

Family Law in Iran

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INTRODUCTION

The Iranian diaspora is one of the largest such populations in the world. Along with their baggage, migrants and refugees bring with them marriages and divorces, inheritance rights and custody disputes. This naturally means that immigration staff, employers, social welfare bodies and others may 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 of government, and how it functions is in part determined by cultures and customs. This paper will attempt to convey something of what Iranian 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.

Iranian law contains many features which are quite different to western law and to the forms of Islamic law employed in Sunni countries. One 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 and has no duty to provide support because the marriage was 'only for a month'. There may be a daughter who claims to be destitute, although her deceased father was a major landowner. Or a husband who says he has to use his savings to pay his ex-wife for the housework and breastfeeding she did while they were married. Or a couple who claim to have married each other, in secret and without witnesses. No knowledge of the Islamic law practised in other countries would prepare one for the unique features of Iranian family law evident in these four cases: there is an institution of 'temporary marriage', daughters do not inherit land, wives are entitled to be paid for doing housework and breastfeeding their own children, and marriages may be legally binding without witnesses. However there is no adequate summary of Iranian family law published in English. Those available in French are out of date, suppose that the Civil Code will apply to the exclusion of Shari'ah law, and focus narrowly on the position of women.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 thorough English-language treatment of Shi'ah law¹ actually deals in detail

¹ *Islamic Law*, xv.

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 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 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 relied mainly on translated texts, not all of which refer to the same period, although I have tried to use the most recent information.

The political framework of the law

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 limited powers to propose legislation, and the principle of *valayat-i faqih*. The latter gives a senior *faqih* (expert in Islamic law) absolute political power, as the 'Leader' (*rahbar*), and it makes the Executive and Legislative branches of government as a whole subordinate to the judiciary. In Khomeini's *The Islamic State*, the function of parliament is planning, not legislation. The ruling circles and institutions today – that is, those associated with the office of Leader, the Guardian Council and the judiciary – work with a conception of the law which is the same as the Shari'ah: it is the law given by an ongoing Shi'ah tradition of exegesis and expansion of Islamic law, and is *not* parliamentary legislation. There are others, notably most of the reform-minded parliamentary parties and some departments of government, who operate with a different conception of law, but these have little ability to legislate and no power to influence jurisprudence.

Further constitutional details are not relevant here,² but it is important to note that the supremacy of the judiciary extends to the position of judges even in lower and family courts vis-a-vis legislation and government regulations.³ It is also relevant to note that the law in Iran functions within

¹ Chiefly al-Hilli, one of the authors used here.

² See Schirazi, *Constitution*.

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

an ethic of governance in which law in the western sense has only shallow roots. Personal relationships (*rabeteħha*) are more important than external norms (*zabeteħha*) in guiding the administration of the country.¹ The result is a decidedly *ad hoc* approach to making and applying law.

The formal sources of law are:

- edicts of the leader;
- constitutional law;
- rulings of the Council of Guardians and of the Expediency Council (which Schirazi translates as 'Assessment Council'), the Council of Ministers, the Supreme Council of Justice, and the Council of the Cultural Revolution;
- legislation of the *Majlis* (parliament) including ratified international agreements, so far as the parliamentary legislation or agreements are confirmed by the Council of Guardians or the Expediency Council;
- regulations promulgated as subordinate legislation by various government departments;
- primary Islamic sources (the Qur'án and Sunna, the latter including commentaries and rulings of the twelve Imams) and secondary commentary and *fatwas* (legal opinions) based on these;
- and to some extent established customs and the rulings of superior courts.

The existence of multiple law-making bodies can lead to contradictions: five councils and the Leader can make laws, and all are superior to parliament. In fact there were two other councils, also superior to parliament, that have had legislative powers, but neither have created legislation relevant to family law and neither is active now, so we need not consider these. There is also a Security Council which is not formally a legislative body, but is superior to parliament. Its brief includes fighting 'cultural invasion' from the West and restraining 'social immorality',² so it is not inconceivable that it might issue rulings relevant to family law.

The validity and order of priority of some of these sources is being 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 the state can annul all other Islamic ordinances, even prayer, fasting and the pilgrimage to Mecca. He argued that "If the powers of the state were [only]

judges enjoy full authority to annul such cabinet rulings, which are beyond the legal rights and authorities of the executive body." (IRNA report, April 20, 2001).

¹ See Schirazi, *Constitution* 298 ff.

² Schirazi, *Constitution* 97.

operational within the framework of the ordinances of God, the extent of God's sovereignty and the absolute trusteeship given to the Prophet would be a meaningless phenomenon devoid of content."¹ The state's freedom of action is thus identical to the freedom of action of God. It follows that state law can over-rule the Shari'ah and everything else (including individual rights for example). This principle has been used to pass and enforce regulations that contradict the Shari'ah, but none of these have been in the realm of family law.² Naturally it has been vigorously opposed by the more orthodox *ulamá*.

On the other hand, Article 4 of the Constitution provides that "All laws and regulations must be based on Islamic *principles*. This article applies generally to all the articles of the Constitution and other laws ... the religious jurists of the Guardian Council [will decide] whether or not such laws ... conform to this article."³ The generality of this reference, to principles (*mavazin*) rather than specific ordinances (*ahkam*) provides the Guardian Council with the absolute right to veto new law which they consider not to be in accordance with the spirit of the Shari'ah. They have exercised this recently with respect to cases where the Shari'ah obviously has nothing to say, for instance in relation to the procedures for registering the publication of a newspaper. The Guardian council is an independently operating body, but may be considered as an aspect of the judicial branch, which in practice constitutes a conservative political faction.

Khomeini and other leading jurists have emphasised that the *ahkam* must be implemented in law, and article 72, which specifically gives the Guardian Council the right to veto parliamentary legislation, refers to both principles and *ahkam*, specific religious laws. The Guardian Council has used this to reject an amendment raising the age at which girls can marry. On this occasion, they have interpreted accordance with the Shari'ah in the strictest sense: the law must be identical to the *ahkam*. A more liberal

¹ Text cited in Schirazi, *Constitution* 230.

² Schirazi, *Constitution* 63 - 81. Laws contrary to the Shari'ah as understood by the 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 accordance with the wishes of the Guardian Council have also been passed under this principle. These include breaking the state monopoly on foreign trade stipulated in the constitution (Schirazi, *Constitution* 67).

³ See Islamic Propagation Organization, *Constitution*.

interpretation would be that no civil law may permit or require something which is forbidden by the Shari'ah. Since a girl who marries at 15 has not broken the Shari'ah, on this reading the proposed law was not contrary to the Shari'ah. The choice of a strict or liberal interpretation of conformity to the Shari'ah lies with the Guardian Council in each case.

Article 170 of the Constitution states that judges "shall refrain from the execution of any government decrees or regulations which should prove contrary to Islamic laws and precepts or should lie beyond the jurisdiction of the Executive. This makes individual judges even in lower courts the arbiters of the appropriateness of laws and of the limits to the Executive power, and again makes the Shari'ah superior to state law. Even the head of the judicial branch does not have the authority to require judges to follow his directives, or to dismiss or reassign them. In Iran, every judge is a sovereign. The result is a chaotic slow and unpredictable judicial system, which the government does not have the power to reform. At the lowest level, the lack of clarity means that the judge has considerable freedom to 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 weight, but by 1985 the balance in the same courts had shifted to applying Shari'ah law.

Some theoreticians have proposed that the tension between the priority of the state and of the Shari'ah should be resolved in favour of the former, by declaring that any law passed by an Islamic state becomes *ipso facto* part of the Shari'ah.¹ This is a shift from a theocratic to a caesaropapist theory of the state. A more limited argument which has actually been applied and even institutionalised, in the Expediency Council, is the principle common to all Sunni schools of Islamic law, allowing public interest to be taken into account in determining the immediate Shari'ah requirements. The odd thing about the latter argument is that Shari'ah jurists have traditionally rejected the principle of *maslahat* as a Sunni innovation.² Striking as these arguments are in the development of Iranian legal theory, neither appears to have been applied to issues of family law thus far. It will be interesting to see whether the Expediency Council considers that *maslahat* justifies raising the

¹ Schirazi, *Constitution* 171. Brown, 'Islamic constitutionalism' provides an historical overview of the developing theory regarding the relationship between Shari'ah and government.

² It does have Quranic roots, in the concept that 'necessity makes legal' (Qur'an 2:173, 6:145). For a discussion of the adoption of the principle of *maslahat* in contemporary Iran see Schirazi, *Constitution* 233 - 244.

minimum age for marriage, a proposal that has been made by parliament but rejected by the Guardian Council as contrary to the Shari'ah.

Precedent, including rulings of superior courts on analogous cases, is not binding in theory. However Mir-Hosseini reports that in Tehran the head of the first Special (family) Court exercises tutelage over all the other courts in the city.¹ Legal opinions from authoritative jurists (*mujtahids*), which may have arisen as court rulings, are in principle binding as part of the secondary Islamic sources, but the situation in Shari'ah Islam is complicated by the fact that a *fatwa* (opinion) is valid only during the lifetime of the authority who issues it. According to this rule, the opinions of Ayatollah Khomeini, as Leader (*Rahbah*) and as legal expert,² are no longer valid. Yet his prestige is such that a court may well follow them.

From the above we can draw the tentative conclusion that, at least as regards family law, the Shari'ah generally takes priority over parliamentary legislation, pre-revolutionary Islamic legislation is generally valid, and individual judges have considerable latitude for interpretation.

Administration of the law

The political framework within which the legislature and judiciary operate in Iran is quite unique, and a considerable hindrance to the good administration of the law and of the land.

- Legislation

The Preamble to the 1983 Civil Code specifies that enactments passed by the *Majlis* must be signed by the President within five days and passed to the Government, which is required to publish the text within forty-eight hours. Legislation comes into force 15 days after publication, unless the legislation itself specifies otherwise. No legislation may be retrospective, unless special provision unless the legislation itself specifies otherwise.³ The numerous other legislative bodies and the decrees of the leader are not subject to procedural requirements.

¹ *Marriage on Trial* 25.

² Khomeini was interested primarily in philosophy rather than law, but did qualify as a jurist and published a collection of opinions on various questions (See Khomeini, *A Clarification of Questions*).

³ CC Articles 1 to 4.

- The judicial system

The highest judicial body is the Supreme Judicial Council, mandated by article 157 of the Constitution (1979) and charged with the appointment, suspension, promotion and dismissal of all judges. This body has declaratory powers that amount to legislation. It has for instance declared that extortion in the sale of necessary goods, obstructing roads (i.e., demonstrations), and spreading rumours (freedom of the press) are criminal offences.¹ Since the Council issues orders directly to both prosecutors and judges, such declarations amount to law. The Council has also drafted articles and submitted them to the Majlis for ratification.

The Ministry of Justice is responsible directly to the Leader, but the Minister of Justice is appointed by the President. The Minister has very limited powers.

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 in effect family courts. The Special Civil Courts are presided over by Shari`ah judges and are empowered to deal with familial disputes relating to 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 Tehran in 1987, with some statistical information about the types of cases arising, in *Marriage on Trial*, 58-83.

In 1994 Iran started to reform the judiciary, replacing these multiple jurisdictions with a system of 'general tribunals'. It is not clear whether the structural changes have in fact been implemented through the abolition of multiple jurisdictions, but anecdotal evidence suggests no progress towards the aim of the reform — to simplify and speed up the judicial process.

The present Family Courts were established in 1997. The intention is to have at least one bench of every general court in each city specialising in family law, but in rural areas family law is the province of the general court. The jurisdiction of the family court covers permanent and temporary marriage; divorce, cancellation and annulment of marriages; dowry and engagement gifts; the payment of the wife for housework during the

marriage; maintenance disputes; the custody of children and visiting rights; paternity; disobedience (of the wife); guardianship of minors; maturity; remarriage; and the conditions in marriage contracts. The judges in family courts must themselves be married, and must have a working experience of at least four years. They are assisted in their work by female counsellors and must give judgement in consultation with them.¹

The constitution includes a striking provision making judges personally responsible for material or moral damages as a result of an error by a judge.² Although it is said that "in cases of a government mistake, the loss is recompensated by the government", since the judiciary are completely independent it is not clear how the government could ever bear the responsibility. In any case, the claim would have to be argued in the courts before the same judiciary, and it is not surprising that the procedure seems to be unused.

As we have seen, uncertainty about the priority of various sources of law gives judges considerable freedom. The administration of justice is also highly politicised at present, with the judiciary in effect constituting a conservative political faction, and factions within the judiciary representing different visions of what an Islamic society and Islamic state should be.

- The legal profession

Proceedings in the Special Civil Courts that hear matters of family law are 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 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 a particular region.⁴ Only persons holding such a certificate can claim to be a barrister or solicitor (there is no distinction). The Bar Association also has disciplinary courts for cases of misconduct, but does not have a code of conduct. Attorneys are permitted to advertise, and do in fact advertise in

¹ Amin, *The Civil Code* 50.

² Mir-Hosseini, *Marriage on Trial* 25. Mir-Hosseini's book is a comparative anthropology of the family law systems in Iran and Morocco. She provides a detailed picture of the administration of family law up to about 1990.

¹ Ansari-Pour, 'Iran', 239-40.

² Islamic Propagation Organization, *Constitution*, Article 171.

³ Mir-Hosseini, *Marriage on Trial*, 25, 30, 31.

⁴ Ansari-Pour, 'Iran', 238-9.

newspapers and on English-language web sites devoted to current affairs. Attorneys are required either to have an LLB or higher degree in law, or to hold a BA in Islamic law or its equivalent from the Islamic seminaries.¹ Foreign lawyers are not permitted to practice in Iran.

There is a category of second class attorneys who may not appear at the High Court and may act only in a particular region of the country. There are also a small number of 'legal aides' who are admitted only to the peace Courts.² These are analogous to magistrate's courts for minor offences and also function as small claims tribunals in civil cases. In the latter role they might conceivably be involved in family disputes.

Fischer gives the courses and some texts used in the department of Islamic Law at the University of Tehran before the revolution. This covers Shafi'ite and Hanifite law as well as some of the same texts that are used in the *madrasahs* in Qom which train judges.³

Article 163 of the Constitution states that the qualifications and legitimacy of the judiciary shall be determined by law in conformity with the principles of *fiqh* (Islamic jurisprudence). Following the 1979 revolution, as the *ulamá* moved to displace judges whose training was in civil law, and as all female judges were dismissed, it was necessary to appoint students from the seminaries as judges.⁴ The level of knowledge required for judges has since risen. A law school for the training of judges was established at Qom immediately after the revolution.⁵ The difficulty of having judges whose training differs from that of attorneys has also been reduced by giving each judge a clerk who is a graduate in secular law from a university.⁶

Shí`ah law

¹ Manner of Taking the Attorneyship Licence Act, 1997.

² Amin, *The Civil Code*, 54.

³ *Religious Dispute to Revolution*, 250-1, 147-9 respectively. Fischer perhaps over-estimates the similarities, since the book which he says is the text for Qur'anic law, Banu Amin Isfahani's *Kanz al-'irfan* is not even listed in Tabátábá'i's bibliography (*An Introduction to Shi'i Law*), while Kolayni's *al-Kafi* is listed as a text for study, whereas a madrasah student would be expected to know the work thoroughly before beginning.

⁴ Schirazi, *Constitution* 66.

⁵ Mir Hosseini, *Islam and Gender*, 247-8.

⁶ Mir-Hosseini, *Marriage on Trial*, 25.

- Traditional Shí`ah law as compared to Sunni law

Shí`ah approaches to traditional Islamic law (*Shari'ah*) differ in some respects from those current in the four main Sunni schools of law in the same period. Shí`ah law is also known as the Ja'fari school of Shari'ah, because of the importance of the sixth Imam, Ja'far as-Sádiq in its development.

From the earliest times there have been marked difference in inheritance law between Shí`ah and Sunni schools, and the Twelver Shí`ah institution of temporary marriage (*mut'a*) is not accepted in Sunni schools. The laws concerning the making of the marriage contract are quite different in Shí`ah traditional law, but those regarding the forbidden degrees and other impediments to marriage are almost identical to those of the Sunni schools.

In general the effects of modernism were also felt a generation or two later than in Egypt and Turkey, creating some differences early in the twentieth century. Since the 1979 revolution, the situation has been reversed, with some changes being made in the traditional Shari'ah provisions regarding divorce which in any other Muslim country would be politically impossible.

References below to *fiqh* or Shí`ah Shari'ah should be taken as referring specifically to the Ithna-Ashari (Twelver) school of Shí`ah Shari'ah, which is the state religion in Iran and differs markedly on legal questions from the Zaidiya and Isma'ili branches of Shí`ah belief. Within twelver Shi'ism, there seems to be no systematic difference between Iranian, Iraqi and Lebanese opinions, and a good deal of movement of scholars and books between the three.

Like the Sunni Shari'ah, Shí`ah Shari'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

¹ The shari'ah is thus frankly unsuitable to be what it has become in Iran, the basis for a state legal system and the charter of the government of a state. Throughout Islamic history, in Iran and elsewhere, jurists have generally been prevented by 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 respect it is strikingly similar to the law — the Halakha — produced by Jewish scholars during the period in which the Jewish people had no state. For a devastating treatment of the unsuitability of the Halakha as the basis of state law, see Gershon Weiler, *Jewish Theocracy*, Leiden, E.J. Brill, 1988.

some tensions where state organs claim an interest in matters such as marriage, divorce, inheritance and the custody of children. In addition to the question of whether the particular law that the state desires is compatible with the Sharī'ah, it is difficult to legitimate any state involvement in these questions. In contemporary Iran it is the Guardian Council which most clearly presents a vision of law and society in which government has little role, while parliament and the government itself see a proactive role for an Islamic government in an Islamic society, and the Expediency Council as its name suggests is concerned with finding *ad hoc* solutions to keep 'the system' operating.

- The sources of traditional Shī`ah law

The sources of Shī`ah law are:

1) The Qur'án, which is the same as the edition authorised by `Uthman that is used by the Sunnis. Early Shī`ah sources considered that some words of the true Qur'án were deleted by `Uthman. The deleted phrases are listed in the *Bihár al-Anwár*, an important 17th-century collection of hadith: all refer to the question of the succession to Muhammad, and have no relevance to family law.¹

2) The Sunnah of the Prophet and the Imams as recorded in the four canonical collections of hadith, and in *Nahj al-Balaghah*, the collection of Alí's letters and sermons. The four hadith collections have been systematised in works such as the *Bihár al-Anwár*, which is now available in searchable electronic format, replacing the original collections for most purposes. The rulings of the Imams have been codified in four early systematic collections: the sources underlying these have to some extent been lost. The four collections are -

Kulayni (d. 329/ 940 AD): *al-Kaḥfi* (The sufficient)

Ibn Babawayh al Qummi (d. 381/991) *Man la Yahduruh al faqih* (Self-study jurisprudence)

Hasan al Tusi (d. 460/1067) *Tahdhib al akham* (Best selection of principles), and

Istibsar (Enlightening the people)

¹ Momen, *Shi`i Islam*, 172.

It will be noted that these are relatively late, compared to the systematic collections of Sunni hadith. The science of hadith criticism was only established for Shī`ism by `Allám al-Hillí (1250-1325), and is borrowed from the methods already used by Sunni scholars.¹ So far as I am aware, no translations of these Arabic sources are available. These four sources have been compiled by Muhaqqiq al-Hillí (1205-1277), whose work on *fiqh*, *Shará'i` al-Islám*, is still an essential text in seminary courses on law.² Fortunately it is available in a French translation, which has been used here.

3) Consensus (*ijma`*). This means, the consensus of the whole community whose views can be ascertained, meaning in practice the available Shī`ah authors and sources, including at least one of the Imams. Since the views of Imams are, for Shī`ah Muslims, part of the hadith, this source is scarcely different to the sunnah.

4) Reason is recognized as a source of law, although its application is in practice limited to solving obscurities and contradictions in the law, and applying general principles to new cases. Analogy (*qiyas*) is formally rejected as a source of law, where this involves speculation as to the general principle underlying a specific rule, but not where it involves the analogical 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 Shī`ah law using reason. The principle of *ihtiyát* (see below) gives much the same results as analogy, without the need to explicitly suppose that the reason for a legal rule can be known. Since `Allám al-Hillí, reason, supported by the Qur'án, traditions and consensus, has been used by Shī`ah jurists to arrive at legal decisions. The process is known as *ijtihad*., and the person who practices it is a *mujtahid*.

The principles⁴ governing *ijtihad* are:

1) Bará'a: allowing the maximum possible freedom of action. A doubtful obligation may be disregarded if it cannot be confirmed by a scrupulous search of the primary texts.

2) Ihtiyát: Prudence. Where the object of an obligation is uncertain and it

¹ Momen, *Shi`i Islam* 185.

² Momen, *Shi`i Islam*, 95, 201.

³ Emamy, *L'Institution Juridique*, 8-9.

⁴ According to Emamy, *L'institution Juridique Du Mahr*, 6-7 and Momen, *Shi`i Islam* 185-8.

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

3) Istisháb: The existing state (for example, the existence of a right) is regarded as continuing as long as there is any doubt that the legal situation has changed.

4) Ta'adol or Tarajih: where two traditions are of equal weight (given the validity of their transmission and the credibility of their contents) but contradict one another, there is a free choice as to which to apply.

Another principle suspends the application of the law where its implementation would probably or certainly expose the believers to a difficulty or burden disproportionate to that envisaged by the law.

According to Mir-Hosseini, the traditional *fiqh* books referred to most frequently in the Special Civil Courts are those by Muhaqqiq al-Hillí (d. 1277 CE) and Shahid-i Awwal (d. 1384), both of which have been translated into Persian.¹ The first of these has been translated from the Arabic by A. Querry, and is used here as a standard for traditional Shí'ah *fiqh*. Al-Hillí is concerned with moral and ritual duties as much as with what we would call 'legal' questions. He also deals with some issues that are most unlikely to arise today, either because of other legal changes or because of changes in society. Examples include the marriage and divorce of slaves, or the father who gives one of two daughters in marriage without specifying which.

The traditional *fiqh* is very extensive and detailed. Its rulings are mentioned here only where the issue is one which might plausibly arise in contemporary family law either outside Iran (for example, in the case of an emigrant couple who claim to be validly married under Iranian law) or where one part of the family is in Iran. Slavery can therefore be omitted, as well as issues that arose in a time when polygamy was more common — how to divide the dowry when two wives are married simultaneously for a single stipulated dowry, for example.² There are thick volumes of *fiqh* devoted to cases which, in the modern world, are scarcely conceivable. The discussion of temporary marriage can be much abbreviated (since one is not likely to leave the country during the term of the contract).

- Recent Shí'ah *fiqh*

Khomeini's books, particularly the *Tahrir al-Vasila* and *Towzih al-Masa'el* (*Clarification of Questions*), are commonly consulted by judges and

¹ *Marriage on Trial*, 31.

² Emamy, *L'institution Juridique* 32-34.

legislators, and the second is used as a layman's handbook.¹ The Guardian Council (20/11/82) has ruled that no law may contradict Khomeini's works, but this position may not be universal even as a theory. Although Khomeini championed the concept of *valiyat-e fuquha*, he was not a *fiqh* specialist. His works do not employ the tradition methods of proof from the citation of sources and the reasoning is brief or non-existent. This would make it difficult for a judge to extend them by analogy. Many of his positions on 'new questions' (those not covered in the traditional *fiqh* books) have not in fact been followed.² Mir-Hosseini reports that Khomeini's works were the most frequently used source in 1985-9. This must be attributed to the political situation at the time, rather than intrinsic merit, and may not continue.

Khomeini's successor as Leader, Khamane'i, does not have the highest level of qualification in *fiqh* (jurisprudence of the Shari'ah): judges would be correspondingly more likely to disregard his rulings.³ The contemporary mujtahid generally recognized as being most highly qualified and a 'point of imitation' (*marja-e taqlid*) is Ayatollah Montazeri, who has been placed under house arrest by Khamane'i. His rulings are therefore under a shadow, although he has a sizeable following as both fuquha and *marje-ye taqlid* (point of imitation).

The late Ayatollah Motahhari represents a moderately progressive school of thought, in comparison to Khomeini. His ideas, notably his book *System of Women's Rights in Islam* have given rise to a school of 'Dynamic Jurisprudence' which seeks to adapt particular *fiqh* rulings while retaining the concept that *fiqh* principles are unchangeable. Mir-Hosseini has described the school, and presented interviews with some of its leading proponents, in *Islam and Gender*.⁴ Motahhari's views are available in translation, and have been cited below alongside those of Khomeini. As Mir-Hosseini shows, however, contemporary figures in the school have gone considerably further than Motahhari in willingness to modify

¹ Schirazi, 'Constitution', 166.

² Schirazi, 'Constitution', 169. Some of these might theoretically be considered part of 'family law'. Khomeini proposes for instance that marriage with extraterrestrial creatures is permitted if they display reason and understanding. The agie of majority should be judged by observing whether they ejaculate or display hard pubic hairs.

³ For a list of fatwas issued by Khamane'i, see Schirazi, 'Constitution', 79. None of these are relevant to marriage and divorce.

⁴ Especially in part II, 'The neo-traditionalists'.

traditional *fiqh*. The discussion with Ayatollah Jannati shows that freedom of discussion and willingness to entertain new ideas had increased markedly even over the five years between 1992 and 1997. The theoretical position of this school may well have gained sufficient adherence, for instance in the circles of the Expediency Council, to enable legislative changes such as raising the minimum age of marriage.

Modernists, and especially feminists, are now questioning the very use of *fiqh* as a source of law, arguing that it is the product of interpretations of the Qur'án and Sunnah by an exclusively male scholarly tradition which has frequently been hostile to women. Katajun Amirpur outlines the positions and interpretive strategies of some leading feminist critics of traditional *fiqh* in 'Islmaischer Feminismus in der Islamischen Republik Iran.' These views are seen as sufficiently important to warrant serious discussion from the conservative side, but given the conservative hold on the Guardian Council and the judiciary they will not be permitted to affect legislation or court practice in the near future. In August 1998 a bill was passed which in effect bans the propagation of feminist ideas in the press.

Pre-revolutionary laws

Following the revolution, the Guardian Council took the view that the compatibility or otherwise of existing laws with the Sharí'ah should be decided by the Guardian Council on a case-by-case basis, the laws continuing in force until they were annulled or replaced. The Supreme Court had wanted to annul all laws from the Pahlavi period. After some delay, Khomeini declared in August 1982 that judges should give their verdicts based on the laws of the sharia and not the current laws. He threatened violence against the Guardian Council, and declared that obeying Pahlavi laws should be a criminal offence.¹ This provided the Supreme Court with the justification for instructing judges, individually, to use the shari'a and to determine in each case whether the law was in accordance with the shari'a. Doubtful cases were to be referred to the Supreme Court or the Office of the Imam. The Guardians Council rejected the Supreme Court's circular, but complied with Khomeini's decree so far as the laws of stipulated criminal punishments (*hodud*) and retaliation for personal injuries (*qisas*) went. It did not comply with respect to family law.

¹ Schirazi, 'Constitution', 163.

The years since have seen a series of islamisation programmes and law reviews which have produced little, since the bodies involved have conflicting interests. Broadly speaking, laws from the first period of codification, from 1910 to 1935, were largely based on the Sharia in any case, and many remain in force. This includes the Civil Code, and the 1937 Marriage and Divorce Act, which will be dealt with below. Of later laws which were felt before the revolution to be contrary to the Sharí'ah, some have been annulled, but others have been retained — in cases of necessity 'the Sharí'ah' has proved to be a very flexible concept.

The Civil Code

- History and form

Iran's first civil code (*Huquq-i madani*) was drafted and enacted between 1928 and 1936, under the inspiration of Shi'ah Sharí'ah law and to a lesser extent the Code Napoleon and Belgian and Swiss codes. It closely follows the Shari'ah. European influences are confined largely to provisions regarding nationality and domicile, and procedures for the ratification and publication of legislation.¹ The formal structure of the code, arranged in books and numbered paragraphs, has remained the same since, and many articles have remained unchanged.

The English translation of the code by Amin is acceptable, and up to date to 1982, but it is clear that his interest lies more in commercial law. Some passages of the family law sections are almost incomprehensible. A German translation of the relevant articles is included in Bergman and Ferid, pages 15 to 34. The translation is not always sensitive to the Islamic and patriarchal context.

- Scope of application

Article 6 of the Civil code specifies that "laws relating to personal status, such as marriage, divorce, capacity and inheritance, shall be observed by all Iranian subjects, even if resident abroad." Iranian laws also apply to the guardianship of minor children who are Iranian nationals.² In marriages of mixed nationality, Iranian law applies where the husband is Iranian and, where paternity is certain, this extends to the children.³ Iranian nationality is

¹ Amin, *The Civil Code*, pp. 1 - 3.

² Article 965.

³ Articles 963 and 964.

defined in articles 976 to 990, and will not be considered further here, except to say that it is based on a mixture of patrilineality and long-term residence, and that the rights of non-nationals to own property in Iran are tightly restricted.

Claims and lawsuits are to be pursued in the country in which they are initiated, but where one party lives within Iran the competent court is the court in the place where this person lives. If both parties live outside of Iran, the court in Tehran is responsible, working through the consulate in the country concerned.¹ The fact that a claim or case is being pursued in a foreign court does not nullify the competency of an Iranian court to hear the case.² The decisions of foreign courts are not automatically given effect within Iran and may not be enforced if they are contrary to public morals or order.³

Article 962 recognizes the capacity of foreign nationals in Iran to make contracts, but specifically excludes family law and inheritance where the person concerned would not possess full legal capacity in accordance with the law of his or her own country. This would appear to prevent foreign nationals who would be regarded as minors in their own countries from marrying in Iran. Article 970 gives diplomatic officers resident in Iran the right to carry out marriage formalities only where both parties are their own nationals, and in accordance with the laws of their own countries. Such marriages must still be registered in Iran.

Article 12 of the Constitution makes *Shi`ah* Islam the state religion in perpetuity, but recognizes the Hanafi, Shafi'i, Maleki, Hanbali and Zaidi schools, allowing followers of these schools to perform religious rituals according to their own teachings. This presumably applies to the ritual form of engagement and marriage agreements. It also says that, in matters of "religious instruction and personal status (including marriage, divorce, inheritance and the framing of wills) and the cases relating thereto [these 5 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 [*sic*] the local regulations will be formulated according to precepts of jurisdiction of the councils of that region of councils with the assurance that

¹ Bergmann, Alexander and Murad Ferid, *Internationales Ehe- und Kindschaftsrecht*, 36: article 7 and note to article 7 of the Family Protection Act, 1975.

² CC Article 971.

³ CC Articles 972-5.

the rights of followers of other sects will be preserved." It is not known whether this has been put into effect: the constitution contains provisions for other institutions which were not immediately given effect.

- Religious minorities

Article 13 of the Constitution recognizes Iranian Zoroastrians, Jews and Christians as minority religious groups. They are entitled to apply the teachings of their own religion in matters of personal status. It appears that they do so, through marriage officiators and 'courts' within their own communities, the results of which are registered by the state. However the personal status laws of these communities must withstand the test of 'public order'. In concrete terms, the adoption of children in religious minorities is recognized (but not among Muslims), and members of churches that do not recognize divorce cannot be divorced.¹

Iran's largest religious minority, the Bahá'ís, have their own laws regarding engagement, marriage, divorce, the writing of a will and inheritance, and a system of local and national elected assemblies empowered to rule on cases. However the Bahá'í Faith is not a recognized religion: its followers are regarded as heretical Muslims or as apostates, and its assemblies have been dissolved. Bahá'í marriages are not recognized, so that Bahá'í children are regarded as illegitimate and cannot inherit. They are not regarded as being protected by Article 14's guarantee of human rights for non-Moslems.²

The specific situation regarding the registration of marriages, and thus inheritance, may be changing. Maurice Copithorne, UN special rapporteur on Human Rights has stated in his report on Iran that questions about a spouse's religion are no longer asked when a marriage is registered.³

The Marriage and Divorce Act of 1937

This act, promulgated in 1931 and revised in 1937, contains some

¹ On this point see Bergmann and Ferid, *Internationales Ehe- und Kindschaftsrecht*, 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* 19, 1-2 (2001).

² 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 *Iran Nameh* 19, 1-2 (2001)

³ Agence France Presse, 18 October 2000.

provisions that are still valid. These concern particularly the registration of marriages and divorces. Other articles have been taken over bodily in the civil code and will be referred to below as part of the Code. A German translation of the relevant articles is included in Bergmann and Ferid, *Internationales Ehe- und Kindschaftsrecht*, pages 34 and 35.

The Family Protection Act of 1967

Among the more important pre-revolutionary amendments was the Family Protection Act of 1967,¹ which in effect abolished unilateral divorce (*talaq*). Divorces were decided by the courts that issued permits for the registration of divorce, known as certificates of the impossibility of reconciliation. If the couple had not reached mutual agreement, the court could issue a certificate, with the grounds available to women being the same as those available to men, except that women had additional grounds in the failure of the husband to support his wife, his taking another wife, or failing to treat co-wives equally. The second and subsequent marriages of a man were made conditional on court permission. The latter provision applied also to temporary marriages (see below).

From the point of view of the wife, the changes extended the grounds on which she could petition for a judicial divorce to include:

- her husband's imprisonment for five years or more,
- contracting a disease injurious to family life,
- taking a second wife without her permission,
- abandoning family life, or
- being prosecuted for a crime dishonouring the family.

The conditions on which a court could grant a man permission to take a second wife were that he should be financially capable and able to fulfil the rule of impartiality in his treatment of his wives. Rather than enforce such conditions by legislation, the legislation required them to be written into marriage contracts as secondary conditions. While the *Shari'ah* accepted the legality of such conditions as negotiated between the marriage partners or their representatives, it did not provide any justification for the role that this implied for the state in what had been a private contract.

Because the law was operationalised by ordering that the conditions should be printed in contracts, rather than by legislation, existing marriages

in effect function under a variety of regimes according to the contract 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 contract before they will entertain a case. Marriage contracts from before 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 Civil Code which stipulate the grounds for a judicial divorce: sexual incapacity, insanity, failure to support the wife or ill-treatment.¹

The Family Protection Law was fiercely opposed by the conservative *'ulamá*, including Khomeini, before the revolution. Following the revolution the law was annulled by ministerial decree, in February 1979. But in October of the same year the Revolutionary Council passed the Bill on Special Civil Courts which said that the pre-revolutionary ordinances of civil law were to be enforced again.² At the same time, pressure was being brought to bear on Khomeini by women who had supported the revolution, and he issued an opinion allowing women to make use of a right of divorce acquired through these secondary contractual conditions, and allowing those whose marriage contracts did not contain such provisions to request a judicial divorce in cases of mistreatment. It was not until 1982 that all the provisions of the 1967 law were reinstated through a Ministerial Order. The Ministry of Justice at that time ordered that 12 secondary contractual conditions were to be written into marriage documents and that the registry offices were to invite persons getting married to sign them, but left the couples free to decline.³ From subsequent debate it appears that not only couples, but also courts and registry offices have rejected these conditions, and chosen to apply traditional forms and *Shari'ah* norms.

This order contained an additional provision, that in the event of a divorce the husband should pay the wife half of the wealth acquired during their marriage unless the court ruled that the divorce was due to the wife's refusal to fulfil her marital duties or because of sexual misbehaviour on her part.

Parliamentary attempts to make the order enforceable were blocked by the Guardian Council. In 1992 the Expediency Council largely over-ruled the Guardian Council by issuing legislation providing a basis for judicial divorce on the grounds of the breakdown of the marriage, and also stating

¹ CC Articles 1121, 1122, 1125, 1129, 1130.

² Schirazi, *Constitution*, 217.

³ Schirazi, *Constitution* 217.

¹ For discussions see Mir-Hosseini, *Marriage on Trial* 54-58.

that after the divorce the wife may apply for payment of compensation for any work which she undertook during her married life but which the shari`a does not define as obligatory. This would include both nursing children and doing housework. Where an amount cannot be agreed on, the courts are empowered to fix an amount in settlement, taking the blame for the breakdown into account. The same Expediency Council law permits the presence of a woman in marriage courts and says that the divorce only becomes effective when the husband has returned the dowry and the 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 traditional Shi`ah views of the Shari`ah.

The Family Protection Act of 1975

Many articles of this Act have been cancelled by subsequent articles included in the post-revolutionary revision of the Civil Code, but more than half remain valid. A German translation of the relevant articles is included in Bergmann and Ferid, *Internationales Ehe- und Kindschaftsrecht*, pages 35 to 36d. The extended grounds of divorce provided in the Family Protection Act of 1967 are incorporated into article 8 of this Act.

Post-revolutionary legislation

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 Shari`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`anic 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 Shari`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.

¹ As cited in Mir-Hosseini, *Marriage on Trial*, 55.

- the husband has deserted family life for six months or more without just cause.
- the husband has been convicted of any offence repugnant to the family and position of the wife, including offences involving *hadd* punishments (fixed corporal punishments for some serious crimes) and discretionary punishments.
- the husband's failure to father a child after five years of marriage.
- the husband's disappearance, where it continues for six months after the date of the wife's application to the court.
- the husband has taken another wife without the consent of the first, or has failed to treat his wives equally.

These stipulations are only valid if the husband has initialled each clause, and not all do so.

A 1982 amendment to article 1130 of the Civil Code enables a judge to issue a divorce where the marriage entails hardship and harm (*`asr va haraj*) for the wife. In effect this means that a woman married before 1982 can win a judicial divorce if she can establish grounds analogous to those above.¹

Current legislative proposals

The age of majority, which had been 18 years under the Pahlavi regime, was lowered after the revolution to 15 years for boys and 9 years for girls.² In October 2000 the Iranian parliament passed a bill that would require court approval for the marriage of boys under 18 or girls under 15.³ This legislation has been rejected by the Guardian Council. It is likely that it will be passed again without substantial changes by parliament, will be rejected again by the Guardian Council, and so referred to the Expediency Council for a decision.

Parliament has also launched a review of the country's legal system and a review of laws passed since the revolution.⁴

¹ Mir-Hosseini, *Marriage on Trial*, 65.

² Bergmann and Ferid, *Internationales Ehe- und Kindschaftsrecht*, 6.

³ AFP report, October 29.

⁴ AFP report, October 28.

MARRIAGE

Definition and character

Muhaqqiq Al-Hillí, among the most prominent of traditional *Shi`ah* jurists, begins his treatment of marriage by saying it is of three sorts: enduring marriage, marriage for a fixed period, and marriage and sexual union with female slaves.¹ The last of these is no longer relevant and is omitted here. Marriage for a fixed period will be treated in a separate section below, indicating differences from the marriage which we will call 'permanent', i.e., marriage that continues until death, divorce or annulment.

In traditional law, marriage (permanent and temporary) has been regarded as a means of legitimating sexual relations and determining paternity, and as a private contract between the parties. Muhaqqiq al-Hillí defines marriage as "a contract whose object is domination over the vagina, without the right of its possession."² Marriage is also seen as a religious obligation, since it is a means of preserving morals, and permanent marriage in particular has a sacramental character not possessed by other contracts. The sacramental character is evident in the insistence that the marriage and divorce formulas should be pronounced in Arabic and in the past tense (they are performative utterances), and that the contract should not be conditional and is not annulled simply by failure to perform.³

Modernist marriage legislation in other Muslim countries has emphasised the social role of marriage. The civil code of Iran does not say how marriage is viewed, but article 10 of the constitution states "Considering that the family unit is the fundamental unit of Islamic society, all relevant laws, regulations and planning provisions must serve the purpose of facilitating the establishing of families and safe-guarding the sacredness of the family institution and strengthening family relations on 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

¹ al-Hillí, *Droit Musulman* I.639.

² Mir-Hosseini, *Marriage on Trial*, 32, citing the Persian translation of *Sharáyi` al-Islam*, vol. II, p. 428. Since I do not have the Persian translation, I cannot locate this in my own French translation (*Droit Musulman*). It is in any case not in the book on marriage.

³ See Emamy, *L'institution Juridique* 14.

conditions for fostering "the character of women and the assertion of her material and spiritual rights", and particularly to support pregnant women and mothers responsible for children. It mandates the establishment of a special Court for Family Protection, and specifies that the state may assign 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 see, largely in accordance with traditional Shi`ah Shari`ah as formulated in a traditional society. The provisions above are a recognition that the state also has an interest in registering and regulating marriage, divorce and the custody of children. They also reflect a desire to raise the status of women above that accorded them in traditional Shi`ah society.

There is a tension as regards the concept of the relationship between husband and wife in some articles, between a desire to be modern and a 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 with each other for the welfare of their family and the education of their children, but article 1105 says forthrightly that "the position of the head of the family is the exclusive right of the husband."

Permanent impediments to marriage

- Through a blood relationship

Article 1045 stipulates the blood relations with whom marriage is forbidden "even if the relationship is based on mistake or adultery":

- 1) parents and their ascendants
- 2) children and their descendants
- 3) brother or sister, and their descendants
- 4) sisters of a parent, grandparent or great grandparent.

This is similar in broad lines to the forbidden degrees recognized in Sunni law, but leaves many questions to be answered by the judge, using the Shi`ah fiqh. The stipulation that a relationship based on mistake or adultery

¹ A decision of the Council of Guardians, dd. 26/7/1360, rejected planned legislation allowing the transfer of the right of the guardianship of infants and incapable children to their mothers, on the grounds that the an ancestor should not 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 mother to serve as legal guardian of her child (article 15).

is equivalent to a relationship through marriage means that a man may not marry his own daughter born out of wedlock, and a legitimate and illegitimate child of the same man may not marry. This is in accordance with the Hanbalite and Hanifite, and contrary to the Shafi`ite position.

- Through a wet nurse

Article 1046 (based on Qur`an 4:22) stipulates that a foster relationship created by wet nursing is equivalent to a blood relationship, provided that:

- 1) the woman's lactation is due to a legitimate conception. Khomeini adds that it is abominable to employ a wet nurse whose own child was born of fornication.¹
- 2) the milk is sucked directly from the breast
- 3) The child has at least had full milk for 24 hours or for 15 consecutive times without taking in between any other food or milk of another woman
- 4) The child was less than two years old when nursed
- 5) The milk taken by the child is from the same woman with the same husband. If, therefore, a child takes during twenty-four hours some milk from one woman and some from another, this fact does not debar marriage 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 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 some trace of the man responsible for the conception that initiated lactation. This would also explain the first condition: the fornicator has no part of the child conceived, and therefore no part in the milk that results.
- 6) In addition to the above, Khomeini adds many more conditions, which are so improbable they can be omitted here. He also stipulates in great detail the blood and milk relatives with whom a permanent impediment is created by nursing.² For general purposes it would appear to be sufficient to apply the general rules that wet-nursing creates a milk relationship analogous to a blood relationship, and that this relationship includes the husband who is 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 Shi`ah law. The second is also unique, although the issue was at least discussed in the Sunni schools. The third is stricter than any of the Sunni

¹ *Clarification* 2488.

² *Clarification* 2464-2486.

schools: Hanafites and Malekites say that a single nursing, however short, creates a milk relationship, and the Shafi'ites and Hanbalites say that five nursing sessions of normal length create a relationship. The requirement of 15 consecutive feeds presumably comes from a hadith attributed to `A'isha, who said that the Qur'an at first stipulated 10 feeds, and a later amendment lowered this to five. The present text of the Qur'an contains no trace of 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.

The surprising detail of treatment of milk relationships arises from the custom, still prevalent at least in rural areas of Iran, of passing a sickly boy child around available wet nurses in the belief that the milk of young mothers in particular has a medicinal effect.¹ One supposes also that women wishing to have their marriage annulled would find it convenient to discover a forgotten milk relationship with their husband. Khomeini suggests that women should be prevented from suckling any and every child, since they may forget who they have nursed, resulting in improper marriages.² It is notable that there is no mention in the Civil Code of how such a relationship is to be proved. This is perhaps understandable, since witnesses are not required in *Shi'ah fiqh* even for a marriage. The question of course is whether the testimony of women alone can be taken as evidence in this case, given that a child is not likely to be given the breast in the company of men. Khomeini says that the testimony of two just men or four just women is required, and they must be able to certify the details, but it is also acceptable if the fact is generally known with sufficient certainty.³

Another stipulation mentioned by Khomeini (and not original to him) is that the milk should be pure and not mixed with something else.⁴ The background here may be the custom among nomadic tribes of sealing a peace between tribes or clans by sharing food in which mother's milk has been mixed. By stating that this does not create a marriage impediment (which might appear obvious given the other conditions stated above), the jurists have effectively sanctioned this method of reducing conflict.

It should be noted that the milk relationship is equivalent to a blood relationship only in terms of creating impediments to marriage. It does not

create a right of inheritance or any other rights.¹

Because nursing a child creates an impediment to marriage, a woman may not nurse an infant girl to whom her husband is married, since she would then become her husband's mother-in-law, and thus unlawful to her husband.² Where no such objection arises, she does not require her husband's permission to nurse a child.

- Through marriage

Article 1047 states that marriages between the following persons are permanently prohibited:

- 1) Marriage between a man and his mother-in-law or his grand-mother-in-law of any degree, whether the relationship is by blood or milk;
- 2) Marriage between a man and woman who has formerly been the wife of this father or one of his grandfathers, or of his son or one of his grandsons;
- 3) Marriage between a man and females descending from his wife, provided that the husband and wife have already consummated the marriage.

The last provision implies that in other cases it is the formalisation of a marriage which creates the relationship of impediment. This is stated explicitly by Khomeini.³ This, and the exception in the case of a man and his wife's daughter by another man, are both in accord with Sunni *fiqh*.

Khomeini adds to this the aunts of a man's father or grandfather, and says that a man may not marry his wife's niece without the wife's permission.⁴

- Through illicit sexual relations

Article 1055 says "Sexual intercourse by mistake or by adultery if preceding marriage is tantamount to the existence of marriage as far as prohibition of marriage is concerned but cannot cause cancellation of the former marriage." Khomeini says that illicit relations with a woman who is in the waiting period for a reversible divorce (i.e., the period in which the husband may cancel the divorce) creates a permanent impediment to marriage, but not if the waiting period relates to a non-reversible divorce (i.e., a 'triple' divorce), or is the waiting period following a temporary

¹ Friedl, *Children of Deh Koh*, 85-7, 182.

² *Clarification* 2489.

³ *Clarification* 2496.

⁴ *Clarification* 2474.

¹ Khomeini, *Clarification* 2490.

² *Clarification* 2492.

³ *Clarification*, 2385.

⁴ *Clarification*, 2388, 2392.

marriage or the death of the previous husband.¹ It would appear that it is not the fornication, but the breach of the former husband's remaining rights, which creates the permanent impediment. Khomeini adds that knowingly marrying a woman who is already married creates a permanent impediment between her and the second husband.²

Article 1056 states that "one who perpetrates a shameful act on a boy cannot marry his mother, sister or daughter." Khomeini defines the act in this case strictly as sodomy with penetration, and says that this cannot function retrospectively to annul an existing marriage with the mother, sister or daughter.³

- Through li'an and multiple divorce

Article 1052 states that a divorce by li'an, a solemn imprecation in which a man accuses his wife of adultery, involves a permanent bar to the remarriage of the parties concerned.

Article 1057 states that a woman who has been the wife of a man three consecutive times and has been divorced each time is unlawful as wife to that man until she has contracted a permanent marriage to another man, has consummated that marriage, and the marriage has ended in divorce, annulment or the death of the husband. Khomeini allows remarriage 'If she marries another man' but elsewhere specifies that this entails actual consummation.⁴

Article 1058 states that 'The wife of a person who has been divorced from him nine times, six of which were revocable divorce, will be illegal as wife to that man for ever.

Temporary impediments

- Through marriage

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 both marriages are temporary. A man is permitted to marry four women simultaneously, so where a man already has four valid permanent

¹ *Clarification* 2398.

² *Clarification*, 2402.

³ *Clarification* 2405, 2406.

⁴ *Clarification* 2401, 2527.

marriages, this creates a temporary impediment to further marriages.¹

Article 1049 forbids a man marrying the daughter of his brother-in-law or of his sister-in-law unless his wife gives permission.

The period of waiting (*iddeh*), during which a woman is not permitted to remarry following the death of her husband, her divorce, or the end of a temporary marriage can also be regarded as a temporary impediment specific to the woman.² This applies also where a woman has had sexual relations "by mistake", that is, outside of a valid marriage but where there were reasons that might have led her to suppose that there was a valid 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 divorce before it becomes definitive), or if he remarries her each time after the divorce, the third divorce creates an impediment to remarriage between that couple. This impediment can be removed if the woman marries a different man, and that marriage is consummated. Consummation in this case specifically includes penetration, and not merely being alone in privacy together. When the second husband dies or divorces her, and her waiting period is over, she may remarry the first husband.⁴

A marriage that is in breach of a temporary impediment to marriage is invalid, and itself causes a permanent impediment to valid marriage between the couple.⁵ This is so even if the couple were not aware of the existence of the impediment, if the invalid marriage was consummated. An invalid marriage that has not been consummated does not create a permanent impediment according to the Civil Code, but does according to Khomeini.⁶

- Through religion

Article 1059 states that the "marriage of a female Moslem with a non-Moslem is not allowed."

¹ Bábí and Bahá'í law allows only one a second marriage, for husband or wife, but only where the first husband or wife has been shown to be infertile, and subject to obtaining the permission of the first partner (see Le Bab, *Le Beyan Persan*, Wahid 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 traditions.

² CC Article 1054.

³ CC Article 1157.

⁴ Khomeini, *Clarification* 2527.

⁵ CC Article 1050.

⁶ *Clarification* 2400.

Traditional Shí`ah *fiqh* has distinguished between *islám* and *imán*, becoming a Muslim and being a true believer. The latter includes belief in the sinless Imám and action in accordance with this belief. That is, *imán* refers only to Shi'a Muslims, whereas *islám* refers to both Sunni and Shí`ah 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 Shí`ah woman may not marry a Sunni. A woman may not marry a man who is her inferior in faith, she may only marry her equal (*kuf*).¹ Khomeini appears to reject this, saying only that a Moslem woman may not marry a non-Moslem, and adds that a Moslem man may not marry an infidel woman in permanent marriage.² This is a modernising interpretation, both in including Sunnis as of equal standing, and by subjecting men to almost the same restriction as traditionally applied only to men.

Khomeini further defines the meaning of 'Muslim', through his definition of apostasy, which occurs where a Moslem denies God or the Prophet, or if his denial of an essential precept of the religion such as the 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 according to their own account they are monotheist and acknowledge the Prophet: their laws of prayer and fasting however differ. By defining the status of Moslem by orthopraxis, Khomeini would also appear to exclude the `Ali-Ilahis and other 'extremist' Islamic sects who do not fast and pray in the same way.

If the wife becomes an apostate before the marriage is consummated, or 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 consummated and she is pre-menopausal, she must observe a waiting period as for a divorce. Incidentally, Khomeini betrays here that he expects people who are non-muslims, by his definition, to be subject to Islamic family law.

¹ Fyzee, *Outlines of Muhammadan Law*, 45-6.

² *Clarification*, 2396.

³ Khomeini, *Clarification*, 2447.

⁴ The specification is in *Clarification* Question 82, page 410, and in *Clarification* Appendix II.

⁵ Menopause is defined by Khomeini as 60 years or older for a *seyyedeh*, a descendant of Muhammad, and 50 years for other women. However he also says that if a woman says she is past menopause, she should be believed. (*Clarification* 2448, 2456, 2504).

⁶ *Clarification*, 2448.

If a husband becomes an apostate, the marriage is dissolved, and the wife is obliged to observe the waiting period for widows. In both of the last cases, a return to (orthodox) Islam during the waiting period re-establishes the marriage.¹

- during pilgrimage

No valid permanent marriage can be contracted by a person who is "wearing the pilgrimage garment", that is, between the time of ceremonially entering the status of pilgrim on approaching Mecca and the ablutions following the *hajj* pilgrimage. This rule does not apply to pilgrimages to Mashhad, Qom, Shiráz and other centres, which are a more important feature of Iranian Shí`ah life than the pilgrimage to Mecca. It is however of interest because of the historical role it played in the development of the institution of temporary marriage.² Unlike the other kinds of temporary impediment, a breach of the *hajj* impediment only creates a permanent impediment if it was 'knowing'.³

- special impediments

Articles 1060 and 1061 state that the marriage of any Iranian woman with a foreign national, and of certain Government servants and students supported by the Government with female foreign nationals, require special permission from the Government.

Proposal and engagement

- In the Civil code

Book VII of the civil code deals with marriage and divorce. It begins without preamble with engagement. Article 1034 states that it is permissible to propose to any woman where there is no obstacle to marriage. In contrast to traditional Shari`ah, it does not specify that a Moslem may not propose to a woman who is already entertaining a proposal from another Moslem.

Article 1035 stipulates that a proposal, or discussions about a marriage, do not constitute a marriage even if all or part of the agreed dowry is paid.

¹ *Clarification* 2449 and 2450. There is a distinction between the apostasy of a 'born' Muslim, which is equivalent to the death of the husband, and the apostasy of a convert to Islam, which is equivalent to a divorce.

² See Gribetz, *Strange Bedfellows*.

³ CC Article 1053, Khomeini, *Clarification*, 2407.

So long as the marriage has not been formalised, either of the parties can 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 given, or their equivalent value, when an engagement is broken. Restitution is limited to presents 'which are ordinarily preserved', presumably excluding consumables. There is no right of restitution where the proposed marriage does not take place because of the death of one of the betrothed (article 1038). There is no mention of fault in this section.

Article 1040 allows each of the parties to ask the other, in the context of an engagement, to produce a doctor's certificate showing that they are not suffering from serious contagious diseases. The Council of Ministers has supplemented this with a resolution requiring notaries to demand from couples a certificate showing that do not suffer from thalassemia, before registering a marriage.¹

- In the *fiqh* sources

Mir-Hosseini states that Shi'i hadith permit a man to look at the entire body of a woman he intends to marry,² on the grounds that in marriage a man is like a buyer and should see what he is buying. This would appear to be greatly overstated: Al-Hillí says only that a man has a right to see the hands and face of his intended. He reports opinions extending this to the hair and the dressed body, but is himself only willing to extend such liberty in the case of non-Muslim women.³ Confusion may have arisen because al-Hillí's following sections cover the rules regarding nudity and modesty in contexts other than a proposal for marriage. What interests Mir-Hosseini about this, however, is not the precise degree of undress involved, but the fact that Sheikh Ansari, an 18th century jurist whose works are widely used, allowed a reciprocal right to the woman, arguing that she has more need of it since she does not have the right to revoke the marriage at will.

Al-Hillí also stipulates that a loss of sanity or mental capacity after a proposition has been made renders the proposal, and the acceptance if there has been one, void.⁴

Marriage pre-conditions

- Existing wives

As in traditional Shi'ah law, a man is allowed up to four permanent wives at any one time, concurrent with as many temporary marriages as he can afford. However it is rare for a man to have more than two permanent wives.

Article 6 of the Marriage and Divorce Act of 1937 requires that the prospective husband must declare whether or not he already has a wife. This declaration is to be included in the marriage document. A man who lies may be imprisoned for between one and six months, if the wife lodges a complaint (article 7).

- Age of marriage

The minimum age for marriage is now set at 9 years for girls and 15 years for boys. Nevertheless a contract to marry (an engagement) for a child under that age is said to be valid with the permission of the guardian.¹ The legal effect of this in the present situation is not clear, since we have seen that an engagement is not binding and there is no possibility of claiming restitution for breach of promise. It would presumably mean that gifts given on the betrothal of a girl child would have to be returned if the engagement was broken, whereas ordinary gifts would not.

In traditional *fiqh* there was no minimum age for marriage, which may literally be concluded at birth, but there is a minimum age for consummation. Al-Hillí sets this at nine years. However Khomeini appears to have no objection to intercourse with a girl below nine.² They agree that if the marriage is consummated before that time, and the girl is injured as a result, this creates a permanent legal barrier to any further sexual intercourse.³ Below the ages of nine years for girls and fifteen years for boys, children are minors (*sighr*), although al-Hillí reports traditions allowing puberty to be recognized for boys as young as 10 years of a certain 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

¹ Ansari-Pour, 'Iran', 242.

² *Islam and Gender*, 252.

³ *Droit Musulman*, I.642:16-17.

⁴ *Droit Musulman*, I.648:51.

¹ Civil Code Article 1041, in a note added to the article as of 29 December 1982.

² See e.g., Khomeini, *Clarification* 2510.

³ Al-Hillí, *Droit Musulman*, I.644:30-31, endorsed by Khomeini, *Clarification* 2410.

be read as an optional criteria where the date of birth cannot be established.¹ There is no fixed age for legal maturity in the traditional *fiqh*: it is premised on having attained puberty and 'discernment' (*roshd*) which is determined on the testimony of two male witnesses, in the case of boys, or two witness of either sex in the case of girls. They must testify that the person concerned is not a prodigal, is capable of disposing of his or her goods as required by the work they do, and in the case of girls whether they engage in women's work such as spinning and weaving.² In the Civil code maturity is 18 years, except that a person aged 15 years or more can demonstrate their maturity to a court.³

- Permission of the father or grandfather: the 'virgin' female

The term 'virgin' in this context applies to any previously unmarried girl or woman, even if she has lost her physical virginity willfully or by 'accident'.⁴

Article 1043 of the civil code (as amended 29 December 1982) states that "The marriage of a girl who has not married previously is dependent on the permission of her father or her paternal grandfather, even if she has reached the full age of majority."

The earliest *fiqh*, from the time of al-Sharíf al-Murtadá (d. 436 AH), is said to have allowed an adult virgin to arrange and conclude her own marriage.⁵ Al-Hillí agrees, but says that opinions on this point differ.⁶ Traditional *Shí'ah fiqh*, from the time of Ibn Bábúya (d. 381) has said that the grandfather takes precedence over the father, but if the father dies, the grandfather's right to *jabr* ceases. It must be supposed that the requirement to ask permission also lapses, since the two are linked: permission is 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 wishes to marry, she should obtain permission from her father or paternal grandfather "as an obligatory caution", reflecting the uncertainty in the *fiqh* on this point.⁷

To anyone familiar with Sunni Islamic law, the absence of any requirement for a *walí* is striking. The father or grandfather is not required

¹ al-Hillí, *Droit Musulman*, I.469-70.

² al-Hillí, *Droit Musulman*, I.470:9-12.

³ CC Articles 1209, 1210.

⁴ Al-Hillí, *Droit Musulman*, I.650.66.

⁵ Howard, *Mut'a Marriage*, 84-5.

⁶ *Droit Musulman*, I.650:69-70.

⁷ Khomeini, *Clarification*, 2376.

to be actually present when the marriage is contracted. A woman thus has the legal ability to make a contract, subject to having prior permission from the father or grandfather if she has not been previously married. There seems to be no provision for verifying this permission, but this would not normally be necessary, since the father or grandfather will have participated in the negotiations regarding the dowry and other conditions (specified in the marriage contract) and the ceremony normally takes place in the home in which the bride is living, which would normally be that of her father or grandfather (fathers, not mothers, having legal custody of pubescent daughters).

Al-Hillí also notes differing views about whether the grandfather's right lapses if the father has already died. The issue is whether the grandfather has the right in his own right, or through the father of the girl. He concludes that the grandfather retains the right even after the death of the father.¹ This discussion confirms what the wording of the civil code implies, that both the father and the grandfather have the simultaneous right to authorise the marriage of a 'virgin'. This raises the possibility that both will marry her, but to different husbands.

Article 1044 of the Civil Code specifies that only the permission of the father or paternal grandfather is required: if they are under restraint for some reason, there is no need for permission from the guardian. The conditions of 'restraint' are not specified, but traditional *fiqh* books have considered conditions such as insanity, being a slave, not being a Muslim, being a known profligate and long-term absence. Khomeini refers only to their absence.²

- Forced marriage (*jabr*) of girls

Since the father or grandfather must give permission for the marriage of any previously unmarried girl, and a child who has not attained the age of legal competence (*rishd*) is not capable of giving assent or refusing, there is in effect a regime of forced marriage for young girls. A substantial portion of 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 stipulates that a girl who has attained the age of maturity

¹ *Droit Musulman*, I.650.65.

² *Clarification*, 2377.

³ BCC World radio news report, December 2000.

cannot be married against her will,¹ and implies that a girl married while 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 'probable'³ and he recognized that women who had attained the age of maturity were in fact forced into marriage, since he says that she can refuse to consent to a marriage contracted for her if the dowry is lower than that customary for women of her status.⁴ The silence of a 'virgin' girl (presumably an adult virgin) is to be taken as assent.⁵ The Civil Code states that "if a person showing at first reluctance" – which is the customary behaviour expected of the prospective bride – "later authorises the making of the contract, the contract will be binding." This would allow silence to be taken as assent, except, as the Code states, if "the reluctance is so acute that the reluctant person cannot be considered as having been in possession of any intention."⁶ Khomeini also recognises the practice of forced marriage, specifying that the contract is valid if the couple later give their consent to the marriage and the terms, thus implying that the marriage is otherwise invalid.⁷

- Permission of the father or grandfather: minors and imbeciles

Al-Hillí states that no minor (male or female) can contract a marriage: only the father or a direct male ascendant can do so, or the magistrate in the absence of any male ascendant.⁸

- Unreasonable denial of permission

According to article 1043 of the civil code, "if the father or the paternal grandfather withhold the permission without justifiable reason, the girl can refer to the Special Civil Court giving full particulars of the man whom she wants to marry and also the terms of the marriage and the dowry money agreed upon, and notify her father or her paternal grandfather through that Court of the foregoing particulars. The Court can issue a permission for marriage fifteen days after the date of notification to the guardian if no

¹ *Droit Musulman*, I.650:70.

² *Droit Musulman*, I.650:67.

³ *Droit Musulman*, I.652:87.

⁴ *Droit Musulman*, I.652:85.

⁵ *Droit Musulman*, I.652:89.

⁶ Article 1070.

⁷ Khomeini, *Clarification*, 2376.

⁸ Al-Hillí, *Droit Musulman*, I.649:64.

response has been received from the guardian to justify refusal."

- Formal requirements

The formal requirements of the Civil code¹ for the legal recognition of a marriage are that the "marriage takes place by offer and acceptance in words which explicitly convey the intention of marriage, the offer and acceptance being spoken by the man and woman themselves or by persons who are legally entitled to do so, and the acceptance must closely follow the proposal "in accordance with custom." The stipulated conditions are that the person who makes the offer or acceptance (who is not necessarily one of the partners) must be sane, of legal age, and capable of forming a decision, and that the identity of both parties is known to the other.

According to Khomeini, the offer and acceptance should be spoken in Arabic, and using the perfect tense (to emphasise that the act is completed at the time).² This requirement would explain the use of deputy who reads the formula on behalf of one or both of the partners. Khomeini allows one 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 woman or her representative says 'I marry myself to you for a specified gift' and the man or his representative says 'I accept the marriage'.⁴

Al-Hillí allows either party to make the offer, and permits the use of 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 parties are dumb.

There is no mention of the possibility that one or both parties may give their assent by post, but neither is there any requirement for either of the partners to be present in person. Khomeini specifies the situation in which neither partner has consented to a marriage at the time it was made on their behalf, but they consent after the fact. Such a marriage is then valid, implying that its validity is suspended until the consent of the partners is 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

¹ Articles 1062 to 1067, 1070.

² Khomeini, *Clarification*, section 2370; al-Hillí, *Droit Musulman*, 646.

³ Khomeini, *Clarification*, 2364 and 2367.

⁴ Khomeini, *Clarification* 2369.

⁵ *Droit Musulman*, I.647:41.

following article begins "If power is given without conditions as to the identity of the husband ..." the law clearly envisions that this person may choose the husband as well as representing the bride when the marriage is concluded. These provisions would cover the variety of practices in other law schools: among the Hanifites and Malekites, for example, a walí is required to act for the bride even if she has been previously married, and the walí is in the first case the bride's father, then her adult son if she has one, and only then her paternal grandfather. A Malekite bride could be deemed to have designated to son to act for her. The provision in effect allows a person who is not, under Iranian law, a walí to act as if he was one.

In the case where the attorney chooses the marriage partner and makes the contract, article 1072 prevents the person with power of attorney using it to marry the bride himself, unless that possibility has been explicitly allowed. The person with power of attorney must follow any conditions laid down by his principal regarding the marriage partner and dowry. If he does not do so, "the authenticity of the marriage will depend upon corroboration from the principal." A marriage made by power of attorney is not valid if the attorney does not act according to the best interests of his principal.¹

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 having to obtain their agreement. He denies the right of the child to cancel the marriage on reaching puberty, and the right of the obtain person to cancel such a marriage on regaining his or her sanity.² This is the Shí'ah form of the right of *jabr*, but the legislation specifying a minimum age for marriage is intended to annul this: it applied only to pre-pubescent children, in a situation where a child could be married from birth.

- Witnesses

In comparison with Sunni Islamic law, it is striking that there is no requirement in the Civil Code to have witnesses present. Nor is there any alternative aimed at ensuring that the marriage is publicly known, such as one finds in Moroccan law (where the two formal witnesses are not required if there has been a large wedding party). The early *fiqh* says that the presence of witnesses is recommended in permanent marriage, for the sake of the children and inheritance.³ Al-Hillí at one point says that the contract

must be made in the presence of witnesses and must be made public,¹ but also says that the presence of two witnesses and other marriage formalities is not indispensable, adding specifically that a secret marriage is legal and valid.² In the 20th century, the Ayatollahs Sístani, Motahhari and Khomeini do not mention any need for witnesses, although they specify the witnesses that are required for a divorce and other acts.

There are customary substitutes for having designated witnesses, in the use of a mullah to read the marriage formula, the presence of parents, wedding festivities, and the custom of ceremonially parading the bride from her former home to her husband's house. The fact that the marriage formula would normally be recited in Arabic also normally entails the presence of a male adult with a seminary education, simply because few others would be able to recite the formula correctly. As a matter of law however, neither the Shí'ah *fiqh* nor the civil code seems to consider secret marriage to be objectionable. It has been suggested³ that the Sunni requirements for the presence of a walí acting on behalf of the bride and for the presence of two witnesses are linked, as part of an early attempt to control irregular marriages and forbid temporary marriage (*Mut`a*).

- Variations in practice

Actual practice certainly varies, bearing in mind that Iran encompasses a variety of ethnic and tribal groups, with only half of the population having Farsi as their mother tongue. The tribal Baluchi bride is always represented by a walí and is not present when the contract is concluded by her walí and the groom and the groom's parents.⁴ This is almost in accordance with Sunni Shari`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 women, in addition to the walí and the groom or his representative. In urban Shiraz, which can be regarded as the Persian heartland, only married women are present with the bride at the moment when the contract is made. A Mullah stands behind a curtain or outside a window and reads the marriage contract, the women urge the bride to accept, and on the third reading she does so "with a barely audible 'yes'".⁵ Only then may the groom

¹ *Droit Musulman*, I.640:5.

² *Droit Musulman*, I.648:49-50.

³ Howard, *Mut`a Marriage*.

⁴ *Encyclopaedia Iranica*, entry for `Aqd, citing Ríahí, *Zár wa Bád wa Balúc*, pp. 49-50.

⁵ *Encyclopaedia Iranica*, article for `Aqd, citing various sources.

¹ CC Articles 1073 and 1074.

² Khomeini. *Clarification* 2375.

³ Howard, *Mut`a Marriage* 85, citing Al-Kulayni citing Ja`far al-Sádiq.

enter. Both forms would be compatible with the requirement of the civil code, if the Mullah is regarded as the representative of the man in Shiraz, and the wali as the representative of the woman in the Baluchi context. It is notable that the Shirazi variant would not accord with Khomeini's prescription, since the bride does not make the offer, and the reading of the contract in Persian and a simple 'yes' take the place of the Arabic formula which Khomeini would require. In addition to ethnic variations, there may be a considerable difference between what is considered proper in the religion of the people and what the fuqaha have derived from theoretical studies.

The reading of the Fatiha, the first chapter of the Qur`án, is a traditional part of the ceremony but is not prescribed.¹

The Dowry in the contract

Dowry (*mahr*) is of such importance in both marriage and divorce that it will be dealt with separately. Failure to specify a dowry does not void the contract, but entitles the bride to the *mahr al-mithal*.²

Al-Hillí says that the marriage contract may include a clause giving one of the parties the right to 'cancel' the dowry,³ but does not say whether this means a marriage with no dowry, or the application of the *mahr al-mithal*.

Other conditions in the contract

- Conditionality

Article 1068 of the civil code says that making a marriage conditional will render it void. This should be distinguished from conditions regarding the marriage, which are treated below. A conditional marriage is subject to an as yet unknown condition: "I will marry you, if you get a promotion".

In contrast to the previous article, article 1069 states that if there is a provision in a marriage contract reserving the right of cancellation of the 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

contract.¹ There is evidently a contradiction here, unless we suppose that the provision of article 1069 applies only to reserving a general right to cancel the contract, but specific conditionality is permitted. It may also be that custom endorses the specific condition of the bride's virginity, but all other forms of conditionality are void.

One might wonder why such a condition is required, given that the husband has the right to divorce his wife. A cancellation would differ from a divorce, in as much as all or part of the dowry would have to be repaid to the husband, as in the case of a broken engagement to marry.

- Marriage Terms

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 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 specifically allow for a stipulation that delegates the power of divorce to the wife (acting on behalf of the husband),² if the husband is absent for a certain period without providing for the maintenance of the wife, treats her harshly or makes an attempt on the life of his wife. A process under such a provision would in the first case be a civil case³ with appeal to the court of appeals and of Cassation. Apologists for traditional *fiqh* have argued that the *fiqh* is not inherently inequitable, since it allows the marriage contract to 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 include it.⁴

Article 1128 of the Civil Code allows special qualifications of the partners to be included in the marriage contract, either explicitly or by mutual implicit understanding. In practice this is most likely to mean a specification that the bride should be a virgin. The article gives the other party the right to cancellation of the marriage if it is found that the other party lacks the desired qualification.

¹ Clarification, 2444.

² 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. Khomeini, Clarification 2539.

³ Civil Code, 1119. Bergmann and Ferid, *Internationales Ehe- und Kindschaftsrecht*, 34, comment to article 4.

⁴ *Islam and Gender*, 120.

¹ Mir-Hosseini, *Marriage on Trial* 32.

² Mir-Hosseini, *Marriage on Trial* 32.

³ *Droit Musulman*, I.648:52.

Khomeini says that if the contract stipulates that the man will not take his wife out of the city, the condition is binding.¹ In his *Tahrir al-Vaisla* he says that conditions that contradict the shari`a are null and void,² implying that the remainder of the contract is valid.

Registration and proof

Most marriages are celebrated before a mullah or religious figure. They must also be reported to the 'notaries' offices of the Ministry of Justice,³ where they are recorded in the public registers and entered on the identity cards (*sijill*) of the partners. There is no fee for registering marriages and divorces.⁴ Failure to register a marriage or notify a divorce or the revocation of a revocable divorce makes the man concerned liable to imprisonment for one to six months. An 'officiator' who participates in performing a marriage and fails to register the fact is liable to the same punishment.⁵ This provision originally constrained a man wishing to take a second wife, since he would have to obtain court permission before the marriage could be registered, and would have to have his first wife's permission before the court would grant permission. Failure to register the marriage would make the man, the notary and the second wife, if she was aware of the situation, liable to six months imprisonment. However in 1984 the Guardian Council declared this punishment contrary to the *Shari`ah*.⁶ It is not clear whether the Council has overturned the registration law as a whole, or only the punishment of a man failing to register his second marriage.

According to article 2 of the Marriage and Divorce Act of 1937, marriages which are not made according to the prescriptions of the Ministry of Justice are treated as customary rather than official marriages. The legal implications of this in present-day Iran are not clear, since all marriages are 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

assumption is unavoidable. Where one party denies the existence of a marriage, the party claiming marriage is to be believed if the claim entails obligations for that person, but not if the claim would bring benefits.¹

Consummation

There are some legal points, such as the question of whether a man may ever marry the daughter of his wife, for which the crucial question is not whether a valid marriage contract has been made, but whether the marriage has been consummated. The issue is also important where one party claims the existence of a marriage, and the other denies it.²

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 witnesses would not be required: 'consummation' would be presumed if the couple were at any time alone together.

Al-Hillí requires prior ritual purification, provides specific prayers to be said before consummation, and names days and times when consummation is not permitted: at noon or sunset, on the occasion of an eclipse or earthquake, and so forth.³ The prayers are specifically called *ádáb*, ritual duties, and seem to be aimed mainly with avoiding any conflict with other ritual duties or prohibitions. One requirement is interesting in terms of the question of whether secret marriage is valid: Al-Hillí says that there is an obligation to hold a celebration party for a day or two and to invite the believers, on the occasion of the consummation.

¹ *Clarification*, 2451.

² Cited by Schirazi, *Constitution* 206.

³ CC Article 993.

⁴ Marriage and Divorce Act 1937, Article 2.

⁵ Marriage and Divorce Act of 1937, Article 1.

⁶ See Mir-Hosseini, *Islam and Gender*, 182 n6.

⁷ Al-Hillí, *Droit Musulman*, I.648:53.

¹ Al-Hillí, *Droit Musulman*, I.648:54.

² Al-Hillí, *Droit Musulman*, I.649:58-59.

³ Al-Hillí, *Droit Musulman*, I.640-642.

MARRIAGE RIGHTS AND DUTIES

The rights and duties of husband and wife are not equal: each has separate obligations and duties. There is also no common ownership of marital goods. Although 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 with each other for the welfare of their family and the education of their children, they are not regarded as equal and cooperating partners. Article 1105 states that "the position of the head of the family is the exclusive right of the husband" and other provisions show that this means that the wife must be obedient in various matters and to be sexually available to her husband. Nevertheless her position under Iranian law is better than under the law codes of most Sunni Muslim countries.

Financial claims of the wife on the husband

- Dowry

The wife (and not her family) is entitled to receive the dowry (*mahr*). Under some circumstances she is entitled to refuse cohabitation prior to receiving her dowry.¹ The usual practice is to make only part of the dowry immediately payable. These points are discussed further in the section on dowry. Anecdotal evidence shows that a wife's first recourse to obtain her dowry is social pressures, but that the courts do act to enforce payment when asked.

- Maintenance

The wife has a right to be maintained (*nafaqah*) by her husband.² This right comes into effect when the marriage is consummated, and continues so long as she is not in a state of disobedience (*nushuz*).³ It remains in effect even if the husband is poverty-stricken and the wife has independent wealth, and it is not reciprocal at all.

Marriage is therefore based on the assumption that the man is the sole, and not merely the principal, financial provider. A woman who has earnings or inherited wealth is in theory not obliged to contribute anything to the

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 boys and girls still assumes the old role models. The gap between social and legal expectations and the actual situation is thought to be a major cause of divorce. The law cannot be changed, being rooted in the *Shari'ah* and staunchly defended by conservatives. More important, the attitudes of judges in the divorce courts do not accommodate this reality. Mir-Hosseini reports one as saying that 'problems are inevitable when women work and earn money; it is for this reason that in Islam it is preferable for them to stay at home...'¹

Maintenance embraces a right to food, and the right to use lodgings and furniture and clothing "in proportion to the situation of the wife" (Article 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 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 does not include a legal (as distinct from moral) right to have the expenses of major medical treatment met.² A modernist response led to some discussion in women's and legal journals, but the traditional standpoint appears to stand. Article 1107 also specifies the wife's right to a servant if she is accustomed to this, or if she needs one because of illness or disability. Article 1111 empowers a court to determine the amount of maintenance and to compel the husband to pay it. Where payment is impossible, the wife 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 husband's assets without his permission. If she is obliged to work to support herself, her obligation to give obedience is suspended.⁴

The right to maintenance normally continues in the 3-month 'iddah period following a divorce (discussed in the section on divorce), but there is no right to maintenance during the 'iddah period following the husband's death.

Obedience for the woman entails not leaving the house without her husband's permission, surrendering to any pleasure he desires, and not

¹ CC Article 1085.

² CC Article 1106.

³ CC Article 1108.

¹ *Marriage on Trial*, 125.

² Mir-Hosseini, *Islam and Gender*, 255.

³ CC Article 1129.

⁴ *Clarification*, 2416.

refusing sexual intercourse without a religious excuse.¹

- Alimony

Alimony will be considered in the section dealing with divorce.

Other Rights of the wife

- Property

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.

- Childbearing

It appears that traditional *fiqh* also gave the wife the right to fecundation, or at least the possibility of it. The husband may not delay consummation of the marriage by more than four months, and sexual union should be 'regular'. Khomeini specifies that a husband may not abandon intercourse with his permanent wife for more than four months.⁴ Premature withdrawal 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 of 10 dinars, which Query glosses as 36 grammes of gold.⁵

- Security and dignity

Although the wife is required to live where her husband directs her, Article 1115 of the Civil Code states that if living in the same house as her husband entails a risk of bodily or financial injury or loss of dignity, she may choose a separate dwelling. Her husband continues to be liable for her cost of maintenance, until such time as a court may order her to return to her 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.

¹ Khomeini, *Clarification* 2412.

² CC Article 1118.

³ Khomeini, *Clarification*, 2414.

⁴ *Clarification* 2418.

⁵ Al-Hillí, *Droit Musulman*, 1.644:29.

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 wife's obedience³ and to control her outside activities. He can prevent her 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 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 ordinary housework, to care for himself or the children, or to breastfeed a child, unless there is no other means of feeding the child. If we remove these from consideration, and suppose that the questions of where the wife lives and whether she leaves the home without permission are stipulated because they affect her sexual availability, it would appear that the 'right to obedience' amounts essentially to a right to demand sexual relations.

He also has a right to terminate the marriage (CC Art 1133, see Divorce, talaq, below).

Mutual rights

Both partners have a 'right' to sexual access in two senses: sexual relations 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 that the husband may not refrain from sexual relations with his wife for more than four months.

Both partners are bound to live on the basis of friendly relations and to cooperate with one another in strengthening the foundation of the family and raising children.⁵ They have a mutual but not equal right of inheritance from one another.⁶

¹ CC Art 1105.

² CC Article 1114.

³ CC Article 1108.

⁴ CC Art 1117.

⁵ CC Article 1103.

⁶ CC Article 940.

DOWRY

Definition and determination

The dowry (*mahr*, or *sadaq*) is a sum which the husband pays or obliges himself to pay to the wife (not to her family), by virtue of having sexual relations. The Shi`ah rules are essentially the same as those of the Sunni schools.

In rural Iran and among recent immigrants the dowry is overshadowed by a bride price (*shirbaha*) paid to the bride's family, and used in theory to provide her with household necessities. In this case the dowry that is 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 the customary *shirbaha*.¹

Although the dowry may appear to be the price in a contract of sale – literally a bride-price – it differs in many ways from the consideration involved in a sale.² It may or may not be economically significant (a dowry of one copy of the Qur`an is not unusual), but it is always legally and symbolically significant. The best way to understand it would appear to be not as a price, but as an act of giving³ which, along with the pronouncement of the marriage formula and the act of consummation, constitutes part of the performance which creates a marriage relationship. Modern apologetic writers emphasize that it provides a security for the wife.

The dowry should preferably be stipulated in a valid marriage contract, but where it is not stipulated, or where the contract is not valid, a dowry must nevertheless be paid. In the latter case the amount is proportionate to 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*).

The dowry is fixed by agreement⁴ and stipulated in the marriage formula, "I marry myself to you for [a certain sum]", or "I marry my principal to you for [a certain sum]". Where no sum is stipulated, the contract is still valid, and the amount is fixed by agreement or by law (see

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 circumstances, such as a herb used to cure an illness rarely encountered, cannot constitute a dowry, according to traditional *fiqh*.² A poodle serving 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 be called property and which can be owned and possessed." This seems to exclude services, and also to exclude a promise to do something, such as to free a slave, or not to do something, such as not to take a second wife. The provision in the traditional *fiqh* which allows services as the dowry rests on Muhammad's example in allowing the teaching of the Qur`an to serve as a 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, such as a public work.⁶ According to the Civil Code, where the agreed dowry is something that by its nature cannot be owned, the wife is entitled to the 'reasonable dowry' (see below).⁷

Another instance in which the dowry is invalid is a marriage contract

¹ Emamy, *L'institution juridique du mahr*, 42.

² Emamy, *L'institution juridique du mahr*, 17.

³ On this point Shi`ah law differs from Sunni law. Abu Hanifa says that as a slave 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 perform a pilgrimage on behalf of another) cannot constitute a dowry. See Emamy, *L'institution Juridique* 24-26.

⁴ In this respect, Shi`ah law differs from Sunni law. The latter considers Muhammad's act as a particular privilege of the Prophet, which does not establish a legal precedent. See further Emamy, *L'institution Juridique* 20-24.

⁵ Emamy, *L'institution Juridique* 19.

⁶ Emamy, *L'institution Juridique* 19.

⁷ CC Article 1100.

¹ Mir-Hosseini, *Marriage on Trial* 74.

² This is discussed further in Emamy, *L'institution Juridique* 14-16.

³ See Qur`an 3:4.

⁴ Civil Code, 1078.

specifying a dowry, and also specifying a higher dowry should the husband require his wife to leave her home town. In this case the dowry, being conditional, is usually regarded as unspecified and invalid, although some authorities have disagreed.¹

Where the quality of the articles is not specified, the husband is obliged to provide those of average quality.² The quantity or value must be 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 equivalent in value.⁴

There is no maximum or minimum amount, although some traditional jurists have recognized a legal maximum of 500 dirhams, citing traditions 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 from the sixth Imam.⁶ Sunni law does not recognise any maximum.⁷ 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 there are marriages today in which the wife's right to the 'unpaid dowry' in the event of a divorce is worth virtually nothing. Marriage contracts made before the revolution, by families who considered themselves modern, may also have a minimal pro-forma dowry, both because the dowry was considered an archaic vestige and because at that time husbands' arbitrary right of divorce was limited and women had greater rights, so that there was less stress on the function of the dowry in providing security for the wife.⁸

If the dowry is not legally valid, this does not make the marriage contract itself invalid.⁹ The primary intention of the couple is to marry, bear and raise children, and the dowry is a secondary matter. For the same reason, the marriage is valid if no dowry has been set. If the dowry agreed is

not valid, but the marriage has been consummated, the woman is entitled to receive the 'dowry of equivalence', a dowry equivalent to that which is 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 than the parties thought, the dowry is the monetary equivalent of the value it was thought to have.

Article 1079 of the Civil Code says that the dowry "must be known to the marrying parties to the extent that their ignorance is removed." However 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 dowry. In both cases, the parties can decide on the dowry by mutual consent after the marriage, but before consummation. If they do not do so, and the marriage is consummated, the wife is entitled to the 'dowry of equivalence', according to article 1093, or to the 'reasonable dowry' according to article 1100. Khomeini says, the dowry of equivalence.² If they do not fix a dowry, and the marriage ends in divorce without being consummated, she is entitled to the 'reasonable dowry'.³

Where a father arranges the marriage of his minor child, the father is obliged to pay the dowry (to which some authorities add: "if the child cannot").⁴ If the father dies before the dowry is paid, it is a first charge on his estate.

Where a man engages an intermediary to arrange a marriage, or it is arranged by someone having a power of attorney, and the man later refuses to recognise the marriage contract, some authors say it is the intermediary, not the principle, who is obliged to pay the jilted woman the dowry, or some say, half of the agreed dowry, while others say there is neither marriage nor 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 dowry.⁶ Where the contract specifies that the wife has the right to determine the dowry, presumably after the marriage has been contracted, she may not

¹ Emamy, *L'institution Juridique* 40-42.

² Emamy, *L'institution Juridique* 25-6 cites the precedents.

³ Emamy, *L'institution juridique du mahr* 31.

⁴ CC Article 1100.

⁵ Emamy, *L'institution juridique du mahr*, 34.

⁶ Emamy, *L'institution juridique du mahr*, 35.

⁷ Bahá'í law does stipulate maximum and minimum amounts, in this reflecting a *Shi'ah* rather than Hanifite character.

⁸ Mir-Hosseini, *Marriage on Trial* 75.

⁹ Emamy, *L'institution Juridique* 16, 35-36.

¹ Emamy, *L'Institution juridique du mahr*, 36; Civil Code, 1088.

² *Clarification*, 2419.

³ CC Article 1093.

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

⁵ Emamy, *L'institution juridique du mahr*, 50-52.

⁶ CC Article 1089.

decide on an amount exceeding the ‘reasonable’ dowry (Article 1090). Article 1091 specifies that the reasonable dowry is to be determined in the light of the status of the wife, with respect to her family’s rank and other circumstances and peculiarities concerning her in comparison with her equals and relatives, and also in the light of the customs of the locality. Article 1094 adds to this, that the wealth of the man is to be considered in fixing the reasonable dowry. This differentiates it from the ‘dowry of equivalence’.

Where a man and woman have illicit sexual relations believing themselves to be legally married, or under some other form of ‘mistake’, the traditional *fiqh* says that the man is obliged to pay the woman the ‘dowry of equivalence’.¹

In addition to the dowry, the groom’s family usually provide a ring, jewellery and clothing, a pair of matching mirrors and candle holders. The latter are used as decorations during the marriage ceremony. The jewellery and clothing is usually not written into the contract or regarded as part of the dowry, but the ring, mirrors and candle-holders are.²

Payment and ownership

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 purposes. No clause that benefits any third party can be attached to the dowry agreement. It is legally the wife's property from the moment of marriage, and she has the right to dispose of it.³ Nevertheless, the husband is responsible for the dowry until it is handed over: if an agreed article is lost through no fault of his own, he is nevertheless obliged to provide an equivalent.⁴ Likewise, if a material fault is found in an agreed article, the wife is entitled to demand an equivalent.

Although the wife becomes the owner of the dowry immediately after the performance of the marriage ceremony,⁵ one half of her ownership is unconditional, and the other half is subject to the consummation of the marriage. If the marriage ends in divorce without being consummated, she

¹ Emamy, *L'institution Juridique*, 13.

² Mir-Hosseini, *Marriage on Trial* 74.

³ CC Article 1082.

⁴ Emamy, *L'Institution juridique du mahr*, 60-63; Civil Code 1084.

⁵ CC Article 1082.

is entitled to only half of the dowry and may have to repay any additional amount she has received.¹

If a temporary or permanent marriage proves to be void (for instance because of an impediment), and has not been consummated, the wife is not entitled to any dowry. Where it has been consummated, and the wife did not know that the marriage was not valid, she is entitled to the reasonable dowry.²

A wife has the right to refuse consummation and other matrimonial duties until the dowry, is paid. However she has this right only if the dowry is specified as being paid in one amount and not in installments (see below), and she has only one opportunity to use this provision to enforce payment: if she has freely consummated the marriage she cannot later withdraw consent pending payment of the dowry.³ A clause specifying the at marriage will be cancelled if the dowry is not paid by a certain time would be an invalid clause, but the marriage contract and the agreed dowry would still be valid.⁴

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

Delayed payment

It is common practice to divide the dowry into a portion to be paid immediately, a portion to be paid over time, and a portion which is payable when the marriage ends by death or divorce. The last of these is commonly much the larger amount, and serves as a discouragement to divorce and a source of security for the wife in the event of divorce. Mir-Hosseini states that the dowry is usually an amount which is well beyond the means of the groom, and is almost never expected to be paid at the time of marriage.⁶ However Friedl, whose research was in a rural village, reports dowry negotiations involving practicable amounts and necessary goods which are in fact handed over the time of marriage.⁷ Because her discussion is non-technical it is not clear whether the goods involved are an immediately paid

¹ CC Article 1092.

² CC Articles 1098 and 1099.

³ CC Articles 1085-6.

⁴ CC Article 1081.

⁵ Emamy, *L'institution juridique du mahr*, 60.

⁶ *Marriage on Trial*, 73.

⁷ *Women of Deh Koh and Children of Deh Koh*, passim.

dowry or a *shirbaha*. She also says that it is regarded as meritorious among 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 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 being recalculated to allow for inflation, up to the date of the husband's death.¹

The Civil Code allows the dowry to be divided into installments and paid over time.² If the contract does not specify the amounts and times, immediate payment is assumed, since Khomeini says the wife may refuse to have intercourse until she receives the dowry.³

OTHER LEGAL IMPLICATIONS OF MARRIAGE

Extra-marital relations, underage relations

Clause 100(c) of the Retribution Act of 1932 specifies that "any non-Muslim who has intercourse with a Muslim woman shall be executed" regardless of the consent, age and marital status of either party.

Violence and marital rape

The Shari`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.

¹ Ansari-Pour, 'Iran', 243-4.

² Article 1083.

³ *Clarification*, 2420.

¹ CC Article 1127.

² Mir-Hosseini, *Marriage on Trial* 71.

Mir-Hosseini reports that 43 out of the 150 petitions made by women to 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 and 52 petitions respectively, and far ahead of custody cases (13 and 5 petitions respectively). When one considers that many of the divorce cases simply involve the registration of a divorce, it appears that a substantial part of the case load involves adjudicating these two complementary rights within marriages. As Mir-Hosseini points out, however, petitions under these two headings may in fact be tactical moves in a divorce.

Under Iranian law, the wife's right to maintenance continues unless she is disobedient. In the words of the Civil code "If the wife refuses to fulfil the duties of a wife without legitimate excuse, she will not be entitled to the cost of maintenance."² This places the burden of proof on her, and it in any case means that she loses the right to maintenance if she leaves the marital home without a reason recognized by the shari'a. She must in fact show that she has been forced out of the home, and the husband must show that she has left voluntarily, by inviting her back.

¹ Mir-Hosseini, *Marriage on Trial*, 42-3.

² Article 1108.

TEMPORARY MARRIAGE

Marriage according to the Twelver¹ *Shi`ah* form of Islamic *Shari`ah* is of two types, 'normal marriage', *nikah* and temporary marriage, *mut`a* (Arabic) or *sigha* (Persian). Both are recognized in the civil code. In the *fiqh* books, but not in the civil code, *mut`a* is further subdivided into *mut`at al-hajj* (temporary marriage during the pilgrimage to Mecca) and *mut`at an-nisá'*.

Iran is the only country which recognizes the validity of temporary marriage (See the Civil Code, articles 1075 to 1080), and it has a lower social status than permanent marriage. The institution existed at the time of the Prophet but was banned by the second Caliph and rejected by all Sunni schools of law. It will be discussed here rather briefly, since such marriages by their nature are not likely to be found in the diaspora community. It has also been the subject of several studies in European languages.²

A temporary marriage does not count as one of the maximum of four marriages to which a man is entitled. A man can contract as many 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

¹ This is one of the areas in which Twelver Shi`ism differs markedly from other *Shi`ah* traditions.

² 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.

³ 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 (Nov. 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 is increasingly seen as a suitable legal form to formalise an open-ended partnership.

any children born from it. However in law its purpose is not to have children, but to legitimate the man's sexual enjoyment (*istimta*).¹ It entitles the man to exclusive access to the woman's sexual favour for a specified period, in exchange for a specified payment of *mahr* (dowry).

Khomeini states that the contract is valid even if the real purpose is not pleasure, and even if the contract stipulates that there will be no sexual intercourse.² The reason for this provision is that temporary marriage is sometimes used as a way of admitting an outsider into the home, where she would otherwise have to be veiled and chaperoned, or where his presence would otherwise require the women of the household to be absent or veiled. Usually such temporary marriages involve a minor in the household. Khomeini gives the example of a man for whom it is inconvenient that his sister-in-law is not his 'intimate' – that is, she must veil from him, may not be alone with him, and so forth. He cannot marry a child of that household, since marriage with a brother's children is forbidden, but he can contract a short temporary marriage with an infant girl, and bring that girl to his sister-in-law to nurse. His sister-in-law thus becomes a 'mother' to his infant 'wife': she is his mother-in-law.³

A temporary marriage which does not anticipate sexual relations still legitimates any subsequent sexual relations, if the couple so decide.⁴

Any ambiguity in respect to the duration renders the contract void (CC Article 1076). With respect to the stipulation of the dowry, article 1077 states that the same latitude and conditions apply as with permanent marriage, whereas article 1095 says that the absence of a dowry makes the contract void. The latter seems to be applied in practice.

It is notable that according to the Civil Code, a temporary marriage entails the same rights of mutual inheritance as a permanent marriage. It seems unlikely that this has been put into effect, at least for women who 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

registration of a particular marriage.¹ A temporary marriage does not entitle the wife to receive maintenance, unless this is specifically agreed.²

If the marriage is terminated before consummation, the woman is entitled to half the *mahr*,³ but she forfeits the entire amount if the termination is demanded by her or is attributable to her action. She can make her obedience contingent upon receiving her *mahr* in full, and the man can claim the whole amount back if she denies sexual access from the outset or a portion of it back if she refuses him later. However the husband has no right to claim part of the dowry back if she dies during the period of the marriage, even if she dies before consummation.⁴

A temporary wife has no claim to maintenance or sexual intercourse unless these are stipulated in the contract. Khomeini however says that the husband must not refuse intercourse with his temporary wife for more than four months.⁵ If she becomes pregnant, she is not entitled to maintenance during the pregnancy. She is required to be sexually available, but is otherwise at liberty. She does not require the man's permission to leave the house or take a job, providing she remains sexually available.⁶

There is no divorce in a temporary marriage, but the man may 'make a gift of the time', that is, of the time remaining of the contract, by saying "I have spared you the term". This terminates the contract, without requiring any witnesses. Unlike a divorce, the wife does not have to be ritually clean at the time the formula is pronounced.⁷ The woman must observe an 'idda of two menstrual periods following the termination of the contract, before she may remarry, but this is not required if the same couple decide to remarry permanently.⁸

The children born from a temporary marriage have legal legitimacy, but are socially stigmatized. Although they are legitimate, they do not share the privileges of siblings born into a permanent marriage.

¹ In practice it appears that temporary marriage is also used by women to legitimate their sexual enjoyment, but they do not have a right to sexual satisfaction (unlike a permanent wife).

² *Clarification* 2421, 2423.

³ *Clarification* 2493.

⁴ Khomeini, *Clarification* 2420, 2429.

⁵ *Clarification*, 2425.

¹ Mir-Hosseini, *Law of Desire*, 166.

² CC Article 1113.

³ CC Article 1097, Khomeini *Clarification* 2431.

⁴ CC Article 1096.

⁵ *Clarification*, 2422.

⁶ Khomeini *Clarification* 2427.

⁷ CC Article 1120; Khomeini *Clarification* 2509.

⁸ Khomeini, *Clarification* 2432.

DIVORCE

Divorce has become very common in Iran, although marriage is still more stable than in Morocco. Divorce is not easy for the husband, by the standards of Islamic countries, and for the wife it usually means giving up the children. It occurs mainly in the middle and upper social strata.¹ From Mir-Hosseini's anthropological studies and from observing news reports, it would appear that the main causes are the increasing incidence of polygamy, a practice which had been becoming rare prior to the 1979 Revolution, increasing numbers of arranged and forced marriages of girls barely in their teens, tensions in traditional family structures caused by the increasing education and workforce participation of women, and social tensions especially in urban families due to economic failure, leading to hopelessness, high unemployment and high rates of drug addiction. A combination of modernity and the Islamic revolution have placed the institution of the family under great stress.

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 contract a second marriage when they feel that the first is unsatisfactory, and one or other marriage, usually the first, often ends in divorce soon after. There seems to be little social support for polygamy as a long-term family structure.

A divorce may be revocable or irrevocable: in the former the husband has a right to renounce his intention to divorce his wife at any time during a waiting period ('iddah). This is known as 'returning', and may be signalled by word or deed, without any requirement for witnesses or that the wife be informed.² The result is that a wife may believe she is divorced, and may have remarried, while her ex-husband claims that he 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 conceive, for instance because he is past her menopause or has not reached

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 wife and remarried her, divorced her and remarried her, and again divorced her (without her being married to any other man in the interval), or because the man has pronounced the divorce formula and changed his mind ('returned' to his wife) twice. The act of returning to the wife, thus cancelling a divorce which has been initiated but not completed, is counted as a new marriage. This has led to the 'triple divorce', in which a man pronounces the divorce formula three times. By means of the legal fiction that he has changed his mind after the first and second times that the formula was pronounced, the third recitation of the formula achieves an irrevocable divorce. Such a 'third' divorce also creates a bar to remarriage between the couple which remains until the wife has contracted and consummated marriage with another man (a *tahlil* marriage).

Unilateral divorce: *Talaq*

Talaq is divorce through the repudiation by a man of his wife, by speaking a repudiation formula (once) in the presence of two male witnesses.³ There must be an immediate intention to effect a divorce, so a conditional divorce is null and void⁴ and the words said in jest have no effect.⁵ Khomeini says that the divorce formula must be read in correct Arabic, and takes the form "My wife, Fatimeh, is divorced."⁶

In the *Shari'ah*, no grounds are required, but intention is necessary and the word *talaq* or a derivative must be used. The wife need not agree or even be informed. The husband can only utter the *talaq* formula when his wife is in a state of purity (*tuhr*) having washed after the end of a menstruation (or

¹ Mir-Hosseini, *Marriage on Trial*, 131, 160.

² CC Articles 1143-4, Khomeini, *Clarification* 2524, 2525.

¹ Mir-Hosseini, *Marriage on Trial* 38, CC Article 1145; Khomeini *Clarification* 2522.

² CC Article 1145.

³ CC Article 1134; Khomeini *Clarification* 2543. The latter specifies two 'just' witnesses.

⁴ CC Article 1137.

⁵ Khomeini, *Clarification* 2498

⁶ *Clarification* 2508.

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

¹ CC Article 1140; Khomeini *Clarification* 2499. If he later learns that she was not in a state of purity at the time, the divorce formula has no effect (Khomeini, *Clarification* 2501).

² But he should wait at least the time until her next menstruation would be expected, or she would be ritually pure following childbirth (Khomeini, *Clarification* 2503, 2506).

³ CC Article 1140, Khomeini *Clarification* 2500.

⁴ CC Article 1141, Khomeini, *Clarification* 2504. Khomeini concludes that a man may have intercourse with a girl under nine years old and divorce her without restriction.

⁵ CC Article 1142; Khomeini *Clarification* 2507.

⁶ CC Articles 1148 and 1149.

⁷ CC Articles 1135, 1138.

⁸ CC Article 1136.

⁹ Khomeini, *Clarification* 2541, 2542.

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

A *khul'* divorce is one in which the wife, seeking a divorce, pays her husband to divorce her.¹ Mir-Hosseini reports that half of the divorces registered in Tehran are of this type.² The payment involved is often the portion of the dowry which the husband still owes, but it may be any amount.³ A *mubarat* divorce is defined as one in which both parties feel a dislike for the other, and in this case the amount which the wife pays to her husband is limited to the value of the dowry.⁴ Since the husband has a unilateral right to divorce, and can effect an immediate irrevocable divorce, divorce of this kind arises only where a man is genuinely unwilling to effect a divorce or is unwilling or unable to pay outstanding dowry and other debts to his wife (such as payment for household work). There are specific formulas for each type of divorce, to be read by the husband or his agent in Arabic. The woman's portion of the proceedings, in which she or her agent specifies what she will pay, may be said in Persian⁵

If a *talaq* divorce formula has been pronounced and the wife later pays her husband not to 'return' to her during the waiting period, as is in *khul'* divorce, this does not in fact prevent the husband returning.⁶

Judicial divorce

Tatliq, or judicial dissolution is a possibility where a woman seeks a divorce but her husband refuses to release her. It involves the judge either compelling the husband to pronounce a divorce or pronouncing it himself, on the husband's behalf. The only grounds recognized in *Shi'*ah law are a failure to maintain the wife, and the husband's impotence.⁷ These grounds 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). However these apply, as a judicial divorce, only to marriages contracted

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 have to pursue her own rights as a party to the contract. Article 1130 allows a judge to compel a husband to divorce his wife where she has proved that "the continuation of the marriage causes difficult and undesirable conditions." Although it is presumed *pro forma* that the husband will pronounce the divorce formula, where this cannot be achieved the divorce "will be made on the permission of the Islamic judge". Whether the formula is dispensed with, or the judge makes himself the husband's agent to effect the divorce, is not clear.

Article 1129 specifies that a judge may compel a husband to divorce his wife where he is unable to maintain his wife, or has refused to pay maintenance and cannot be forced to do so.¹

Article 1156 allows a wife how husband is continuously absent and whose whereabouts are unknown to apply for a judicial divorce. The waiting period in this case is four months and ten days from the time the divorce is granted.

A court may also issue a finding of presumed death, following a procedure of public notification, where a person has been continuously absent for 10 years and the person concerned would be 75 years old or 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 finding is also relevant to inheritance. Where a man has been continuously absent for four years, his wife can apply to the court for a divorce without the case having to meet the more stringent requirements for a declaration of presumed death.³ The procedure of public notification is the same. A waiting period (*uddah*) must be required following the judicial divorce, since Article 1030 deals with the possibility that the missing husband returns during this period. From this it follows that the divorce pronounced by the judge is conditional.

Delegated *talaq*

¹ For applications of this principle see Mir-Hosseini, *Islam and Gender* 62, 162, 164-5.

² CC Articles 1020 to 1023.

³ CC Article 1029.

¹ CC Article 1146.

² *Marriage on Trial* 82. Note that Mir-Hosseini incorrectly states that the wife automatically forfeits her unpaid dowry in such cases.

³ See, e.g., Khomeini, *Clarification* 2530.

⁴ CC Article 1147; Khomeini, *Clarification* 2535.

⁵ See Khomeini, *Clarification* 2529-30, 2532-3.

⁶ Khomeini, *Clarification* 2526.

⁷ Mir-Hosseini, *Marriage on Trial*, 39.

The *fiqh* allows the husband to delegate his right of *talaq* to his wife, by inserting this as a condition in the marriage contract, enabling her to divorce herself. The husband retains his own right of *talaq*.

The right is normally subject to a condition, for instance the wife may have the right to divorce her husband if he remarries or treats her harshly. The procedure in this case would be for the wife to apply to a court, demonstrating that the condition had been fulfilled, and asking the judge to pronounce the *talaq*.¹

Annulment (*faskh*)

A marriage may be annulled either by a fault in the marriage contract, or as 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 ordered before the marriage has been consummated, the wife is not entitled to keep any dowry: if after, she is entitled to half. The wife must observe the same waiting period as in a divorce.

Where the annulment arises because a milk relationship is discovered, Khomeini says that there is no dowry if the marriage has not been consummated, and the dowry of equivalence if it has been consummated but the woman was not aware of the milk relationship.²

Cancellation

Serious deficiencies arising in either partner give the other partner the right to cancel a marriage, without requiring a divorce, or its attendant procedures.³ The reference to procedures may be only to the need for attempted reconciliation in the case of a divorce, or may also mean that there is no need for an 'iddah period where a marriage is cancelled due to long-lasting impotence on the part of the man. The deficiencies listed are

- in a man: - chronic madness, whether it is continuous or recurrent (CC Article 1121)
- impotence continuing for one year after the wife refers the matter

to a magistrate.

- castration

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

A woman's right to cancellation in case of madness or sexual impotence on the part of her husband applies whenever the deficiency arises, unless she was aware of the deficiency at the time of marriage (Article 1126), and subject to article 1131, which says that an option to cancel the marriage lapses if it is not exercised once the deficiency is known, within a period to be determined by "custom and usage."

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 of her right to maintenance.¹

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

- protrusion of the womb

- black leprosy (but Khomeini says, 'elephantiasis': which may be the same thing)²

- leprosy

- connection of the vaginal and anal passages

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

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

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 just mentioned.

Some deficiencies are also mentioned in the Family Protection Act of 1975, article 8, with the interesting variation that they apply on the same terms to husband and wife. The deficiencies concerned are illnesses that make the continuation of the marriage dangerous to the other partner.

Divorce procedures

The majority of divorces do not go through the courts, since a divorce can simply be registered where there is mutual agreement. Courts deal only with

¹ CC Article 1119.

² *Clarification* 2494, 2495.

³ CC Article 1132.

¹ CC Article 1127.

² *Clarification*, 2380.

³ *Clarification*, 2380.

⁴ CC Article 1124.

cases where one party is resisting divorce, or the couple have agreed on the divorce but cannot agree on a settlement. Blame is very much an issue, since the wife loses her claim to maintenance during the marriage and *'iddah* period if the divorce results from her failure to comply with her marital duties. Typical procedures in 1986 are described by Mir-Hosseini in *Marriage on Trial*, 59-83. From the fact that Iran is presently experiencing what its leadership regards as an epidemic of divorce, and from complaints concerning the administration of the courts, it would appear that the processing times which she mentions, of two or three months, may now be much longer.

During the divorce proceeding the residence of the wife is to be fixed by mutual agreement (thus not unilaterally by the husband), and failing this by the judge, who is to ascertain the opinions of near relatives where possible.¹

- Arbitration

After an initial attempt to reconcile the couple, the court refers them to arbitration. Each spouse nominates an arbiter, and these must submit a report of their attempt to reconcile the couple within two months.²

Mir-Hosseini, reports a discussion of whether the arbitrators are taken seriously.³ They seem to have no power of enforcement, and their 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 court cannot deny a petition for divorce brought by a man, but may delay giving a decision, either on its own initiative or on the recommendation of the arbiters stating that reconciliation is possible. Mir-Hosseini reports that "in one court, the judge referred each case only once to arbitration and, upon the receipt of the report, issued the document enabling the husband to register the divorce. In another court, the judge used every possible device available to delay what he considered to be an unjust divorce and made sure that the wife was duly compensated."⁴

Where the wife has petitioned for divorce, courts often seek to reconcile the couple by repeatedly referring the case to arbitration, or by

strengthening the wife's position in the marriage by persuading the husband to make a promise — for instance, promising to divorce another wife, to stop taking drugs, or not to beat his wife. These can be enforced by requiring him to delegate the right of *talaq* to his wife if he should break the promise. This is effected through a contract which in effect becomes an attachment to the original marriage contract. The ancillary contract itself is a quaint device: it is formally a contract of sale for some trifle belonging to one party, sold for a few tumans to the other party, and the condition of the delegation of *talaq* is attached to this contract of sale.¹

- Post Arbitration

Finally the court may issue a certificate of the impossibility of registration,² which is valid for three months. If it is presented to the registry within this time, the notary must inform the spouses when they should attend for the execution and registration of the divorce. If on or other fails to do so, a new time is set. If on the second occasion the wife does not attend, the divorce is executed by the husband and duly registered. If the husband fails to attend the matter must be referred back to the court to summon the husband. If he again fails to attend, the court may execute the divorce in his stead.³

The waiting period (*iddah*)

The waiting period, during which the ex-wife may not remarry, is three consecutive menstruations, or 3 full lunar months for a woman of childbearing age who does not menstruate.⁴ The period begins at the time the divorce formula is recited, whether or not the wife knows that the formula has been recited.⁵ This applies also where a woman has had sexual relations "by mistake", that is, outside of a valid marriage but where there were reasons that might have led her to suppose that there was a valid marriage.⁶ The waiting period following a temporary marriage is two menstruations, but for a woman of childbearing age who does not menstruate it is 45 days.⁷

¹ CC Article 1116.

² Mir-Hosseini, *Marriage on Trial*, 61. Bergmann and Ferid provide details of the procedure for appointing arbiters (*Internationales Ehe- und Kindschaftsrecht*, 36, Articles 5 and 6 and note to Article 5 of the 1975 Family Protection Act).

³ *Islam and Gender*, 124.

⁴ *Marriage on Trial*, 63.

¹ Mir-Hosseini, *Marriage on Trial*, 71-2.

² Family Protection Act 1975, Article 6.

³ Ansari-Pour, 'Iran', 245.

⁴ CC Articles 1150 and 1151, Khomeini, *Clarification* 2512, 2513.

⁵ Khomeini *Clarification* 2516.

⁶ CC Article 1157.

⁷ CC Article 1152, Khomeini *Clarification* 2515.

The waiting period for a widow extends for fourth months and ten days from the time she learns of her husband's death,¹ even if the woman is in menopause, she was pregnant and gives birth within this period, the marriage was not consummated, or it was a temporary marriage.² During this period she may not wear colourful clothes, eye shadow, or other forms of beautification.³ Since bright clothes and makeup are now forbidden in public anyway, this rule would appear to be a religious precept regarding private behaviour.

However if the woman is pregnant at the time of divorce or dissolution 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 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.

There is no waiting period for a woman who has been divorced before the marriage was consummated, or who is past the menopause (the divorce in both cases being irrevocable).⁵

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

¹ Khomeini *Clarification* 2520.

² Khomeini *Clarification* 2517.

³ Khomeini *Clarification* 2518.

⁴ CC Article 1153; Khomeini, *Clarification* 2514, 2518.

⁵ Khomeini, *Clarification* 2511.

⁶ Khomeini *Clarification* 2521.

⁷ CC Article 943.

⁸ Khomeini (*Clarification* 2523) specifies the right to continue to live in the house in which she lived before the divorce, except in specific cases for which he refers to more detailed works.

irrevocable divorce.

Except in these cases, the husband is required to pay maintenance to his wife during the divorce proceedings and, in advance, for three months after the divorce is registered. Failure to pay is punished by the same court, with Mir-Hosseini mentioning floggings of fifty and seventy-four lashes as typical.¹

If the wife is pregnant by her husband, she is entitled to receive maintenance until the child is born, even in the three exceptional cases just mentioned.²

Payment of any unpaid dowry

In 1997 a law was passed requiring an unpaid dowry that is specified in monetary terms to be revalued in line with inflation, unless the couple has agreed otherwise.³ Contracts have commonly stipulated the dowry in gold coins, in which case no correction for inflation is required.⁴

¹ *Marriage on Trial*, 64.

² CC Article 1109.

³ Mir-Hosseini, *Islam and Gender*, 275. The legislation is in the form of a note to article 1082 of the Civil Code.

⁴ Mir-Hosseini, *Marriage on trial* 74.

CHILDREN

Paternity

Nasab, or legal filiation, is recognized only in the context of a valid marriage, whether permanent or temporary. A child born outside a valid marriage is the issue of *zina*, fornication, and cannot be legitimated, as stated in article 1167 of the Civil Code: "A child who is the issue of *zina* is not attached to the *zani* (fornicator)." The abortion of illegitimate children is not permitted.¹

Where the man made an erroneous assumption (*shubha*) that there was a valid marriage, the child may be legally filiated to him, but if the man knew there was no valid marriage, and the woman thought there was, there is no paternity.² Although there is a theoretical possibility of marriages without witnesses, in which the couple might both think erroneously that they were married, the fact that marriages must be registered means there is little chance of appealing to *shubha*. Ziba Mir-Hosseini does report two such cases in Tehran, where the father in an unregistered marriage had died and the child's paternity had to be proved. In both cases the testimony of witnesses was accepted, and the existence of the marriages confirmed.³

A child born during the term of a marriage is assumed to 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 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 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 be the issue of *zina*.

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

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 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 case, "the child belongs to the second husband unless definite indications otherwise."² This seems to be the only instance in which paternity can be determined by objective criteria.

Article 1161 of the Civil Code states that a husband's explicit or implicit admission of paternity cannot later be withdrawn. The following article allows a man to repudiate fatherhood within two months of learning of its birth, or (article 1163) within two months of learning its correct date of birth. From the reference to the exact date of birth, it would appear that these articles only in the ambiguous case just mentioned. There does not seem to be a general right to deny fatherhood based on objective evidence.

There is a general rule that a child born of fornication does not belong to the fornicator (CC Article 1167): the rights of parentage are seen as a benefit which should not be obtained by wrong-doing. This could mean that a child is technically parentless. However articles 1164 to 1166 deal with the possibility that one or both of the parents may have thought there was a valid marriage, or may have been mistaken about the identity of the other. In both cases, the party or parties who had sexual relations under the 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

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 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

¹ Khomeini *Clarification* 2453.

² CC Article 1165.

³ *Marriage on trial*, 153.

⁴ CC Article 1158.

⁵ CC Article 1159.

¹ CC Article 1153.

² CC Article 1160.

³ Khomeini *Clarification* 2461.

⁴ Pakzad, 'Legal status', 169, citing a note to article 41 of the Law of the Registration of Vital Statistics, 1976.

⁵ CC Article 993.

Care and education

The maintenance of children during the marriage is said to be a right and duty assigned to both parents,¹ and also to the father only.² In practice it is a male preserve, except that in the case of a boy under two years old or a girl under seven years old, the mother is said to have priority. For older children it is the father who has priority.³ These are the same rules as apply in allocating custody following a divorce. In fact some of the provisions regarding the maintenance and education of children seem to assume that their parents are divorced. Either parent is entitled to punish the child, 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 obliged to take such measures as circumstances and their means allow for the education of the child.⁶

The mother's duty expressly does not include breast-feeding, except where there is no other suitable nutrition.⁷ However Khomeini says that the mother's milk is the best for the child, so "it is right that the wife does not ask for wages from the husband for nursing the child, and it is appropriate that the husband pays her for it." He also says that the husband has the right to take a child from its mother and give it to a wet nurse.⁸ He recommends that children should be breast fed for two full years.⁹

Where the parents are living separately, whether following a divorce or not, the absent parent has a right to visit the child.¹⁰

If the mother becomes insane during the first two or seven years of the child's life, respectively, the responsibility reverts to the father.¹¹ If either parent dies, the responsibility according to Article 1171 of the Civil Code reverts to the other, even if it is the father who has died and he has

appointed a guardian for the child. This would mean that the mother would have custody and responsibility, which would be highly unusual under Islamic law. However Article 1199 specifies that only the father has a duty to maintain the children, and if he dies the duty passes to the paternal grandfather or great grandfather, and only if these are dead or incapacitated does it revert to the mother, followed by the maternal grandfather, maternal grandmother, and paternal grandmother.

If the physical or moral well-being of the child is endangered by the carelessness or moral degradation of the parent who is responsible, the courts may make other appropriate arrangements.¹

Legal Guardianship (wilaya)

In addition to the duties and rights mentioned above, a minor child is under the guardianship of his father, paternal grandfather or a guardian appointed by either of them.² The guardian has responsibility for administering the estate of his ward and acting as his or her legal representative.³ If the natural guardian is unfit to exercise legal guardianship for various reasons, the courts may appoint another guardian.⁴ This may be the mother of the child, provided that she has not remarried following a divorce.⁵ If either of the natural guardians dies, the other may appoint an executor to exercise wilaya from the death of the second natural guardian, and such an executor may be authorised to appoint a successor. The appointed guardian may be a woman (with her husband's permission),⁶ but it is stipulated that a Moslem guardian cannot appoint a non-Moslem successor.⁷

An appointed guardian is also responsible for the maintenance and

¹ CC Article 1168.

² CC Article 1199.

³ CC Article 1169. A bill to give the mother priority for both boys and girls under the age of seven years was passed by parliament in May 2002, but is unlikely to be approved by the Guardian Council.

⁴ CC Article 1179.

⁵ CC Article 1172.

⁶ CC Article 1178.

⁷ CC Article 1176.

⁸ Clarification 2487.

⁹ Clarification 2491.

¹⁰ CC Article 1174.

¹¹ CC Article 1170.

¹ CC Article 1173. Originally this task was assigned to the public prosecutors, an office that was abolished in 1994. In 1977 article 1173 of the Civil Code was amended to make the head of the local justice administration responsible for appointing guardians. The office of Public Prosecutor was officially reinstated on May 20, 2003, but the announcement did not refer to their former roles under article 1173 (IranMania, May 21). Ansari-Pour, 'Iran', 244-5, provides a list of instances in which a court may appoint a guardian: the addiction, immorality or insanity of the natural guardian, and various forms of child abuse.

² CC Articles 1180, 1181, 1194.

³ CC Article 1183.

⁴ CC Articles 1182, 1184-87.

⁵ Family Protection Act 1975, Article 15.

⁶ See CC Article 1233.

⁷ CC Article 1192.

education of the child,¹ which implies that the natural guardian has the same duties. This creates a conflict with the rights and duties of the mother.

The Civil Code distinguishes between the age of majority, which is 15 lunar years for boy and 9 years for girls, and the age of maturity, which is 18 years, except that a person aged 15 years or more can demonstrate their 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 against any consideration, but they may take possession of property as a gift.³ Guardianship continues until the ward obtains maturity, rather than majority, but an insane child cannot be regarded as mature, so that the guardianship of the natural guardian continues in this case.⁴

Custody in divorce

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 Maliki 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

¹ CC Article 1188.

² CC Articles 1209, 1210.

³ CC Articles 1212 and 1214.

⁴ CC Article 1218-3.

⁵ CC Article 1169.

⁶ CC Article 1170.

⁷ CC Article 1171.

⁸ Mir-Hosseini, *Marriage on trial*, 159.

agreements.¹

The partner who does not have custody may be granted visiting rights,² and these may be enforced by the police.

A woman who has custody by legal right is also entitled to maintenance from the father for the children, which may be enforced by the courts.

The Guardianship of incapables

A child ceases to be under legal guardianship on reaching the age of maturity. If he or she later becomes mentally deficient or insane, a legal guardian must be appointed by the Special Civil Court.³ Outside Iran, the Iranian Consular Officers have the right to appoint guardians for incapable persons, including immature persons who do not have a natural guardian or an executor appointed by the natural guardian.⁴

¹ See Mir-Hosseini, *Marriage on trial*, pp 155-8 for examples.

² CC Article 1174.

³ CC Articles 1192, 1218 to 1227.

⁴ CC Articles 1228 to 1230.

INHERITANCE

Inheritance will be dealt with briefly here, since it is conceivable that a body such as a social welfare organisation might be interested to know that a certain person has or does not have property rights by inheritance or bequest under Iranian law.

Inheritance by will

- Making a will

Articles 835 to 839 provide for a right to make and revoke a will in favour of beneficiaries. What is striking from a western perspective is that the will may not deprive any of the heirs by right of their rightful inheritance (Article 837). Thus heirs and beneficiaries are distinct. Clearly any disposition in favour of beneficiaries will deprive the heirs to some extent, but the precise meaning of article 837 is given in Article 843. This stipulates that the total testamentary disposition may not exceed one third of the estate, except with the permission of the heirs. If some of the heirs agree, the disposition applies only to the share of those heirs. If the legacy exceeds one third of the value of the estate, the excess reverts to the heirs.¹

The rule of one third is applied according to the value at the time the testator dies.² Where the disposition is the usufruct of a property rather than its possession, rules are provided for its valuation.³

The beneficiary must be alive and able to be the owner of the property bequeathed. Where the beneficiary is unborn, property rights only pass to the child if the child is born alive. In general the capacity to possess rights under Iranian law begins at birth,⁴ but we will see several cases in relation to inheritance in which rights appear to be held in suspense until the time of birth.⁵ Moreover an abortion resulting from crime is regarded as equivalent to birth: the heirs of and aborted child who is a beneficiary inherit as if the child was born live.

Where a bequest is made to multiple but defined beneficiaries without

¹ Article 849.

² CC Articles 844, 845.

³ CC Article 846.

⁴ CC Article 956.

⁵ See also CC Article 957.

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 nominate a person to supervise the operations of the executor. A minor may be appointed as an executor, to function together with an adult until the minor reaches adulthood. The executor is a trustee, not a guarantor, but may 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 executor for a minor.

- Acceptance

Article 827 of the Civil Code stipulates that a right of property resulting from a will does not become definite except with the agreement of the beneficiary *after* the death of the testator. Where the beneficiary is a minor or insane, the guardian must accept or reject the legacy. Acceptance may be for all or part of the legacy.³

Article 829 says that an acceptance made before the death of the testator has no effect, meaning by this only that an acceptance made during the lifetime of the testator does not prevent the latter changing his or her will. The following article states that where the beneficiary has accepted the legacy before the death, a second acceptance after the death is unnecessary. An acceptance before death therefore does have effect. However a rejection before the death does not prevent the beneficiary accepting the legacy after the death of the testator.

The heirs (by right) of the testator cannot take possession of the legacy until the beneficiary has stated his or her rejection of it. Where there is a delay harmful to the heirs, the judge (not further defined) will compel the beneficiary to communicate a decision.⁴

Article 828 states that where the beneficiaries are not limited by number, as in the case of a will in favour of the poor or for a work of public benevolence, there is no requirement for a formal acceptance.

¹ CC Article 853.

² CC Articles 854-859.

³ CC Articles 831, 832.

⁴ CC Article 833.

Inheritance by right

The initial section of the Civil Code (articles 861 to 866) provides a brief outline of inheritance by right, dividing it into a right acquired by blood relationship or by marriage (article 861). The latter refers to a surviving spouse.¹ The surviving spouse does not inherit to the exclusion of children (in contrast to western inheritance laws). The relations who inherit are divided into three classes, the lower classes inheriting only if there is no representative of the higher classes.² The classes given are:

- 1) Father, mother and children's children.
- 2) Grandparents, brothers, sister and their children.
- 3) Paternal and maternal uncles and aunts, and their children.

However if the deceased is a non-Muslim, and any of the potential heirs is a Muslim, the Muslim heirs exclude all non-Muslims.³ This means (in contrast to Islamic law in some other countries) that Muslims do inherit from non-Muslims, but not vice versa.

It is striking that the spouse and children appear to have been accidentally omitted from the list above – an indication perhaps that this part of the civil code is not actually used to decide on inheritance cases, which have been worked out in voluminous detail in the traditional *fiqh* books. For our purposes it is sufficient to know that the Father, mother, son, 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 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 trees, but not land.⁵ Their shares may however be decreased by the presence of more distant potential heirs.⁶

The code provides complex rules for the division of the estate, the basic procedure being to determine which heirs have a certain fixed right, such as the right to a half, sixth, or eighth of the inheritance. If the resulting total 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

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 female.²

In addition, article 915 of the Civil Code states that the father's favourite ring, his Qur`án, clothing and sword are inherited by the eldest son, except where there is no other property to be divided among the other heirs. This is an interesting vestige of the rule of primogeniture which applied in pre-Islamic Iranian law.

Only legitimate children inherit, so that a denial of paternity accompanies by li'an (see Divorce, above) prevents paternal inheritance.³ In principle an illegitimate child also does not inherit from the mother.⁴

An heir inherits only if he or she is alive at the time of the death of the deceased, or was conceived at the time of death and is born alive. This may require a delay in dividing the estate.⁵

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 procedural laws of that country will be followed.⁶

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

Duties of heirs

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 ways mirrors the inheritance right. A relative only has a right to maintenance support covering food, clothing, accommodation and furniture where he or she cannot earn a living.⁸ The maintenance costs of parents must be paid by the nearest related child or grandchild in order of kinship,⁹

¹ CC Articles 893-905.

² See e.g. CC Articles 907, 911, 925.

³ CC Articles 882, 883.

⁴ CC Article 884.

⁵ CC Articles 875, 878.

⁶ CC Article 967.

⁷ CC Articles 872, 1022-1028.

⁸ CC Articles 1196, 1197, 1204.

⁹ CC Article 1200.

¹ Article 864.

² CC Articles 886-892.

³ CC Article 881-1.

⁴ CC Article 891.

⁵ CC Articles 913, 945, 947.

⁶ CC Article 892.

⁷ CC Article 914.

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 duty to maintain his wives takes priority.²

AFTERWORD

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.

¹ CC Article 1201.

² CC Article 1203.

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