

## CHAPTER XI

## IRAN

## CENTRE OF THE SHIITE ISLAM

Under the provisions of the Iranian constitution, Islam is the official religion of the Kingdom and any man-made law which is repugnant to the sacred principles of Islam shall be *ultra vires*.<sup>1</sup> The *Ithnā 'Asharī (Jāfrī)* school of Islamic law has its stronghold in Iran, its followers being in an overwhelming majority. As regards the minorities following the various *Sunnī* schools, the *Laws of Personal Status (Non-Shī'a Iranians) Application Regulation*, 1933 provides that they shall be governed by their own laws and customs in the matters of personal status, inheritance and bequests.<sup>2</sup> It is further laid down by this *Regulation* that where the parties to a case belong to different schools of law, the law followed by the husband shall be applied to matters relating to marriage and divorce, whereas inheritance and bequests shall be governed by the law followed by the propositus or the legator, as the case may be.<sup>3</sup>

## II

## THE CIVIL CODE OF 1935

One of the earliest steps for the codification of Islamic law was taken up in Iran. The law of personal status was first codified here as a part of the comprehensive *Civil Code* enacted between 1928 and 1935. In 1927, the Iranian Ministry of Justice set up a Commission to prepare the draft of a civil code. It submitted the required draft in several instalments. Its provisions relating to matters other than family law and succession were derived from the

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1. *The Constitution of Iran*, 1906, articles 1-2.  
 2. *Qānūn ijāza riāyat Ahwāl al-Shakhsiya Irāniān Ghayr Shī'*, 31 *Tir.*, 1312, article 1.  
 3. *Id.* article 2.

*Code Napoléan* of France in so far as the latter did not conflict with the principles of the *Sharī'a*.<sup>4</sup> On the other hand, those parts of the draft code which dealt with matrimonial affairs, guardianship, maintenance, intestate and testamentary succession represented "codification, simplification and unification of the *Sharī'a* law".<sup>5</sup> The latter provisions were framed in accordance with the opinions of two leading jurists of Iran, Muhammad Fātimī and S.M. Kāzīm Assar.<sup>6</sup> On the basis of the draft so prepared by the commission, the Iranian legislature enacted the *Qanūn Madanī* (Civil Code), in three instalments between, 1928 and 1935.<sup>7</sup>

The Iranian *Civil Code* is a bulky enactment dealing at length with the whole of the civil law. The law relating to succession is found in articles 861 to 949 whereas the whole of *Book VII* deals with marital and family affairs. All these parts of the *Code* were based exclusively on the traditional *Ithnā 'Asharī* law.

The traditional *Ithnā 'Asharī* (*Jāfī*) law relating to inheritance and wills, as incorporated in the *Civil Code of 1935*<sup>7</sup> is in force in Iran till the present day, without any reform. On the contrary, the law of marriage and divorce as originally laid down in the *Code* has not remained unchanged.

## II

### REFORM OF MARRIAGE LAW

The law relating to marital transactions as originally laid down in *Book VII* of the *Civil Code* of 1935 was reformed more than once in the following years. A separate law dealing with marriage and divorce, known as *Qanūn Izdiwāi* (Marriage Law) was also enacted in 1931.<sup>8</sup> It introduced into the matrimonial law certain principles authority for which could be found in the schools of Islamic law other than the *Ithnā 'Asharī* school. Some of them were based on social or administrative considerations. A few additions of a similar nature were made to the new *Marriage Law* by two other enactments enforced in 1937 and 1938.<sup>9</sup>

In 1967, the Iranian legislature enacted another very important law reforming further certain aspects of the law relating to marriage and divorce. This law, enforced on 24 June 1967, is known as the *Qānūn Himāyat Khāneiwāda* (Family Protection Law). The purpose of the new law was to

4. Nasr, S. Hossain in *Symposium on Changes in Muslim Personal Law* (New Delhi, 1964), 92.

5. Bānani, *Modernization of Iran* (Stanford, 1961), 71.

6. Nasr, *op. cit.* n. 4.

7. Articles 1034 to 1057.

8. Law of 14 August 1931.

9. Law of 19 May 1937 and the *Law Relating to Production of the Certificate of Medical Fitness*, 1938.

regulate the institutions of divorce and polygamy with a view to preventing their misuse.

A summary of all the reforms introduced into the marriage laws between 1931 and 1967 follows.

#### REGISTRATION OF MARRIAGE

The present Iranian law requires that every marriage must be duly registered in accordance with the prescribed rules; failure to do so will not affect the validity of the marriage but is punishable under law.<sup>10</sup> Before a marriage is registered, the parties shall be asked to produce certificates of medical fitness.<sup>11</sup>

#### FREE CONSENT

Both the parties to an intended marriage must give their free consent to it. It is an offence to obtain by inducement the consent of a person for his or her marriage.<sup>12</sup>

#### PRE-MARITAL STIPULATIONS

The parties to an intended marriage may incorporate, in the deed of marriage, any lawful stipulations. So long as any such stipulation is not opposed to the very purpose of marriage, it shall be enforceable by the courts.<sup>13</sup>

#### CHILD MARRIAGE

The minimum marriage-age as laid down in the Iranian *Civil Code* is eighteen years for men and fifteen years for women.<sup>14</sup> Marrying a person who is below this age is an offence punishable under the *Marriage Law* of 1931.<sup>15</sup>

#### BIGAMOUS MARRIAGE

The *Marriage Law* of 1931 requires that if at the time of marriage a man is already married he must inform the woman about the fact of his first marriage; his failure to do so is an offence.<sup>16</sup> To this rule, the *Family Protection Law* of 1967 adds that a person desiring to contract a bigamous

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10. The *Marriage Law*, 1931, article 1.

11. *Production of Medical-Fitness Certificate Law*, 1938, article 1.

12. The *Marriage Law*, 1931, article 5.

13. *Id.* article 4.

14. Article 1041.

15. Article 2.

16. Article 6.

marriage must seek the prior permission<sup>17</sup> of the Court. Before giving such permission, the Court shall satisfy itself about the capacity of the husband to maintain more than one wife and to treat the co-wives equitably. A person violating this requirement shall incur the penalties laid down in the *Marriage Law* of 1931 for the offence of contracting a bigamous marriage by concealment from the second wife of the fact of the first marriage.<sup>18</sup> A wife whose husband has contracted a second marriage, with or without the Court's permission but against her own wishes, may seek dissolution of her marriage by the Court.<sup>19</sup>

#### DISSOLUTION OF MARRIAGE

The *Family Protection Law* of 1967 has taken away from the husband the freedom to pronounce a unilateral divorce. Under article 8 of this law, either spouse who wishes to get the marriage dissolved should make an application to the Court whereupon the Court shall try, through arbitrators if necessary, to effect a reconciliation between the spouses and prevent the dissolution from taking place. If the Court finally fails to do so, it shall issue a certificate of the 'impossibility of reconciliation'. The Divorce Notaries may register a divorce on production of such a certificate by either spouse within three months from the date on which it is issued.

The grounds on which either of or both the spouses may apply for a certificate of 'impossibility of reconciliation' are listed in several provisions of the *Civil Code* of 1935, the *Marriage Law* of 1931 and the *Family Protection Law* of 1967.<sup>20</sup> These are as follows:

- (i) permanent or recurring insanity of the other spouse,<sup>21</sup>
- (ii) affliction of the husband with impotency or castration or amputation of the genital organ,<sup>22</sup>
- (iii) affliction of the wife with prostration of the womb or similar sexual defects, black or white leprosy, or complete blindness,<sup>23</sup>
- (iv) imprisonment of the other spouse for five years or more, if the order of punishment is being executed,<sup>24</sup>
- (v) any dangerous addiction on the part of the other spouse prejudicing the continuance of the marital life,<sup>25</sup>

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17. Article 14.

18. Article 6.

19. The *Family Protection Law*, 1967, article 11(c).

20. See the *Family Protection Law*, 1967, article 11.

21. The *Civil Code*, 1935, article 1121.

22. The *Civil Code*, 1935, article 1122.

23. The *Civil Code*, 1935, article 1123.

24. The *Family Protection Law* 1967, article 11.

25. *Ibid.*

- (vi) a second marriage of the husband against the wishes of the aggrieved party,<sup>26</sup>
- (vii) desertion on the part of the other spouse,<sup>27</sup>
- (viii) conviction of the other spouse by a final judgement for an offence repugnant to the status of the family and the dignity of the aggrieved spouse,<sup>28</sup>
- (ix) mutual agreement between the spouses for a divorce,<sup>29</sup> and
- (x) a stipulation in the marriage-contract as to a 'delegated divorce' (*talāq al-tafwīd*) authorising the wife to divorce herself in specified circumstances.<sup>30</sup>

Since the right to divorce primarily belongs, according to the *Shari'a* as traditionally interpreted, to the husband and the wife can get such a right only through a necessary stipulation in the marriage-contract, article 17 of the *Family Protection Law* directs the incorporation of grounds (i) to (viii) above in every marriage-contract and, thus, keeps the newly introduced rights of wives within the limits of the classical law.

As regards husbands, it is not clear from the provisions of the *Family Protection Law* if the above grounds are exhaustive or if he can seek a certificate of 'impossibility of reconciliation' on any other grounds too, e.g., incompatibility of temperament.

#### INTEREST OF DIVORCEE AND CHILDREN

The Court shall, while considering the grant of a certificate of 'impossibility of reconciliation', issue directions relating to maintenance and custody of children and also make provision for the payment of alimonies to the wife during the period of 'idda.<sup>31</sup>

#### MAINTENANCE OF WIFE

The *Marriage Law* of 1931 deals with the wife's right to maintenance. It provides that if an order of the Court directing the husband to provide maintenance to the wife, issued on her application, cannot be executed, she may demand dissolution of marriage by the Court.<sup>32</sup> It further permits the wife to live separately from her husband, without losing her right to

26. *Ibid.*

27. *Ibid.*

28. *Ibid.*

29. *The Family Protection Law*, 1967, article 9.

30. *The Marriage Law*, 1931, article 4; *the Family Protection Law*, 1967, article 10.

31. *The Family Protection Law*, 1967, articles 12, 13, 18.

32. *Id.* article 10.

maintenance, if she has left her husband's house due to a fear of unbearable physical injury or monetary loss.<sup>33</sup>

#### SETTLEMENT OF FAMILY-DISPUTES BY ARBITRATORS

The *Family Protection Law, 1967* provides that the Court may refer a marital or family dispute to arbitrators if either party thereto requests for it.<sup>34</sup> A case in which the validity of a marriage-contract or a divorce is involved shall, however, be decided by the Court itself and cannot be referred to arbitrators. The procedure to be followed by the arbitrators in the settlement of disputes referred to them is laid down in detail in article 7 of the law.

The above reforms introduced into the family law in Iran now distinguish it, in many important aspects, from the traditional *Ithnā 'Asharī* law.

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33. *Id.* article 12.

34. *Id.* article 6.

APPENDIX TO CHAPTER XI  
TEXT OF THE IRANIAN FAMILY LAWS\*

(i) THE MARRIAGE LAW, 1931-37

REGISTRATION

1. Every marriage, divorce, or revocation of divorce shall, before it is actually contracted or effected, be registered with the prescribed authority. Failure to register any of these transactions shall be punishable by imprisonment for one to six months.

2. The certificate of marriage or divorce issued in accordance with the prescribed rules shall constitute the legal proof of a marriage or divorce, as the case may be.

CHILD-MARRIAGE

3. Whoever marries a person below the minimum marriage-age as prescribed by article 1031 of the *Civil Code*, or is an accessory to a marriage either party to which is below the said age, shall be punishable by imprisonment for six months to two years; if the girl is below the age of thirteen years, the punishment shall be imprisonment for two to three years. In all cases an additional fine of an amount of 2,000 to 20,000 *riyals* may also be imposed.

STIPULATIONS IN MARRIAGE-CONTRACT

4. The parties to a marriage may, at the time of marriage, stipulate any lawful conditions not opposed to the purpose of marriage. A wife can stipulate that if her husband disappears, or fails to provide maintenance to her for a long period, or assaults her, or maltreats her in a way which makes the marital relations intolerable, she will have power to seek, from the Court, an irrevocable divorce to be pronounced by it on behalf of the husband.

CONSENT OBTAINED BY FRAUD

5. Either party to an intended marriage who obtains by fraud the consent of the other party thereto shall be liable to imprisonment for six months to two years.

BIGAMOUS MARRIAGE

6. A man must, at the time of marriage, inform the woman if he is already married; if he gives false information he shall be liable to imprisonment for the period specified in the preceding article.

7. In all the above cases, proceedings may be instituted on the application of the aggrieved party; all such offences shall be compoundable.

8. The spouses shall behave towards each other with benevolence.

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\*This English translation of the two Iranian laws has been prepared by the author of the present study and is based on their official Persian texts.

9. Maintenance of the wife shall be the husband's liability.

*Explanation :*

Maintenance includes residence, food, clothing and reasonable household goods.

10. In the case of the husband's failure to provide maintenance, the wife can approach the Court. The Court shall thereupon fix the scale of maintenance and direct the husband to pay it.

If the Court's order cannot be executed, the wife may apply for dissolution of marriage.

11. Subject to a contract to the contrary, the husband shall have power to decide regarding the place of residence for the wife.

12. Where the wife leaves her husband's house due to a fear of grave physical or financial injury, she shall not be directed to return and shall not lose her right to maintenance while living separately.

13. In a case under the foregoing article, the spouses shall decide about the place where the wife shall reside. If they cannot agree on it, their near relatives or, in their absence, the Court shall settle the matter.

14. The wife can deal with her own property in any way she likes without the permission of the husband.

#### CUSTODY OF CHILDREN

15. The mother shall have the custody of male children up to two years from the date of birth, after which the father shall have the right to their custody; in case of girls, the mother's right to custody shall extend up to seven years of age.

16. If during the period of custody the mother marries another person or becomes insane or refuses to look after the children, the father shall take charge of the children.

#### (ii) THE FAMILY PROTECTION LAW, 1967

1. -All civil disputes of a family or matrimonial nature shall be dealt with, notwithstanding the provisions of the *Civil Procedure Code*, by a *Sharistān* (town) Court or, where there are no such Courts, by a *Bakhsh* (county) Court.

2. Civil disputes of a family nature include civil litigation involving the spouses, children, paternal grandfather, guardians and executors of wills, arising from the rights and duties specified in *Book II* (Marriage and Divorce) *Book VIII* (Children), *Book IX* (Family), and *Book X* (Wardship and Guardianship), or in articles 1005-1006 or 1028-30, of the *Civil Code* and the relevant articles of the *Qānūn Umūr Hisbī*, 1940.

3. The Court may take up any investigation or other measure, in any form it deems appropriate, to have a correct appreciation of the subject of litigation and to ensure proper redress, including examination of witnesses and experts and soliciting help of social workers.

4. Should the Court consider either party to a case unable to bear the cost of litigation, it may exempt such party from the court fee, arbitration fee, experts' remuneration and other expenses, and may appoint counsel for such party. If such party wins the case, it shall pay the costs from which it was so exempted and also the fee of the counsel appointed by the Court.

5. Counsels and experts referred to in the preceding article shall comply with the instructions issued by the Court.



6. The Court shall refer the dispute (except when it concerns the validity of a marriage or a divorce *per se*) to one to three arbitrators, if so requested by either party. The arbitrators shall submit their award within a period specified by the Court. The Court may reject the application for appointment of arbitrators if it is convinced that it is made with a view to prolonging the litigation or avoiding a judicial hearing.

The arbitrators appointed under this law shall not be bound by the procedure specified in the *Civil Procedure Code*.

7. The arbitrators shall try to effect a reconciliation between the parties. Should they fail to remove the differences, they shall give to the Court their award about the nature of the dispute within a period specified by the Court.

The award will be communicated to the parties by the Court. The parties may file their objections within ten days of its receipt.

When the parties accept the award, or do not object thereto within the specified period of limitation, it shall be enforced. In case of objections being filed against it, the Court shall deal with such objections in an extra-ordinary sitting and shall pronounce its own judgement which shall be final.

If the arbitrators do not give their award within the specified period, the Court shall itself proceed to examine the nature of the case and decide on it.

8. A divorce shall be effected after the Court has examined the case and has issued a certificate of *impossibility of reconciliation*. The party desiring such a certificate must submit to the Court a petition therefor giving reasons. When the Court receives such an application from either party, it shall, by itself or through arbitrators, try to remove the differences and prevent the divorce. If the Court fails in its efforts, it shall issue a certificate of *impossibility of reconciliation*. The Divorce Notaries shall effect a divorce after receiving such a certificate, and shall register the divorce.

9. If the husband and wife have mutually agreed on divorce, they must notify their decision to the Court. The Court shall thereupon issue a certificate of *impossibility of reconciliation*. In such a case, if the parties have not provided in their agreement suitable arrangements for the care of children and their maintenance, the Court shall take action under article 13 of this law.

Where the arrangement made by the spouses for the children are disturbed after the divorce, the Court shall, upon an application made by either parent, a relative of the children, or a public prosecutor of the town, take action under article 13.

10. In respect of article 4 of the *Marriage Law* (1931) also, when the wife wishes to divorce herself on behalf of her husband, she must obtain a certificate of *impossibility of reconciliation* from the Court.

11. In addition to the circumstances specified in the *Civil Code*, in the following cases as well the wife or husband can make an application to the Court for a certificate of *impossibility of reconciliation* :

- (a) where the other party has been, by a final judgement, sentenced to imprisonment for five years or more, or with fine the equivalent of which, in case of inability to pay, is imprisonment for such period, or to fine and imprisonment totalling to imprisonment for such period, and the order is being executed,
- (b) dangerous addiction of the other party which, in view of the Court, prejudices the continuation of family life and which make the continuance of the marital union impossible,
- (c) where the husband has, without the consent of his wife, married another woman,
- (d) when the other spouse has deserted the family life; the decision whether there has been a desertion being of the Court, and

- (e) where the other spouse has been convicted, by a final judgement, for having committed an offence repugnant to the status of the family or dignity of the other party; the decision whether an offence is so repugnant to the family prestige or other party's dignity is to be taken by the Court on the basis of the circumstances, local custom and other relevant factors.

12.(1) In all cases when a matrimonial dispute results into the grant of a certificate of *impossibility of reconciliation*, the Court shall determine and fix the conditions for the maintenance of children and the alimony payable during the period of *'idda*, in accordance with the social and financial conditions of the parties and the interest of children. The Court shall, when issuing the said certificate, specify the arrangements for the children to be followed after the divorce, and if it decides that the children will remain with them or any other person, it shall also specify the manner of their maintenance and its cost.

(2) The maintenance of wife shall be payable from the income and belongings of the husband and that of the children from the income or belongings of either the husband or the wife or both. The Court shall specify the amount obtainable for each child from such income or assets and the method for its realisation. The Court shall also specify arrangements for the meeting of the children with both the parents. In case of either parent's death, the right to visit the children will pass on to the close relatives of the deceased.

(3) The children whose parents had separated from each other before the enforcement of this law, for whom no arrangement for the expenses of maintenance and custody had been made, shall be entitled to such arrangement under the provisions of this law.

13. In every case where the Court, on being informed by either parent or close relatives of the children or by the Public Prosecutor, comes to the conclusion that it is necessary to reconsider the arrangements made earlier for the custody of children, it shall proceed to reconsider it. In such a case, the Court may give the custody of a child to any person it deems fit, but, in that case, the responsibility regarding the expenses of custody during such period will be of the person who, according to the Court's decision, is bound to pay it.

14. If a husband wishes to marry another woman, he must seek permission of the Court to do so. The Court shall give such permission after it satisfies itself, through all necessary measures including examination of the existing wife, regarding the financial capability of the husband and his capacity to do justice.

If a person, without obtaining the Court's permission, contracts a second marriage, he shall be punishable with the penalty laid down in article 5 of the *Marriage Law of 1310-1316 (1931-37)*.

15. The husband may, with the approval of the Court, prohibit his wife from engaging in any employment which may be repugnant to the prestige of the family or the interest of the wife or of the husband himself.

16. The judgement of the Court in the following cases shall be final, (whereas a revision may be applied for in other cases) :

- (a) issue of the certificate confirming *impossibility of reconciliation*,
- (b) fixation of maintenance during *'idda* and expenses for the maintenance of children,
- (c) custody of children,
- (d) right of the father or mother or close relatives of an absent parent to visit the children, and
- (e) the permission referred to in article 14.

17. The provisions of article 11 shall be incorporated as conditions in respect of marriage in every marriage-contract and, for such matters, an irrevocable power of repudiation in favour of the wife shall be specified in such contracts.

A divorce so provided for, when pronounced, shall be irrevocable in accordance with the provisions of the *Civil Code*.

18. The spouses or either of them may apply to the Court that before entering into the merits of the case the question of the custody of children, their existing conditions or the expenses of their maintenance, be given immediate consideration and orders issued on such matters.

Whenever such an application is made to the Court it shall consider such matters. Any order issued by the Court about the maintenance and custody of children shall be executed forthwith.

19. After the enforcement of this Law, Divorce Notaries can no longer effect and register a divorce unless an order of the Court in that behalf or a certificate of *impossibility of reconciliation* is produced. Those who violate this rule shall be liable to administrative penalty.

*Note :*

The period of validity for a certificate confirming *impossibility of reconciliation* shall be three months from the date on which it has been issued.

20. Hearing of family disputes shall be held *in camera*.

21. The Court's orders shall be enforced in accordance with the general principles.

22. Rules for the enforcement of this Law shall be framed by the Ministry of Justice within three months from the date of its enforcement and such rules, after these have been enacted and approved by the Cabinet, shall be enforced.

23. The Government shall enforce this Law.

