The Court can issue a permission for implying that its validity is suspended until the consent of the partners is marriage fifteen days after the date of notification to the guardian if no given.

Article 1071 of the Civil code allows either the man or woman to depute a third party with power to contract the marriage. Since the Droit Musulman, I.650:70.

Droit Musulman, I.650:67.

Droit Musulman, I.652:87.

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Droit Musulman, I.652:85.

Articles 1062 to 1067, 1070.

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2

Droit Musulman, I.652:89.

Kho meini, Clarification, section 237 0; al-H illí, Droit Musulman, 646.

6

3

Article 1070.

Kho meini, Clarification, 2364 and 2367.

7

4

Kho meini, Clarification, 2376.

Kho meini, Clarification 2369.

8

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Al-Hillí, Droit Musulman, I.649:64.

Droit Musulman, I.647:41.

37

38

following article begins "If power is given without conditions as to the must be made in the presence of witnesses and must made public,¹ but also identity of the husband ..." the law clearly envisions that this person may says that the presence of two witnesses and other marriage formalities is not choose the husband as well as representing the bride when the marriage is indispensable, adding specifically that a secret marriage is legal and valid.²

concluded. These provisions would cover the variety of practices in other

In the 20th century, the Ayatollahs Sístani, Motahhari and Khomeini do not

law schools: among the Hanifites and Malekites, for example, a walí is
mention any need for witnesses, although they specify the witnesses that
are
required to act for the bride even if she has been previously married, and the
required for a divorce and other acts.

walí is in the first case the bride's father, then her adult son if she has
one, There are customary substitutes for having designated witnesses, in
the

and only then her paternal grandfather. A Malekite bride could be deemed
use of a mullah to read the marriage formula, the presence of parents,
to have designated to son to act for her. The provision in effect allows a
wedding festivities, and the custom of ceremonially parading the bride from
person who is not, under Iranian law, a walí to act as if he was one.

her former home to her husband's house. The fact that the marriage formula
In the case where the attorney chooses the marriage partner and makes
would normally be recited in Arabic also normally entails the presence of a
the contract, article 1072 prevents the person with power of attorney using it
male adult with a seminary education, simply because few others would be
to marry the bride himself, unless that possibility has been explicitly
able to recite the formula correctly. As a matter of law however, neither
the

allowed. The person with power of attorney must follow any conditions laid
Shî ah fiqh nor the civil code seems to consider secret marriage to be
down by his principal regarding the marriage partner and dowry. If he does
objectionable. It has been suggested³ that the Sunni requirements for the
not do so, "the authenticity of the marriage will depend upon corroboration
presence of a walí acting on behalf of the bride and for the presence of
two

from the principal." A marriage made by power of attorney is not valid if
witnesses are linked, as part of an early attempt to control irregular
the attorney does not act according to the best interests of his principal.¹
marriages and forbid temporary marriage (Mut`a).

Khomeini allows a child's father or paternal grandfather to conclude a
marriage for a pre-pubescent boy or girl, or for an insane person, without
- Variations in practice

having to obtain their agreement. He denies the right of the child to cancel
Actual practice certainly varies, bearing in mind that Iran encompasses a
the marriage on reaching puberty, and the right of the obtain person to
variety of ethnic and tribal groups, with only half of the population having
cancel such a marriage on regaining his or her sanity. ² This is the Shî ah

Farsi as their mother tongue. The tribal Baluchi bride is always
represented

form of the right of jabr, but the legislation specifying a minimum age for
by a walí and is not present when the contract is concluded by her walí
and

marriage is intended to annul this: it applied only to pre-pubescent children,
the groom and the groom's parents.⁴ This is almost in accordance with

in a situation where a child could be married from birth.

Sunni Sharī'ah, except that one man and one woman would be not be sufficient as witnesses — Sunni law requires two men or one man and two - Witnesses

women, in addition to the walī and the groom or his representative. In urban

In comparison with Sunni Islamic law, it is striking that there is no

Shiraz, which can be regarded as the Persian heartland, only married requirement in the Civil Code to have witnesses present. Nor is there any women are present with the bride at the moment when the contract is made. alternative aimed at ensuring that the marriage is publicly known, such as

A Mullah stands behind a curtain or outside a window and reads the one finds in Moroccan law (where the two formal witnesses are not required marriage contract, the women urge the bride to accept, and on the third if there has been a large wedding party). The early fiqh says that the

reading she does so "with a barely audible 'yes'".⁵ Only then may the groom presence of witnesses is recommended in permanent marriage, for the sake of the children and inheritance.³ Al-Hillī at one point says that the contract

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Droit Musulman, I.640:5.

Droit Musulman, I.648:49-50.

Ho ward , Mut`a Marriage.

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CC Articles 107 3 and 107 4.

Encyclopaedia Iranica, entry for `A qd, citing Ríáh í, Zár wa Bád wa Balúc, pp.

Kho meini. Clarification 2375.

49-50.

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Ho ward , Mut`a Marriage 85, citing Al-Kulayní citing Ja`far al-Sádiq.

Encyclopaedia Iranica, article for `Aqd, citing various sources.

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enter. Both forms would be compatible with the requirement of the civil contract.¹ There is evidently a contradiction here, unless we suppose that the

code, if the Mullah is regarded as the representative of the man in Shiraz,

provision of article 1069 applies only to reserving a general right to cancel

and the walī as the representative of the woman in the Baluchi context. It is the contract, but specific conditionality is permitted. It may also be that

notable that the Shirazi variant would not accord with Khomeini's

custom endorses the specific condition of the bride's virginity, but all

other

prescription, since the bride does not make the offer, and the reading of the forms of conditionality are void.

contract in Persian and a simple 'yes' take the place of the Arabic formula

One might wonder why such a condition is required, given that the which Khomeini would require. In addition to ethnic variations, there may husband has the right to divorce his wife. A cancellation would differ from be a considerable difference between what is considered proper in the a divorce, in as much as all or part of the dowry would have to be repaid to

religion of the people and what the fuqaha have derived from theoretical the husband, as in the case of a broken engagement to marry. studies.

The reading of the Fatiha, the first chapter of the Qur`án, is a traditional - Marriage Terms

part of the ceremony but is not prescribed.¹

Article 4 of the Marriage and Divorce Act of 1937 and Article 1119 of the Civil code permit the incorporation of marriage stipulations in the marriage

The Dowry in the contract

document or in other documents, so far as these are not contrary to the law or incompatible with the nature of the contract of marriage. These articles

Dowry (mahr) is of such importance in both marriage and divorce that it specifically allow for a stipulation that delegates the power of divorce to the

will be dealt with separately. Failure to specify a dowry does not void the wife (acting on behalf of the husband),² if the husband is absent for a certain

contract, but entitles the bride to the mahr al-mithal.²

period without providing for the maintenance of the wife, treats her harshly

Al-Hillí says that the marriage contract may include a clause giving one or makes an attempt on the life of his wife. A process under such a of the parties the right to 'cancel' the dowry,³ but does not say whether this provision would in the first case be a civil case³ with appeal to the court of

means a marriage with no dowry, or the application of the mahr al-mithal.

appeals and of Cassation. Apologists for traditional fiqh have argued that the fiqh is not inherently inequitable, since it allows the marriage contract to

Other conditions in the contract

specify conditions such as the wife's right of divorce. Mir-Hosseini however

cites an instance in which bride and groom had agreed to an unconditional right of divorce, but the mullah drawing up the marriage contract refused to

- Conditionality

include it.⁴

Article 1068 of the civil code says that making a marriage conditional will

Article 1128 of the Civil Code allows special qualifications of the
render it void. This should be distinguished from conditions regarding the
partners to be included in the marriage contract, either explicitly or by
marriage, which are treated below. A conditional marriage is subject to an
mutual implicit understanding. In practice this is most likely to mean a
as yet unknown condition: "I will marry you, if you get a promotion".
specification that the bride should be a virgin. The article gives the other
In contrast to the previous article, article 1069 states that if there is a
party the right to cancellation of the marriage if it is found that the other
provision in a marriage contract reserving the right of cancellation of the
party lacks the desired qualification.
contract, the provision, rather than the marriage itself, is void. Khomeini
says that if the husband stipulates in a contract that the woman be virgin and
after the contract it becomes evident that she was not, he can cancel the

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Clarification, 2444.

If the condition purported to give the wife the ability to perform a divorce in
her

own right, rather than as her husband's agent, it would be invalid . Kho
meini,

Clarification 2539.

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3

Mir-Ho sseini, Marriage on Trial 32.

Civil Code, 1119. Be rgmann and Ferid , Internationales Ehe- und
Mir-Ho sseini, Marriage on Trial 32.

Kind scha ftsrecht,34, comment to article 4.

3

4

Droit Musulman, I.648:52.

Islam and Gender, 120.

41

42

Khomeini says that if the contract stipulates that the man will not take
assumption is unavoidable. Where one party denies the existence of a
his wife out of the city, the condition is binding.1 In his Tahrir al-Vaisla he
marriage, the party claiming marriage is to be believed if the claim entails
says that conditions that contradict the shari`a are null and void,2 implying
obligations for that person, but not if the claim would bring benefits.1
that the remainder of the contract is valid.

Consummation

Registration and proof

There are some legal points, such as the question of whether a man may
Most marriages are celebrated before a mullah or religious figure. They
ever marry the daughter of his wife, for which the crucial question is not
must also be reported to the 'notaries' offices of the Ministry of Justice,3

whether a valid marriage contract has been made, but whether the marriage where they are recorded in the public registers and entered on the identity cards (sijill) of the partners. The issue is also important where one party claims the existence of a marriage, and the other denies it.²

divorces.⁴ Failure to register a marriage or notify a divorce or the revocation

In Qajar times it was not uncommon among the nobility for years to elapse between the formal marriage and the consummation. During this time the wife would live with her family. The public festivities would take place on the day of consummation, when the bride would be conveyed in procession to her husband's house. Given such delays, there would naturally be cases involving the issue of consummation. Medical evidence or registered, and would have to have his first wife's permission before the witnesses would not be required: 'consummation' would be presumed if the court would grant permission. Failure to register the marriage would make couple were at any time alone together.

the man, the notary and the second wife, if she was aware of the situation,

Al-Hillí requires prior ritual purification, provides specific prayers to be

liable to six months imprisonment. However in 1984 the Guardian Council said before consummation, and names days and times when consummation declared this punishment contrary to the Sharī'ah.⁶ It is not clear whether is not permitted: at noon or sunset, on the occasion of an eclipse or the Council has overturned the registration law as a whole, or only the earthquake, and so forth.³ The prayers are specifically called *ádáb*, ritual punishment of a man failing to register his second marriage.

duties, and seem to be aimed mainly with avoiding any conflict with other According to article 2 of the Marriage and Divorce Act of 1937, ritual duties or prohibitions. One requirement is interesting in terms of the marriages which are not made according to the prescriptions of the Ministry of Justice are treated as customary rather than official marriages. The legal obligation to hold a celebration party for a day or two and to invite the believers, on the occasion of the consummation.

now 'customary'.

In traditional *fiqh*, which may still apply in the case of unregistered marriage, there is a presumption that a marriage exists where both parties claim that it does.⁷ Given the legal possibility of secret marriages, such an

Clarification, 2451.

Cited by Schirazi, Constitution 206.

CC Article 993.

Marriage and Divorce Act 1937, Article 2.

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Marriage and Divorce Act of 1937, Article 1.

Al-Hillí, *Droit Musulman*, I.648:54.

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See Mir-Hosseini, *Islam and Gender*, 182 n6.

Al-Hillí, *Droit Musulman*, I.649:58-59.

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3

Al-Hillí, *Droit Musulman*, I.648:53.

Al-Hillí, *Droit Musulman*, 1.640-642.

43

44

MARRIAGE RIGHTS AND DUTIES

household. This has become unrealistic for the urban poor, since the wage of an unskilled or semi-skilled worker in Iran would barely cover the rent of a small city apartment. Two wages are required, but the socialization of The rights and duties of husband and wife are not equal: each has separate boys and girls still assumes the old role models. The gap between social and obligations and duties. There is also no common ownership of marital legal expectations and the actual situation is thought to be a major cause of goods. Although Article 1103 of the Civil Code states that "husband and divorce. The law cannot be changed, being rooted in the Shar'ah and wife are bound to establish friendly relations," and the following article says staunchly defended by conservatives. More important, the attitudes of that they must cooperate with each other for the welfare of their family and judges in the divorce courts do not accommodate this reality. Mir-Hosseini the education of their children, they are not regarded as equal and reports one as saying that 'problems are inevitable when women work and cooperating partners. Article 1105 states that "the position of the head of the earn money; it is for this reason that in Islam it is preferable for them to stay family is the exclusive right of the husband" and other provisions show that at home..."¹

this means that the wife must be obedient in various matters and to be

Maintenance embraces a right to food, and the right to use lodgings and sexually available to her husband. Nevertheless her position under Iranian furniture and clothing "in proportion to the situation of the wife" (Article law is better than under the law codes of most Sunni Muslim countries.

1107), as well as the payment of minor medical expenses. In June 1993 Ayatollah Yazdi, then head of the Judiciary and now a leading conservative Financial claims of the wife on the husband

and head of the Haqqani institute for post-graduate legal studies in Qom, expressed the conventional Shi`i view that the wife's right to maintenance - Dowry

does not include a legal (as distinct from moral) right to have the expenses The wife (and not her family) is entitled to receive the dowry (mahr). Under of major medical treatment met.² A modernist response led to some some circumstances she is entitled to refuse cohabitation prior to receiving discussion in women's and legal journals, but the traditional standpoint her dowry. ¹ The usual practice is to make only part of the dowry appears to stand. Article 1107 also specifies the wife's right to a servant if immediately payable. These points are discussed further in the section on she is accustomed to this, or if she needs one because of illness or disability.

dowry. Anecdotal evidence shows that a wife's first recourse to obtain her Article 1111 empowers a court to determine the amount of maintenance and dowry is social pressures, but that the courts do act to enforce payment to compel the husband to pay it. Where payment is impossible, the wife when asked.

may apply to the court for a judicial divorce.³ Khomeini stipulates that a wife who is entitled to maintenance may take the required amount from her - Maintenance

husband's assets without his permission. If she is obliged to work to support The wife has a right to be maintained (nafaqah) by her husband.² This right herself, her obligation to give obedience is suspended .⁴ comes into effect when the marriage is consummated, and continues so long The right to maintenance normally continues in the 3-month 'iddah as she is not in a state of disobedience (nushuz).³ It remains in effect even if period following a divorce (discussed in the section on divorce), but there is the husband is poverty-stricken and the wife has independent wealth, and it no right to maintenance during the 'iddah period following the husband's is not reciprocal at all. death.

Marriage is therefore based on the assumption that the man is the sole, Obedience for the woman entails not leaving the house without her and not merely the principal, financial provider. A woman who has earnings husband's permission, surrendering to any pleasure he desires, and not or inherited wealth is in theory not obliged to contribute anything to the

Ma rriage on Trial, 125.

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CC Article 1085.

Mir-Ho sseini, Islam and Gender, 255.

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3

CC Article 1106.

CC Article 1129.

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CC Article 1108.

Clarification, 2416.

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46

refusing sexual intercourse without a religious excuse.¹

He is the head of the family¹ and is entitled to choose the place of residence

and insist that his wife resides in the house he chooses.² He has a right to his

- Alimony

wife's obedience³ and to control her outside activities. He can prevent her Alimony will be considered in the section dealing with divorce.

undertaking a profession or trade that is incompatible with the interests or dignity of the family, unless her right is stipulated in the contract.⁴ He has a

Other Rights of the wife

right to withhold his wife's maintenance if she disobeys him.

His right to obedience does not entitle him to require his wife to do

- Property

ordinary housework, to care for himself or the children, or to breastfeed a child. The wife has a right to control and dispose of her own wealth.² She is not obliged to do housework³ or to suckle children.

these from consideration, and suppose that the questions of where the wife lives and whether she leaves the home without permission are stipulated

- Childbearing

because they affect her sexual availability, it would appear that the 'right to

It appears that traditional fiqh also gave the wife the right to fecundation, or 'obedience' amounts essentially to a right to demand sexual relations, at least the possibility of it. The husband may not delay consummation of

He also has a right to terminate the marriage (CC Art 1133, see the marriage by more than four months, and sexual union should be Divorce, talaq, below).

'regular'. Khomeini specifies that a husband may not abandon intercourse with his permanent wife for more than four months.⁴ Premature withdrawal

Mutual rights

is forbidden, unless the right has been stipulated in the contract or the wife has consented at the time. Breach of this entitles the wife to compensation

Both partners have a 'right' to sexual access in two senses: sexual relations

of 10 dinars, which Query glosses as 36 grammes of gold.⁵

are made legitimate (halal) for them, and neither has a right to unreasonably

deny the other. In the case of the wife's right, the fiqh defines this, by saying

- Security and dignity

that the husband may not refrain from sexual relations with his wife for Although the wife is required to live where her husband directs her, Article more than four months.

1115 of the Civil Code states that if living in the same house as her husband

Both partners are bound to live on the basis of friendly relations and to

entails a risk of bodily or financial injury or loss of dignity, she may choose

cooperate with one another in strengthening the foundation of the family a separate dwelling. Her husband continues to be liable for her cost of

and raising children.⁵ They have a mutual but not equal right of inheritance maintenance, until such time as a court may order her to return to her

from one another.⁶

husband's house.

Rights of the husband

The husband's primary right is to sexual access with his wife.

The husband is entitled to contract up to four marriages simultaneously.

CC Art 1105.

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Kho meini, Clarification 2412.

CC Article 1114.

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CC Article 1118.

CC Article 1108.

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Kho meini, Clarification , 2414.

CC Art 1117.

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Clarification 2418.

CC Article 1103.

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Al-Hillí, Droit Musulman, I.644:29.

CC Article 940.

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DOWRY

below). Most jurists reject a dowry agreement which is conditional, for example one fixing a low dowry so long as the wife is not required to leave her place of birth, but a higher dowry is she is in future required to move to another city.¹

The dowry may be any licit article, service, or legal act of value which could be sold or rented, having a general (market) use and value in the eyes of reasonable people. An article having value only under occasional relations. The Shî'ah rules are essentially the same as those of the Sunni circumstances, such as a herb used to cure an illness rarely encountered, schools.

cannot constitute a dowry, according to traditional fiqh.² A poodle serving in rural Iran and among recent immigrants the dowry is overshadowed no purpose cannot be a dowry, but a guard dog may. The Civil Code's provision (article 1078) is more restrictive, specifying "anything which can provide her with household necessities. In this case the dowry that is be called property and which can be owned and possessed." This seems to registered in the contract may be a minimal amount to comply with the legal requirement. In urban Iran the legal dowry has greater importance than free a slave, or not to do something, such as not to take a second wife. The customary shirbaha.¹

provision in the traditional fiqh which allows services as the dowry rests on Muhammad's example in allowing the teaching of the Qur`án to serve as a literally a bride-price – it differs in many ways from the consideration dowry. ³ Muhammad likewise married a slave (Saffiyah) and gave her her freedom as dowry. ⁴ The opinion that a promise not to remarry can serve as a dowry rests on the general fiqh rule that "the dowry is anything to which the man consents."⁵ It seems unlikely that a court would over-rule such strong precedents simply because of the wording of article 1078. In fact, the reference in the Civil Code is probably intended not to exclude promises and services, but to exclude physical properties which cannot be owned, writers emphasis that it provides a security for the wife.

such as a public work. ⁶ According to the Civil Code, where the agreed dowry should preferably be stipulated in a valid marriage contract, dowry is something that by its nature cannot be owned, the wife is entitled

but where it is not stipulated, or where the contract is not valid, a dowry to the 'reasonable dowry' (see below).⁷

must nevertheless be paid. In the latter case the amount is proportionate to

Another instance in which the dowry is invalid is a marriage contract the social rank and personal qualities of the wife (mahr al-mithal), and these are also the usual criterion for a dowry which is stipulated (mahr al-musamma).

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Emamy, L'institution juridique du mahr, 42.

The dowry is fixed by agreement⁴ and stipulated in the marriage 2

Emamy, L'institution juridique du mahr, 17.

formula, "I marry myself to you for [a certain sum]", or "I marry my

On this point Shī'ah law differs from Sunni law. Abu Hanifa says that as a slave

principal to you for [a certain sum]". Where no sum is stipulated, the

is an economic property, the services of a slave can constitute the mahr, but as a

free person is not an economic property his services (the example given is to

contract is still valid, and the amount is fixed by agreement or by law (see perform a pilgrimage on behalf of another) cannot constitute a dowry. See Emamy, L'institution Juridique 24-26.

In this respect, Shī'ah law differs from Sunni law. The latter considers

Muhammad's act as a particular privilege of the Prophet, which does not establish

Mir-Hosseini, Marriage on Trial 74.

a legal precedent. See further Emamy, L'institution Juridique 20-24.

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This is discussed further in Emamy, L'institution Juridique 14-16.

Emamy, L'institution Juridique 19.

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See Qur'ān 3:4.

Emamy, L'institution Juridique 19.

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Civil Code, 1078.

CC Article 1100.

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specifying a dowry, and also specifying a higher dowry should the husband not valid, but the marriage has been consummated, the woman is entitled to require his wife to leave her home town. In this case the dowry, being receive the 'dowry of equivalence', a dowry equivalent to that which is conditional, is usually regarded as unspecified and invalid, although some

customary for a woman of her status and qualities. If the marriage has not been consummated, and is dissolved by divorce, annulment or the death of either party, no dowry is payable.¹ If the agreed object proves to be non-existent (the house has burnt down, for instance) or to have a different value specified. Where a specific item, such as 'my black horse' is agreed, the parties must have seen it.³ If an item is specified as the dowry, and this proves to belong to someone else, the husband is required to provide its

Article 1079 of the Civil Code says that the dowry "must be known to be equivalent in value.⁴ the marrying parties to the extent that their ignorance is removed." However There is no maximum or minimum amount, although some traditional Article 1087 allows for the possibility that the dowry may not be mentioned in the contract, and even that the contract may specify that there is to be no

from the sixth Imam to support this.⁵ Others say that the limit of 500 dirhams is recommended, not obligatory. It is regarded as reprehensible to set a dowry worth less than six dirhams, again on the basis of a tradition marriage is consummated, the wife is entitled to the 'dowry of equivalence', according to article 1093, or to the 'reasonable dowry' according to article

Following the 1979 revolution, it was regarded as praiseworthy to limit the dowry to a nominal sum, often a copy of the Qur`án, with the result that and the marriage ends in divorce without being consummated, she is there are marriages today in which the wife's right to the 'unpaid dowry' in entitled to the 'reasonable dowry'.³

the event of a divorce is worth virtually nothing. Marriage contracts made before the revolution, by families who considered themselves modern, may be obliged to pay the dowry (to which some authorities add: "if the child also have a minimal pro-forma dowry, both because the dowry was cannot').⁴ If the father dies before the dowry is paid, it is a first charge on considered an archaic vestige and because at that time husbands' arbitrary his estate.

right of divorce was limited and women had greater rights, so that there was

Where a man engages an intermediary to arrange a marriage, or it is less stress on the function of the dowry in providing security for the wife.⁸ arranged by someone having a power of attorney, and the man later refuses If the dowry is not legally valid, this does not make the marriage to recognise the marriage contract, some authors say it is the intermediary, contract itself invalid.⁹ The primary intention of the couple is to marry, bear not the principle, who is obliged to pay the jilted woman the dowry, or some and raise children, and the dowry is a secondary matter. For the same say, half of the agreed dowry, while others say there is neither marriage nor reason, the marriage is valid if no dowry has been set. If the dowry agreed is dowry.⁵ The authority to determine the amount of the dowry may be delegated to a third party (such as an agent arranging the marriage), or the contract may specify that the husband has a unilateral right to determine the

1
dowry. ⁶ Where the contract specifies that the wife has the right to determine

Emamy, L'institution Juridique 40-42.

Emamy, L'institution Juridique 25-6 cites the precedents.

the dowry, presumably after the marriage has been contracted, she may not Emamy, L'institution juridique du mahr 31.

CC Article 1100.

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1

Emamy, L'institution juridique du mahr, 34.

Emamy, L'Institution juridique du mahr, 36; Civil Code, 1088.

6

2

Emamy, L'institution juridique du mahr, 35.

Clarification, 2419.

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Bahá'í law does stipulate maximum and minimum amounts, in this reflecting a CC Article 1093.

Shí'ah rather than Hanifite character.

Emamy, L'institution juridique du mahr, 43-4.

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Mir-Hosseini, Marriage on Trial 75.

Emamy, L'institution juridique du mahr, 50-52.

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Emamy, L'institution Juridique 16, 35-36.

CC Article 1089.

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decide on an amount exceeding the 'reasonable' dowry (Article 1090).

is entitled to only half of the dowry and may have to repay any additional Article 1091 specifies that the reasonable dowry is to be determined in the amount she has received.¹

light of the status of the wife, with respect to her family's rank and other

If a temporary or permanent marriage proves to be void (for instance circumstances and peculiarities concerning her in comparison with her because of an impediment), and has not been consummated, the wife is not equals and relatives, and also in the light of the customs of the locality. entitled to any dowry. Where it has been consummated, and the wife did not Article 1094 adds to this, that the wealth of the man is to be considered in know that the marriage was not valid, she is entitled to the reasonable fixing the reasonable dowry. This differentiates it from the 'dowry of dowry. 2

equivalence'.

A wife has the right to refuse consummation and other matrimonial Where a man and woman have illicit sexual relations believing duties until the dowry, is paid. However she has this right only if the dowry themselves to be legally married, or under some other form of 'mistake', the is specified as being paid in one amount and not in installments (see below),

traditional fiqh says that the man is obliged to pay the woman the 'dowry of and she has only one opportunity to use this provision to enforce payment: equivalence'.¹

if she has freely consummated the marriage she cannot later withdraw In addition to the dowry, the groom's family usually provide a ring, consent pending payment of the dowry.³ A clause specifying the at marriage jewellery and clothing, a pair of matching mirrors and candle holders. The will be cancelled if the dowry is not paid by a certain time would be an latter are used as decorations during the marriage ceremony. The jewellery invalid clause, but the marriage contract and the agreed dowry would still and clothing is usually not written into the contract or regarded as part of be valid.⁴

the dowry, but the ring, mirrors and candle-holders are.²

She cannot claim the dowry from a bankrupt husband, although her right is only suspended.⁵

Payment and ownership

Delayed payment

The dowry is paid to the wife. Even where she is a child living with her father or grandfather, the latter is not permitted to use it for his own

It is common practice to divide the dowry into a portion to be paid purposes. No clause that benefits any third party can be attached to the immediately, a portion to be paid over time, and a portion which is payable dowry agreement. It is legally the wife's property from the moment of when the marriage ends by death or divorce. The last of these is commonly marriage, and she has the right to dispose of it.³ Nevertheless, the husband much the larger amount, and serves as a discouragement to divorce and a

is responsible for the dowry until it is handed over: if an agreed article is source of security for the wife in the event of divorce. Mir-Hosseini states lost through no fault of his own, he is nevertheless obliged to provide an that the dowry is usually an amount which is well beyond the means of the equivalent.⁴ Likewise, if a material fault is found in an agreed article, the groom, and is almost never expected to be paid at the time of marriage.⁶ wife is entitled to demand an equivalent.

However Friedl, whose research was in a rural village, reports dowry Although the wife becomes the owner of the dowry immediately after negotiations involving practicable amounts and necessary goods which are the performance of the marriage ceremony,⁵ one half of her ownership is in fact handed over the time of marriage.⁷ Because her discussion is non-unconditional, and the other half is subject to the consummation of the technical it is not clear whether the goods involved are an immediately paid marriage. If the marriage ends in divorce without being consummated, she CC Article 1092.

CC Articles 1098 and 1099.

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Emamy, L'institution Juridique, 13.

CC Articles 1085-6.

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Mir-Hosseini, Marriage on Trial 74.

CC Article 1081.

3

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CC Article 1082.

Emamy, L'institution juridique du mahr, 60.

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Emamy, L'Institution juridique du mahr, 60-63; Civil Code 1084.

Marriage on Trial, 73.

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CC Article 1082.

Women of Deh Koh and Children of Deh Koh, passim.

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dowry or a shirbaha. She also says that it is regarded as meritorious among

OTHER LEGAL IMPLICATIONS OF

poor peasants for a wife to 'forgive' the suspended amount when her husband is close to death, as it would otherwise be an unpaid debt and a

MARRIAGE

spiritual burden to him in the afterlife. If she does not do so, the dowry must be paid from the property of the deceased, with an original monetary value

Extra-marital relations, underage relations
being recalculated to allow for inflation, up to the date of the husband's death.¹

Clause 100(c) of the Retribution Act of 1932 specifies that "any non-Muslim who has intercourse with a Muslim woman shall be executed" paid over time.² If the contract does not specify the amounts and times, regardless of the consent, age and marital status of either party, immediate payment is assumed, since Khomeini says the wife may refuse to have intercourse until she receives the dowry.³

Violence and marital rape

The Sharī'ah conception of marriage is that the husband has authority over his wife, and she has a duty of obedience to him, and this authority and obedience relates in particular to sexual relationships. The wife cannot refuse sexual relations without a recognized reason such as menstruation, or venereal disease in the man.¹ The concept of "marital rape" would presumably only apply where such legitimate reasons can be demonstrated. A husband also has a limited right to chastise his wife. Leaving aside criminal procedures for assault, which fall outside the scope of this survey, the issue arises where a wife claims 'hardship and harm' ('asr va haraj) as a ground when petitioning for a judicial divorce. Courts will not consider psychological violence as sufficient, and require tangible evidence of physical violence such as a broken arm or a police report. A doctor's certificate is not sufficient, and eyewitness reports are seldom sufficient.²

Maintenance and obedience

We have seen that the marriage gives the wife a right to receive maintenance (nafaqa) during the marriage, which should be distinguished from the right of divorced people to receive maintenance from the wealthier ex-spouse, in Western law. The husband, on the other hand, has the right to be regarded as the head of the household and to be obeyed in certain respects, for instance in deciding where his wife will live, and whether she can travel or take work outside the home.

Ansari-Pour, 'Iran', 243-4.

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Article 1083.

CC Article 1127.

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Clarification, 2420.

Mir-Hosseini, Marriage on Trial 71.

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Mir-Hosseini reports that 43 out of the 150 petitions made by women to

TEMPORARY MARRIAGE

Tehran Special Courts in February 1988 were petitions for maintenance, and 46 of the 118 petitions brought by men sought enforcement of their right to obedience.¹ This is second only to divorce, which accounted for 80

Marriage according to the Twelver¹ Shi'ah form of Islamic Shar'ah is of and 52 petitions respectively, and far ahead of custody cases (13 and 5 two types, 'normal marriage', nikah and temporary marriage, mut'a (Arabic) petitions respectively). When one considers that many of the divorce cases or sigha (Persian). Both are recognized in the civil code. In the fiqh books,

simply involve the registration of a divorce, it appears that a substantial part but not in the civil code, mut'a is further subdivided into mut'at al-hajj

of the case load involves adjudicating these two complementary rights (temporary marriage during the pilgrimage to Mecca) and mut'at an-nisá'. within marriages. As Mir-Hosseini points out, however, petitions under

Iran is the only country which recognizes the validity of temporary these two headings may in fact be tactical moves in a divorce.

marriage (See the Civil Code, articles 1075 to 1080), and it has a lower Under Iranian law, the wife's right to maintenance continues unless she social status than permanent marriage. The institution existed at the time of is disobedient. In the words of the Civil code "If the wife refuses to fulfil the Prophet but was banned by the second Caliph and rejected by all Sunni the duties of a wife without legitimate excuse, she will not be entitled to the schools of law. It will be discussed here rather briefly, since such marriages

cost of maintenance."² This places the burden of proof on her, and it in any by their nature are not likely to be found in the diaspora community. It has case means that she loses the right to maintenance if she leaves the marital also been the subject of several studies in European languages.²

home without a reason recognized by the shari'a. She must in fact show that

A temporary marriage does not count as one of the maximum of four she has been forced out of the home, and the husband must show that she marriages to which a man is entitled. A man can contract as many has left voluntarily, by inviting her back.

temporary marriages simultaneously as he wishes. It is used in a serial way, to legitimate what would otherwise be regarded as promiscuity, but is also contracted by young urban couples whose families oppose their marriage, or who are not prepared to approach their families for the necessary permission and assistance with the marriage costs and arrangements. A temporary marriage is not normally registered, but a court can issue a specific order authorizing registration. The contract will normally be drawn up by a mullah.³

A temporary marriage has the effect of legitimating sexual union and

This is one of the areas in which Twelver Shi'ism differs markedly from other Shi'ah traditions.

Haeri, Law of Desire; Castro, Materiali; von Ende, Ehe auf Zeit; Gribetz,

Strange Bedfellows; Gourji, Temporary Marriage; Howard , 'Mut'a marriage';

Murata, Temporary Marriage; as well as sections in other works about Iranian marriage.

Mir-Hosseini, Marriage on Trial, 166, 167. Article 993 of the Civil Code in fact

requires the registration of temporary marriages, but this does not seem to be done

in practice. An AFP report (No v. 3 2002) indicated that 271 temporary marriages

were registered in about months of 2002, a sharp rise that was attributed to

economic difficulties. A notary was quoted as saying that many temporary marriages are not registered, and that most of those that were registered were between couples in their thirties. This suggests that registered temporary marriage

Mir-Hosseini, Marriage on Trial, 42-3.

is increasingly seen as a suitable legal form to formalise an open-ended

Article 1108.

partnership.

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any children born from it. However in law its purpose is not to have

registration of a particular marriage.¹ A temporary marriage does not entitle

children, but to legitimate the man's sexual enjoyment (istimta').¹ It entitles

the wife to receive maintenance, unless this is specifically agreed.²

the man to exclusive access to the woman's sexual favour for a specified

If the marriage is terminated before consummation, the woman is period, in exchange for a specified payment of mahr (dowry).

entitled to half the mahr,³ but she forfeits the entire amount if the

Khomeini states that the contract is valid even if the real purpose is not

termination is demanded by her or is attributable to her action. She can

pleasure, and even if the contract stipulates that there will be no sexual

make her obedience contingent upon receiving her mahr in full, and the

intercourse.² The reason for this provision is that temporary marriage is

man can claim the whole amount back if she denies sexual access from the

sometimes used as a way of admitting an outsider into the home, where she

outset or a portion of it back if she refuses him later. However the husband

would otherwise have to be veiled and chaperoned, or where his presence

has no right to claim part of the dowry back if she dies during the period

of

would otherwise require the women of the household to be absent or veiled.

the marriage, even if she dies before consummation.⁴

Usually such temporary marriages involve a minor in the household.

A temporary wife has no claim to maintenance or sexual intercourse

Khomeini gives the example of a man for whom it is inconvenient that his
unless these are stipulated in the contract. Khomeini however says that the
sister-in-law is not his 'intimate' – that is, she must veil from him,
may not husband must no refuse intercourse with his temporary wife for more
than
be alone with him, and so forth. He cannot marry a child of that household,
four months.⁵ If she becomes pregnant, she is not entitled to maintenance
since marriage with a brother's children is forbidden, but he can contract a
during the pregnancy. She is required to be sexually available, but is
short temporary marriage with an infant girl, and bring that girl to his
sister- otherwise at liberty. She does not require the man's permission to
leave the
in-law to nurse. His sister-in-law thus becomes a 'mother' to his infant
house or take a job, providing she remains sexually available.⁶
'wife': she is his mother-in-law.³

There is no divorce in a temporary marriage, but the man may 'make
a
A temporary marriage which does not anticipate sexual relations still
gift of the time', that is, of the time remaining of the contract, by saying "I
legitimizes any subsequent sexual relations, if the couple so decide.⁴
have spared you the term". This terminates the contract, without requiring
Any ambiguity in respect to the duration renders the contract void (CC
any witnesses. Unlike a divorce, the wife does not have to be ritually clean
Article 1076). With respect to the stipulation of the dowry, article 1077
at the time the formula is pronounced.⁷ The woman must observe an 'idda of
states that the same latitude and conditions apply as with permanent
two menstrual period following the termination of the contract, before she
marriage, whereas article 1095 says that the absence of a dowry makes the
may remarry, but this is not required if the same couple decide to remarry
contract void. The latter seems to be applied in practice.
permanently. ⁸

It is notable that according to the Civil Code, a temporary marriage

The children born from a temporary marriage have legal legitimacy, but
entails the same rights of mutual inheritance as a permanent marriage. It
are socially stigmatized. Although they are legitimate, they do not share
the

seems unlikely that this has been put into effect, at least for women who
privileges of siblings born into a permanent marriage.

engage in the serial short-term marriages. Khomeini says that the partners in
a temporary marriage do not inherit from one another.⁵ Such marriages are
normally not registered, but the courts can issue an order authorising the

Mir-Ho sseini, Law of Desire, 166.

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In practice it appears that temporary marriage is also used by women to
CC Article 1113.

legitimate their sexual enjoyment, but they do not have a right to sexual

CC Article 1097, Kho meini Clarification 2431.

satisfaction (unlike a permanent wife).

CC Article 1096.

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Clarification 2421, 2423.

Clarification, 2422.

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Clarification 2493.

Khom eini Clarification 2427.

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Kho meini, Clarification 2420, 2429.

CC Article 1120; K homeini Clarification 2509.

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Clarification, 2425.

Kho meini, Clarification 2432.

59

60

DIVORCE the age of menstruation,¹ or
in the case of a third divorce between the same
two parties.²

The third divorce may arise either because the man has divorced his
Divorce has become very common in Iran, although marriage is still more
wife and remarried her, divorced her and remarried her, and again divorced
stable than in Morocco. Divorce is not easy for the husband, by the
her (without her being married to any other man in the interval), or because
standards of Islamic countries, and for the wife it usually means giving up
the man has pronounced the divorce formula and changed his mind
the children. It occurs mainly in the middle and upper social strata.¹ From
(‘returned’ to his wife) twice. The act of returning to the wife, thus
Mir-Hosseni's anthropological studies and from observing news reports, it
cancelling a divorce which has been initiated but not completed, is counted
would appear that the main causes are the increasing incidence of
as a new marriage. This has led to the ‘triple divorce’, in which a man
polygamy, a practice which had been becoming rare prior to the 1979
pronounces the divorce formula three times. By means of the legal fiction
Revolution, increasing numbers of arranged and forced marriages of girls
that he has changed his mind after the first and second times that the
barely in their teens, tensions in traditional family structures caused by the
formula was pronounced, the third recitation of the formula achieves an
increasing education and workforce participation of women, and social
irrevocable divorce. Such a ‘third’ divorce also creates a bar to

remarriage

tensions especially in urban families due to economic failure, leading to
between the couple which remains until the wife has contracted and
hopelessness, high unemployment and high rates of drug addiction. A
consummated marriage with another man (a tahlil marriage).
combination of modernity and the Islamic revolution have placed the
institution of the family under great stress.

Unilateral divorce: Talaq

Polygamy certainly plays a role in the dynamics of divorce, but from
Mir Hosseini's case studies in Marriage on Trial it would appear that men
Talaq is divorce through the repudiation by a man of his wife, by speaking a
contract a second marriage when they feel that the first is unsatisfactory,
repudiation formula (once) in the presence of two male witnesses.³ There
and one or other marriage, usually the first, often ends in divorce soon after.
must be an immediate intention to effect a divorce, so a conditional divorce
There seems to be little social support for polygamy as a long-term family
is null and void⁴ and the words said in jest have no effect.⁵ Khomeini says
structure.

that the divorce formula must be read in correct Arabic, and takes the form
A divorce may be revocable or irrevocable: in the former the husband
"My wife, Fatimeh, is divorced."⁶

has a right to renounce his intention to divorce his wife at any time during a
In the Sharî ah, no grounds are required, but intention is necessary and
waiting period ('iddah). This is know as 'returning', and may be
signalled

the word talaq or a derivative must be used. The wife need not agree or even
by word or deed, without any requirement for witnesses or that the wife be
be informed. The husband can only utter the talaq formula when his wife is
informed.² The result is that a wife may believe she is divorced, and may
in a state of purity (tuhr) having washed after the end of a menstruation (or
have remarried, while her ex-husband claims that she did or said something
during the waiting period which cancelled the divorce. This fundamental
weakness in the law explains the need for the present system of registering
divorces at the end of the waiting period. Divorce by consent or dethroning
(see below) is irrevocable. A unilateral divorce is irrevocable if it occurs
before the marriage has been consummated, because the wife is not able to

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Mir-Hosseini, Marriage on Trial 38, C C Article 1145; Khomeini
Clarification

conceive, for instance because he is past her menopause or has not reached
2522.

CC Article 1145.

CC Article 1134 ; Khomeini Clarification 2543. The latter specifies two
'just'

witnesses.

CC Article 1137.

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Mir-Ho sseini, Marraige on Trial, 131, 160.

Kho meini, Clarification 2498

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CC Articles 114 3-4, K hom eini, Clarification 2524, 2525.

Clarification 2508.

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following childbirth).¹ These requirements do not apply if the husband is absent, and so cannot obtain information concerning her menstruation,² if the marriage has not been consummated, or if the wife is pregnant.³ It is not proper to divorce a wife between two menstruations during which intercourse has taken place, unless the wife is pregnant or is incapable of conception.⁴ The effect of these provisions appears to be that both parties should know whether the wife is pregnant or not at the time of repudiation. Where a woman is of childbearing age but has no periods, the repudiation cannot be pronounced until three months after the last intercourse.⁵ After pronouncing the repudiation, the husband abstains from sexual intercourse with his wife, and she enters a period of waiting ('iddah) lasting three menstrual cycles. This is a revocable repudiation: during the three-month period the husband has the right to revoke his repudiation and take his wife back without any further formalities, by any act or word that conveys his intention.⁶ During this period the wife cannot remarry, and is entitled to maintenance and does inherit if her husband should die during that period.

The Civil Code specifies that the repudiation formula must be in clear and precise wording, and may be uttered by an attorney.⁷ The divorcer must be of legal age, in possession of his faculties, must intend the act and not be under coercion.⁸ The guardian of a permanently insane person can divorce his ward's wife if this is in the interests of his ward. The guardian of a minor cannot divorce the permanent wife of his ward, but may terminate a temporary marriage before the end of its term, if this is in the interests of his ward.⁹

CC Article 1140; K homeini Clarification 249 9. If he later learns that she was not in a state of pur ity at the time, the divorce formula has no effect (K hom eini,

Clarification 2501).

But he sho uld wait at least the time until her next menstruation would be expected, or she would be ritually pure fo llowing childb irth (Khom eini, Clarification 2503, 25 06).

CC Article 1 140 , Kho meini Clarification 2500.

CC Article 1 141 , Kho meini, Clarification 2504. Khomeini concludes that a man may have intercourse with a girl under nine years old and divorce her without restriction.

CC Article 1142; K homeini Clarification 2507.

CC Articles 1148 and 1149.

CC Articles 1135, 1138.

CC Article 1136.

Kho meini, Clarification 254 1, 25 42.

63

64

Divorce by consent (Mubarat) or 'dethroning' (Khul')

before 1982. For marriage contracted after 1982, the conditions may (or

may not) be included as part of the marriage contract and the wife would

A khul' divorce is one in which the wife, seeking a divorce, pays her

have to pursue her own rights as a party to the contract. Article 1130 allows

husband to divorce her.¹ Mir-Hosseini reports that half of the divorces

a judge to compel a husband to divorce his wife where she has proved that registered in Tehran are of this type.² The payment involved is often the

"the continuation of the marriage causes difficult and undesirable portion of the dowry which the husband still owes, but it may be any

conditions." Although it is presumed pro forma that the husband will amount.³ A mubarat divorce is defined as one in which both parties feel a

pronounce the divorce formula, where this cannot be achieved the divorce dislike for the other, and in this case the amount which the wife pays to her

"will be made on the permission of the Islamic judge". Whether the formula

husband is limited to the value of the dowry.⁴ Since the husband has a

is dispensed with, or the judge makes himself the husband's agent to effect

unilateral right to divorce, and can effect an immediate irrevocable divorce, the divorce, is not clear.

divorce of this kind arises only where a man is genuinely unwilling to effect

Article 1129 specifies that a judge may compel a husband to divorce his

a divorce or is unwilling or unable to pay outstanding dowry and other debts

wife where he is unable to maintain his wife, or has refused to pay

to his wife (such as payment for household work). There are specific

maintenance and cannot be forced to do so.¹

formulas for each type of divorce, to be read by the husband or his agent in

Article 1156 allows a wife how husband is continuously absent and

Arabic. The woman's portion of the proceedings, in which she or her agent

whose whereabouts are unknown to apply for a judicial divorce. The

specifies what she will pay, may be said in Persian⁵

waiting period in this case is four months and ten days from the time the

If a talaq divorce formula has been pronounced and the wife later pays

divorce is granted.

her husband not to 'return' to her during the waiting period, as is in

khul' A court may also issue a finding of presumed death,

following a

divorce, this does not in fact prevent the husband returning.⁶

procedure of public notification, where a person has been continuously absent for 10 years and the person concerned would be 75 years old or
Judicial divorce

older, or was engaged in hostilities in the Armed Forces and has not appeared three years after the conclusion of peace, or has been presumed lost on board a ship or aircraft under specified circumstances.² Such a Tatlîq, or judicial dissolution is a possibility where a woman seeks a finding is also relevant to inheritance. Where a man has been continuously divorced but her husband refuses to release her. It involves the judge either absent for four years, his wife can apply to the court for a divorce without compelling the husband to pronounce a divorce or pronouncing it himself, the case having to meet the more stringent requirements for a declaration of on the husband's behalf. The only grounds recognized in Shî'ah law are a presumed death.³ The procedure of public notification is the same. A failure to maintain the wife, and the husband's impotence.⁷ These grounds waiting period (uddah) must be required following the judicial divorce, have been greatly extended since 1982, including the husband's taking a second wife without the permission of the first (for a list, see above, p. 19). returns during this period. From this it follows that the divorce pronounced However these apply, as a judicial divorce, only to marriages contracted by the judge is conditional.

Delegated talaq

CC Article 1146.

Marriage on Trial 82. Note that Mir-Hosseini incorrectly states that the wife

automatically forfeits her unpaid dowry in such cases.

See, e.g., Khomeini, Clarification 2530.

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CC Article 1147; Khomeini, Clarification 2535.

For applications of this principle see Mir-Hosseini, Islam and Gender 62, 162,

See Khomeini, Clarification 2529-30, 2532-3.

164-5.

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Khomeini, Clarification 2526.

CC Articles 1020 to 1023.

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Mir-Hosseini, Marriage on Trial, 39.

CC Article 1029.

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The fiqh allows the husband to delegate his right of talaq to his wife, by
to a magistrate.

inserting this as a condition in the marriage contract, enabling her to divorce

- castration

herself. The husband retains his own right of talaq.

- amputation of the sexual organ (CC Article 1122).

The right is normally subject to a condition, for instance the wife may A
woman's right to cancellation in case of madness or sexual impotence on
have the right to divorce her husband if he remarries or treats her harshly.

the part of her husband applies whenever the deficiency arises, unless she

The procedure in this case would be for the wife to apply to a court,

was aware of the deficiency at the time of marriage (Article 1126), and

demonstrating that the condition had been fulfilled, and asking the judge to
subject to article 1131, which says that an option to cancel the marriage
pronounce the talaq.¹

lapses if it is not exercised once the deficiency is known, within a period
to

be determined by "custom and usage."

Annulment (faskh)

The contraction of a venereal disease is not a grounds for cancellation,
but does entitle the wife to refuse to have sexual relations, without any loss
A marriage may be annulled either by a fault in the marriage contract, or as
of her right to maintenance.¹

result of an impediment to a valid marriage in one or other party. Both
parties have an equal right to seek an annulment. If the annulment is

- in a woman: - chronic madness, whether it is continuous or recurrent

ordered before the marriage has been consummated, the wife is not entitled
(CC Article 1121)

to keep any dowry: if after, she is entitled to half. The wife must observe the

- protrusion of the womb

same waiting period as in a divorce.

- black leprosy (but Khomeini says, 'elephantiasis': which may be

Where the annulment arises because a milk relationship is discovered,
the same thing) ²

Khomeini says that there is no dowry if the marriage has not been

- leprosy

consummated, and the dowry of equivalence if it has been consummated but

- connection of the vaginal and anal passages

the woman was not aware of the milk relationship.²

- being crippled (but Khomeini says, 'obvious lameness')³

- being blind in both eyes (CC article 1123).

Cancellation

The man's right to cancellation applies if they existed (and by
implication,

were not known to him) at the time of marriage,⁴ and subject to article 1131

Serious deficiencies arising in either partner give the other partner the right
just mentioned.

to cancel a marriage, without requiring a divorce, or its attendant

Some deficiencies are also mentioned in the Family Protection Act of procedures.³ The reference to procedures may be only to the need for

1975, article 8, with the interesting variation that they apply on the same attempted reconciliation in the case of a divorce, or may also mean that

terms to husband and wife. The deficiencies concerned are illnesses that there is no need for an 'iddah period where a marriage is cancelled due to

make the continuation of the marriage dangerous to the other partner.

long-lasting impotence on the part of the man. The deficiencies listed are Divorce procedures

- in a man: - chronic madness, whether it is continuous or recurrent (CC Article 1121) The majority

of divorces do not go through the courts, since a divorce can

- impotence continuing for one year after the wife refers the matter

simply be registered where there is mutual agreement. Courts deal only with

CC Article 1127.

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CC Article 1119.

Clarification, 2380.

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Clarification 2494, 2495.

Clarification, 2380.

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CC Article 1132.

CC Article 1124.

67

68

cases where one party is resisting divorce, or the couple have agreed on the strengthening the wife's position in the marriage by persuading the husband

divorce but cannot agree on a settlement. Blame is very much an issue,

to make a promise — for instance, promising to divorce another wife, to since the wife loses her claim to maintenance during the marriage and

stop taking drugs, or not to beat his wife. These can be enforced by 'iddah period if the divorce results from her failure to comply with her

requiring him to delegate the right of talaq to his wife if he should break the

marital duties. Typical procedures in 1986 are described by Mir-Hosseini in

promise. This is effected through a contract which in effect becomes an Marriage on Trial, 59-83. From the fact that Iran is presently experiencing

attachment to the original marriage contract. The ancillary contract itself is

what its leadership regards as an epidemic of divorce, and from complaints

a quaint device: it is formally a contract of sale for some trifle belonging to concerning the administration of the courts, it would appear that the one party, sold for a few tumans to the other party, and the condition of the processing times which she mentions, of two or three months, may now be delegation of talaq is attached to this contract of sale.¹ much longer.

During the divorce proceeding the residence of the wife is to be fixed - Post Arbitration

by mutual agreement (thus not unilaterally by the husband), and failing this Finally the court may issue a certificate of the impossibility of registration,²

by the judge, who is to ascertain the opinions of near relatives where which is valid for three months. If it is presented to the registry within this possible.¹

time, the notary must inform the spouses when they should attend for the execution and registration of the divorce. If one or other fails to do so, a new - Arbitration

time is set. If on the second occasion the wife does not attend, the divorce is

After an initial attempt to reconcile the couple, the court refers them to executed by the husband and duly registered. If the husband fails to attend

arbitration. Each spouse nominates an arbiter, and these must submit a the matter must be referred back to the court to summon the husband. If he report of their attempt to reconcile the couple within two months.²

again fails to attend, the court may execute the divorce in his stead.³ Mir-Hosseini, reports a discussion of whether the arbitrators are taken seriously.³ They seem to have no power of enforcement, and their

The waiting period (iddah) intervention may in many cases be no more than a pro forma action required before the real divorce procedures will be accepted by a court.

The waiting period, during which the ex-wife may not remarry, is three The court cannot deny a petition for divorce brought by a man, but may consecutive menstruations, or 3 full lunar months for a woman of delay giving a decision, either on its own initiative or on the childbearing age who does not menstruate.⁴ The period begins at the time recommendation of the arbiters stating that reconciliation is possible. Mir- the divorce formula is recited, whether or not the wife knows that the Hosseini reports that "in one court, the judge referred each case only once to formula has been recited.⁵ This applies also where a woman has had sexual arbitration and, upon the receipt of the report, issued the document enabling relations "by mistake", that is, outside of a valid marriage but where there

the husband to register the divorce. In another court, the judge used every

were reasons that might have led her to suppose that there was a valid possible device available to delay what he considered to be an unjust marriage.⁶ The waiting period following a temporary marriage is two divorce and made sure that the wife was duly compensated."⁴

menstruations, but for a woman of childbearing age who does not Where the wife has petitioned for divorce, courts often seek to reconcile menstruate it is 45 days.⁷

the couple by repeatedly referring the case to arbitration, or by Mir-Ho sseini, Marriage on Trial, 71-2.

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CC Article 1116.

Family Protection Act 1975, Article 6.

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Mir-Ho sseini, Marriage on Trial, 61. Bergmann and Ferid provide details of the Ansari-Pour, 'Iran', 245.

procedure for appo inting arbiters (Internationales Ehe- und Kindschaftsrecht, 36, CC Articles 115 0 and 115 1, Khom eini, Clarification 2512, 2513. Articles 5 and 6 and note to Article 5 of the 1975 Fam ily Protection Act).

Kho meini Clarification 2516.

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Islam and Gender, 124.

CC Article 1157.

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Ma rriage on Trial, 63.

CC Article 1 152 , Kho meini Clarification 2515.

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The waiting period for a widow extends for fourth months and ten days irrevocable divorce.

from the time she learns of her husband's death,¹ even if the woman is in

Except in these cases, the husband is required to pay maintenance to his

menopause, she was pregnant and gives birth within this period, the

wife during the divorce proceedings and, in advance, for three months after

marriage was not consummated, or it was a temporary marriage.² During

the divorce is registered. Failure to pay is punished by the same court, with

this period she may not wear colourful clothes, eye shadow, or other forms

Mir-Hosseini mentioning floggings of fifty and seventy-four lashes as of beautification.³ Since bright clothes and makeup are now forbidden in typical.¹

public anyway, this rule would appear to be a religious precept regarding

If the wife is pregnant by her husband, she is entitled to receive private behaviour.

maintenance until the child is born, even in the three exceptional cases just

However if the woman is pregnant at the time of divorce or dissolution mentioned.²

of the marriage the waiting period extends until she has given birth and performed the ablutions following childbirth, even if this is time is less than

Payment of any unpaid dowry three months.⁴ Thus it is not possible for a man to 'adopt' the child of another marriage by marrying the mother before she gives birth.

In 1997 a law was passed requiring an unpaid dowry that is specified in There is no waiting period for a woman who has been divorced before monetary terms to be revalued in line with inflation, unless the couple has the marriage was consummated, or who is past the menopause (the divorce agreed otherwise.³ Contracts have commonly stipulated the dowry in gold in both cases being irrevocable).⁵

coins, in which case no correction for inflation is required.⁴ Since the calculation of the waiting period depends on factors that may be known with certainty only by the woman (when she heard of her husband's death, if and when she menstruates) it is not surprising that the woman's simple statement that her waiting period has ended is taken as sufficient, except where she is 'under accusation' or the time since the death

or divorce is shorter than the possible waiting period.⁶

During the waiting period following a revocable divorce, the husband and wife retain their inheritance rights from one another.⁷ There is no separate right to alimony, but the wife's right to maintenance by her husband continues during the waiting period⁸ except where:

- the divorce arises because of the wife's disobedience, or
- the marriage has been annulled or
- in those cases mentioned above, in which a repudiation constitutes an

Kho meini Clarification 2520.

Kho meini Clarification 2517.

Kho meini Clarification 2518.

CC Article 1 153 ; Kho meini, Clarification 2514, 2518.

Kho meini, Clarification 2511.

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Kho meini Clarification 2521.

Marriage on Trial, 64.

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CC Article 943.

CC Article 1109.

Kho meini (Clarification 2523) specifies the right to continue to live in the house Mir-Hosseini, Islam and Gender, 275 . The legislation is in the form of a note to

in which she lived before the divorce, except in specific cases for which he refers article 1082 of the Civil Code.

to more detailed works.

Mir-Hosseini, Marriage on trial 74.

71

72

CHILDREN

child,¹ so this provision

would apply only where the pregnancy was not

known at the end of the waiting period following a divorce or dissolution,

and has remarried within a few months. If she remarried immediately at the

Paternity

end of the three-month waiting period, and gave birth six months after the second marriage, paternity could be attributed to both husbands. In such a Nasab, or legal filiation, is recognized only in the context of a valid

case, "the child belongs to the second husband unless definite indications marriage, whether permanent or temporary. A child born outside a valid

otherwise.² This seems to be the only instance in which paternity can be marriage is the issue of zina, fornication, and cannot be legitimated, as

determined by objective criteria.

stated in article 1167 of the Civil Code: "A child who is the issue of zina is

Article 1161 of the Civil Code states that a husband's explicit or

not attached to the zani (fornicator)." The abortion of illegitimate children

is implicit admission of paternity cannot later be withdrawn. The following not permitted.¹

article allows a man to repudiate fatherhood within two months of learning

Where the man made an erroneous assumption (shubha) that there was

of its birth, or (article 1163) within two months of learning its correct date

a valid marriage, the child may be legally filiated to him, but if the man

of birth. From the reference to the exact date of birth, it would appear

that

knew there was no valid marriage, and the woman thought there was, there

these articles only in the ambiguous case just mentioned. There does not

is no paternity.² Although there is a theoretical possibility of marriages

seem to be a general right to deny fatherhood based on objective evidence.

without witnesses, in which the couple might both think erroneously that

There is a general rule that a child born of fornication does not

belong

they were married, the fact that marriages must be registered means there is

to the fornicator (CC Article 1167): the rights of parentage are seen as a

little chance of appealing to shubha. Ziba Mir-Hosseini does report two

benefit which should not be obtained by wrong-doing. This could mean that

such cases in Tehran, where the father in an unregistered marriage had died a child is technically parentless. However articles 1164 to 1166 deal with and the child's paternity had to be proved. In both cases the testimony of the possibility that one or both of the parents may have thought there was a witnesses was accepted, and the existence of the marriages confirmed.³

valid marriage, or may have been mistaken about the identity of the other. A child born during the term of a marriage is assumed to be belong to the mother's husband, providing that the birth occurs between 6 and 10 months after an act of sexual intercourse between them.⁴ There is no belief mistaken belief that these were legitimate, acquires the rights of parenthood.

It is also possible for a man who is himself illegitimate by birth to marry

a pregnant woman and so legitimate her child.³ in the 'sleeping foetus', as in Sunni law, which in some cases allows paternity to be imputed to a man as much as four years after he has died or

The child's family name is that of the father.⁴ Each child is given

an identity certificate which remains with the child throughout life, and is used divorced the mother concerned. In Iranian law a child born more than 10 months after a divorce or the end of a temporary marriage will be assumed to record major events. The first page gives birth details including the names of the parents. All births and abortions occurring after the 6th month of pregnancy have to be registered.⁵

A child born within 10 months after the dissolution of a marriage belongs to the ex-husband, providing the mother has not remarried in the interval.⁵ We have seen that a woman who is pregnant at the time of divorce or dissolution of the marriage cannot remarry until after the birth of the

CC Article 1153.

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Khom eini Clarification 2453.

CC Article 1160.

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CC Article 1165.

Khom eini Clarification 2461.

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Marriage on trial, 153.

Pakzad, 'Legal status', 169, citing a note to article 41 of the Law of

the

CC Article 1158.

Registration of Vital Statistics, 1976.

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CC Article 1159.

CC Article 993.

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Care and education

appointed a guardian for the child. This would mean that the mother would have custody and responsibility, which would be highly unusual under The maintenance of children during the marriage is said to be a right and Islamic law. However Article 1199 specifies that only the father has a duty assigned to both parents,¹ and also to the father only. ² In practice it is a to maintain the children, and if he dies the duty passes to the paternal male preserve, except that in the case of a boy under two years old or a girl grandfather or great grandfather, and only if these are dead or incapacitated under seven years old, the mother is said to have priority. For older children does it revert to the mother, followed by the maternal grandfather, maternal it is the father who has priority.³ These are the same rules as apply in grandmother, and paternal grandmother.

allocating custody following a divorce. In fact some of the provisions

If the physical or moral well-being of the child is endangered by the regarding the maintenance and education of children seem to assume that carelessness or moral degradation of the parent who is responsible, the their parents are divorced. Either parent is entitled to punish the child, courts may make other appropriate arrangements.¹ within "the limits of correction".⁴ Neither parent can refuse to maintain the child during the period in which they are responsible for it,⁵ and they are Legal Guardianship (wilaya) obliged to take such measures as circumstances and their means allow for the education of the child.⁶

In addition to the duties and rights mentioned above, a minor child is under

The mother's duty expressly does not include breast-feeding, except the guardianship of his father, paternal grandfather or a guardian appointed where there is no other suitable nutrition.⁷ However Khomeini says that the by either of them. ² The guardian has responsibility for administering the mother's milk is the best for the child, so "it is right that the wife does

not estate of his ward and acting as his or her legal representative.³

If the natural

ask for wages from the husband for nursing the child, and it is appropriate

guardian is unfit to exercise legal guardianship for various reasons,

the

that the husband pays her for it." He also says that the husband has the right

courts may appoint another guardian.⁴ This may be the mother of the

child,

to take a child from its mother and give it to a wet nurse.⁸ He recommends

provided that she has not remarried following a divorce.⁵ If either of

the

that children should be breast fed for two full years.⁹

natural guardians dies, the other may appoint an executor to exercise

wilaya

Where the parents are living separately, whether following a divorce or

from the death of the second natural guardian, and such an executor may be

not, the absent parent has a right to visit the child.¹⁰

authorised to appoint a successor. The appointed guardian may be a woman

If the mother becomes insane during the first two or seven years of the

(with her husband's permission),⁶ but it is stipulated that a Moslem

child's life, respectively, the responsibility reverts to the father.¹¹ If

either guardian cannot appoint a non-Moslem successor.⁷

parent dies, the responsibility according to Article 1171 of the Civil Code

An appointed guardian is also responsible for the maintenance and

reverts to the other, even if it is the father who has died and he has

CC Article 1173. Originally this task was assigned to the public prosecutors,

an

CC Article 1168.

office that was abolished in 1994. In 1977 article 1173 of the Civil Code

was

CC Article 1199.

amended to make the head of the local justice administration responsible

for

CC Article 1169. A bill to give the mother priority for both boys and girls

under appointing guardians. The office of Public Prosecutor was officially

reinstated on

the age of seven years was passed by parliament in May 2002, but is

unlikely to May 20, 2003, but the announcement did not refer to their former

roles under

be approved by the Guardian Council.

article 1173 (IranMania, May 21). Ansari-Pour, 'Iran', 244-5,

provides a list of

CC Article 1179.

instances in which a court may appoint a guardian: the addiction,

immorality or

CC Article 1172.

insanity of the natural guardian, and various forms of child abuse.

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CC Article 1178.

CC Articles 1180, 1181, 1194.

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CC Article 1176.

CC Article 1183.

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Clarification 2487.

CC Articles 1182, 1184-87.

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Clarification 2491.

Family Protection Act 1975, Article 15.

10

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CC Article 1174.

See CC Article 1233.

11

7

CC Article 1170.

CC Article 1192.

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education of the child,¹ which implies that the natural guardian has the same agreements.¹

duties. This creates a conflict with the rights and duties of the mother.

The partner who does not have custody may be granted visiting rights,² The Civil Code distinguishes between the age of majority, which is 15 and these may be enforced by the police.

lunar years for boy and 9 years for girls, and the age of maturity, which is

A woman who has custody by legal right is also entitled to maintenance 18 years, except that a person aged 15 years or more can demonstrate their from the father for the children, which may be enforced by the courts.

maturity to a court.² Minor and immature persons are not responsible for damage to property in their care and are not capable of making transactions

The Guardianship of incapables

against any consideration, but they may take possession of property as a gift.³ Guardianship continues until the ward obtains maturity, rather than

A child ceases to be under legal guardianship on reaching the age of majority, but an insane child cannot be regarded as mature, so that the maturity. If he or she later becomes mentally deficient or insane, a legal guardianship of the natural guardian continues in this case.⁴

guardian must be appointed by the Special Civil Court.³ Outside Iran, the Iranian Consular Officers have the right to appoint guardians for incapable Custody in divorce

persons, including immature persons who do not have a natural guardian or an executor appointed by the natural guardian.⁴

Shi'a custody rules leave little room for negotiation. Wilaya (the supervision exercised by the father or paternal grandfather) is incontestable according to the Civil code, whereas the mother's right to give care (hadana) and have access is restricted. She has the right to keep her son until the age of two, and her daughter until the age of seven,⁵ after which the hadana right passes to the father. The mother loses her hadana right if she remarries or becomes insane.⁶ In short, the post-divorce family is strongly patri-focal, and not matrifocal as in Malikite countries and western countries.

In the case of the death of either parent, the hadana right passes to the surviving partner,⁷ and in the case of the father's absence or disqualification it passes to the paternal grandfather. Custody is never passed through the maternal line. Under traditional shi'a law, a widow who remarried would lose her right of hadana (to her deceased husband's father), but this provision was cancelled with effect from July 1985.⁸

Prior to the revolution courts had discretionary power to award custody to the more suitable parent, but any such rulings must now have lapsed. The Special Civil Courts now do not have this legal discretion, but can facilitate

CC Article 1188.

CC Articles 1209, 1210.

CC Articles 1212 and 1214.

CC Article 1218-3.

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CC Article 1169.

See Mir-Hosseini, Marriage on trial, pp 155-8 for examples.

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CC Article 1170.

CC Article 1174.

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CC Article 1171.

CC Articles 1192, 1218 to 1227.

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Mir-Hosseini, Marriage on trial, 159.

CC Articles 1228 to 1230.

77

78

INHERITANCE stipulating individual shares, all receive equal shares.¹ That is, the rule of

inheritance that males receive double shares does not apply to bequests. The testator may appoint one or more persons as executors, and may Inheritance will be dealt with briefly here, since it is conceivable that a nominate a person to supervise the operations of the executor. A minor may body such as a social welfare organisation might be interested to know that be appointed as an executor, to function together with an adult until the a certain person has or does not have property rights by inheritance or minor reaches adulthood. The executor is a trustee, not a guarantor, but may bequest under Iranian law.

be liable for losses due to negligence.² Article 860 stipulates that only the father or paternal grandfather (thus: not the mother) may appoint an Inheritance by will executor for a minor.

- Making a will

- Acceptance

Articles 835 to 839 provide for a right to make and revoke a will in favour

Article 827 of the Civil Code stipulates that a right of property resulting of beneficiaries. What is striking from a western perspective is that the will from a will does not become definite except with the agreement of the may not deprive any of the heirs by right of their rightful inheritance

beneficiary after the death of the testator. Where the beneficiary is a minor (Article 837). Thus heirs and beneficiaries are distinct. Clearly any or insane, the guardian must accept or reject the legacy. Acceptance may be disposition in favour of beneficiaries will deprive the heirs to some extent, for all or part of the legacy. ³

but the precise meaning of article 837 is given in Article 843. This

Article 829 says that an acceptance made before the death of the stipulates that the total testamentary disposition may not exceed one third of testator has no effect, meaning by this only that an acceptance made during the estate, except with the permission of the heirs. If some of the heirs the lifetime of the testator does not prevent the latter changing his or her agree, the disposition applies only to the share of those heirs. If the legacy will. The following article states that where the beneficiary has accepted the

exceeds one third of the value of the estate, the excess reverts to the heirs.¹

legacy before the death, a second acceptance after the death is unnecessary. The rule of one third is applied according to the value at the time the An acceptance before death therefore does have effect. However a rejection testator dies.² Where the disposition is the usufruct of a property rather than before the death does not prevent the beneficiary accepting the legacy after its possession, rules are provided for its valuation.³

the death of the testator.

The beneficiary must be alive and able to be the owner of the property

The heirs (by right) of the testator cannot take possession of the legacy bequeathed. Where the beneficiary is unborn, property rights only pass to until the beneficiary has stated his or her rejection of it. Where there is a

the child if the child is born alive. In general the capacity to possess rights delay harmful to the heirs, the judge (not further defined) will compel the under Iranian law begins at birth,⁴ but we will see several cases in relation beneficiary to communicate a decision.⁴

to inheritance in which rights appear to be held in suspense until the time of

Article 828 states that where the beneficiaries are not limited by birth.⁵ Moreover an abortion resulting from crime is regarded as equivalent number, as in the case of a will in favour of the poor or for a work of public

to birth: the heirs of and aborted child who is a beneficiary inherit as if the benevolence, there is no requirement for a formal acceptance.

child was born live.

Where a bequest is made to multiple but defined beneficiaries without

Article 849.

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CC Articles 844, 845.

CC Article 853.

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CC Article 846.

CC Articles 854-859.

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CC Article 956.

CC Articles 831, 832.

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See also CC Article 957.

CC Article 833.

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Inheritance by right

a remainder, further rules govern its distribution.¹ As a general rule, where

there are male and female heirs of the same class (for instance, sons and daughters), each of the males receives a share that is twice that of each outline of inheritance by right, dividing it into a right acquired by blood female.²

relationship or by marriage (article 861). The latter refers to a surviving

In addition, article 915 of the Civil Code states that the father's spouse.¹ The surviving spouse does not inherit to the exclusion of children favourite ring, his Qur`án, clothing and sword are inherited by the eldest (in contrast to western inheritance laws). The relations who inherit are son, except where there is no other property to be divided among the other

divided into three classes, the lower classes inheriting only if there is no heirs. This is an interesting vestige of the rule of primogeniture which representative of the higher classes.² The classes given are:

applied in pre-Islamic Iranian law.

1) Father, mother and children's children.

Only legitimate children inherit, so that a denial of paternity

2) Grandparents, brothers, sister and their children.

accompanied by *li'an* (see Divorce, above) prevents paternal inheritance.³

In

3) Paternal and maternal uncles and aunts, and their children.

principle an illegitimate child also does not inherit from the mother.⁴

However if the deceased is a non-Muslim, and any of the potential heirs is a

An heir inherits only if he or she is alive at the time of the death of the

Muslim, the Muslim heirs exclude all non-Muslims.³ This means (in

deceased, or was conceived at the time of death and is born alive. This may contrast to Islamic law in some other countries) that Muslims do inherit require a delay in dividing the estate.⁵

from non-Muslims, but not vice versa.

The property of deceased foreign nationals in Iran is divided according to the laws of the country of the deceased, but this does not mean that the spouse and children appear to have been accidentally omitted from the list above – an indication perhaps that this procedural laws of that country will be followed.⁶

part of the civil code is not actually used to decide on inheritance cases,

Death for inheritance purposes is defined as actual death or continual absence extending to the time at which such a person might normally be expected to live.⁷

daughter, husband and wife of the deceased are heirs who cannot be excluded by the presence of any other potential heir.⁴ The theoretical share

Duties of heirs

of a husband is half of all of his wife's estate, and the share of a wife is a

quarter of the cash value of her husband's moveable property, buildings and

Relatives by blood in a direct line ascending or descending have a reciprocal duty to provide maintenance for each other, a duty which in some of more distant potential heirs.⁶

ways mirrors the inheritance right. A relative only has a right to maintenance support covering food, clothing, accommodation and furniture procedure being to determine which heirs have a certain fixed right, such as where he or she cannot earn a living.⁸ The maintenance costs of parents the right to a half, sixth, or eighth of the inheritance. If the resulting total must be paid by the nearest related child or grandchild in order of

kinship,⁹

exceeds the whole, the shares of the daughters are decreased first⁷ rather than decreasing all 'fixed' shares in proportion (as in Sunni law). If there is

CC Articles 893-905.

See e.g. CC Articles 907, 911, 925.

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Article 864.

CC Articles 882, 883.

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CC Articles 886-892.

CC Article 884.

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CC Article 881-1.

CC Articles 875, 878.

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CC Article 891.

CC Article 967.

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CC Articles 913, 945, 947.

CC Articles 872, 1022-1028.

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CC Article 892.

CC Articles 1196, 1197, 1204.

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CC Article 914.

CC Article 1200.

81

82

with equally distant relatives paying equal shares.¹ There are rules analogous to the inheritance rules, which establish who is required to pay what share of the maintenance costs. Where means are limited, a man's

AFTERWORD

duty to maintain his wives takes priority.²

From the perspective of present standards of good governance, the family law of Iran, appears to be a ramshackle system, self-contradictory and brutally unfair to women and non-Muslims. The law's provisions foster social ills such as multiple sexual partners (for men), the abuse of girls, arbitrary divorce, and the relegation of women to an inferior economic

position. Similar critiques could be levelled against its criminal law system, the laws regarding media and press laws and political prisoners, and the commercial laws that restrict investment and accountability. Iran is a country whose systems of law, in almost every field, have become a major part of its problems. There is no immediate way of remedying the ills, because of the peculiar constitutional arrangements that have in effect given Iran two governments, one under the Leader with effective power but functioning under a conception of law which allows only a limited room for flexibility, the other made up of an elected legislature whose powers are limited to proposing legislation and an 'executive' which does not have executive power over the most important ministries. Some progress has been made, for instance by requiring the registration of divorces, and in this respect the system may appear more flexible than the family law systems of Sunni countries. The rule that a wife has a right to be paid for doing housework is a highly creative solution, giving a wife something she may concede in divorce negotiations. However there appears to be no prospect of achieving the thorough-going reform of family law that is required. It should not be imagined however that Iranian society and Iranian families actually reflect the pattern of relationships found in the family law. Most fathers do not force their daughters to marry in childhood, or keep temporary wives. Most couples do not regard their marriage as a commercial transaction. Women may be legally disadvantaged, but they find ways to exert control over their own destinies.

CC Article 1201.

CC Article 1203.

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