



FAMILY LAW III. IN MODERN PERSIA

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The basic source of family law in Persia is the *šarī'a* interpreted according to the Ja'farī school of Shi'ite law. In the 20th century there have been two major phases of change, one following the start of the Pahlavi monarchy in 1925 and the other after the founding of the Islamic Republic in 1979. The present article focuses on law related to marriage, divorce, and custody of children.

Until the 1930s, the Shi'a clergy defined and administered family law in accordance with uncodified but well-developed and fully-recognized principles of Ja'fari law. They performed marriages and divorces and dispensed justice in *šarī'a* courts (*maḥākem-e šar'*), which had de facto jurisdiction in all family matters. Reform of the judiciary began with the Constitutional Revolution of 1905-6 and gained momentum under Reżā Shah Pahlavī (1925-41). The aim of the reformers was to create a "modern" and centralized judicial system on a Western model. This was achieved in most areas of law, where European legal concepts and codes were adopted and new courts were established. With family law, however, Shi'ite legal concepts were retained almost intact, partially reformed and gradually grafted onto a new legal machinery (Banani, p. 71; Amin, p. 61).

Between 1927 and 1935 a civil code of 1,335 articles was enacted; articles



relating to personal status were in effect a simplification and codification of dominant opinion within Shi'ite jurisprudence. The code was drafted in three volumes by a commission appointed by the Ministry of Justice (Wezārat-e dādgoštārī), using three authoritative Shi'ite legal texts (Najm-al-Dīn Moḥaqqaq Ḥellī's *Šarā'e' al-Eslām*, Zayn-al-Dīn 'Āmeli Šahīd-al-Tānī's *Šarḥ al-Lom'a*, and Shaykh Mortazā Anšārī's *Makāseb*) as sources and the Belgian, French, and Swiss Codes as models. The second volume, consisting of 301 articles devoted to personal status and the family, was debated and approved, article by article, in the Majles in 1935. Articles 1034 to 1206, dealing with marriage, its dissolution, family relations, and children, retained the patriarchal bias of the *šarī'a*. Limited reforms were introduced, adopting principles from other schools of Islamic law so as to extend the grounds upon which a woman could obtain a judicial divorce to include the husband's refusal or inability to provide for her (Article 1129), his refusal to perform his marital (sexual) duties, his maltreatment of her, and his affliction with a disease which could endanger her life (Article 1130). Otherwise, the only departure from Shi'ite law was Article 1041, prohibiting the marriage of girls under thirteen (Šāyegān, pp. 35-42; Banani, pp. 69-84).

Meanwhile, in 1931 a Marriage Law (*Qānūn-e ezdewāj*) had been enacted, setting out procedural rules for implementation of the civil code concerning matrimonial transactions, which resulted in reduction of the administrative and judicial functions of the clergy. It consisted of twenty articles and two notes. Articles 1 and 2 required marriages and divorces to be registered in civil bureaus set up in accordance with mandates of the Ministry of Justice. Failure to do so did not affect the validity of the marriage or the divorce, but incurred penalties and the loss of legal recognition by the state, thus creating a dual notion of legality: *qanūnī/rasmī* (legal/official) as opposed to *šarī* (religious). Article 3 set financial penalties and prison terms for all those involved in the marriage of girls under 13. Articles 4 and 8 to 17—incorporated, in slightly different wording, in the civil code—dealt with a wife's right to maintenance and her right to initiate divorce proceedings, requiring that such actions be brought initially to civil courts. In the same year the jurisdiction of *šarī'a* courts was reduced to disputes involving the essential validity (*aṣl*) of marriage and divorce (Banani, p. 78).

A major change in the sphere of family law occurred with the enactment of the Family Protection Law (FPL; *Qānūn-e ḥemāyat-e kānevāda*), which curtailed the rights of men to arbitrary divorce and polygamy as enshrined in



the civil code. Originally proposed by Senator Mehrangīz Manūčehriān, president of the Association of Women Lawyers, the FPL was passed by the Majles on 25 Kordād 1346/15 June 1967 and received royal assent on 3 Tīr/23 June.

The FPL, comprising twenty-three articles and one note, achieved its reforms through procedural devices. It changed the rules for registration of marriage and divorce and set up new court procedures, independent of the Civil Procedure Code (*Āṯn- e dādrasī-e madanī*), for dealing with all kinds of familial disputes. All divorcing couples were required to appear in courts presided over by civil judges, some of them women. In the absence of a mutual consent to divorce, the court would, upon the establishment of certain grounds, issue a certificate referred to as “Impossibility of Reconciliation” (*adam-e sāzeš*). Grounds available to men were parallel to those available to women; both could apply to the court to appoint arbitrators to try to bring about reconciliation; although the final decision on divorce and child custody arrangements rested with the court (Articles 6-13). Registration of a divorce without a court certificate was made an offense, subject to the penalty of six months to one year imprisonment for all parties involved, including the registrar (Articles 14, 16). To avoid a clash with *šarī'a* provisions that recognize divorce as the arbitrary right of a man (reflected in Article 1133 of the Civil Code, “A man can divorce his wife whenever he wishes”), the FPL resorted to a legal device: it required that conditions in which a divorce certificate could be requested from the court be included as stipulations in all marriage contracts (Article 17). Article 4 of the 1931 Marriage Law, repeated in Article 1119 of the Civil Code, also recognized stipulations in marriage contacts, giving a wife, in certain conditions, the right to divorce herself on behalf of her husband after establishing in court the existence of a stipulated condition. Before the FPL, it was up to the woman, in effect her family, to negotiate such a right for her, which seldom happened. The FPL made these stipulations an integral part of every marriage contract. In large urban centers, courts that dealt with family disputes and were regulated by the FPL procedural rules became known as “FPL courts.”

In 1975, the FPL was replaced by another law with the same title, comprising twenty-eight articles and nineteen notes, which extended the reforms of the FPL and formally repealed any prior laws conflicting with its mandate. It increased the minimum age at marriage from fifteen to eighteen for females and from eighteen to twenty for males, placed women on a more equal footing



with men with respect to divorce and child custody, and provided the courts with discretionary powers to grant or withhold divorces and to decide on child custody arrangements.

Co-opted later by the official Women's Organization of Iran (Sāzmān-e zanān-e Īrān) under the patronage of Princess Ašraf, the FPL aroused debates that went far beyond its scope and original mandate. Many members of the clergy opposed it from the onset, seeing it as destructive to Muslim values and family structure. Āyat-Allāh Komeynī, in a 1967 ruling, denounced it as contrary to Islam, declaring divorces issued under the FPL to be void (Algar, p. 441). The Pahlavi state took the entire credit for the FPL and hailed it as a major advance in the enhancement of women's legal status and the modernization of society (Afkhami, 1984). Some specialists abroad regarded it as the most radical reform of traditional divorce laws in the Muslim world (Hinchcliffe, 1968a, 1968b; Bagley), while others saw it as limited in impact to the urban middle and upper class and as irrelevant to lower class and rural and tribal women (Higgins). After the Revolution of 1979, the debate took a different turn, with Persian women as the main participants, seeing the FPL as symbolizing the legal advance of Persian women under a secular regime and their loss in an Islamic one (e.g. Tabari and Yeganeh; Sanasarian; Azari; Nashat; Afshar; Afkhami and Friedl).

Family Law in the Islamic Republic. Soon after the victory of the Revolution, a directive from Āyat-Allāh Komeynī's office declared the FPL to be non-Islamic and announced its suspension and the reinstatement of the *šarī'a*. There followed a period of uncertainty until the FPL courts were replaced by Special Civil Courts (*Dādghāh-e madanī-e kāšš*). Created by a legislation with the same name and ratified by the Revolutionary Council on 1 Mehr 1358/22 September 1979, these courts were to be presided over by religious judges (*hākem-e šar'*), free from the provisions of the Civil Procedure Code—hence the term “Special.” Their establishment was seen as a first step towards the application of the *šarī'a* in its most important sphere: the family. It was also the outcome of a compromise between those who urged the immediate restoration of the *šarī'a* and those who argued for a gradual approach (Moḥaqqueq-Dāmād, pp. 513-22; Amin, pp. 132-33). Meanwhile, to enable the judiciary to conform to Shi'ite legal norms, a process of reorganization was initiated.

With respect to family law, two concomitant and contradictory legal developments can be detected: reduction in restrictions imposed on men's rights to divorce and polygamy, and attempts to compensate and protect



women in the face of them. The first began with the dismantling of the FPL and its replacement by the Special Civil Court Legislation (SCCL). The SCCL contained twenty articles and three notes, all but one concerned with defining the structure and jurisdiction of its courts, which are invested with the same degree of discretionary power enjoyed by the FPL courts. It allowed registration of divorces with mutual consent but retained an element of the FPL reform: Note 2 of Article 3 required that, if a husband wished a divorce the court must first refer the case to arbitration; if reconciliation proved impossible, the husband should be given “permission to divorce.” The evident contradiction between this note and the classical Shi’ite position (reflected in Article 1133 of the Civil Code, quoted above) was resolved by reference to a koranic verse (Mir-Hosseini, 1993, p. 55).

Elements of earlier reforms have also been retained in other areas of family law, although in an ad hoc and inconsistent manner. The Council of Guardians (Šūrā-ye negahbān) and the Supreme Judicial Council (Šūrā-ye ‘ālī-e qazā’ī), both set up under the 1979 Constitution, undertook the revision of laws found to be in contradiction with *šarī’a* provisions. In 1982 and 1991, fifty articles of the civil code were either deleted, amended, or replaced (Taleghany, 1995, p. xxi). Article 1041, which set a minimum age at marriage (thirteen for females and fifteen for males), was amended in 1982 to prohibit marriage prior to puberty (defined in the amended version of Article 1210 as nine lunar years for girls and fifteen lunar years for boys). Permission to marry a girl under thirteen could be issued by the Special Civil Courts. Yet Article 3 of the 1931 Marriage Law, which sentenced those involved in a marriage of a girl under thirteen to from six months’ to two years’ imprisonment, was left intact.

A similar double rule exists with respect to polygamy. In 1984, the penalty introduced by the FPL (Article 17) for registering a polygamous marriage without court permission was declared to be inconsistent with the *šarī’a* (Council of Guardians, Opinion 1488, 9 Mordād 1363/31 July 1984). Yet Articles 5 to 7 of the 1931 Marriage Law, requiring a man to declare his marital status at the time of marriage and fixing a sentence of six months’ to two years’ imprisonment if the second wife brings a legal action for deception, have not been repealed.

The situation over polygamy becomes more complicated if temporary marriage (commonly known as *mot’a* or *sā’igā*) is also taken into consideration (Šafā’ī; Murata, 1358, 1991; Haeri). Although the civil code recognizes this as a valid marriage, the 1931 Marriage Law and all subsequent legislation—even



after the Revolution—are silent as to the formalities of its registration. The FPL, by both omission and commission, excluded disputes involving *mot'a* from adjudication on the basis that they were not registered and were thus devoid of legal validity. The aim was to discourage and even to prevent this type of marriage without directly banning it. After 1979, however, the Special Civil Courts not only heard disputes involving *mot'a* unions but could authorize their registration, thus giving them “legal” (*qanūnī*) status (Mir-Hosseini, 1993, pp. 162-91, 1998, pp. 104-7).

With respect to a mother’s custody rights and control over her children after divorce or death of the father, the FPL reforms were severely curtailed. Article 15 of the FPL, which placed a mother on the same level as a paternal grandfather in terms of natural guardianship (*welāyat-e qahrī*) of her children, was among the first to be repealed by a legislation passed on 26 Mehr 1358/18 October 1979 (Šafā’ī, II, pp. 164-68). The civil code gave a mother the right to custody of her daughter until the age of seven and of her son until the age of two (Article 1169). Although, in case of her husband’s death, a woman acquires custody of her children (Article 1170), she loses it if she remarries (Article 1171), and she has to submit to the authority of their paternal grandfather (Article 1180). A single-article legislation passed on 6 Mordad 1365/28 July 1986 gives these mothers and “mothers of martyrs” the right to receive their deceased husband’s salary and to keep the custody of their children even after remarriage.

With the relaxation of restrictions on men’s rights to polygamy and unilateral (not extra-judicial) divorce, attempts were made to compensate and protect women. In 1982, new marriage contracts were issued, carrying two stipulations which marriage notaries are required to read out to couples (Supreme Judicial Council directives dated 19 Mehr 1361/11 October 1982 and 28 Shahrivar 136/19 September 1983). The first stipulation entitles women to claim half the wealth that her husband acquired during marriage, provided that the divorce is neither initiated by her nor caused by any fault of hers. The second enables women to obtain a judicial divorce more or less on the same grounds available to them under the FPL: the only difference is that, in conformity with the *šarī’a* mandate on divorce, the husband can now refrain from signing any of these stipulations. In practice, however, the presence or absence of his signature under each clause has no effect on the woman’s right to obtain a divorce, as the decision lies with the judge. Article 1130 of the Civil Code was amended in 1982 to empower the judge to grant or withhold a



divorce requested by a woman, if he considers that the continuation of marriage would entail hardship and harm (*‘oṣr wa ḥaraj*; Mir-Hosseini, 1993, pp. 65-70).

In December 1992, following pressure by women and the rising divorce rate, a more radical step was taken through the enactment of the Amendments to Divorce Regulation (ADR; Eṣlāḥ-e moqarrarāt marbūṭ be ṭalāq), which reinstated the rejected elements of the FPL divorce provisions but under a different legal logic. The ADR, a single article legislation with seven notes, was first ratified by the Majles on 21 Esfand 1370/10 March 1992, but contested by the Council of Guardians. It was eventually ratified through the intervention of the Assembly for Ascertaining the Interest of the Regime (*Majma‘-e taškīṣ-e maṣlahat-e neẓām*) on 28 Aban 1371/18 November 1992.

The ADR outlaws the registration of all divorces without a court certificate—which incidentally has the same name as that issued under the FPL: “Impossibility of Reconciliation.” It requires all divorcing couples, even those who have reached an agreement, to go through a process of arbitration. If the arbiters, one chosen by each side, fail to reconcile them, the court allows the man to effect and register a divorce only after he has paid his wife all her dues, i.e. her *mahr*, and *‘edda* (the waiting period after marriage during which a woman cannot remarry) maintenance, unless he convinces the court of his inability to pay (Notes 1, 2, and 3). If the divorce is *rojī‘* (revocable), the divorced wife is required to stay in the marital home during this period (Note 4). Note 5 allows the appointment of women as advisory judges to work in cooperation with the main judge. Note 6, which was contested by the Council of Guardians, enables the court to place a monetary value on women’s housework and to force the husband to pay her “wages in kind” (*ojrat al-metl*) for the work she has done during marriage, provided that divorce is not initiated by her or is not caused by any fault of hers. If this is not possible, then the husband has to make a “gift” to the wife, the amount to be decided by the court on the basis of his financial circumstances, the duration of marriage, and the tasks she has performed.

With the enactment of the Law of Formation of General Courts, which has brought about a restructuring of the courts, the Special Civil Courts disappeared. This law, ratified by the Majles and endorsed by the Council of Guardians on 15 Tīr 1373/5 June 1994, required familial disputes, like others, to appear in General Courts, presided over by either a *mojtahed* or a civil judge who had jurisdiction over all types of cases from penal to familial. Cases



involving a dispute over the essential legality of marriage and divorce were referred to courts whose presiding judge was authorized by the head of the judiciary (Kešāvarz, pp. 9-14).

In 1998, changes in family law under the Islamic Republic seemed still to be unfolding and far from complete. On 1 Esfand 1375/20 February 1997, a bill was presented to the Majles requiring family cases to be heard in specific courts presided over by married judges with at least eight years judicial experience; it also required the presence of female advisory judges (*mošāwarān-e qazā'ī-e zan*). The bill was ratified on 8 Mordād 1376/30 July 1997. On 21 Aḍar 1375 the Majles passed a note to Article 1082 of the civil code, according to which a woman's *mahrīya*, if in cash, should be recalculated to take account of inflation. The Council of Guardians approved this note on 6 Ḵordād 1376/29 May 1997.

See also [DIVORCE](#); [MARRIAGE](#).

BIBLIOGRAPHY

M. Afkhami, "Iran, a Future in the Past: The 'Prerevolutionary' Women's Movement," in R. Morgan, ed., *Sisterhood is Global*, Garden City, N.Y., 1984, pp. 333-41.

M. Afkhami and E. Friedl, eds., *In the Eye of Storm: Women in Post-Revolutionary Iran*, New York, 1994.

H. Afshar, "Women, Marriage, and the State in Iran," in H. Afshar, ed., *Women, State, and Ideology: Studies from Africa and Asia*, Albany, N.Y., 1987, pp. 70-86.

H. Algar, tr., *Islam and Revolution: Writings and Declarations of Imam Khomeini*, Berkeley, 1981. M. Amid, *Le Divorce en Droit Iranien*, Paris, 1939.

S. H. Amin, *Middle East Legal Systems*, Glasgow, 1985.

A.M. Amirian, *Le Mouvement législatif en Iran et le mariage en droit et en fait—sa réforme*, Paris, 1937.



Idem, *Le mariage en droit Iranien et Musulman comparés avec le droit français* I, Paris, 1938.

F. Azari, ed., *Women of Iran*, London, 1983.

F. R. C. Bagley, "The Iranian Family Protection Law of 1967: A Milestone in the Advance of Women's Rights," in C.E. Bosworth, ed., *Iran and Islam*, Edinburgh, 1971, pp. 47-65.

A. Banani, *The Modernization of Iran*, Stanford, 1961.

Daftar-e omūr-e zanān dar nahād-e rīāsāt-e jomhūrī (Women's Office of the President's Organization), *Jāygāh-e zan dar qānūn*, Tehran, 1373 Š./1995.

S. H. Emāmī, *Hoqūq-e madanī* IV and V, Tehran, 1363 Š./1984.

S. Haeri, "Women, Law and Social Change in Iran," in J. I. Smith, ed., *Women in Contemporary Muslim Societies*, London, 1980, pp. 209-34.

Idem, *Law of Desire: Temporary Marriage in Iran*, London, 1989.

P. Higgins, "Women in the Islamic Republic of Iran: Legal, Social, and Ideological Changes," *Signs* 10, 1985, pp. 477-95.

Najm-al-Dīn Moḥaqqueq Awwal Ḥellī, *Šarāye' al-eslām*, ed. and tr. by A. Yazdī and M.-T. Dāneshpažūh, Tehran, 1346/1967; repr. 1364/1985.

D. Hinchcliffe, "Legal Reforms in the Shi'i World: Recent Legislation in Iran and Iraq," *Malaya Law Review* 10/2, 1968a, pp. 292-305.

Idem, "The Iranian Family Protection Act," *International and Comparative Law Quarterly* 17, 1968b, pp. 516-21.

G. Ḥojjatī Ašrafī, *Majmū'a-e qawanīn: asasī wa madanī bā ākarīn ešlahāt-e 1374*, Tehran, 1374 Š./1995.

M. J. Ja'farī Langarūdī, *Hoqūq-e Kānevāda*, Tehran, 1368 Š./1989.

N. Kātūzīān, *Hoqūq-e madanī-e kānevāda*, Tehran, 1368 Š./1989.

B. Kešāvarz, *Negareš-ī bar qānūn-e taškīl-e dādghāhā-ye 'omūmī wa enqelāb*, Tehran, 1374 Š./1995.



S. Mahdavi, "The Position of Women in Shi'a Iran: Views of the Ulama," in E. Fernea, ed., *Women and the Family in the Middle East: New Voices of Change*, Austin, 1985, pp. 255-68.

T. Mahmood, *Family Law: Reform in the Muslim World*, Bombay, 1972.

M. Manūcheriān, *Enteqād: qawanīn-e asāsī wa madanī wa kayfarī-e Īrān*, Tehran, 1328 Š./1949.

Z. Mir-Hosseini, *Marriage on Trial, A Study of Islamic Family Law: Iran and Morocco Compared*, London, 1993.

Idem, "Divorce, Veiling and Feminism in post-Khomeini Iran," in H. Afshar, ed., *Women and Politics in the Third World*, London, 1996, pp. 142-69.

Idem, "Mariage et divorce: une marge de négociation pour les femmes," in N. Yavari-d'Hellencourt, ed., *Les Femmes en Iran: pressions sociales et stratégies identitaires*, Paris, 1998, pp. 95-118.

S. M. Moḥaqqueq-Dāmād, *Barrasī-e feqhī-e ḥoqūq-e kānevāda*, Tehran, 1365 Š./1986.

S. Murata, *Ezdewāj-e mowaqqat*, Tehran, 1358/1979. Idem, *Temporary Marriage (Mut'a) in Islamic Law*, Qom, 1991.

A. R. Naqavi, "The Family Laws of Iran," *Islamic Studies* 6, 1967, pp. 241-66; 7, 1968, pp. 129-36.

G. Nashat, "Women in the Ideology of the Islamic Republic," in G. Nashat, ed., *Women and Revolution in Iran*, Boulder, 1983, pp. 195-216.

P. Paidar, *Women and the Political Process in Twentieth-Century Iran*, Cambridge, 1995.

B. Pakizegi, "Legal and Social Positions of Iranian Women," in L. Beck and N. Keddie, eds., *Women in the Muslim World*, Cambridge, Massachusetts, 1978, pp. 216-26.

F. Qorbānī, *Majmū'a-ye kāmel-e qawanīn wa moqarrarat-e kānevāda wa madanī-ye kāšš*, Tehran, 1370/1991.

E. Sanasarian, *The Women's Rights Movement in Iran*, New York, 1982.



S.-H. Şafā'ī and A. Emāmī, *Hoqūq-e k̄ānevāda I: Nekāh wa enḥelāl-e ān (ṭalaq wa fask) II: Qerābat wa nasab wa āṭār-e ān*, Tehran, 1374/1995.

M. Şafa'ī, *Mot'a wa āṭār-e hoqūqī wa ejtemā'ī-e ān*, Tehran, 1341.

A. Şāyegān, *Hoqūq-e madanī-e Īrān I: Moqaddama dar kolliyat, aşkāş wa k̄ānavāda*, Tehran, 1324 Ş./1946.

Sāzmān-e zanān- e Īrān (Women's Organization of Iran), *Ketāb-e semīnār-e barrasī-e natā'ej-e ejrā'ī-e qānūn-e ḥemāyat-e k̄ānevāda*, Tehran, 1972.

Idem, *The Iranian Women: Past and Present*, Tehran, n.d.

A. Tabari and N. Yeganeh, eds., *In the Shadow of Islam*, London, 1982.

M. A. R. Taleghany, tr., *The Civil code of Iran*, Littleton, Colo., 1995.

M. H. Waṭanī, *Majmū'a-ye kāmēl-e qawanīn va moqarrarat-e omūr-e k̄ānevāda*, Tehran, 1366 Ş./1987.