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CIVIL CODE

CIVIL CODE (*qānūn-e madanī*) of Persia, a series of regulations controlling all civic and social relations between individuals in the various circumstances of their lives. The basic text is the law of 1307 Š./1928, according to which the Civil Code is divided into three parts: Title I on property, Title II on personal status of individuals, and Title III on the law of evidence. It is preceded by an introduction dealing with the promulgation of law and such general principles as the nonretroactive nature of law, freedom and sovereignty of will, and the status of foreign subjects residing in Persia. The code itself has been amended many times, for example, the law of civil liability, the law of property and rent, and family law, which, if included in the original text, would more than double its original length.

Codification and promulgation of the Civil Code

Although the Constitutional law of Persia was adopted in 1324/1906 and its Supplement a year later (see constitutional movement), the civil code was not promulgated for almost thirty years. The first volume was signed into law on 18 Ordībehešt 1307 Š./8 May 1928 and the next two between 6 Bahman 1313 Š./26 January 1935 and 8 Ābān 1314 Š./30 October 1935 (Ṣāleḥ, pp. 993-94). There were various reasons for this thirty-year delay. On one hand, the population of Persia had become acquainted with new democratic criteria for freedom of the individual, equal rights, and the “separation of church and state,” and many people expected the civil code to conform to these principles; on the other hand, the extremely deep and diffuse influence of religious law on the life of the people could not under any circumstances be ignored.

Whenever promulgation of a code of civil law was discussed, first the *ʿolamāʾ* (religious authorities) and then some representatives of the government, each for different reasons, would refuse to agree to the proposed formulas; these two groups thus prevented the presentation of a civil code to the Majles (parliament). As the Civil Code touches on virtually every aspect of every person's life in a society, thousands of eyes were fixed on every provision, whether relative to inheritance, marriage and divorce, property, contracts, liability, donations to religious institutions, wills, nationality, or similar important issues. The government had to take into account all points of view in the preparation of every article in the code and in particular to avoid anything that might offend the tenets of religious law. This necessity was, in fact, the chief problem facing the government (Ṣadr, pp. 211-14; Šāyegān, p. 30; Kasravī, pp. 151-53). Injustice it should be noted that the strength and experience of Reżā Shah's government, particularly the minister of justice, ʿAlī Akbar Dāvar, together with the particular strategies employed in 1307 Š./1928, were instrumental in achieving acceptance of the first volume of the Civil Code; it was presented to the Majles as a single article (*mādda-ye wāḥeda*). Another factor that helped the government to obtain swift confirmation of this law was Reżā Shah's abolition, on 5 Ordībehešt 1306 Š./25 April 1927, of capitulations (the rights of foreign consulates to exercise legal jurisdiction over their own citizens in Persia) and his establishment of a new judicial system (*Gāh-nāma* I, pp. 56-57). Under these circumstances a universal and codified body of civil law was required to shape and protect the legal rights of every person living in Persia, including foreigners (Matīn Daftarī, 1324 Š./1945, p. 12; Ṣāleḥ, pp. 993-94).

Sources of the Civil Code

The primary sources of the Civil Code included Islamic jurisprudence (*feqh*), European law derived from Roman law, and the custom and usage (*ʿorf wa ʿādat*) of the Persian people. Title I, in particular, is based mainly on Islamic jurisprudence, but for Titles II and III, related to such new conditions as naturalization, registration, residency, and the law of evidence, the civil codes of France, Belgium, and Switzerland were the primary sources. Otherwise, with the exception of some of the first ten articles in the introduction to Title I, related to various principles of law drawn from foreign sources, and of book 2 of Title II, which is concerned with international private law, the remainder of the Civil Code can be said to have been inspired by Islamic jurisprudence and private custom and usage (Ṣāleḥ, p. 993).

Religious sources of the Civil Code. The commission that established the articles of the Civil Code was composed both of representatives of the *ʿolamāʾ*; who were thoroughly familiar with Shiʿite law, and of experts on European legal systems; the members included Dāvar, Moṣṭafā ʿAdl (Manṣūr-al-Salṭana), Moḥsen Ṣadr (Ṣadr-al-Ašrāf), Naṣr-Allāh Taqawī, Moḥammad Fāṭemī, Sayyed Kāẓem ʿAṣṣār, Moḥammad Borūjerdī ʿAbdoh, Shaykh ʿAlī Bābā, and Shaykh Moḥammad ʿAlī Kāšī (Ṣadr, I, p. 290; Sāl-nāma-ye Pārs 1308, p. 35). In the preparation of Titles II and III certain substitutions were made in the personnel of the commission; of those serving only Dāvar and ʿAdl had any knowledge of European law. The articles of the Civil Code relating to property and contract, marriage, divorce, inheritance, wills, religious donations, guardianship, and everything appertaining to these subjects were drawn up according to religious law and were frequently taken directly from such works of *feqh* as *Šarāyeʿ-al-Eslām* by Moḥaqqeq Ḥellī, *Lamʿa* and the commentary on it known as *Šarḥ-e lamʿa* by the *šahīdayn* (the two martyrs, i.e., Šams-al-Dīn Moḥammad b. Makkī and Zayn-al-Dīn ʿĀmelī), and *Makāseb* by Shaikh Mortażā Anṣārī. As the conditions of the time demanded, Western codes were taken into consideration in only a few instances.

Roman and European law. New criteria arising from contemporary exigencies unprovided for in traditional Islamic religious law had to be taken into account in the codification of Persian civil law, and guidance was often found in European law (Šāyegān, pp. 35-39; Ṣāleḥ, p. 993). For example, articles relating to the legal residency of individuals, nationality, and the limits placed on the execution of foreign laws and deeds in Persia were framed according to international private law. But, in addition to these provisions, which had been incorporated into Western civil codes since the 19th century, others originated in Roman law transmitted through French law, for example, the law relating to freedom of contract and unjust enrichment. The historical explanation is complex. In Islamic religious law only legally defined contracts (e.g., contracts of sale, rent, or lease) are considered valid and enforceable; agreements reached outside this framework are not covered by Islamic law and have no force in law, just as in ancient Roman law. But the French civil code, in contrast, decrees that any contract between individuals that is not in itself illegal is legally binding on the two parties. This principle has been embodied in article 10 of the introduction to Title I of the Persian Civil Code; which provides that all agreements, insofar as they are not against the law in general, are binding on the signatories. It should be mentioned that approximately 800 provisions of Title I of the Persian Civil Code, though drawn from Shiʿite

religious law, do not appear in any way strange or alien to jurists acquainted with ancient Roman law and the modern legal codes of western European countries derived from it. The bases of the laws regarding property, contract, agreements, and natural obligations in Islamic law are subtly and at times quite clearly similar to those in Roman law. This similarity reflects the rational and logical principles underlying them, rather than any historical connection of a religious or sectarian nature.

Custom and usage (ʿorf wa ʿādat). It is clearly stated in the Persian Civil Code that in matters not expressly covered by the law custom and usage have the power of law; in addition, article 3 of the Code of Civil Procedures (Āʾīn-e dādrasī-e madanī), enacted in 1318 Š./1939, provides that, in the absence of a clear statement of written law, the court must issue a judgment in conformity with custom and usage and that, in the administration of the law, the judge must take the spirit of the law into account. In the provisions of the Civil Code it is not stated to which customs and usages the judge must refer in specific cases. From the general nature of the expressions on this point it is inferred that local usage and custom are intended, so that the judge can, when the law is silent, give judgment according to usages and precedents that have survived from ancient times. But, since the establishment of the Islamic Republic in 1358 Š./1979 and the adoption of a new constitutional law, the fourth principle of which provides that all laws must be in accordance with religious law (cf. article 167), it is evident that article 3 of the Code of Civil Procedures has been abrogated. According to the new constitution, when the law is silent the judge has a duty to strive for a solution to each case that is in conformity with Islamic jurisprudence or the judicial opinions (*fatwā*s) of the *mojtaheds* (theologians). Islamic jurisprudence has thus taken the place of custom and the system of precedents that had been established in the Code of Civil Procedures of 1318 Š./1939.

The social importance of the Civil Code

The Civil Code of Persia contains special features that can be accounted for by the period in which it was promulgated (1307-14 Š./1928-35). First, the demands for freedom and equality that had accompanied the Constitutional movement necessitated the incorporation of these principles; it is thus clearly stated in the Civil Code that each citizen is possessed of inalienable rights and that no one can waive such rights. Even foreign residents were, to a limited extent, possessed of these rights; under certain conditions related to the law of personal status (e.g., marriage, divorce, or inheritance), they were subject to

the laws of their own countries. The same rights were granted to non-Muslim Persians who followed religions considered legitimate by the state (i.e., Christianity, Judaism, and Zoroastrianism). Furthermore, the Civil Code announced the principles of freedom of contract and the nonretroactive nature of the law. Even at the time of its promulgation, however, the Civil Code and its provisions were subject to objections from those keen to "modernize" the country along Western lines. This group sought, for example, the cancellation of the "laws of male primacy" enshrined in religious law: the plurality of wives, the husband's unquestioned right to divorce, differences between male and female offspring in inheritance, the right to remarriage after divorce, the right of the father and paternal relatives to guardianship of a son, and so on. But those who drew up the Civil Code, in formulating the law on these subjects, made not the slightest change in such matters insofar as they were related to Shiʿite custom, except in a very few instances, most of secondary importance, so that even such a respected member of the *ʿolamāʾ* as Sayyed Ḥasan Modarres raised no objection to most of the legislative reforms; in fact, Modarres even mounted a subtle religious defense of some bills that raised objections among some other clerics (Ṣadr, pp. 212-14; Kasravī, pp. 151-53). Many similar examples of the close relationship between the Civil Code and Shiʿite law could be adduced. Some of the modernizing articles incorporated into the Civil Code were ignored after the establishment of the Islamic Republic in 1358 Š./1979. In fact, many provisions of the Civil Code have been changed or canceled. Nevertheless, the Civil Code is unique among Persian laws for its clarity and elegance of language, its simplicity, and the combination of substance and brevity of language; to this date no other law has attained the status of the Civil Code.

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