

**The Legal Regime Governing the Economic Situation of Married  
Women in Iran. A Dialogical View from Quebec**

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# Introduction

## Abstract

Family is the basic unit of society, and is grounded upon social, legal, religious and economic constructs.<sup>1</sup> The economic construct of the family and the division of economic rights and responsibilities have been addressed and studied from different perspectives by scholars.<sup>2</sup> The aim of the work that had been done on this topic is often to promote the economic situation of women by studying the rules and principles governing the rights and responsibilities of married persons. These rules and principles are found in civil law and common law principles, religious or customary laws, and other marriage-related contracts and agreements.

Depending on cultures and societies, and the often differential treatment they apply to men and women, entering into marriage may deteriorate women's economic situation. The gender-based division of labor within family, which disproportionately burden women, notably through childcare responsibilities, causes a substantial decline in women's income and interrupts their education and employment.<sup>3</sup> This makes it difficult for women to have a career for themselves after a separation or divorce.<sup>4</sup> Therefore, there is a general belief that legal principles and laws governing the marital relationship and property rights should be structured to protect women's economic interests.

To establish an equitable economic framework between spouses, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) opts for an egalitarian

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<sup>1</sup> General Assembly Resolution, '217 a (iii)', *Universal Declaration of Human Rights*, (1948). Article 16 (3).

<sup>2</sup> For Example see: Hr Hahlo, 'Matrimonial Property Regimes: Yesterday, Today and Tomorrow', *Osgoode Hall LJ*, 11 (1973), 455.

and also see: Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari 'Ah', *WANTED*, (2009), 23.

<sup>3</sup> Laura Neuman, 'Marriage, Family and Property Rights ', ([https://www.ohchr.org/Documents/Publications/PractitionerToolkit/WA2J\\_Module2.pdf](https://www.ohchr.org/Documents/Publications/PractitionerToolkit/WA2J_Module2.pdf); New York, USA: The United Nations Entity for Gender Equality and the Empowerment of Women, 2018) at 7-12.

<sup>4</sup> Committee on the Elimination of Discrimination Against Women, 'General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women', (2013), *ibid.* CEDAW/C/GC/29 I(1).

regime which asks for equal rights and responsibilities for both men and women, during and after the marriage. It rules in favor of a partial community of property between spouses according to which all economic advantages and disadvantages arising from a marriage and its dissolution should be borne equally by both parties.<sup>5</sup> (Assembly 1979)

However, legal regimes differ in outlining the method of contribution each spouse must commit to the household, financial maintenance, and the division of property after a separation or divorce. Some legal regimes, following the CEDAW, emphasize formal equality and grant similar rights and responsibilities to both parties, while establishing a partial community of property. Another group of legal regimes establish the separation of property as the guiding principle for marital economic relationships, wherein the expenses should be borne by men as the heads of the household, whereas women should be compensated for their unpaid contributions to the household.<sup>6</sup>

As a country with a Sharia-based Civil law system and a specific cultural background, Iran has its own special matrimonial regime and does not follow the CEDAW's approach to women and men's rights and responsibilities. Iran's matrimonial regime bases itself on Sharia's approach to men and women, and is anchored in Iranian culture. This accounts for a legal matrimonial system that is different from laws existing in Western countries. Under this system, the husband and wife have different economic responsibilities.

This thesis examines Iran's matrimonial regime and compares it to the Quebec matrimonial regime. Such a comparative study hopes to bring some novel suggestions aiming at correcting certain deficiencies in the current Iranian matrimonial regime. While Quebec family law espouses a contributory approach for both spouses in marital life, all economic institutions under Iranian family law are designed to enforce a compensatory approach toward the spouses' economic relation. The compensatory approach of Iranian law to the financial aspects of marital life causes some difficulty for the wife, which is exacerbated at the time of the termination of the marriage.

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<sup>5</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (1979). Article 16.

<sup>6</sup> [https://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1\\_en.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf) p.7-8

Besides assessing the issues with Iran's marital regime, this research seeks to propose legal solutions for enhancing the economic rights of women. A holistic approach will therefore be adopted, which will lead us to take into consideration certain cultural and religious specificities which have become mandatory rights in Iran. The reform proposals put forward in this thesis will thus seek to respond to Iran's current social context.

This study will examine women's economic situations in marriage, separation, divorce and upon the death of their spouse. It will argue that the cultural specificities of Iranian society and Islamic law must be examined and assessed. It will also analyze women's economic situation in marital relationships in Iran and Quebec. The study of these two different civil law jurisdictions will focus on the principle of equality and examine related arguments and ideologies regarding women's rights and responsibilities.

The purpose of this study is to understand and analyze the legal and contractual framework surrounding the marital economic relationship with a view to contributing to the establishment of a balanced regime in Iran. This balanced regime would account for individual, structural and institutional discriminations and inequalities. Finally, this study seeks to evaluate the social and economic hierarchies among women (intra-gender) and between women and men (inter-gender).

## **Key Words**

Iranian Law, Islamic Law, Quebec Family Law, Matrimonial Regime, Contributory System, Compensatory System, Separation of Assets, Family Patrimony, Alimony, Mahr.

## **Résumé**

La famille est l'unité de base de la société et est fondée sur des constructions sociales, juridiques, religieuses et économiques. En fonction des cultures et des sociétés et du traitement souvent différencié qu'ils appliquent aux hommes et aux femmes, le mariage peut détériorer la situation économique des femmes. La division du travail fondée sur le sexe au sein de la

famille, qui pèse de manière disproportionnée sur les femmes, notamment en raison de leurs responsabilités en matière de garde d'enfants, entraîne une baisse substantielle du revenu des femmes et interrompt leur éducation et leur emploi. Cela rend difficile pour les femmes d'avoir une carrière pour elles-mêmes après une séparation ou un divorce. Par conséquent, il est généralement admis que les principes juridiques et les lois régissant la relation conjugale et les droits de propriété devraient être structurés de manière à protéger les intérêts économiques des femmes.

Pour établir un cadre économique équitable entre les époux, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) opte pour un régime égalitaire qui exige l'égalité des droits et des responsabilités pour les hommes et les femmes, pendant et après le mariage. Elle se prononce en faveur d'une communauté partielle de biens entre époux selon laquelle tous les avantages et inconvénients économiques résultant d'un mariage et de sa dissolution devraient être assumés également par les deux parties.

Cependant, les régimes juridiques diffèrent en définissant le mode de contribution que chaque conjoint doit engager pour le ménage, l'entretien financier et le partage des biens après une séparation ou un divorce. Certains régimes juridiques, à la suite de la CEDAW, mettent l'accent sur l'égalité formelle et accordent des droits et des responsabilités similaires aux deux parties, tout en établissant une communauté partielle de biens. Un autre groupe de régimes juridiques établit la séparation des biens comme principe directeur des relations économiques conjugales, où les dépenses devraient être supportées par les hommes en tant que chefs de famille, tandis que les femmes devraient être indemnisées pour leurs contributions impayées au ménage.

En tant que pays doté d'un système de droit civil fondé sur la charia et ayant une culture particulière, l'Iran a son propre régime matrimonial spécial et ne suit pas l'approche de la CEDAW concernant les droits et les responsabilités des femmes et des hommes. Le régime matrimonial Iranien se fonde sur l'approche de la charia à l'égard des hommes et des femmes et est ancré dans la culture Iranienne. Cela explique un système matrimonial légal différent des lois existant dans les pays occidentaux. Dans ce système, le mari et la femme ont des responsabilités économiques différentes.

Cette thèse examine le régime matrimonial de l’Iran et le compare au régime matrimonial du Québec. Alors que le droit de la famille du Québec adopte une approche contributive pour les deux conjoints dans la vie conjugale, toutes les institutions économiques en vertu du droit de la famille Iranien sont conçues pour appliquer une approche compensatoire à l’égard de la relation économique des conjoints. L’approche compensatoire de la loi Iranienne concernant les aspects financiers de la vie conjugale cause certaines difficultés à l’épouse, qui sont exacerbées au moment de la fin du mariage. Une telle étude comparative espère apporter de nouvelles suggestions visant à corriger certaines lacunes du régime matrimonial Iranien actuel.

Outre l’évaluation des problèmes liés au régime matrimonial de l’Iran, cette recherche cherche à proposer des solutions juridiques pour améliorer les droits économiques des femmes. Une approche holistique sera donc adoptée, ce qui nous amènera à prendre en considération certaines spécificités culturelles et religieuses devenues des droits obligatoires en Iran. Les propositions de réforme présentées dans cette thèse chercheront donc à répondre au contexte social actuel de l’Iran.

Cette étude examinera la situation économique des femmes dans le mariage, la séparation, le divorce et le décès de leur conjoint. Il soutiendra que les spécificités culturelles de la société Iranienne et du droit Islamique doivent être examinées et évaluées. Il analysera également la situation économique des femmes dans les relations conjugales en Iran et au Québec. L’étude de ces deux juridictions de droit civil se concentrera sur le principe de l’égalité et examinera les arguments et les idéologies connexes concernant les droits et les responsabilités des femmes.

### **Les Mots-Clés**

Droit Iranien, Droit Islamique, Droit de la Famille du Québec, Régime Matrimonial,  
Régime Contributif, Système Compensatoire, Séparation des Biens, Patrimoine Familial,  
Pension Alimentaire, Mahr.

## **Main Questions and Structure of the Research**

This study examines the financial rules of Iranian family law regarding women in marital relations and compares this with the Quebec marital regime. The main questions in this research can be framed as follows:

- What are the financial rights and obligations of a woman party to a marriage contract under Iranian family law?
- Are these rights and obligations comparable with the rights to equality enforcing the status of parties to marriage under the legal system of Quebec?
- How can we compare women's financial rights and responsibilities in a religious-based legal system, such as Iran's, with those rights under a non-religious and secular legal system such as Quebec?
- Can Quebec's legal history inspire reforms in Iran, in the view of establishing a more balanced legal regime there?

To achieve the goal of this research and find answers to these questions, the first part of the research, up to the third chapter, focuses on Iran's legal system in general, the place of family law in this system and the wife's financial institutions under Iranian family law. The second part introduces and compares Iran's matrimonial system to Quebec's legal framework and uses the latter to illustrate egalitarian regimes. This comparison will lead to recommendations for reforms of Iran's legal matrimonial regime. The research is structured in the following manner.

The first chapter introduces Iran's legal regime and its general features. The different sources of Iranian law and its Sharia based system are also presented.

The second chapter introduces Iranian family law in general. It provides a historical narrative of its evolution, and it maps out its main sources, including Sharia law's influence on it.

The third chapter details the economic aspects of Iranian family law. To have a better understanding of the Iranian matrimonial regime and its special Islamic terms and literature, this chapter examines all the economic rights granted to the wife under Iranian law.



The fourth chapter focuses on Iran's matrimonial regime. The chapter explains how the separation of property regime is applied. It also examines rulings for the compensation of unpaid contributions made by women to their household.

The fifth chapter looks at Quebec's matrimonial regime. It starts with the place of family law in Quebec, as a mixed law province in the Canadian federation, where family law is by and large anchored in the civil law tradition. The chapter elaborates on the development of the matrimonial regime and women's financial rights in Quebec. The chapter further explores issues dealing with the contributory approach in marital life and spousal support entitlement rules.

Finally, the sixth chapter introduces various features of a potential reform of Iranian law and the criteria to be considered to bring this reform to fruition. The chapter explains how a reform of Iranian law could be inspired from the Quebec matrimonial regime.

## **Problem Statement**

Following the 1979 Islamic revolution, the Iranian secular system applicable under the Pahlavi regime was replaced by a new Islamic system. Under the new Islamic Republic, Sharia (according to Jafari or Twelver-Imam jurisprudence) was chosen as the primary source of law in the Iranian constitution.<sup>7</sup> A Guardian Council was formed to make sure that all laws passed by Parliament respect Sharia rules and the constitutional provisions. While the previous Iranian civil law regime had been inspired by secular civil codes from European countries, particularly France, Switzerland and Belgium, the newly prevalent Sharia law sometimes contradicted the civil law provisions.

In addition to the combination of religious and non-religious laws, conflicts between liberal and conservative interpretations of Sharia also contributed to fostering discussions and debate over the new Sharia-based legal system.<sup>8</sup> According to the liberal approach to Islamic law, Islamic

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<sup>7</sup> See Article 4 of the Iran's constitutional law: "*All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.*".

<sup>8</sup> Ziba Mir-Hosseini, '8 Sharia and National Law in Iran', *Sharia Incorporated* (2010), 319 at 329-34.

jurisprudence is changeable and can be adapted to social realities, time and place. Therefore, to keep Islamic rules alive, Sharia should be in touch with peoples' daily lives and respect the context leading to a specific historical ruling.<sup>9</sup> On the other hand, the conservative approach maintains the framework of classical jurisprudence, preventing the legal system from evolving with social needs and requirements.

The combination of Islamic law and civil law created many legal complications. Therefore, reforming or introducing new laws has become a very time-consuming process.<sup>10</sup> This has effectively paralyzed the evolution of Iranian law.

Regarding the economic aspects of the family, Iranian law has chosen to pursue the obligatory application of the separation of property regime. Since sharia rules support the separation of property regime, lawyers and specialists do not allow the introduction of other marital regimes, like the community of property, into Iranian family law. In addition, Iranian law adopts a compensatory approach when dealing with a wife's economic rights. Indeed, since the wife bears no economic responsibility within the family, this responsibility lying fully on the husband's shoulders, any economic task the wife may perform during marital life entitles her to seek compensation from her husband. While the Iranian legislator has attempted to improve the wife's economic rights in recent years, all these developments are basically founded on this compensatory approach. However, as I will later explain, this approach cannot sufficiently cover the wife's economic needs, especially upon termination of the marriage. In Quebec, the wife's economic rights are dealt with using a contributory approach. This recognizes that marriage is a joint economic endeavor, thus entitling the wife to a share in marital property upon the termination of the marriage.

Another problem identified under Iranian family law is that the concept of a unified matrimonial regime does not exist. Financial marital rules exist under family law, but these are not regrouped

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<sup>9</sup> Dr Naser Katouzian, 'The Value of Tradition and the Allure of Justice in the Inheritance of Wives ( ارزش سنت و ) (جذبہ عدالت در توارث همسران)', *Law and Political Science*, 39 (1998), 93-118 at 93-94.

<sup>10</sup>For example see: Ziba Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', *Interpreting Divorce Laws in Islam* (Copenhagen: DJØF Pub. , 2012a) at 74-78.

in the same category. Iranian family law separates the economic institutions of a family from the general matrimonial regime. This means Iranian lawyers and specialists have not further built on the matrimonial regime as a general system, and thus fail to view it as one coherent body of law. This also makes it difficult to introduce matrimonial regime reforms since the latter lacks visibility.

Meanwhile Islamic law has its own family law system with a distinct set of rights and obligations for the husband and wife. These rights must be analyzed and understood using concepts inherent to the matrimonial regime. By not clarifying these rights under the light of Islamic concepts nor identifying the matrimonial regime in Iranian law, more problems are caused in Iranian family law, especially regarding certain aspects of human rights.<sup>11</sup>

That is why changes introduced with view to reforms marital economics are minor, partial and sometimes do not coherently match the existing matrimonial system in law. For example, the possibility to stipulate the wife's claim over half of her husband's property if a divorce occurs does not match other aspects of women's financial rights. This is thus an unsuccessful attempt to follow the common property regime which exists in certain European and North American jurisdictions. This shows the partiality of the legislator and a cherry-picking approach to the wife's economic rights. This is not an appropriate means of promoting women's rights and reforming the family economic system.<sup>12</sup>

As such, the Iranian matrimonial regime suffers from not correctly identifying its problems and therefore not applying appropriate solutions. Any suggestion to reform must be adapted to the characteristics of Iranian law. Reform cannot be brought about by merely importing and applying North American or European family law and modern rules for women's rights. It is only by mapping out the current Iranian matrimonial system and identifying its insufficiencies

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<sup>11</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 363-66.

<sup>12</sup> Naser Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) (1; Tehran: Sherkate Sahamie Enteshar, 2015) at 5-6. and Abbas Mohammadi, 'Matrimonial Regime in Iran and France (رژیم مالی خانواده در ایران و فرانسه)', *Ketabe Zanan* (<http://www.hawzah.net/fa/Article/View/89261>, 24, 2010) at 4-5.

using a comparative approach, notably with Quebec's matrimonial regime, that we will be able to recommend some tangible solutions to address these insufficiencies.

## **Theoretical Framework and Methodology**

This research studies the economic marital relationship under Iranian and Quebec laws in order to compare the marital financial rights and responsibilities under the two legal regimes.

The framework of Iran's civil law is mainly founded on religious law. To provide a comprehensive understanding of Iranian family law, this research examines related Islamic rules and provisions. These provisions and rules are adopted from the Shia school of law (Jafari), a denomination of Islam which believes in the twelve Imams as successors of the Prophet of Islam. The combination of Islamic jurisprudence with Iranian law requires referring to Islamic jurisprudence and references. More precisely, one must refer to the Shia school of law which has its own characteristics, method of reasoning, historical aims, and resources. Therefore, to have a thorough understanding of Iranian family law and Iranian law on economic marital relations, we must study the Shia regime of family law, its evolution in the Iranian context, and its combination with Iranian culture.

While studying the Islamic, social and cultural backgrounds of Iran's legal system and family law is a necessary step, this study will also inevitably examine different statutory provisions, as well as their evolution and impact on married women's rights and responsibilities. Different approaches have influenced and shaped several provisions in both Iranian and Quebec family laws over decades, presenting a new source of study for a better understanding of the two regimes.

The methodology adopted in this research is comparative law.<sup>13</sup> (Hage 2014) The study seeks to compare family law in Iran and Quebec. The purpose of this comparative study is to understand the difference between the legal principles and rules in these two jurisdictions, the

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<sup>13</sup> See Jaap Hage, 'Comparative Law as Method and the Method of Comparative Law', *Maastricht European Private Law Institute Working Paper*, Working Paper No. 2014/11. /2014/11 (2014).

reason for these differences, and the theoretical principles upon which each system has founded its normative order.

This comparative study thus examines the similarities and differences between the Iranian and Quebec civil law systems, and the solutions that each system provides to legal issues affecting wives in family law. It provides a description of the law by focusing on the cultural, religious and legal contexts of these different jurisdictions. It also examines how legal rules function in the different legal systems. The primary purpose of this comparative study is not to harmonize different laws. Rather, the objective is to present a better understanding of different cultural backgrounds, as well as religious and social values that led to these differences.<sup>14</sup>

This comparative study can also be considered as a tool for construction. Quebec law, as opposed to laws in other Canadian provinces, enjoys a higher level of similarity with Iran's legal system. Indeed, the two legal systems are anchored in the civil law tradition. Therefore, the result of this comparison may help to understand the level of financial protection every legal system provides for women as wives, and how these rules could be modified in order to have a better, more just and impartial legal system.

In other words, the final aim of this comparative legal endeavor is to study the context within which each legal system functions, and then to find the regime which provides the best protections for the economic rights of wives. The comparison then serves as a springboard for a reflection on potential reforms of the Iranian legal regime, taking into consideration the interval within which modifications of this regime.

By studying the Quebec and Iranian legal systems, we are able to compare the solutions both systems have conceived for protecting married women's rights. To complete the legal comparison, this research will examine not only the sources of law and relevant case laws in both legal systems, but also the cultural, religious, social, and legal contexts in which the law is shaped.

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<sup>14</sup> Lee Peoples, 'Comparative Law Methodology and Sources', *Oklahoma City University Law Library* (2005) at 1-2.

Every research which aims to promote women's rights and interests, in general, tends to rely on some variation of feminist legal theory.<sup>15</sup> This research's ultimate goal is to reform family law in Iran by creating a balanced system between spouses' economic rights. This might lead to the enhancement of both men and women's rights. However, due to the traditionally weaker economic situation of women in Iranian society, it is true that the outcome might be the enhancement of women's economic rights in a majority of situations. That is why this dissertation may come close to adopting a feminist approach in some respects. However, we shall privilege, whenever possible, proposals which are neutral from a gender perspective, by creating balanced rights and responsibilities within the family. The study will thus seek to avoid biased and partial approaches in favor of either men or women. While feminist studies seek the maximization of women's rights by securing more rights for women to remedy their historical discrimination and the rights violations they have suffered, an objective study of Iran's family law should assess and seek a balance between the rights and responsibilities of the parties to the marriage contract.<sup>16</sup> This is to say that the approach we propose to adopt in this dissertation will obviously take into consideration the particular disadvantages suffered by women in traditional family settings; yet, one of the main goals of law remains justice, and justice requires that all members of the society be provided a balanced, equitable treatment. Ultimately, women, men, and contemporary families are all likely to benefit from a reformed legal framework which is more equitable to all.

## **Research Limitations and Features**

The framework for reform this research works on contains certain features and respects certain limitations.

Firstly, the ultimate goal of this research is to provide tangible solutions to remedy issues faced by women in the current Iranian legal system. While it seeks to explain, review and criticize the current system of rights and responsibilities pertaining to women and focus on the financial

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<sup>15</sup> Margaret Walters, *Feminism: A Very Short Introduction* (141: Oxford University Press, 2005).

<sup>16</sup> See Valentine M Moghadam, 'Gender and Revolutionary Transformation Iran 1979 and East Central Europe 1989', *Gender & Society*, 9/3 (1995), 328-58.

disadvantages faced by women in Iran, it also proposes a gradual improvement of the system by suggesting modifications to current rules and applicable laws.<sup>17</sup>

Secondly, this research seeks to propose reforms that will be feasible to implement within the Iranian matrimonial regime. It avoids to work on solutions that are neither accessible nor practicable in Iranian society, as stimulating as they may be in theory. This means that any suggestion for reform put forward in this research must consider the conclusions pertaining to the social, moral, legal, cultural and religious limitations discussed in the first chapters.

Thirdly, and consequently, this comparative research seeks to propose solutions acceptable within Iranian culture. This means that while this research seeks to improve women's economic rights, it is conscious that the foundations of Iranian culture must be respected. It will therefore aim at finding a pragmatic and realistic compromise that may be received by the Iranian legal system, that respects mandatory religious requirements, and that responds to the evolving needs and expectations of Iranian women, men, and families.

Fourthly, since this research intends to respect the framework of Islamic law and religious Iranian law, it will seek to renovate Iranian law drawing on *dynamic Ijtihad*. It assumes, and justifies that assumption, that the Iranian matrimonial regime can be reformed using a new approach to Islamic law, which would consider how economic relations between men and women concretely unfold in modern society, and would allow to revisit certain legal rules with a view to establish a more balanced legal system.

Fifthly, one of the goals of this research is to present a general overview of the Iranian matrimonial regime with particular regard to women's economic rights. This study takes into consideration the general rules and principles of the legal system to provide a just, coherent, and sustainable solution to women's rights.

Sixthly, to find a novel solution to issues faced by married women, this research considers limits to such solutions imposed by the law. Law can only provide a basic minimum in terms of rights

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<sup>17</sup> See Mihrangiz Kar, *Crossing the Red Line: The Struggle for Human Rights in Iran* (Mazda Pub, 2007).

and responsibilities. A fully balanced and just framework for the family is only guaranteed by improving the morality and conscience of a society, which may imply cultural changes over time.

Seventhly, this study aims to provide an unbiased and neutral analysis regarding different legal measures. It does not seek to take position on political approaches that either opponents or proponents of Iran's post-revolution establishment have been pushing. Given the fact that the political establishment plays an important role in the improvement or deterioration of women's rights, every study on women's rights in general and on matrimonial rights specifically should keep in mind political evolutions and their context before introducing any measure. However, a credible legal study should respect the principle of neutrality and impartiality when assessing any legal measure, in view of producing a workable, reliable solution to the problems it identifies. Yet, this research cannot escape taking into consideration the political and social developments accompanying the enactment and interpretation of every legislation. However, it will limit itself to studying those developments within the context of the Iranian legislator's decision-making process, by explaining the history of every measure in an objective and unbiased manner.

Eight, this research limits its scope to the Shia school of law; as a result, other Islamic legal approaches are out of scope of this research. It bears noting in practice that the Twelver-Imams Shia school of law is the official school of Islamic jurisprudence recognized under Iranian law and the majority of Iran's population is following this school of thought.

Ninth, this research limits its scope to permanent marriage, which is the normal type of marriage practiced in Iranian society to create a family. Therefore, temporary marriage (*Mut'ah*) is outside the scope of this research.

Tenth, as this dissertation aims at identifying paths for the reform of Iranian law using Quebec's legal regime as a springboard, the audience for this dissertation is not confined to academic circles but rather encompasses decision-makers in Iran. This explains why the dissertation contains rather lengthy developments on Quebec law. In the same way, the Canadian academic context in which this thesis was prepared made a detailed analysis of the Iranian legal regime



necessary. In other words, a relatively lengthy description and analysis of both regimes was unavoidable for the sake of this dissertation.

Finally, conducting a study of economic marital relationships comparing Iranian law to the Quebec legal regime will bring new insights to the current literature on women's studies in Iran. It will provide new analytical tools to Iranian society and decision-makers, which could help fill the existing gap between the current situation and an ideal, equality-based society.

In addition to all the legal reforms that could be applied in Iranian law by taking inspiration from Quebec law to promote women's rights, using legal principles existing in Iran such as the rule of compensation under civil liability law could prove useful. In other words, pursuing a comparative study and looking at the solutions offered by the Quebec regime to improve women's economic rights, may shed a new light on legal tools and solutions which already exist in Iranian law. In that respect, reflecting on reforms of a particular legal system by taking inspiration from another legal system is the goal of comparative law endeavor.<sup>18</sup>

For example, if the wage for domestic labor envisaged by Iranian law cannot be applied, since evidence of such labor is not easy to provide, courts of law could apply instead the general rules of compensation for a wife who has conducted housework during the marital years without any compensation. The court also could apply the general principle of unjust enrichment or no harm in case of divorce, when the wife is not entitled to any financial compensation for the years she lived with her husband.<sup>19</sup> The legislator can be persuaded to use all the possible legal solutions to improve the economic rights of the wife.

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<sup>18</sup> See Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices', *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016), (2016).

<sup>19</sup> Seyed Hossein Safaei and Assad Allah Emami, 'A Concise of Family Law', *Mizan Publication*, (2017) at 273.

**Part I: Introduction to Iran's Legal System  
and its Matrimonial Regime**

# **1 Chapter One: Iran's Legal System and the Different Sources of Iranian Law**

## **1.1. History**

The Islamic Republic of Iran (Iran) is a large country in the Middle East, whose official language is Persian (Farsi) and official religion is Islam.<sup>20</sup> Iran's current political regime, the Islamic Republic, was established in 1979 after the famous Islamic revolution that ended the country's long history of monarchies. Iranian history itself goes back thousands of years, when it was known as "Persia", one of the oldest civilizations in the world.<sup>21</sup>

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<sup>20</sup> Mir-Hosseini, '8 Sharia and National Law in Iran'. "Iran has a population of over 70 million, of which 89 per cent are Shiite, 9 per cent Sunni and the remaining 1-2 per cent Christians, Jews and Zoroastrians. Persian-speakers are the dominant and largest ethno-linguistic group (51%), followed by the Azarbayjani Turks (24%), Gilaki and Mazandarani (8%), Kurds (7%), Arabs (3%), Lurs (2%), Baluches (2%), and Turkmen (2%). Seventy per cent of the population speaks Persian or related languages, with 26 per cent speaking Turkish or related languages."

<sup>21</sup> Maliheh Zare, 'An Overview of Iranian Legal System and Research', (GlobaLex; NewYork: New York University School of Law, 2013) at 2,3.

Today, Iran's cultural, social and legal systems are the result of interactions between the Persian pre-Islamic and Islamic heritages.<sup>22</sup> To have a good understanding of the Iranian legal system, a brief overview of Iran's history will be helpful.

Iran's history, as it affects the judiciary system, can be divided into three different stages: (1) the pre-Islamic era, (2) the Islamic era and (3) the contemporary era which includes the pre-revolution and post-revolution periods.

### ***1.1.1 The pre-Islamic Era***

The pre-Islamic era concerns the entire period before the advent of Islam in Iran. At the time, the main religion in Iran was Zoroastrianism<sup>23</sup>. Today's Persian language (Farsi) and most Persian cultural traits are inherited from that period. During this time, the Persian Empire was known as one of the strongest and richest civilizations in the world. Iran experienced several monarchies over thousands of years, some of which were the longest lasting dynasties in history. The Achaemenids, Arsacids and Sassanids are three famous dynasties of this era.<sup>24</sup>

The history of this era is not very detailed since many documents and records disappeared or were destroyed over the course of different attacks and invasions, such as that of Alexander the Great, the Mongols or the Tartars. However, preserved historical artifacts such as the code of Hammurabi and the Cyrus Charter of Human Rights Cylinder show that a judiciary system attempting to establish law and regulations based on custom, tradition and Zoroastrian teachings existed under the Persian Empire. This demonstrates that at the time, people already regarded justice as a crucial necessity. Kings who were successful in establishing a certain degree of

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<sup>22</sup> Akbar Aghajanian, 'Family and Family Change in Iran', *Department of Sociology Fayetteville State University. Fayetteville NC, 28301* (2001) at 2.

<sup>23</sup> Paulina Niechciał, 'Constructing Zoroastrian Identity in Muslim Iran', *Akta Fakulty Filozofické Západočeské Univerzity v Plzni*, /1 (2011), 190-203.: "Zoroastrianism is an ancient Iranian religion founded by Zoroaster, the inspirer of his teaching applied to ancient Iranian beliefs."

<sup>24</sup> Monica Ringer, Abbas Amanat, and Farzin Vejdani, 'Iranian Nationalism and Zoroastrian Identity: Between Cyrus and Zoroaster', *Iran Facing Others*, (2012), 265-75 at 267-70.

justice over their lands, such as Cyrus the great, were amongst the most popular kings in history.<sup>25</sup>

### **1.1.2 The Islamic Era**

The Islamic era started with the advent of Islam in Iran in the seventh century. The Sassanid Empire, named after the last pre-Islamic dynasty to rule Iran, was defeated by the third Islamic Caliph's army. As such, during years, the country's main religion changed from Zoroastrianism to Islam. In doing so, a new judiciary system was established based on the Sharia. However, after the advent of Islam, Iran's governing system remained somewhat disunited. The Iranian polity was reduced to local governors and warlords, weakening the country. This led to several attacks on different parts of Iran by neighboring kingdoms and tribes.<sup>26</sup>

One of Iran's most important defeats occurred at the hands of the Mongols, who invaded Iran in this era during several attacks between 1219 to 1258 A.D. The Mongol occupation of Iran changed the Iranian governing and judiciary system because the Mongols did not follow Sharia law. Instead, they established a new legal system based on Mongol laws. In their unwritten legal system, the Mongol leader was the first to decide on all administrative, legislative and judicial matters. Although the Mongol armies and government progressively became Muslim, the high level of corruption and insecurity within the judicial system wrought dissatisfaction among Iranian people. This led to many popular uprisings against the ruling elite, ultimately ending in the fall of the Mongol reign in Iran by 15<sup>th</sup> century.<sup>27</sup>

With the fall of the Mongol dynasty in Iran, many years of weak, local, short-lived dynasties ensued, along with further foreign attacks. Finally, in 1501 the first strong Iranian dynasty in centuries emerged: the Safavid dynasty. The dynasty was founded by Sheikh Ismaeel Safavi,

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<sup>25</sup> Ibid. 268-270.

<sup>26</sup> Adineh Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* (London: British Institute of International and Comparative Law(BIICL), 2008) at 35-37.

<sup>27</sup> Aigle Denise, '« Iran under Mongol Domination: The Effectiveness and Failings of a Dual Administrative System », Bulletin D'études Orientales, In: Bethany Walker & Jean-François Salles, Eds., *Le Pouvoir À L'âge Des Sultanats Dans Le Bilâd Al-Shâm/Power in the Age of the Sultanate in the Bilâd Al-Shâm* (Seminar Acor-Ifpo, Amman 15-16 May 2005).', *Abstracta Iranica. Revue bibliographique pour le domaine irano-aryen*, 57/Volume 30 (2008), 65-78 at 65-70.

who became the first Safavid king, adopting the name of Shah Ismaeel. One of the most important aspects of this event was that the Safavid dynasty declared Shiite Islam as the country's official religion.<sup>28</sup> This profoundly affected the judicial system. The Safavid polity was a centralized and integrated form of government, established by a religious Shiite- Sufi dynasty. Shah Ismaeel sought to transform the dominant religious school of thought in Iran from Sunni to Shiite. This transformation was successful and Shiite Islam has remained the official religion of Iran up until today. This transformation completely changed the judicial system designed by the Mongols. In the new system, two kinds of courts were created: the religious courts and the secular courts. They worked together under the supervision of the king. Religious courts followed Sharia law, while secular courts, which conducted separate tasks, gave rulings based on governmental rules and local traditions.<sup>29</sup>

The Safavid reign ended in 1722 and was replaced by the Qajar dynasty, in power until 1925. The Qajar dynasty maintained the Safavid judicial system while increasing the influence of religion and the clergy in the judiciary. Parties could choose to go to religious courts in all civil and criminal disputes.<sup>30</sup>

During the nineteenth century, Iran was involved in two large scale wars with Russia, causing the partial invasion and loss of some parts of Iranian territories. After these wars, Iran became the object of a power struggle between two important imperial powers, Russia and Great Britain, who wanted to expand their areas of influence and control. This caused a further loss of Iran's territorial and political integrity.<sup>31</sup>

Europe's expansionist desires in Iran brought about a certain exposure of Iranian people to the European social and cultural way of life. This is why the nineteenth century is commonly understood as Iran's first introduction to Western culture and Western European systems of governance. The two important wars with Russia, the presence of Western European diplomats,

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<sup>28</sup> Said Amir Arjomand, 'History, Structure, and Revolution in the Shi'ite Tradition in Contemporary Iran', *International political science Review*, 10/2 (1989), 111-19 at 112.

<sup>29</sup> Saylor Academy, 'Safavid Dynasty of Iran سلسله صفویان', (at 2-5).

<sup>30</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 37.

<sup>31</sup> Ervand Abrahamian, 'The Causes of the Constitutional Revolution in Iran', *International Journal of Middle East Studies*, 10/3 (1979), 381-414 at 393.

representatives, merchants and other agents in Iran, the sending of Iranian elites to study at European universities, and the publishing of foreign newspapers and books in Iran all contributed to this cultural and political exposure. Familiarity with Western social and political developments, democracy and the rule of law, instead of the monarchy Iran had always known caused Iranians to start demanding justice and a change to the system of absolute monarchy. Indeed, Qajar kings made different concessions to foreign companies in exchange for petty sums of money, thereby accepting contracts perceived as unjust and going against the Iranian peoples' interests. This led people to question the king's and ruling elites' political decisions. Iranians gradually became dissatisfied and disappointed by what they saw as a weak government giving in to colonial powers.<sup>32</sup>

In this context, the supreme religious authority (*marja'eeat*), who had historically always kept itself aloof of the Iranian polity, played a determining role in leading grassroots protests against foreign interference and the king's poor political decisions. One such event was the infamous protest against the 1891 Tobacco Concession. Known as the Tobacco Movement, this protest opposed granting a tobacco concession to an English commercial entity, since this concession gave away the right to produce, sell and export all of Iran's tobacco.<sup>33</sup> In this situation, the Ayatollah Mirzaye Shirazi gave a binding religious legal opinion (*fatwa*) calling for the Iranian peoples' boycott of all tobacco products. His *fatwa* stated that using tobacco in any way was forbidden under any circumstance. Iranians, including merchants, followed Mirzaye Shirazi's *fatwa* and effectively boycotted tobacco, to the extent that the Tobacco Movement became a successful political protest against the Qajar dynasty and the starting point of the 1906 Constitutional Movement.<sup>34</sup>

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<sup>32</sup> Ibid., at 412-14.

<sup>33</sup> For more information on the Tobacco Movement look at Mansoor Moaddel, 'Shi'i Political Discourse and Class Mobilization in the Tobacco Movement of 1890–1892', *Sociological Forum* (7: Springer, 1992), 447-68. And Nikki R Keddie, *Religion and Rebellion in Iran: The Tobacco Protest of 1891-1892* (Frank Cass & Co, 1966).

<sup>34</sup> Abrahamian, 'The Causes of the Constitutional Revolution in Iran', (at 399).

### ***1.1.3 Contemporary Period (Iran's Contemporary Legislative Period)***

The 1906 Constitutional Movement established a new judiciary system in Iran. It signaled the beginning of Iran's contemporary legislative period, which stretches up until today. The important 1979 revolution further divides the contemporary legislative period into two sub-periods: The Pre-Revolution Period (1906-1979) and the Post-Revolution Period (1979 onwards).

#### ***1.1.3.1. The Pre-Revolution 1979 Period***

In 1906, Muzaffar al Din Shah, Iran's 5<sup>th</sup> king of the Qajar dynasty, accepted and signed the Iranian constitution as a result of the Iranian Constitutional Revolution (*Mashrooteh*). This important event in Iran's legal history opened the Iranian Parliament for the first time, and the Qajar dynasty's absolute monarchy was transformed into a constitutional monarchy. As a result, three separate branches of state powers were established and a modern judicial system was set up.<sup>35</sup>

The Qajari system of absolute monarchy had caused many injustices regarding rule of law. As such, people sought to establish the House of Justice (*Edalat-Khaneh*). This became one of the first and most important steps towards limiting the absolute monarchy of the king. Muzaffar al Din Shah accepted the people's demands and signed a decree to set up the Ministry of Justice. He declared that the State's establishing the House of Justice was the most important step toward implementing Islamic law.<sup>36</sup>

The role of the clergy and their leadership was decisive in the Iranian Constitutional Revolution. Respecting the rules of Sharia was enshrined in the Constitution. Article 2 of the Supplement to

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<sup>35</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 39-41.

<sup>36</sup> Abrahamian, 'The Causes of the Constitutional Revolution in Iran', (at 401-02).



the Constitution<sup>37</sup> stipulated that a board of five knowledgeable members of clergy should be appointed for Parliament (*Majlis*). These were responsible for reviewing the compatibility of all legislative acts with Sharia. Accordingly, Sharia became the basis for Iran's constitutional system. In addition, in the Supplement to the Constitution and other legislative acts, members of the clergy were appointed to certain judicial positions, such as judges of Islamic courts<sup>38</sup>, special criminal courts<sup>39</sup> and reconciliation courts<sup>40</sup>.

The new judicial system legally recognized two official courts: the religious courts and the secular courts. This division was inherited from the judicial organization established under the Safavid period. Sharia was hence given an official status in the modern judicial system. The religious courts were under the supervision of the highest-ranking members of clergy (*Mojtahid*) while secular court judges were appointed by the king.<sup>41</sup> The Constitution attempted to establish these legal courts across Iran and close all the locally run, autonomous courts. However, it took several years to implement the Constitution and fully establish the supremacy of the new judicial system in Iran.<sup>42</sup>

In the years following the establishment of the Constitution and its Supplement, the Principles of the Judiciary Structure Act was drafted by Hassan Moshir ol Doleh (known as Pirnia) and enacted by the Parliament. This Act was an initial step in legislating on Iran's judicial system and further developing the Iranian legal system. It enacted the establishment of the Supreme Court as the highest judiciary authority in Iran<sup>43</sup> and divided all other courts into two categories<sup>44</sup>: the general courts consisting of the preliminary courts, the appeal courts and the reconciliation courts; and the special courts consisting of the trade court, the military court, the special criminal court and the judges' disciplinary court.<sup>45</sup>

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<sup>37</sup> The Supplement to the Constitution 1906 was approved and ratified by Muzaffar al Din Shah, one year after signing the Constitution, in order to correct and complete the text of the Constitution. The Supplement to Constitution was approved in 1907 and later amendment to that were done on 1925, 1949, 1957 and 1967.

<sup>38</sup> The Supplement to the Constitution 1906: Article 72.

<sup>39</sup> The Principles of Penal Tribunals: Article 416 and 417.

<sup>40</sup> The Principles of the Justice Organization: Article 20 and 35.

<sup>41</sup> The Supplement to the Constitution 1906: Article 80.

<sup>42</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 325-26.

<sup>43</sup> The principles of the Judiciary Structure Act, Article 10 and 11.

<sup>44</sup> The principles of the Judiciary Structure Act, Article 1 and 4.

<sup>45</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 41-45.

The Principles of the Judiciary Structure Act mentioned Sharia courts using the term “registry” (*mahzar*)<sup>46</sup>. While the Legislator approved the existence of Sharia courts in this new legislative act, it distinguished between the “registries” and the “courts” by using this term. It also stipulated that preliminary courts should refer cases to the registries and implement their verdict.<sup>47</sup> A fully qualified member of clergy was the judge of each registry and two knowledgeable members of clergy were his deputies.<sup>48</sup> The Principles of the Judiciary Structure Act also limited the jurisdiction of the registries to certain categories of cases such as disputes about religious matters, appointing a trustee or guardian, testimony, or family matters. They also had jurisdiction over disputes regarding marriage and divorce.<sup>49</sup>

The Pahlavi dynasty succeeded to the Qajar dynasty and was founded by Reza Khan, who was renamed Reza Shah and who ruled from 1925 to 1941. Reza Shah was a contemporary to Ataturk in Turkey, who was also implementing many religious reforms at the time. Ataturk’s reforms inspired Reza Shah who sought to bring about the same secular reforms and limit the role of religion in all aspects of Iranian peoples’ lives. (Fazaeli 2016)<sup>50</sup> In 1926, Ali Akbar Khan Davar, the Minister of Justice, dissolved Iran’s entire judiciary system with the aim of reforming and conforming it to the modern secular system adopted by Reza Shah. French judicial experts were consulted such that Reza Shah was able to establish a new judiciary system based on the Romano-German legal system by 1936. During these years, some substantial and procedural legislative acts were adopted. Reza Shah also started a training program for judges and appointed such newly trained judges to the different courts in Tehran and other cities. He also opened new law schools in order to appoint their graduates to judicial positions. Through this, the role of the clergy in the judiciary and other related branches became limited. Legal education, which had been traditionally delivered by the clergy through courses on the science of jurisprudence (*fiqh*), was shifted to the law schools. Law students left the country to learn the Western legal system abroad and law schools used foreign professors in order to introduce a modern legal system. In addition, modern legislation was imported from Western countries such

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<sup>46</sup> The principles of the Judiciary Structure Act, Article 2.

<sup>47</sup> The principles of the Judiciary Structure Act, Article 29.

<sup>48</sup> The principles of the Judiciary Structure Act, Article 3.

<sup>49</sup> The principles of the Judiciary Structure Act, Article 145.

<sup>50</sup> Roja Fazaeli, *Islamic Feminisms: Rights and Interpretations across Generations in Iran* (Taylor & Francis, 2016) at 18-20.

as Belgium and France, thereby excluding the clergy from this modernization process. The judiciary elite, traditionally educated by the clergy, were now being sent to Western countries for their education, stripping the clergy of yet another important position in the country's institutional fabric.<sup>51</sup>

In fact, by dissolving the judiciary and removing the clergy from its traditional role within it, the Pahlavi reforms diminished the overall influence of the clergy on the Iranian judicial system. The reforms gradually reduced the authority of general Islamic courts to the special courts and completely removed jurisdiction of Islamic courts over criminal cases. They also narrowed the authority of the clergy in civil matters to three categories of cases: cases about the validity of marriage and divorce, cases where the hearing of witnesses or oaths were necessary, and cases involving the appointment of a trustee, guardian or executioner of will. Later on, by enacting more legislations such as the Marriage Act of 1931 and its revision in 1937 and the Non-Litigation Act of 1939, the jurisdiction of Islamic courts was further reduced.<sup>52</sup>

The Pahlavi reforms also removed the clergy from the registries by enacting the Land Registry Act (*Ghanone sabte asnad va amlak*) which ceased the registration of deeds by local members of clergy and opened registry offices in charge of registering all deeds.<sup>53</sup>

Throughout Reza Shah's reign, many reforms came to be and the judicial system was completely transformed. Reza Shah sought to diminish the role of the clergy in the judiciary, and to a larger extent in Iran's social and political landscape. Sharia courts nonetheless continued to hold jurisdiction in limited cases such as inheritance and certain issues in family law. Sharia rules, as an organic part of Iranian custom and culture, also influenced certain criminal and civil cases.<sup>54</sup>

Reza Shah's monarchy was ended when his son, Mohammad Reza Shah, became king. Mohamad Reza Shah was not as active as his father in diminishing the influence of Sharia over Iranian law. During his monarchy, which started in 1941 and ended with the Islamic Revolution of 1979, the judicial system had undergone only very limited legislative changes. One example

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<sup>51</sup>Nader Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', *Boston College Third World LJ*, 8 (1988), 91-102 at 93-94.

<sup>52</sup> *Ibid.*, at 93.

<sup>53</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 47-49.

<sup>54</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 326-27.

was the passing of the Family Protection Act of 1967, which set up a special court: The Family Protection Court. This court held jurisdiction over family and marital disputes, extending to marriage, divorce and dowry<sup>55</sup> in 1974.<sup>56</sup>

### ***1.1.3.2. The Post- Revolution 1979 Period***

The Islamic Revolution of 1979 gave birth to the Islamic Republic of Iran. The revolution was a grassroots reaction to the Pahlavi monarchy's increasing isolation from the general Iranian population. The movement was led by high ranking clergy, and spearheaded by Ayatollah Khomeini.<sup>57</sup> The monarchy of Mohammad Reza Shah was overthrown by the people, who demanded an end to dictatorship. After the Shah's demise, a referendum was held on 30 and 31 March 1979 to gather Iranian citizens' "yes" or "no" votes to the Islamic Republic as Iran's new political entity. The Islamic Republic of Iran ended up being approved by a majority of 98.2% of votes. Accordingly, the 1906 constitution was declared invalid and a new constitution was drafted. It was approved by referendum in December 1979 and amended in 1989. Based on this new constitution, the Islamic Republic of Iran must be headed by a supreme leader who figures among the highest-ranking clergy. This system of governance came to be known as the "Authority of the Jurist" (*Velayat-e Faqih*).<sup>58</sup>

Sharia therefore came to play a very important role in the 1979 revolution as well as in establishing the new system of State governance. While the Pahlavi dynasty had sought to set aside the role of Sharia and the clergy under the 1906 constitution and followed the Western secular system of governance, the role of the clergy in conducting the campaign of discontent people spearheading the peoples' uprising against the Shah proved to be a determining factor of their popularity. Ayatollah Khomeini had been the religious leader of the campaign against the Shah since 1960. He became Iran's supreme leader after the 1979 revolution. His charismatic

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<sup>55</sup> *Mahr* (مهریه)

<sup>56</sup> Sen Mcglinn, *Family Law in Iran* (Leiden, Netherlands: the University of Leiden, 2002) at 20-22.

<sup>57</sup> Nandini Bhattacharya, 'Iranian Revolution, 1979', *The International Encyclopedia of Revolution and Protest*, (Aprill 2009 2009), 1-9 at 1.

<sup>58</sup> Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', (at 94-95).

personality combined with a certain courage in leading the struggle against the Shah made him an attractive and respected leader of the revolution.<sup>59</sup>

After the 1979 revolution, the clergy brought about a new kind of State based on an Islamic Republican model finding its source in Sharia. Its executive power was to be embodied in the highest-ranking member of clergy. The latter was named supreme leader of the Islamic Republic, and the model of governance was in accordance with the doctrine of *Velayat-e Faqih*. This new doctrine was proposed by Ayatollah Khomeini in a book published before the 1979 revolution. In this book, entitled “Islamic Government: the Authority of the Jurist” (*Hokumat-e Islami: Velayat-e faqih*), he argued that the leader of a Muslim-majority State should be the most knowledgeable, highest-ranking member of clergy, who would be capable of making decisions in both political and religious affairs.<sup>60</sup> The theory was thus based on the unification of religion and the State, whereby the Islamic government transfers both the religious and political authority to the highest-ranking Islamic jurist (*Vali-e Faqih*), making him the supreme political ruler of the Islamic state. This *Vali-e Faqih* must answer a number of criteria, such as piety, knowledge and courage. He must also be acceptable to the majority of the people. Ayatollah Khomeini’s theory about *Velayat-e faqih* can be found in Articles II and V of the 1979 Constitution of the Islamic Republic of Iran.<sup>61</sup>

Through this innovative doctrine, Ayatollah Khomeini formed a new Shiite political regime. This regime was to be based on the traditional Islamic ideology, translated into the context of the modern political system of nation-states. This was unprecedented in the Islamic tradition. Ayatollah Khomeini was strongly opposed to the secularization of law as initiated in Iran by Reza Shah’s reforms and continued by his son Mohammad Reza Shah. He believed that the tools to combat what he perceived as threatening Western political and cultural decadence could only be found in Islam. While strongly opposed to the Western model of liberalism and democracy, Ayatollah Khomeini sought to establish a religious government based on a republican regime legitimized by referendum. The political system designed by Ayatollah

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<sup>59</sup> Bhattacharya, 'Iranian Revolution, 1979', (at 2.

<sup>60</sup> Mehran Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', *Journal for the Scientific Study of Religion*, 40/2 (2001), 205-20 at 205-06.

<sup>61</sup> Bhattacharya, 'Iranian Revolution, 1979', (at 2-3.

Khomeini was a unique blend of Islamic and modern Western political elements, supported by popular referendum. However, he maintained the idea that a State can only be Islamic when based on Islamic law and principles and under the leadership of the *Vali-e Faqih*.<sup>62</sup>

In order to bring the social and political spheres of Iranian society back within the fold of Islamic law, Ayatollah Khomeini sought to Islamize the new governing system. As a result, many changes happened in the Iranian legal system.<sup>63</sup>

The first step was preparing the referendum aimed at establishing the new constitution of the Islamic Republic. The Constitution established a Sharia-based system and inserted an institutional mechanism of control into the Constitution to ensure all legislation and proposed laws would respect Sharia. This mechanism is embodied by the Guardian Council, which is responsible for examining the compliance to Sharia of all the laws passed by the Parliament. Article 4 of the Constitution states: "*All civil, criminal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all laws and regulation, and the fuqaha (jurists) on the Council of Guardians have the duty of supervising its implementation.*"<sup>64</sup>

The second step was the Islamization of the judicial system. This was done by examining all the existing laws and conforming them with Sharia when necessary. Since the previous regime had been secular in nature, many laws and regulations needed to be updated based on Sharia rules. In 1979, the Revolutionary Council (The temporary Council who was responsible to protect the Revolution's goal) sought to purify the judiciary by approving the Reform of the Judiciary Structure and Recruitment of Judges Act. In 1982, Ayatollah Khomeini declared that all the laws and regulations which did not comply with Islamic criteria were invalid. Consequently, the Supreme Judiciary Council prepared and issued a directive to all the judges forbidding the application of laws that were not deemed to be in conformity with Islamic rules. In cases where judges were unable to determine the applicable Islamic law, they were directed to judge based

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<sup>62</sup> Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 208-10.

<sup>63</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 331-34.

<sup>64</sup> Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', (at 95.

on Islamic sources and famous *Fatwas* (Islamic decisions), until Parliament had established such applicable laws.<sup>65</sup>

Accordingly, after a period of anarchy in the post-Revolution era, the structure of the judiciary and all the substantial and procedural laws and regulations were changed and the new Sharia-based system was established. The Establishment of General Courts and Special Civil Courts Act in 1979 set up the new judicial system. It divided all the courts into general and special courts, and further divided general courts into civil, criminal, and reconciliation courts.<sup>66</sup>

In this new system, some legislative texts such as the Criminal Code were completely changed. In 1982, the Reform of Some Articles of the Criminal Code Act was passed and the Sharia-compliant Islamic Criminal Code replaced the previous Criminal Code.<sup>67</sup>

Other legislative texts such as the Civil Code did not undergo substantial changes, and only minor updates were introduced over the years. However, the Establishment of the Civil Courts 1 and 2 Act in 1985 changed the structure of civil courts.<sup>68</sup>

In 1986, regarding the question of the legal validity of laws and regulations enacted before the 1979 Revolution, the Guardian Council declared that as long as it had not expressed any opinion concerning them, such laws and regulations were legally valid and could be used.<sup>69</sup>

The Establishment of General and Revolutionary Courts Act in 1994 brought further changes to the judiciary system regarding the division of courts. This Act abolished the existing division between civil, criminal and family courts. Instead, it established courts holding general jurisdiction over all civil and criminal disputes, and all affairs concerning personal status.<sup>70</sup> This Act was largely criticized and resulted in its being reformed in 2002.<sup>71</sup> The principle of

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<sup>65</sup> Ettelaat newspaper, Monday 23 August 1982. 1 and 3.

<sup>66</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 333-35.

<sup>67</sup> Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', (at 95-98.

<sup>68</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 53.

<sup>69</sup> The Collection of Laws of 1986 published by the Official State Newspaper, p 297.

<sup>70</sup> The Establishment of General and Revolutionary Courts Act 1994, Article 4.

<sup>71</sup> The Reform of Establishment of General and Revolutionary Courts Act, 2002.

specialization of courts was re-established with the creation of special courts for civil and criminal disputes. (Entessar 1988)<sup>72</sup>

## **1.2. The Different Sources of Iranian Law**

As mentioned earlier, the Iranian Legal system is based on two pillars: Islamic law and Romano-Germanic law, with a particular focus on the French civil system. Therefore, on the one hand, the Iranian judicial system can be considered as a civil law system. The criminal, civil and commercial branches of law are codified, in a similar fashion to the different European countries this model was borrowed from.

On the other hand, Article 4 of the Constitution provides that Islamic law and Sharia principles are the main sources of Iranian law and regulations and that all codified laws should be compatible with such principles. In addition, Article 167 of the Constitution enumerates the sources of law judges must apply in their cases. Based on this article of the Constitution, the first source of applicable law is codified law. Next, if a judge cannot find the applicable law within the existing corpus of codified law, he should refer to reputable Islamic sources and authentic *Fatwa* to deliver his judgment. As such, Sharia principles are complementary sources of Iranian Law, that come in addition to Iranian laws and regulations.<sup>73</sup>

The sources of Iranian law are thus divided into two different categories, which will be explored below.

### ***1.2.1. Iranian Codified legislation***

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<sup>72</sup> Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', (at 98-100).

<sup>73</sup> Mcglinn, *Family Law in Iran* at 2-6.



As provided by Article 167 of the Constitution, judges must rely first and foremost on codified law. This means the laws that are passed by the Parliament and approved by the Guardian Council. Iranian codified legislation includes the following categories below.

### **1.2.1.1. The Law**

In the Iranian civil legal system, codified law is the first source for the judicial system. The law in specifically legal terms refers to the collection of rules that are codified by the legislator as determined by the constitution.<sup>74</sup> However, for the purpose of this dissertation we will consider the law more broadly as all the rules edicted by a competent authority, including the Parliament, the government or any administrative organization. As such, the Iranian legal system regards the following as law, in order of importance and hierarchy:

#### **1.2.1.1.1. The Constitution**

In the Iranian legal system, the Constitution has precedence over all other legislation, and the latter must be compatible with provisions in the former.<sup>75</sup> The current Iranian Constitution was adopted after Iran's Islamic Revolution in 1979 and was revised in 1989.

#### **1.2.1.1.2. Legislation**

Legislation is any proposed text that may have been passed by Parliament and ratified by the Guardian Council.<sup>76</sup> The latter ratification certifies that the text respects the Constitution and Sharia principles. Legislation can also be a proposed text approved by referendum and subject

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<sup>74</sup> Naser Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* و مقدمه علم حقوق (مقدمه در نظام حقوقی ایران) (26; Tehran: Sherkate sahamie enteshar, 2000) at 54-55.

<sup>75</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 14-15.

<sup>76</sup> Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* و مقدمه علم حقوق و مطالعه در (مقدمه در نظام حقوقی ایران) at 123-24.

to the vote and majority approval of all Iranian citizens.<sup>77</sup> In this case, the Guardian Council's role is to supervise the Referendum process as well as approve the law voted by Referendum.<sup>78</sup>

#### **1.2.1.1.3. Treaties**

A treaty is also considered as law in its general meaning. Based on the Iranian Civil Code<sup>79</sup>, provisions of treaties concluded between the Iranian government and other governments shall have the force of law, if they are not deemed contrary to the Constitution.<sup>80</sup> Similarly to many other legal systems, after the signature of any international document by the government, this document must be ratified by the Parliament, confirmed by the Guardian Council and signed by the president to have force of law in Iran.<sup>81</sup>

#### **1.2.1.1.4. Official Regulations and Directives**

Official regulations and directives provide the set of procedures that must be followed to implement laws through a single minister or council of ministers, in accordance with Article 138 of the Constitution of Parliament: *“In addition to the instance in which the Council of Ministers or a single Minister is authorized to frame procedures for the implementation of laws, the Council of Ministers has the right to lay down rules, regulations, and procedures for performing its administrative duties, ensuring the implementation of laws, and setting up administrative bodies.”*<sup>82</sup>

Like any other law, these regulations and rules must not contradict the Constitution and the spirit of the law. Moreover, only the executive authority has the competence to edict such regulations.

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<sup>77</sup> The Iran's Constitution, Article 59 and 99.

<sup>78</sup> The Guardian Council commented on the Article 59 of the Constitution: “The demanding to holding the referendum by the Parliament, which is the subject of Article 59 of the constitution, is under the rule of approval legislations by the Parliament and should be ratified by the Guardian Council under Article 94 of the Constitution.” Comments number 81/30/4104 dated 1381/12/25.

<sup>79</sup> Iran's Civil Code: Article 9.

<sup>80</sup> Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* مقدمه علم حقوق و مطالعه در نظام حقوقی ایران at 127-28.

<sup>81</sup> Iran's Constitution: Article 77 and 125

<sup>82</sup> The Constitution of Islamic Consultative Assembly: Article 138.

The Iranian legislative system states the legal remedies applicable for such regulations at Article 170 of the Constitution: “*Judges of courts are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws and the norms of Islam, or lie outside the competence of the executive power. Everyone has the right to demand the annulment of any such regulation from the Court of Administrative Justice.*”<sup>83</sup>

### **1.2.1.2. Case Law (Jurisprudence)**

Iran has a civil law system and the role of the case law (which in Iranian legal literature is normally referred to as jurisprudence<sup>84</sup>) in this system is therefore not the same as the role of case law in common law systems. Nonetheless, case law is practically considered as the second most important source of Iranian law.<sup>85</sup>

Regular courts are not legally bound to follow the case law of other courts of the same level or even higher courts. However, in practice, the courts follow the opinion of higher courts when issuing their judgement.<sup>86</sup>

All courts are obliged to follow the case law issued by the Supreme Court. The latter case law is legally binding and has force of law in the Iranian legal system. The single-article in the Uniformity of Jurisprudence Act (1949) stipulates: “*Whenever branches of the Supreme Court create different precedence for similar cases, by request from the Minister of Justice or head of the said Court or Prosecutor General, the General Board of Supreme Court, which in this case should be in session by the presence of at least three quarters of the head justices of the said Court, shall consider the disputed issue and solicit opinions. In this situation, the opinion of the majority of the said Board should be followed by branches of the Supreme Court and the courts*

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<sup>83</sup> Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* مقدمه علم حقوق و مطالعه در نظام حقوقی ایران at 129-31.

<sup>84</sup> Jurisprudence, as this term is legally understood, is not a well-known concept in Iranian legal system and it is more visible in Islamic jurisprudence.

<sup>85</sup> Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* مقدمه علم حقوق و مطالعه در نظام حقوقی ایران at 188-92.

<sup>86</sup> Nasser Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی (Tehran: Mizan, 2005) at 17-19.

*in similar cases and may not be changed except by the opinion of the General Board or by the law.”<sup>87</sup>*

### **1.2.1.3. Custom (urf)**

The third source of Iranian law is custom, which refers to the standards of the community and the established patterns of behavior which common people consider normal and binding. It may originate from Islamic teachings as well as other moral or social norms commonly regarded as governing the behavior of ordinary people. In the Iranian legal system, custom has been referred to several times in the Civil Code and judges can issue a verdict based on custom in cases where the law is silent, vague or contradictory.<sup>88</sup>

### **1.2.1.4. Legal Doctrine**

The fourth source of law in Iran is legal doctrine. It is the opinion of legal scholars and can be used in the legal system in two ways.

Firstly, legal doctrine can be referred to by judges in cases where they cannot issue a judgment by using only the three previously mentioned sources of law (law, jurisprudence and custom). This can be the case when the law is silent, insufficient, contradictory or vague.

Secondly, legal doctrine can be used to bring about novel legal opinions in the legal community, opening a new path to help create new laws through legislation.<sup>89</sup>

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<sup>87</sup> Omar Sial, 'A Guide to the Legal System of the Islamic Republic of Iran', <http://www.nyulawglobal.org/globalex/iran.htm>, (2006) at 4-5.

<sup>88</sup> Katouzian, *The Introductory to Law and the Study of Current Iranian Legal System* مقدمه علم حقوق و مطالعه در نظام حقوقی ایران at 177-79.

<sup>89</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 18-20.

### 1.2.2. *Islamic Sources of Iranian Law*

As mentioned earlier, the Islamic Revolution of 1979 brought about a new Constitution whereby Islam was chosen as the official religion of Iran, and the Shia, or *Jafari*<sup>90</sup>, school of thought was designated as the official school of Islamic jurisprudence. As such, the *Jafari* school became the first source of interpretation of Sharia<sup>91</sup> in the Iranian legal system.<sup>92</sup>

Islam has two main schools of thought: the Shia and Sunni schools. In Iran's Constitution, the Twelver Shia (*Jafari*) school is considered as Iran's official religion. The Shia school admits both the Quran and the views and practices of the Prophet and the Imams to establish its legal rules. The *Jafari* Shia school holds that after the passing away of the Prophet Mohammad, a succession of twelve infallible Imams followed him such that Shia law also follows their opinions and way of living. In particular, it established its legal system based on the thought and works of the sixth Imam, Imam Jafar Sadiq, whose well-known theological school benefited from a large following among students of Islamic law. The *Jafari* school of jurisprudence is also well known in other Islamic schools. This is why the Twelver Shia school is also known as the *Jafari* school.<sup>93</sup>

In addition to the role of Sharia as the most important basis of Iranian law (Article 4 of the Constitution), article 167 of the Iranian Constitution considers Islamic law as the complementary source of codified law (law, jurisprudence, custom and legal doctrine). It

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<sup>90</sup> Twelver Shia has been particularly influenced by the opinions of the sixth Imam, Abu Abdullah Jafar Ibne Mohammad al Sadiq (A.S), and hence its legal school is known as the Jafari school of jurisprudence.

<sup>91</sup> Article 12 of the Iran Constitution: "The official religion of Iran is Islam and the Twelver Jafari school, and this principle will remain eternally immutable. Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites. These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools."

<sup>92</sup> Arjomand, 'History, Structure, and Revolution in the Shi'ite Tradition in Contemporary Iran', (at 112-13.

<sup>93</sup> *Ibid.*, at 111-13.

stipulates that in the absence of codified law, judges are required to deliver their judgments based on reputable Islamic sources and authentic fatwa.<sup>94</sup>

The notion of “reputable Islamic sources” is subject to controversy in different Islamic schools of thought. Nonetheless, Sharia has primary and secondary sources of law agreed upon by all Muslims that the Quran and the traditions of the Prophet Mohammad (*Sunnah*) are the primary sources. The notions of consensus (*Ijma*) and reason (*aql*) are also construed to be some of the most reputable Islamic sources of law in the Shia *Jafari* school of thought.<sup>95</sup>

### **1.2.2.1. Quran**

The Quran is the most important source of Islamic law for all the different legal Islamic schools of thought. They all consider the Quran as the direct revelation of God to the Prophet Mohammad, recorded and written by the Prophet's companions during his lifetime and after his death. According to Islamic law, all Muslims must follow the Quran's legal imperatives in absolute terms. However, the number of verses in the Quran specifically and directly dealing with legal rules are limited both in quality and quantity. Indeed, most Quranic verses deal with moral and ethical obligations. The Quran does not include every basic legal rule, and when it does stipulate some legal rules, these does not cover all aspects of the area addressed.<sup>96</sup>

Therefore, one must have advanced knowledge of the Quran and related religious legal sciences such as *fiqh* to extract Islamic legal rules from the religious and moral obligations of the Quran. All legal institutions, transactions or obligations must respect the moral rules and standards expressed in the Quran such as justice and equality.<sup>97</sup> In addition, religious experts need to use other sources to understand the Quran before applying it as the primary source of Islamic law. As mentioned above, in Shia *Jafari* law, *sunnah*, jurisprudence and custom have contributed to better understanding the Quran. These sources are used to establish the Islamic legal system and

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<sup>94</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 19.

<sup>95</sup> Entessar, 'Criminal Law and the Legal System in Revolutionary Iran', (at 94).

<sup>96</sup> Joseph Schacht, *An Introduction to Islamic Law* (1996) at 200-01.

<sup>97</sup> Ann Elizabeth Mayer, 'Law and Religion in the Muslim Middle East', *The American Journal of Comparative Law*, 35/1 (1987), 127-84 at 155-56 .

were gradually developed by the customary practices of Muslims, as well as through the different ideas and works of Sharia experts (*mojtahed*) accumulated over time.<sup>98</sup>

### ***1.2.2.2. Tradition (Sunna)***

The second source of Islamic law is tradition (*Sunna*). *Sunna* literally means custom, normal behavior and belief or normal and routine method. In the *Jafari* school of thought, *Sunnah* specifically refers to the statements, behavior, practice, sayings and *taqrir*<sup>99</sup> of the Prophet Mohammad<sup>100</sup> and the twelve Imams after him, as collected, compiled and transmitted by their companions. These compilations were organized and codified by Sharia and hadith experts, such as to constitute Shia collections and books of traditions which serve as references.<sup>101</sup> These are considered by Shia scholars as reliable primary sources along with the Quran.<sup>102</sup>

### ***1.2.2.3. Consensus (Ijma)***

The third source of Islamic law, as accepted by the *Jafari* school of thought, is consensus (*Ijma*). This refers to Shia scholars' consensus on the position to adopt regarding a certain religious issue. In the *Jafari* legal system,<sup>103</sup> consensus is valid when it is used to discover the opinion of

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<sup>98</sup> Schacht, *An Introduction to Islamic Law* at 200-01.

<sup>99</sup> *Taqrir* means behavior or silence that confirms a belief or action that has been expressed in the presence of the Prophet or Imam and it has not been refused by them.

<sup>100</sup> Sunna has different meaning for Jafari and Sunni school of thought. The Sunni school of thought believes that the behavior and sayings of companions of Prophet Mohammad have the same validity and used as the source of Sunni law which should be followed by Sunnis.

<sup>101</sup> Some of the most famous of these books are:

-Nahj al-Balagha by Ali ibn Abi Talib - the most famous collection of sermons, letters & narration by the first Imam of Shia.

-al-Kafi by Muhammad ibn Ya'qub al-Kulayni.

-Wasa'il al-Shiah by al-Hurr al-Amili.

<sup>102</sup> Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 209).

<sup>103</sup> Consensus has different meaning for Sunni school of thought and it is considered as the unanimity of Muslim community (Mohammad's Ummeh) on a religious matter.

the Prophet or Imams regarding a certain religious matter, in particular when it comes to determining the position of a group of companions of the Imams or early Islamic scholars who lived during the Imam's life.<sup>104</sup>

#### ***1.2.2.4.Reasoning (Aql)***

The fourth source of Islamic law, accepted by the *Jafari* school of thought, is reasoning (*aql*). Reasoning refers to the use of pure and practical reason to understand the grounds of certain Sharia principles and legal rules. The validity of the use of pure reason in Shia *Jafari* law is based on the fact that Sharia's main goal is to benefit the people and avoid them harm. Therefore, if pure reason confirms that certain actions are beneficial, Sharia will in principle recommend the same thing. Similarly, if reason confirms that an action is harmful, Sharia will in principle forbid it. According to the principle of correlation<sup>105</sup> between Sharia and pure reason, it is thus possible to infer from a certain reasoning a rule in Sharia law. However, there are some rules and prohibitions in Islamic law for which there are no clear underlying reasons. This is why consensus and pure reason are considered as secondary sources of *Jafari* law after the Quran and tradition.<sup>106</sup>

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<sup>104</sup> Mcglinn, *Family Law in Iran* at 12.

<sup>105</sup> Principle of *Mulazema* stipulates that: whatever Sharia stipulated, reason is commanded and whatever reason commands, Sharia will stipulate the same thing.

<sup>106</sup> Abghari, *Introduction to the Iranian Legal System and the Protection of Human Rights in Iran* at 67-69.



## **2 Chapter Two: The Foundations and Sources of Iranian Family Law**

### **2.1. A History of Iranian Family Law**

#### ***2.1.1 Iranian Family Law in Pre-Revolution 1979***

As mentioned earlier, the Safavid dynasty declared Shia Islam as Iran's official religion in the 7<sup>th</sup> century. As such, the clergy have been, for hundreds of years, at the very heart of settling various family disputes. People went to local popular clergymen in order to seek redress for their family disputes. Clergymen ruled according to Sharia law for marriages, divorces, family disputes and other such related areas of family law such as inheritance, custody and guardianship. The government also respected the clergy's competence in personal status and related areas. Sharia court judges during the Safavid and Qajar dynasties were appointed by the

King or his judicial authority. They had jurisdiction over family issues and civil law matters. Therefore, Sharia law was the main source of law used for marital disputes.<sup>107</sup>

In the contemporary period, the 1906 Constitution and Principles of Judiciary Act established that a fully qualified clergy would administrate the Sharia courts registries. Registries held jurisdiction over family disputes including marriage and divorce.<sup>108</sup>

In 1925, the Pahlavi dynasty initiated the period of modern legislation in Iran. During this time family law was consolidated and codified. Family law was changed several times during the Pahlavi reign. The main idea behind these changes was to depart from the strictly Sharia-based rules to pursue what was viewed as the modernization of the judicial system. As such, these legislations sought to systematize Iranian family law, thereby giving it structure, particularly with regards to the registration of marriage and divorce.<sup>109</sup>

#### ***2.1.1.1. Iran's 1935 Civil Code***

Between 1928 and 1936, under Reza Shah Pahlavi's social and legal reforms, Iranian Family Law was legislated under the Iranian Civil Code for the first time, with the codification of family issues such as marriage, family relation, divorce and other kinds of marriage terminations under articles 1031-1206 of Book Two.<sup>110</sup>

The goal of such reforms was to westernize Iranian society. The Iranian Civil Code had been inspired by the secular civil codes of European countries such as France and Belgium. While Sharia law remained the main source for the codification of family law, the organization and lay-out of the Civil Code's chapters and books were largely inspired from European codes of law.<sup>111</sup>

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<sup>107</sup> Mohaghegh Damad Mustafa مصطفی محقق داماد *a Study of Islamic Jurisprudence with Respect to Family Law* (2005, تهران: مرکز نشر علوم اسلامی), at 14-16.

<sup>108</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 350.

<sup>109</sup> Safaei and Emami, 'A Concise of Family Law', (at 38).

<sup>110</sup> Mcglinn, *Family Law in Iran* at 15-16.

<sup>111</sup> Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism', *Critical inquiry*, 32/4 (2006), 629-45 at 634-35.

Some reforms initiated in the Code of family law were considered to be a modernization of Iranian family law, such as the age limitation for the marriage of girls under thirteen years old<sup>112</sup>, or the possibility of judicial divorce for women<sup>113</sup> in special cases such as the husband's inability to fulfill marital duties.<sup>114</sup>

#### ***2.1.1.2. The 1931 Marriage Act***

The 1931 Marriage Act was enacted in 1931 along with the Civil Code and revised in 1937. It was enacted as a guideline to clarify the legal procedural mechanisms for implementing some articles of the Civil Code regarding marriage and divorce. It includes 20 articles and 2 notes.<sup>115</sup>

One of the main goals of this Act was to oblige marriage parties to register marriage and divorce in civil bureaus established under the Ministry of Justice's supervision<sup>116</sup>. Though failure to register the marriage or divorce did not affect their validity, since they were nonetheless completely valid under Sharia, performing such a marriage without registration entailed penalties. Moreover, this marriage or divorce was not legally and officially recognized by the judiciary system. As such, the Marriage Act distinguished the notions of legal and religious state recognition for the first time. Through this Act, the jurisdiction of Sharia courts was limited to disputes including family law and the validity of marriage and divorce.<sup>117</sup>

Another important provision in this Act was Article 3 prohibiting the marriage of girls under thirteen years old and inflicting penalties on those who contravened to this rule.

Other provisions of the Act simply reformulated Civil Code family law dispositions.

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<sup>112</sup> The Civil Code 1935, Article 1041.

<sup>113</sup> The Civil Code 1935, Article 1129-1130.

<sup>114</sup> Amin Banani, *The Modernization of Iran, 1921-1941* (Stanford University Press, 1961) at 69-80.

<sup>115</sup> Safaei and Emami, 'A Concise of Family Law', (at 21.

<sup>116</sup> The 1931 Marriage Act Article 1-2.

<sup>117</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 351-52.

### ***2.1.1.3. The 1967 Family Protection Law and its Revised 1975 Version***

The most important legal amendments in family law were adopted by Mohamad Reza Pahlavi in the Family Protection law of 1967. While the Civil Code of 1935 had not been changed and remained intact, changes occurred in the procedural enactments. This law was adopted through the collaboration of the official Women's Organization of Iran under the supervision and protection of Ashraf Pahlavi, the King's twin sister. This law supported women's equality under the influence of the reformist view of the Nascent Women's Movement. This law, which included 23 articles and 1 note, attempted to establish equal marital rights and obligations for both men and women. It established rules concerning the equal rights of men and women with regards to initiating divorce, granting access to marriage settlement, child custody, guardianship, abolishing extra judicial divorce, legal limitation of men's right to polygamy and the divorce by mutual consent. It also set the age limit of marriage for both boys and girls at 18 years old and established joint responsibility for both men and women.<sup>118</sup>

This law also introduced new procedural rules for the registration of marriage and divorce and new courts by establishing a special jurisdiction on all family disputes. These special courts were administered by a civil judge who could be a man or woman. All divorces had to be registered after the family court judge's final decision and issuing a certificate of "impossibility of reconciliation". The registration of a divorce for which there had been no issuance of the certificate from the court was considered an offense for all the parties involved, including the registrar.<sup>119</sup> The new law abolished men's right to a unilateral divorce and established divorce by mutual consent by giving identical legal grounds to ask for such a divorce for both men and women. In the new law women could even enjoy additional grounds for divorce such as a man's failure to pay alimony, his taking another wife without her consent, or his prosecution for a crime dishonoring the family.<sup>120</sup>

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<sup>118</sup> Ziba Mir-Hosseini, 'How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco', *Wash. & Lee L. Rev.*, 64 (2007), 1499-511 at 1502-03.

<sup>119</sup> The 1967 Family Protection Law, Article 14-16

<sup>120</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 66-69.

In order to strike a compromise with Sharia rules, that gave men an exclusive right to divorce and which was codified in the Civil Code<sup>121</sup>, the 1967 Family Protection Law imposed the insertion of stipulations in all marriage contracts. The law was able to require all marriage contracts to include these conditions because Sharia law allows such negotiated and accepted conditions between marriage parties. In other words, the 1967 Family Protection Law transformed the conditions under which a woman could request a judicial divorce and certify it through a court by obligatory stipulation to the marriage contract rather than enforcing it directly by legislation.<sup>122</sup> The possibility of stipulating conditions to a marriage contract had been recognized in the Civil Code of 1935 as well as in the Marriage Act of 1931.<sup>123</sup> Both of these laws recognized the right for women to stipulate, in marriage contracts, the right to divorce from their husbands under certain conditions. The courts confirmed the validity of such stipulations in marriage contracts. However, it was upon women and their families to negotiate and obtain men's consent to accept such stipulations in the marriage contract, which rarely happened. Through the Family Protection Law, the stipulation of these conditions became an obligatory and integral part of marriage contracts. However, this did not concern existing marriage contracts concluded before the Family Protection Law 1967. In order to give the same rights to married women who did not benefit from such stipulations in their marriage contracts, the courts gave women the opportunity to appeal to articles of the Civil Code establishing certain minimal conditions allowing women to demand judicial divorce.<sup>124</sup>

The 1967 Family Law, with its unprecedented secular approach and reformist rules, was opposed by many religious Iranians and *ulama*, such as Ayatollah Khomeini. He issued a *fatwa* stating that any divorce occurring under Family Law would be invalid under Sharia. However, the Pahlavi modernization of Iranian family law continued and another law with the same title was enacted in 1975. The new Family Protection Law replaced the old one with 28 articles and 19 notes. It further modernized women's rights, increasing the age limitation of marriage for girls

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<sup>121</sup> The 1935 Civil Code, Art. 1133: 'A man can divorce his wife whenever he wishes'.

<sup>122</sup> The 1967 Family Protection Law, Article 17.

<sup>123</sup> Article 4 of the 1931 Marriage Law which was repeated in Article 1119 of the Civil Code.

<sup>124</sup> Mcglinn, *Family Law in Iran* at 19-22.

and boys, bestowing more equal rights to women in divorce and custody and giving more authority to the courts in this area.<sup>125</sup>

This law was the last family law legislation in the Pahlavi reign. The 1979 Revolution overthrew the monarchy and established the Islamic republic.

### **2.1.2 Iranian Family law in Post-revolution 1979**

The 1979 Islamic revolution replaced the secular Iranian system applicable under the Pahlavi regime with a new Islamic system. As mentioned above, in the new Islamic Republic, the Sharia (*Jafari* or Twelver-Imam jurisprudence) was chosen as the first source of law in the constitution<sup>126</sup> and a Guardian Council was formed to make sure that all the laws passed by the Parliament respected Sharia rules and constitutional provisions. The Revolutionary Council, the temporary governing body of Iran in the post-revolution period, appointed a group of clerics to review all the applicable laws and to revoke and modify secular laws so as to have them conform to Islamic principles and Sharia. (Mir-Hosseini 2010) While the previous Iranian family law regime had been inspired by the secular approach, the newly prevalent Sharia law approach found contradictions between Sharia and family law legislations enacted under the Pahlavi regime.

The revolutionary period and first decades after the Islamic Revolution gave way to a modern kind of Islamic state for the first time. The Islamic judiciary system undertook the establishment

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<sup>125</sup> Mir-Hosseini, 'How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco', (at 1503).

<sup>126</sup> See Article 4 of the Iran's constitutional law: "*All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.* "

of an Islamic state law and many decisions were made through a process of trial and error. Combining classical Islamic jurisprudence with modern conceptions of human rights and updating jurisprudence was one such difficulty encountered by the Islamic judiciary system. As such, many succeeding legislative texts were enacted and annulled, resulting in a disintegrated and inconsistent legal system. Family law was an edifying example of this legal anarchy. The new Islamic Republic wanted to conform all existing legislation to the Sharia. The existing legislation had been inspired by secular law but included elements of Sharia rules, thus creating some inconsistency and contradictions between different laws. In addition, by constantly annulling and enacting legislative texts, the law was sometimes silent or ambiguous regarding certain areas, such that it was not always clear which law governed which aspect of society.<sup>127</sup> (Arjomand 2002)

The development of Iranian family law experienced many changes in the post- revolutionary period. Shortly after the Revolution, in February 1979, the 1975 Family Protection Law was suspended by ministerial decree. But the Revolutionary Council held that the pre-revolutionary Civil Code, which included family law provisions, was still valid and enforceable in new judiciary system. This position was officialized by the Special Civil Courts Legislation in October 1979.<sup>128</sup>

### ***2.1.2.1. The 1979 Special Civil Courts Legislation***

This Legislation established the Family Protection Courts which replaced the family courts formerly established under Family Protection Law of 1975. It was considered as the first step toward the application of Sharia in the family law. The Legislation contained twenty articles and three notes explaining the structure and jurisdiction of the Family Protection Courts, which were similar to what existed under the 1975 Family Protection Law. Experienced clerical judges were nominated as presidents of these courts. The courts did not have to adhere to the Code of

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<sup>127</sup> Said Amir Arjomand, 'The Reform Movement and the Debate on Modernity and Tradition in Contemporary Iran', *International Journal of Middle East Studies*, 34/04 (2002), 719-31 at 720-25.

<sup>128</sup> Safaei and Emami, 'A Concise of Family Law', (at 20-21).

Civil Procedure's provisions. The new Legislation required court permission for the registration of divorces except in cases of the divorce by mutual consent, for which parties could go to the registry without the court's permission. The Legislation also required the courts to refer cases of divorce initiated by men to arbitration.<sup>129</sup> If the parties' reconciliation through arbitration was not obtained, the court was issued the "permission to divorce". This Legislation limited the unilateral and extra-judicial divorce by men. It was based on the verse of the Quran which asks married parties to go to the arbiters from both parties' relatives to seek reconciliation before divorce.<sup>130</sup>

Regarding women's right to divorce, which was developed under the Family Protection Law of 1975, Ayatollah Khomeini issued a *Fatwa* allowing women to use marriage contract stipulations, when they had put such contractual conditions, in order to obtain judicial divorce, or in case of maltreatment if they did not mention such stipulations in their marriage contracts.<sup>131</sup>

#### ***2.1.2.2. The 1982 Marriage Stipulation by The Ministry of Justice***

The provisions of the 1975 Family Protection Law continued to have effect in different post-revolutionary family law legislations. In 1982, almost all the provisions of the 1967 Family Law were reinstated again by an order from the Ministry of Justice. Marriage contracts could stipulate conditions seeking to compensate and protect women. These conditions include 12 secondary contractual conditions stipulated in the template marriage contract prepared by Iran's Ministry of Justice. These can be signed by the man and woman at the time of marriage. These conditions are written in the marriage's official documentation and the notary who registers the contract encourages the parties to sign them. However, they remain free to refuse these conditions.<sup>132</sup>

One of the new additional conditions written in the template marriage contract stipulates that the husband should pay his wife up to half of the wealth acquired during the marriage or its

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<sup>129</sup> The 1979 Special Civil Courts Legislation, Article 3, Note 2

<sup>130</sup> Mcglinn, *Family Law in Iran* at 22-23.

<sup>131</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 70-71.

<sup>132</sup> Mahmoud Hekmatnia, *Woman's Rights and Family* (Tehran: Sazman Entesharat Pajoheshgah Farhang o Andisheye Islami, 2012) at 210-11.



value at the time of divorce, unless the divorce is requested by the wife, the court rules that the divorce was due to the wife's refusal to fulfill her marital duties, or because of sexual misbehavior on her part. The wife's entitlement to up to half of the wealth acquired during marital life was included in the template and thus signed by most men and women who marry in Iran. However, some conditions limited the woman's rights.<sup>133</sup>

The second important condition was to give women the legal right to require judicial divorce from the court in 14 situations which caused hardship or difficulty (*Osr o Haraj*) for her. In these situations, a man gave his wife the right to divorce. This was applied by courts of law. The conditions were close to the 1975 Family Protection Law with the main difference being in the Sharia as a basis for the new legislation. However, signing this condition was not obligatory for men who could refrain from signing them.<sup>134</sup>

In practice, the 1982 legislation amended article 1130 of Civil Code and gave judges more power to decide about divorces requested by women in case of hardship. The empowerment of judges had two consequences in relation to the protection of women's rights:

Firstly, the judge had the final say concerning a case of hardship for a woman. The judge could issue a judicial divorce at his discretion even if the man did not sign the conditions on his marriage contract.

Secondly, the fact that a judge was given such discretion entitled women who married before the 1982 amendment to request a judicial divorce for hardship.<sup>135</sup>

### ***2.1.2.3. The 1990 Law of Amendment to Some Articles of The Civil Code***

In 1982 and 1985, in order to continue the process of conforming the existing legislation to the Sharia, the Guardian Council, in association with the High Judicial Council, applied some

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<sup>133</sup> Leyla Dejkhah, 'Divorce and the Challenge of Dividing Properties (طلاق و چالش تصنیف دارایی)', *Ketabe Zanan*, 35 (2007) at 2-3.

<sup>134</sup> Mcglinn, *Family Law in Iran* at 22-23.

<sup>135</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 74-78.

changes including the temporary deletion and amendment of 50 articles of the 1935 Civil Code.<sup>136</sup> In 1990 the Law of Amendment to Some Articles of the Civil Code was ratified by the Parliament. Most of these amended articles belonged to family law. These amendments included the decreasing of the age limitation for marriage of both girls and boys. According to the amendment to article 1041 of Civil Code, the minimum age for marriage decreased to Sharia age, which corresponds to puberty, that is, nine years old for girls and fifteen years old for boys (see amendment to article 1210), while the Special Civil Court could allow for the marriage of girls under thirteen years old. Yet article 3 of the 1931 Marriage Act, which prohibited the marriage of girls under thirteen years of age and put sentences for all involved in such a process, was still applicable. Similar ambiguities occurred in different aspects of family law such as polygamy, temporary marriage and custody rights.<sup>137</sup>

#### ***2.1.2.4. The 1992 Amendment to Divorce Regulations***

The introduction of the “Amendment to Divorce Regulations”, which had been rejected by the Guardian Council and finally passed into law by the Expediency Council in 1992, was an important step in organizing rules of divorce. It was a single article with seven notes which reinstated many articles of the 1975 Family Protection Law. This Regulation tried to put all divorce registrations under the jurisdiction of the Special Court and required all the divorcing parties to register their divorce through a court certificate. Even for the registering of a divorce by mutual agreement, parties needed to go through arbitration and in case of impossibility of reconciliation, the court allowed the man to register the divorce.<sup>138</sup> But the Regulation established a rule whereby the divorce only became effective and could only be registered officially once the man payed all the wife’s religious and legal economic rights including dowry (*Mahr*), alimony (*Nafagha*), and property the wife brought to the marriage (*Jahizieh*), unless he could prove his inability to pay his wife’s dues. The new rule also included the division of

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<sup>136</sup> Hossein Mehrpour, *The Civil Code of Iran* (Tehran: Daneshvar, 2001) at 8-16.

<sup>137</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 353-55.

<sup>138</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 74-78.

property – the court had to determine the amount to be paid by the husband before the divorce was officially registered.<sup>139</sup>

This Regulation also legalized, for the first time, the appointment of women as advisers to the main judge in Special Civil Court mandates.<sup>140</sup>

Clause A of Note 6 of the Regulation introduced a new, important notion in family law which is the wage of domestic labor (*ojrat ol-mesl*). It requires courts to determine the value of the domestic labor performed by the wife during the time of marriage when she had the intention to be paid. The court obliges the husband to pay the wage of this work as determined by the Court. However, this obligation is only due in cases where the husband initiates a divorce and where there is no observed misbehavior of the wife. Therefore, if the wife initiates a divorce or if the wife is deemed to have misbehaved, this clause does not apply.<sup>141</sup>

The Iranian legislator in Note 6, Clause B of the Regulation provides more protection for women going through a divorce process through a rule known as *Nahle* (obligatory gift). The Clause calls on courts, in cases where Clause A does not apply, to determine an amount of financial compensation for domestic labor performed by the wife during the time of the marriage, based on the wealth of the husband and on the duration of their cohabitation.<sup>142</sup>

#### ***2.1.2.5. The 1994 law of Formation General Courts***

In 1994 the Law of Formation General Courts gave the General Courts jurisdiction over all criminal and civil disputes. The Special Civil Courts' jurisdiction was terminated and all family disputes were dealt with in the General Courts along with all other types of disputes until 1999. (Safaei and Emami 2017)<sup>143</sup> The General Courts' president was a senior cleric or a civil judge who had general mandate on all cases including family disputes. The head of the judiciary

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<sup>139</sup> The 1992 Amendment to Divorce Regulations, Notes 1, 2, and 3.

<sup>140</sup> The 1992 Amendment to Divorce Regulations, Notes 5.

<sup>141</sup> Nayereh Tohid, 'Iran', *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Rowman & Littlefield Publishers, 2010), 121-56 at 124-25.

<sup>142</sup> Hekmatnia, *Woman's Rights and Family* at 198-200.

<sup>143</sup> Safaei and Emami, 'A Concise of Family Law', (at 21-22.

mandated an authorized judge to preside the disputes regarding the legal validity of marriage or divorce.<sup>144</sup>

This law and the structure of the General Courts were highly criticized for undermining the general legal principle of specializing the different branches of the courts when they affected the rights of parties in different criminal and civil cases, especially in family disputes.

#### ***2.1.2.6. The 1997 Law of Allocating Some Branches of General Courts to The Family Courts (The Subject of Article 21 of The Constitution)***

In family cases, the General Courts Law violated article 21(3) of the Iranian constitution which stated:

*“The government must secure the rights of women in all respects, according to the Islamic criteria. The government must do the following: 3. create competent courts to protect the integrity and subsistence of the family”*

Finally, the 150 representatives of Parliament signed a bill asking to establish special family courts in order to abide by article 21 of the Constitution. In 1997 the “Law of Allocating Some Branches of General Courts to Family Courts (the Courts Subject to Article 21 of Constitution)” was ratified by the Parliament and the Guardian Council. This law consisted of a single article and three notes. It required that the head of the judiciary system allocate a branch of General Courts in every local jurisdiction to become Family Courts in three months after the ratification of the law. According to this Law, the General Courts were forbidden from accepting to hear family disputes. The jurisdiction of Family Courts extended over all aspects of family law including marriage, divorce, custody and all related disputes.<sup>145</sup>

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<sup>144</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 355-56.

<sup>145</sup> Safaei and Emami, 'A Concise of Family Law', (at 22.

This Law (Note 3) also required that the final decision of the Family Court should only be issued after having the legal opinion of a female legal advisor. However, this was not obligatory, though the Courts should try to respect this.<sup>146</sup>

Through this law, Family Courts were re-established in the Iranian legal system.

After the end of eight years of war with Iraq in 1989, legal reforms were once again initiated gradually. During this period, the Constitution was revised and the governing system changed from a parliamentary system to a presidential system. The Expediency Council was also established based on the revised Constitution. The main mandate of this Council was to resolve any conflicts between the Parliament and the Guardian Council on the ratifying of different legislations. This new body could ratify a law in case of disagreement between the two aforementioned bodies.<sup>147</sup>

In 2000, a decade after the war and with the appearance of a new modernist and reformist government, family law reforms and women's rights were among important issues reformists were looking to address. The failure of existing legislations to duly protect women's rights, and the ambiguity and contradictions contained in some legal notions such as child custody and women's economic rights were important issues that needed to be addressed. Therefore, the liberal Parliament passed around 40 bills concerning women's rights and related areas, including the proposal to join the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which the Guardian Council did not ratify. Nonetheless, around half of these bills passed into law thanks to the Expediency Council's decisions, including the change of the age limitation for marriage, the women's right to divorce and child custody based on amendments to the related articles of the 1935 Civil Code.<sup>148</sup>

Amending and preparing a new, comprehensive family law became an important public debate for a decade. Elaborating a general and better organized family law ridding it of the ambiguity,

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<sup>146</sup> Valentine M Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', *conference for the Woodrow Wilson International Center for Scholars, "Iran After (25, 2004)*, 16-17 at 7-8.

<sup>147</sup> Sial, 'A Guide to the Legal System of the Islamic Republic of Iran', (at 3.

<sup>148</sup> Arjomand, 'The Reform Movement and the Debate on Modernity and Tradition in Contemporary Iran', (at 725-30.

conflict and problems of previous legislations was a long process. The proposal of the “Family Protection Law”, originally prepared by the judiciary and further developed by the government, was presented to the Parliament by the government in 2007 and was finally voted into law in 2013. Its directive regulation was prepared in 2015 by the head of judiciary in order to implement the Law.<sup>149</sup>

#### ***2.1.2.7. The 2013 Family Protection Law***

As mentioned earlier, throughout the legislative history of Iranian family law in the contemporary period, the legal system experienced three legislations all named “Family Protection Law”. The first one was in 1967, the second in 1975 and the third and most recent one in 2013. The enactment of the 1975 Family Protection Law completely repealed the 1967 Law. The Islamic Revolution suspended the 1975 Family Protection Law based on its failure to conform with Sharia. Nevertheless, it continued to be applied unless the articles were officially annulled by the Guardian Council based on their failure to conform with Sharia.<sup>150</sup> The 2013 Family Protection Law officially revoked all previous family legislations except the 1975 Family Protection Law.<sup>151</sup> As such, in the current Iranian legal system, the 2013 Family Protection Law governs all family disputes and the 1975 Law is also valid unless the articles are officially repealed. It is notable that most changes in family law concerned procedure and the articles in Volume 2 of the 1935 Civil Code are still the main body of rules regarding family law, except the articles modified or deleted by the 1990 Law of Modification of Some Articles of Civil Code and some modifications which occurred later in some articles.<sup>152</sup>

The new comprehensive Family Protection Law, which included 58 articles, put an end to the ambiguity and dispersal of different existing family law texts and clarified many uncertainties faced by judges in family disputes. The Family Protection Law provisions are updated based on

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<sup>149</sup> Safaei and Emami, 'A Concise of Family Law', (at 21.

<sup>150</sup> *Ibid.*, at Introductory Page 1.

requirements and changes in modern society and are more compatible with situations faced by contemporary Iranian families.<sup>153</sup> The recent Family Protection Law consists of seven chapters:

**1- Family Court:** The first chapter of this Law, which counts 15 articles, concerns the Family Courts, their structure, jurisdiction and mandate. By establishing Family Courts, the Law ended the tasks of General Courts which previously had jurisdiction over family disputes.<sup>154</sup>

Under Article 2 of the new Law, the presence of a female advisory judge is obligatory in Family Courts and her legal opinion must be mentioned in the final judgment. If the final decision of the judge is against her opinion, the reasons must be explained. Article 8 of the new Law provides that disputes in Family Courts are not subject to provisions of the Civil Code of Procedure.

**2- Family Advisory Centers:** This chapter concerns the Family Advisory Centers. These Centers co-operate with Family Courts in order to settle family disputes and reconcile parties. Their aim is to decrease the divorce rate by mediating between the parties. The Centers can use family consultants, psychologists, social workers and religious advisors.<sup>155</sup>

**3- Marriage:** This chapter is about marriage, its obligatory registration and its procedure which includes temporary marriage. There are some criticisms concerning article 21 which legalizes temporary marriage.

Article 22 adopts new rules regarding dowry and its payment procedure. This article introduces the certain amount of dowry<sup>156</sup> due by men to their wives, and is enforced by general provisions in criminal law that outline sanctions in case of failure to pay the dowry. For the additional amount of dowry, the courts must take into consideration the man's ability to pay with regards to the amount due for the dowry. This important and innovative article will be further explained below, particularly regarding the payment of the dowry.

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<sup>155</sup> Family Protection Law 2013, Article 16-17.

<sup>156</sup> 110 Iranian Golden Coins or its equivalent

**4- Divorce:** This chapter includes all the procedures related to divorce, its registration and other related areas of law such as children's custody and alimony after divorce. It states the rules imposing the referral of the parties to arbitration before any divorce except in cases of divorce by mutual agreement.<sup>157</sup> In the latter cases, the Court must refer the parties to the Family Advisory Centre and notify them regarding the mutual agreement for divorce.<sup>158</sup>

**5- Custody, Guardianship and Alimony:** Different aspects of a child's custody, alimony and general care after divorce are stated in this part.

**6- Salary and pension rights:** This chapter concerns the division of a deceased man's salary and pension between his wife and children with regards to their alimony.

**7- Criminal Provisions:** This part lists the acts or failures resulting in criminal prosecution with regards to Family Law, such as the failure to register the marriage or divorce and the failure to pay the alimony of the wife or children.

According to articles 50 and 56, the minimum age for a girl's marriage is as referred to in article 1041 of the Civil Code (13 years of age). Any party involved in the violation of this article is to be punished.

Finally, Article 58 of the Law repeals the aforementioned previous laws, including the 1992 Amendment to Divorce Regulations Act, the 1997 Law of Allocating Some Branches of General Courts to the Family Courts. However, the 1975 Family Protection law is maintained.<sup>159</sup>

## **2.2 Sharia and The Development of Iranian Family Law**

As elaborated upon previously, Sharia has been the main source of Iranian law since the Safavid dynasty. In the contemporary period, Sharia became the main source of modern legislation.

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<sup>157</sup> Family Protection Law 2013, Article 27.

<sup>158</sup> Family Protection Law 2013, Article 25.

<sup>159</sup> Safaei and Emami, 'A Concise of Family Law', (at 21-24).



Though the Pahlavi administration sought to secularize the legal system, the Sharia roots of Iranian civil law remained intact.<sup>160</sup>

The relationship between Sharia, women's rights and family law, which falls under civil law, is a particularly important and sensitive topic. On the one hand, Iranian family law, including women's rights, is rooted in the Sharia and according to the 1979 Constitution all legislation on this topic should comply with Sharia rules and requirements.<sup>161</sup>

On the other hand, women's rights, as part of the global project of human rights, have been one of the most important evolving topics of discussion and dispute. The discussion becomes particularly tense with regards to the compatibility of religiously grounded legal systems with such a human rights project. For example, the 1979 Constitution enshrined the principle of gender equality but limits it to the Sharia conception of this principle.<sup>162</sup> Several studies have been done on the legal situation of women under Iranian and Sharia laws. Following the 1979 Islamic Revolution and after the promulgation of the 1979 Constitution, articles and books examining women's rights and responsibilities under the new circumstances were written.<sup>163</sup> New elements were now playing a crucial role in shaping the legal structure of Sharia as State law, its interpretation of women's rights, and its adaptation to the contemporary Iranian society.

In broader lines, there are many debates concerning the coexistence of Sharia rules with today's societal needs. Is Sharia still useful considering the many changes brought about by modernity? In other words, could Sharia principles, originally developed hundreds of years ago, address all of today's necessities, including the protection of fundamental human rights? In family law and women's rights, one must examine whether Sharia's approach to family law could comply with the requirements of modern international women's rights. The latter insist on international human rights and different conventions such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The goal of this section is to explore how Sharia

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<sup>160</sup> Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism', (at 633).

<sup>161</sup> The 1979 Iran's Constitution, Article 4.

<sup>162</sup> The 1979 Iran's Constitution, Article 20: "Members of the nation, whether man or woman, are equally protected by the law. They enjoy all the human, political, economic, social, and cultural rights that are in compliance with the Islamic criteria."

<sup>163</sup> Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', at 4-5.

works within the modern legislative system and whether Sharia can satisfy the standards set down by international human rights conventions.

This research seeks to suggest certain policy formulations to renovate Iranian matrimonial law according to the needs of society. It proposes to do so not with a partial overview of women's rights, but by construing women's rights as part of a broader legal system. Therefore, a general approach to *ijtihad* and its role in renovating the Sharia provisions will be considered in a broader perspective. A concrete road map and appropriate regime will be put forward to propose a novel way of combining Sharia rules with the sophisticated modern Iranian societal needs.

This study considers Sharia in relation to the Iranian legal framework as State law. As such, the concept of "Sharia rules" will be limited, for the purpose of this research, to its construction in the Twelver Shia school of thought (*Jafari* school), and will not consider other important Shia or Sunni schools of thought.

### **2.2.1 *The Islamic Legal System***

As we mentioned, the general legal regime provides for rules and provisions that include women's rights and family law. As such, any research on women-related topics must study the general rules and principles of a system to provide a coherent analysis.

This research will examine the marital relationship in Iranian law, in the context of the broader Islamic legal system. Islamic law is a unique set of laws and regulations with its own special overview of society and its members. Therefore, one must first turn to the study of the Islamic legal system and its framework.

Sharia law is considered as a holistic legal system, governing all aspects of a Muslim person's life, both in their private lives and social interactions.<sup>164</sup> It is generally divided into two categories. The first category comprises of all rules pertaining to a Muslim person's personal relationship with God (*Ibadat*). The second category pertains to a Muslim person's social life

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<sup>164</sup> M Cherif Bassiouni and Gamal M Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making'(2002)', *UCLA Journal of Islamic and Near Eastern Law*, 1 (135-81 at 135-36.

and relation with others in society (*Muamalat*).<sup>165</sup> This latter category is the one that must be studied when considering Islamic law in the context of modern society. Therefore, the main difference between Islamic law and other Western legal systems is that it regulates a broader aspect of life including the person's private life and personal relation with God, as well as their relation with society at large. Sharia is a mixed system of law and ethics which treats individuals from an ethical standpoint rather than a purely legal one. This is why Sharia also provides for recommended or detested acts in the eyes of God, which are not allotted with a worldly system of punishment or reward.<sup>166</sup>

There are five categories of actions available for a person in Sharia law:

1. **Recommended actions (*Mostahabat*):** These are praiseworthy actions which one is encouraged to perform. While performing these actions brings God's favour, there is no punishment if an individual does not perform them.
2. **Detested actions (*Makruhat*):** These are actions which one is discouraged from performing. While there is no punishment for performing these actions, abstaining from doing so brings God's favour.
3. **Permitted actions (*Mobahat*):** These are actions one is free to perform and there is no divine favor or disfavor for performing them. This category is made up of most human actions.
4. **Obligatory actions (*Wajebat*):** These actions must be performed, such that performing them is rewarded and not doing so is punished.
5. **Forbidden actions (*Moharramat*):** These actions are forbidden such that performing them brings punishment and abstaining from them is rewarded.<sup>167</sup>

We can see that the first three groups are moral actions which fall out of the scope of binding law. We can categorize them as ethical injunctions. The last two groups are legally binding since they can lead to punishment. It is because the Sharia categories above can be applied to all

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<sup>165</sup> John L Esposito, *The Oxford Dictionary of Islam* (Oxford University Press, 2004) at 208-09.

<sup>166</sup> Weiss Bernard, 'Interpretation in Islamic Law: The Theory of Ijtihad', *EDGE Ian (éd.), Islamic Law and Legal Theory, Great Britain, Dartmouth, The International Library of Essays in Law and Legal Theory Series*, 608 (1996), 273-86 at 199-200.

<sup>167</sup> Esposito, *The Oxford Dictionary of Islam* at 148 and 88.

human actions that it is referred to as a comprehensive system of moral and legal rules which includes public and private aspects of a human life.

Traditionally, the areas governed by Islamic law are divided into four categories in Sharia manuals:

1. Regulation of the private acts of worship (*Ibadat*) and beliefs (*Eteghadat*),
2. Regulation of different transactions and contracts (*Muamelat*),
3. Regulation of marriage, divorce and related areas (*Nekah*),
4. Classification and repression of criminal acts (*Hoodod and Diyat*).<sup>168</sup>

This legal system is based on God's will, seeking to establish a society based on justice and the success of human beings in this world and the afterlife. Islamic theology is founded on the existence of God and on the belief that God is the ultimate legislator. The content of Islamic law is restricted to God's command for human being's successful life. God's will is eternal and does not change over time.<sup>169</sup> The Divine will is accessed through different sources, the primary sources of divine law being the Quran and Prophet Mohammad's sayings, acts and teachings (*Sunnah*). While the Quran discusses different social topics and legal issues, it does not cover everything and only gives some general guidelines to understanding the main goals and general principles of divine law. These are called the goals of Sharia (*maqasid al-Sharia*), and include such values as reasoning, human life, belief in God, patience and kindness, and the existence of life after death.<sup>170</sup> While these are not enough to understand divine will in all questions of law, Prophet Mohammad's teachings and his way of living help Islamic scholars understand more about divine will. That which has been recorded as the Prophet Mohammad's practices, conduct and sayings is called Islamic tradition (*Sunnah*). This contains many examples of the Prophet's private and public life and should be the norm for any Muslim's behaviour and lifestyle.<sup>171</sup> At the time of the Prophet Mohammad, the first Muslims had the chance to use the Quranic

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<sup>168</sup> Ibid., at 148.

<sup>169</sup> Syed Arshad Husain, 'Religion and Mental Health from the Muslim Perspective', *Handbook of Religion and Mental Health* (Elsevier, 1998), 279-90 at 283.

<sup>170</sup> Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought (IIIT), 2008) at 1-2.

<sup>171</sup> Esposito, *The Oxford Dictionary of Islam* at 329.

revelations as interpreted by the Prophet. The Prophet established the Islamic government in Medina, and governed according to Quranic verses. At that time, people had the opportunity to question him about Islamic law and Quranic verses. While the Quran was not comprehensive in its discussion of Islamic law, and brought many additional, novel subjects to pre-Islamic Arabs, the Prophet explained and clarified many the Quranic themes for the people. In time, new problems and questions arose, which the Prophet also addressed. In addition, many legal cases were referred to the Prophet, who was the supreme judge of the Islamic government.<sup>172</sup> The Prophet's legal solutions helped further explain Quranic or Islamic rules. In the Shiite world, this was continued by the Shiite Imams who replaced the Prophet in clarifying Islamic rules to the people who asked them their questions.<sup>173</sup>

The fundamentals of Islamic law were established in the second and third centuries after Prophet Mohammad's migration to Medina (8<sup>th</sup>-9<sup>th</sup> centuries A.D). After the Prophet's lifetime, while scholars used Islamic tradition to extract Islamic law, they were confronted with contradictory Islamic traditions as these were produced in different times, places and conditions and most of the said differences were not recorded in history. In fact, the Islamic traditions, as they were collected and compiled, revealed certain contradictions which needed to be reconciled. Therefore, there are some debates and differences in interpreting these different Islamic traditions.<sup>174</sup> Here, the secondary Islamic legal sources, consensus (*Ijma*) and reason (*Aql*), helped Islamic scholars better understand Islamic law from the Quran and Sunnah.<sup>175</sup> They attempted to answer Muslim believers' questions by imagining how the Prophet would have answered were he still alive, and tried to find guidance in Sharia on how to answer new cases that had not existed at the time of the Prophet.<sup>176</sup> *Fiqh*<sup>177</sup> refers to the Islamic scholars' endeavor

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<sup>172</sup> Wael B Hallaq, 'Was the Gate of Ijtihad Closed?', *International Journal of Middle East Studies*, 16/1 (1984), 3-41 at 35-36.

<sup>173</sup> Bernard, 'Interpretation in Islamic Law: The Theory of Ijtihad', (at 199).

<sup>174</sup> Bassiouni and Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making' (2002)', (at 138-39).

<sup>175</sup> Abdullahi Ahmed An-Naim, *Islam and the Secular State Negotiating the Future of Shari'ah* (Cambridge: Harvard University Press, 2008) at 12-13.

<sup>176</sup> John L Esposito and Natana J Delong-Bas, *Women in Muslim Family Law* (Syracuse University Press, 2001) at 8. p 8.

<sup>177</sup> In general, the definitions of *feqh*, *Sharia* and *fatwa* are as follow under Auda's definition in his book ( Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* at introductory XXiii.)

to understand divine law from Islamic sources, to then explain and/or apply this law to the people.<sup>178</sup> As such, there are different legal opinions (*fatwa*) concerning the same subject, issued by different religious scholars according to their understanding of Islamic sources. Therefore, while God's law is known as Sharia law, the law Islamic scholars expound for the people is based on their understanding of the sources and is known as Islamic jurisprudence (*fiqh*). Therefore, *fiqh*, which literally means "understanding", is the Islamic scholar's knowledge in ascertaining the rules of Islamic law.<sup>179</sup>

### 2.2.1.1. *Ijtihad*

Through the development of Islamic governance after the Prophet, much broader legal issues arose. Over the years, many novel issues came about which had not been conceivable at the time of the Prophet. While Sharia law is the timeless expression of God's will which does not change over time, novel issues can arise over time and their legal regime must be clarified by Islamic scholars. Sometimes, there is no pre-existing basis for novel issues in Sharia law. In such cases, Islamic scholars attempt to find the appropriate solution by using the general rules and principles of Islamic law and main goals of Sharia. In addition, the reasonable and well-known existing local customs (customary law) were used in finding the law of novel legal issues. Islamic law has always respected the reasonable and good traditions of the people.<sup>180</sup> (Hallaq 1984) Indeed, Islamic law originally consisted in two main categories of law:

Firstly, the rules which already existed among people before Islam were maintained and incorporated into Sharia. Indeed, Islam confirmed many local customs as good and appropriate such as legal rules respecting private property and many aspects of already extant contract law.

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*Fiqh* is the huge collection of juridical opinions that were given by various jurists from various schools of thought. It pertains to the application of sharia to various real life situations throughout the past fourteen centuries.

*Sharia*: the divine revelation as received by Prophet Mohammad (SAAS), who made its practice the message and mission of his life, ie the Quran and the Prophetic tradition.

*Fatwa*: The application of Sharia or *fiqh* to Muslims' real life today.

<sup>178</sup> Bernard, 'Interpretation in Islamic Law: The Theory of *Ijtihad*', (at 16).

<sup>179</sup> Abdul Rashid Moten, *Political Science: An Islamic Perspective* (Springer, 1995) at 48-49.

<sup>180</sup> Hallaqa, 'Was the Gate of *Ijtihad* Closed?', (at 5).

Such “signing rules”, where Islamic law signed and confirmed existing rules, allowed Islamic law to absorb many pre-existent Persian-Sasanid and Roman-Byzantine traditions and legal elements.

Secondly, novel law was created and established for the first time by the Prophet, who claimed that such a law was better than that which existed before Islam. One such example of this novel law is the rule forbidding usury in Islam.<sup>181</sup>

Therefore, Islamic scholars try to determine the Islamic rule applicable in different situations, different societies and different times. This process is called *ijtihad* and the Islamic scholar who performs *ijtihad* is called a *Mojtahid*. The literal meaning of *ijtihad* is “mental or physical effort”. In Islamic law, *Mojtahid* exerts effort to derive appropriate rules from the Quran and *Sunnah* by using Islamic legal principles.<sup>182</sup>

There are two obligatory requirements enabling a *Mojtahid* to practice *ijtihad*:

Firstly, he must have excellent knowledge of the main goals of Sharia, the main sources of Islamic law, the numerous Islamic legal principles and general rules of Islamic law as well as knowledge of current legal issues and the ability to analyze them.

Secondly, the *Mojtahid* must prove capable of using this knowledge in inferring<sup>183</sup> legal rules in new situations.<sup>184</sup>

However, the concept of *ijtihad* distinguishes between the *Jafari* and *Sunni* schools of thought.<sup>185</sup> In *Sunni* Schools, *ijtihad* is considered an independent source of legislation along with the Quran and *Sunnah*, such that when a *Mojtahid* cannot find a legal rule in the Quran and *sunnah*, *ijtihad* is performed based on this *Mojtahid*'s free reasoning, in accordance with the

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<sup>181</sup> Bassiouni and Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making'(2002)', (at 136.

<sup>182</sup> Hallaq, 'Was the Gate of Ijtihad Closed?', (at 3.

<sup>183</sup> Inference (استنباط; *Istenbat*) is a process of seeking guidance from the main source of Islamic law to produce law by using the principles of Islamic jurisprudence.

<sup>184</sup> Isa Velaei, *The Encyclopedia of Usul Al Fiqh* فرهنگ تشریحی اصطلاحات علم اصول (Tehran: Ney, 2001) at 35-36.

<sup>185</sup> See An-Naim, *Islam and the Secular State Negotiating the Future of Shari'ah* at 13-15.

goals of Sharia. By contrast, in the *Jafari* school, *ijtihad* must be based on distinguished sources. It is not an independent source of law, but simply a way of extracting appropriate rules from the Quran and *sunnah*.<sup>186</sup>

As Shia is the school prevailing in Iran, regarding the aim of this thesis in its examination of Iranian law, only the *Jafari* school's approach to *ijtihad* will be considered.

Historically, *ijtihad* started after the Prophet's time, when the Quran and *sunnah* did not define the legal rules pertaining to certain matters, it was then necessary to infer legal rules from Islamic sources. By the ninth century after the Prophet's life (14<sup>th</sup> A.D), a corpus of manuals written by different *Mojtahids* on the discovery of certain Islamic rules in different subjects was established. They issued their legal opinions (*Fatwa*) for people who wanted to follow their opinions. Such followers are known as *Mughaleidin* (followers). Over time, their legal opinions were developed by answering the questions and comments of followers, such that they became more organized, structured into different chapters in legal manuals.<sup>187</sup>

Through different social developments over the years, many novel issues arose that needed solutions in Islamic law. This meant that Islamic law grew with its contemporary issues. Traditional Islamic law, as expounded in the early stages of Islam, cannot comply with the needs of modern life and the situation of contemporary Muslim societies. In this situation, one solution for Muslim countries was to abandon Sharia law completely and secularize their laws. Turkey is the only example of a Muslim-majority country that completely rid itself of Sharia law in 1926. For example, Turkish lawmakers opted to base Turkish family law on Swiss Family Law rather than Islamic law. Other Muslim countries did not follow this solution. Instead, they tried to find different ways to adapt their Islamic legal system to face the needs of their modern Islamic society. Countries such as Morocco, Tunisia and Egypt selected different solutions based on their different schools of Sunni thought.<sup>188</sup>

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<sup>186</sup> Bassiouni and Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making'(2002)', (at 137.

<sup>187</sup> Hallaq, 'Was the Gate of Ijtihad Closed?', (at 5-6.

<sup>188</sup> Noel James Coulson, 'Shariah (Islamic Law)', *Encyclopædia Britannica* (<https://www.britannica.com/topic/Shariah/Law-in-contemporary-Islam>: Encyclopædia Britannica, inc., 2017) at Law in Contemporary Islam.



### 2.2.1.2. *Dynamic Ijtihad*

In Shiite countries like Iran, Shiite scholars have been seeking a way to reconcile traditional Sharia law and traditional *ijtihad* with the changing nature of modern society. In doing so, they developed the notion of “Dynamic *Ijtihad*”. Dynamic *Ijtihad* seeks new approaches in applying Islamic law and construing its relation to modern life.<sup>189</sup> The legal rules can vary according to the place and time of the legal issue at hand. Legal reforms can also be a possibility in case of necessity. While Shia jurisprudence developed according to the needs of different times and places, it is essential to use Dynamic *Ijtihad* for applying Islamic law in modern societies. Based on the experience of modern Islamic governments, Islamic law must reflect the experience of society to become a living force. Dynamic *Ijtihad* allows Islamic law to evolve with peoples’ modern needs and avoid the stagnancy of Islamic rules.<sup>190</sup> As such, while Sharia law is the basis of legal rulings, it does not directly and exclusively designate all the rules that must be applied in the different stages of a Muslim life and Islamic society.<sup>191</sup>

However, there are some goals and principles which Sharia law always follows. The main goal of Sharia is to protect human welfare by safeguarding certain essential values which, should they be ignored, would lead to difficulty and hardship in life. These essential values are religion, life, intellect, lineage and property, which must be protected to ensure welfare in the Muslim’s life. This is why Islamic law has determined rules to protect these essential values and preserve them in Islamic society. For example, Islamic law regulates the rules concerning the protection of human life by forbidding what is harmful for one’s health and weakens the intellect, like alcohol.<sup>192</sup>

There are also some important Islamic legal principles which form the basis of Dynamic *Ijtihad*, such as the doctrine of expediency and social necessity (*Maslahat* and *Zarurat*).

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<sup>189</sup> Mcglinn, *Family Law in Iran* at 14.

<sup>190</sup> Fazaeli, *Islamic Feminisms: Rights and Interpretations across Generations in Iran* at 137-38.

<sup>191</sup> An-Naim, *Islam and the Secular State Negotiating the Future of Shari’ah* at 14-15.

<sup>192</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (IB Tauris, 2005) at 339-46.

### 2.2.1.3. *The Doctrine of Expediency and Social Necessity (Maslahat and Zarurat)*

The doctrine of expediency and social necessity is used to produce expediency rules in case of necessity. Expediency rules are observed in cases (1) where there is either no law directly corresponding to Islamic law<sup>193</sup> or (2) where there is a conflict of laws<sup>194</sup> that concerns Islamic law, but their goal is harmonious with the Sharia's main goals (*Maghasid* of Sharia). The main idea here is that since the goal of Sharia is to protect and ensure essential values in private and social life, there can be some Islamic rules that harm such essential values. As a result, if some existing Islamic rules conflict with the main goals of Sharia, the doctrine of expediency calls Islamic scholars to modify or waive the existing Islamic rules and replace them with rules that better secure the essential values and objectives of Sharia.<sup>195</sup> An example would be changing the original rules of inheritance of the wife from her husband, to which we will return later under the "inheritance" subject.

This doctrine is grounded on the following principles.

#### 2.2.1.3.1. **The Principle of No Harm and No Loss** <sup>196</sup>

This principle is derived from the Prophet's saying: "there is no harm and no loss in Islam."<sup>197</sup> The notions of harm and loss are determined by custom (*Urf*). Generally, any damage to life or property of people is considered as harm and loss.<sup>198</sup> According to certain Islamic scholars,<sup>199</sup> this principle applies to all Islamic rulings in both subjective and objective legal

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<sup>193</sup> This occurs when there is no existing Islamic law or when there is a non-Islamic law for which there is no equivalent in Islamic law.

<sup>194</sup> This conflict of law may be existing between a non-Islamic law and an Islamic one or an internal conflict between two Islamic laws.

<sup>195</sup> Kamali, *Principles of Islamic Jurisprudence* at 339-40.

<sup>196</sup> قاعدهى لاضرر

<sup>197</sup> من لا يحضره الفقيه (مصادر) Sheik Sadoogh, *Man La Yahzaroho Alfaqih* قال رسول الله (ص): "لا ضرر ولا ضرار في الاسلام" at 336. منشورات جماعة المدرسين في الحوزة العلمية في قم المقدسة, 1980) الحديث الشيعية. قسم الفقه, 4;

<sup>198</sup> See Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* at 125-27.

<sup>199</sup> Sheikh Morteza Ansari

rules. This means that there is no harmful rule in Islam and if some primary ruling become harmful in some situation, it must not be applied as it contains harm.<sup>200</sup>

Based on Ayatollah Khomeini's legal opinion, this principle is a governing principle which applies to all legal rules expounded by the Islamic government. As such, laws applied by the Islamic government must not harm people. Rather, according to the doctrine of expediency, such laws should be waived by the government, even if they are primary Islamic laws.<sup>201</sup>

### 2.2.1.3.2. The Principle of Correlation between Sharia and Reason

Another principle which is at the core of the doctrine of expediency is the principle of Correlation. This principle holds that there is a correlation between Sharia rules and reason.<sup>202</sup> Based on this principle, Sharia recognizes a rule which is accepted by reason, and conversely reason legitimizes the Sharia-based rule. This means that reason and Sharia law confirm each other. The main idea behind this principle is that God, who is the source of Sharia, is also the source of reason. As such, both methods can confirm one another.<sup>203</sup>

Some Islamic scholars<sup>204</sup> believe that reason has an equal status to all other Sharia sources such as Quran, tradition and consensus. As a result, when no rulings exist based on these sources, Islamic scholars rely on a sound reasoning to deduce rulings.<sup>205</sup>

There are two points to keep in mind when applying reason to deduce Islamic law:

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<sup>200</sup> Velaeae, *The Encyclopedia of Usul Al Fiqh* اصطلاحات علم اصول فرهنگ تشریحی at 253-57.

<sup>201</sup> Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 213-14.

<sup>202</sup> "كل ما حكم به العقل حكم به الشرع وكل ما حكم به الشرع حكم به العقل" Mohammad H Gharavi Naeeni, *Favaeo Alosul* فوائد اصول at 60 . منشورات جماعة المدرسين في الحوزة العلمية في قم المقدسة, (1998) Qom الاصول (3);

<sup>203</sup> Esposito, *The Oxford Dictionary of Islam* at 154.

<sup>204</sup> Some examples are Ibne Edris, Sheikh Mofid and Ibne Joneid.

<sup>205</sup> Velaeae, *The Encyclopedia of Usul Al Fiqh* اصطلاحات علم اصول فرهنگ تشریحی at 226.

Firstly, it is obvious that sound intellect commands priority over any other Islamic legal source, other than the Quran itself. Indeed, the Quran came directly from God and is therefore always the first source of Islamic law. But other sources such as tradition and consensus came from interpretations by Islamic scholars, such that pure reason has priority over them.

Secondly, using reason to formulate general rules and to extract general legal principles is different than using reason to formulate minor legal rules related to worship and ritual practices. The latter were decided by God and the role of reason in them is very limited. The role of Islamic scholars in this case is to find the correct rule for worship from the main ritualistic legal sources such as Quran and tradition. On the other hand, with regards to Islamic legal principles, the role of reason is decisive in deciphering the logical nature of such principles. As such, reason helps the discovery and interpretation of these principles. It also helps to distinguish which principles have priority over other principles or Islamic legal sources.<sup>206</sup>

Accordingly, a legal rule can be waived or modified based on the doctrine of expediency if pure reason commands to do so.

#### **2.2.1.3.3. The Principle of Avoiding Hardship**<sup>207</sup>

Sharia divides the relation between human beings and their actions into three groups. The first group comprises of actions which can be performed very easily, such as eating and speaking. The second group comprises of actions which are necessary, such that it is impossible to not perform them, like breathing. Finally, the third group comprises of actions which are possible to perform, but doing them would cause a great burden or hardship on the person, which may lead to harm, like a sick person who decides to fast.

While the first group can reasonably be the subject of an Islamic ruling, the second group falls naturally out of the scope of such rulings. The principle of avoiding hardship concerns the third group, since it concerns actions which performance leads to hardship. Based on the Quran and

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<sup>206</sup> Ibid., at 226-27.

<sup>207</sup> قاعدهی نفی عسر و حرج

tradition, the spirit of Sharia law is to not place any hardship on human beings.<sup>208</sup> Indeed, God does not seek to place such a burden on human beings<sup>209</sup>, and as such anything that places such an extra hardship on human beings is not permitted in the Sharia.<sup>210</sup>

There are some Islamic legal rules which are difficult to obey, such as fasting very long days in summer, or going to battle against one's enemies to defend one's land. But for such rules, one must pursue the more important aims of the Sharia at hand, regardless of whether performing such actions is accompanied by hardship or not.<sup>211</sup>

The principle of avoiding hardship is applicable throughout Islamic law as long as a more important goal of Sharia is not undermined. It is also applied on a case by case basis when some legal rules impose too difficult an obligation on certain individuals, such as fasting for sick people or conscription for sick or old men. In such cases, fulfilling the general obligation at hand would be forbidden for such individuals, based on the principle of avoiding hardship.<sup>212</sup>

#### ***2.2.1.4. Doctrine of Expediency – Conditions for its Application***

In general, any measures based on one of the abovementioned principles fall under the doctrine of expediency. There are some general rules for applying the doctrine of expediency and inferring a rule based on it.

Firstly, expediency rules apply in cases where they are harmonious with the spirit of Sharia law, such as justice, i.e. when there is no direct prohibition or explicit ruling against them in the Quran and tradition.<sup>213</sup>

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<sup>208</sup> "He has not placed any hardship for you in religion," (22:87) سورة الحج. آية 77. ما جعل عليكم في الدين من حرج.

<sup>209</sup> "Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful." (5:6) سورة المائدة. آية 5: ما يريد الله ليجعل عليكم من حرج ولكن يريد ليطهركم وليتم نعمته عليكم (5:6) لعلكم تشكرون.

<sup>210</sup> Esposito, *The Oxford Dictionary of Islam* at 152 and 312.

<sup>211</sup> Velaee, *The Encyclopedia of Usul Al Fiqh* اصطلاحات علم اصول فرهنگ تشریحی اصطلاحات علم اصول at 261.

<sup>212</sup> Ibid., at 260-61.

<sup>213</sup> Ayatollah Khomeini, 1988: "The government is empowered to unilaterally revoke any Sharia agreements which it has concluded with the people when these agreements are contrary to the interest of the country or Islam." Tamaddonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 214).

There are some disagreements as to the scope of this doctrine. Some Islamic scholars<sup>214</sup> believe that expediency rules can waive primary Islamic rulings in case of emergency and necessity. For example, Ayatollah Khomeini's *fatwa* allowed the Islamic government to waive some Islamic rulings where such a waiver benefited the Islamic Republic and helped achieve better results and interests for public at large. But others believe that there are two categories of Islamic law. The first category is made up of core rules which are unchangeable, such that the Islamic government cannot change them. The second category is secondary laws which are not explicitly stated by the Quran and tradition, such that it can be changed based on the doctrine of necessity and expediency.<sup>215</sup>

Secondly, the doctrine of expediency can only be applied if it is deemed a certain reasonable necessity.

Thirdly, the doctrine of expediency must be applied in a reasonable, rational and acceptable manner.

Fourthly, applying the doctrine of expediency must have benefit for the people at large and not just for a select group of people or part of the population.

Fifthly, the doctrine of expediency must effectively remove or prevent a hardship in peoples' lives.<sup>216</sup>

#### **2.2.1.5. *The Islamic Government of Iran's Use of the Doctrine of Expediency***

The Islamic Republic of Iran, desiring to live up to its claims as an Islamic government, wanted to apply Islamic law as the State law. To achieve this goal, the Guardian Council was designed

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<sup>214</sup> Some examples are Ayatollah Khomeini, Ayatollah Jafar Sobhani, Ayatollah javadi Amoli.

<sup>215</sup> Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 213).

<sup>216</sup> Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* at 3-4.

in the 1979 Constitution to supervise and examine the compliance of all legal rules with Sharia law.<sup>217</sup>

Applying Islamic law in a modern Islamic society calls for two things: considering the necessities of modern government, and somewhat modifying traditional Islamic law. (Auda 2008)<sup>218</sup> To do so, the Islamic government of Iran used the doctrine of expediency as a means to regulate different aspects of personal and social life according to the social needs and changing circumstances. The legal *fatwa* of Ayatollah Khomeini regarding expediency and social needs facilitated the law-making process to allow it to be more based on social needs. He developed the doctrine of *maslahat* under Islamic governance. In his legal opinion, *maslahat* is any necessary social interest which benefited Islamic society and people at large. His *fatwa* broadly permitted the Islamic government to legislate based on the interest of the State. In case of conflict between expediency rules and other Islamic rules, the Islamic government can consider the most important benefit for the State and remove or waive the least important Islamic rules. He permitted Parliament to pass laws and regulation based on social needs and expediency which were not necessarily based on Islamic law. Following his legal opinion, many laws were adopted after the 1979 Islamic Revolution which were not directly related to Sharia law. Many laws created obligatory conditions in certain types of contracts to ensure that certain labor law, family law or divorce-related provisions were respected, even though such conditions were not required per se by Sharia law. The validity of this method was based on the validity of private contracts even though such contracts are not recognized by Sharia law in this form. Many other laws were based on the doctrine of expediency such as giving women the right to divorce under special circumstances, which is contrary to what existed under traditional Sharia law.<sup>219</sup>

However, the Guardian Council did not ratify such parliamentary laws, because these were deemed incompatible with Sharia law. Because of the conflict between the parliament and the Guardian Council with regards to ratifying such laws issued through expediency rules, and because of the inefficiency of the long-winded legislative process, Ayatollah Khomeini issued

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<sup>217</sup> The 1979 Iran's Constitution; Articles 91-99.

<sup>218</sup> Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* at 1-5.

<sup>219</sup> Asghar Schirazi, 'The Constitution of Iran. Politics and State in the Islamic Republic', (1997) at 206.

a *fatwa* which applied as governmental ordinance (*Hokm-e Hukumati*)<sup>220</sup> in 1981 and 1984 stating that Parliament could pass legislation based on social necessity by a majority of two-thirds of its members. The Parliament used this ordinance to pass legislation based on the doctrine of expediency, but the conflict persisted between two Iranian legislative bodies: the Parliament and the Guardian Council.<sup>221</sup> The latter would generally refused to ratify legislation which was not deemed to comply with Sharia rulings. For this reason, Ayatollah Khomeini decided to institutionalize the doctrine of expediency by establishing the Expediency Council (*Majmae Tashkhise Maslahate Nezam*). (Abghari 2008)<sup>222</sup> This council was formed by a select number of members of clergy and government officials. The main goal of this institution is to assess the necessity of passing expediency rules with regards to the Islamic government and the Iranian people. It was formed to end the conflict between Parliament and the Guardian Council with a view to making the process of lawmaking more efficient.<sup>223</sup> The Expediency Council has the authority to make final decisions and ratify legislation in case of dispute. It also has the authority to initiate expediency laws. The amendment to Iran's 1989 Constitution<sup>224</sup> integrated the Expediency Council and constitutionally authorized it to pass legislation based on the doctrine of expediency.<sup>225</sup>

Until today, the Expediency Council has passed many laws under the scope of Governmental Ordinances.<sup>226</sup> However, personal status laws have changed less than public and criminal law. The public law has been less developed in traditional Islamic law. Therefore, to apply these laws in modern Islamic society, an Islamic government must pass new legislation or modify that which existed in traditional Islamic law to meet today's needs. Therefore, the application of expediency laws in economic, administrative and criminal law is relatively common, since there

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<sup>220</sup> Governmental Ordinance (*Hokm-e Hokumati*) is an ordinance which is issued by a *Mojtahid* based on public interest, according to applicable and appropriate rules, in order to govern Islamic society. The examples are the laws about intergovernmental issues, the relation between different parts of government and people or non-governmental organizations, trade, economic law, health, education and tax law.

<sup>221</sup> Shaul Bakhash, *The Reign of the Ayatollahs: Iran and the Islamic Revolution* (Basic Books, 1984) at 200-03.

<sup>222</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 335.

<sup>223</sup> Schirazi, 'The Constitution of Iran. Politics and State in the Islamic Republic', (at 63-64.

<sup>224</sup> Article 112 of the amended Constitution.

<sup>225</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 338-39.

<sup>226</sup> Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (at 213-14.



was no developed Islamic law in such areas. However, personal status law is treated more thoroughly in the Quran and Islamic tradition. There are many implicit or explicit Islamic rulings on such matters as marriage, divorce, inheritance and guardianship. As a result, Dynamic *Ijtihad* and the doctrine of expediency have been applied with more caution and more sparsely in this area.<sup>227</sup>

While changes in criminal law were brought about in a more comprehensive manner since the 1979 Islamic Revolution, changes in Family law were piecemeal, since family law was never considered holistically. As such, while the penal code changed completely and the new Islamic Criminal Law replaced the old penal code with certain changes in Islamic criminal rules, the old civil code continued to be used with only minor modifications in family law.

#### ***2.2.1.6. The Doctrine of Expediency and Social Needs in Iranian Women's Rights***

This thesis aims at suggesting new solutions for the marital regime in Iranian family law while incorporating principles of women's rights by using the methodology of Dynamic *Ijtihad*. While it seeks to suggest solutions that would be deemed acceptable and applicable within Iranian law and the framework of Sharia, it would apply the doctrine of expediency and social needs where necessary to produce new appropriate rules.

By examining the situation of Iranian women in the contemporary period and changing their role in family and society, it appears that a change in certain legal rules is essential.

Traditionally, the Iranian family pattern was based on Iran's pre-Islamic and Islamic heritage, moral values and religious provisions. In this model, tasks were divided between man and woman. While the woman's main role was to take care of the household and be a mother, the man's role was to provide for his family financially, such that he was known as the breadwinner (*nan avar*). In such circumstances, men had an economic position in their family, which gave

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<sup>227</sup> Mayer, 'Law and Religion in the Muslim Middle East', (at 140).

them certain economic power which materialized in their being the heads of their households. Women managed the household and children and played a major part in family activities.<sup>228</sup>

In the contemporary period and especially after the Second World War, some social changes occurred which resulted in a gradual change of pattern in Iranian families. Initially, changes occurred in the economic sphere when oil exports were enriching the Iranian government. This resulted in a rapid economic growth in the country. This opulence allowed the Iranian government to support social modernization. In following a more Western European pattern of economic growth, the government changed the structure of traditional Iranian society. This led to social reforms in both economic and legal areas. Some cultural, legal and social changes were initiated by the government to legitimize social and political roles for women outside the household.<sup>229</sup> There are thus many examples throughout modern history where the Iranian government sought to change the social status of Iranian women. Such examples are Reza Shah's forbidding the wearing of the Islamic headscarf, the institution of women's right to vote and participate in political life, the legislation of a new family law which gave more rights to women in marriage and divorce, or the right to work in various administrative and governmental positions.<sup>230</sup>

Since 1970, the division of labor in the Iranian household has changed. Many women have started to participate in the economy and sought work away from home to earn a salary. Since then, with the increasing number of educated women and their opportunities to work out of the house, the number of working women has been increasing every day such that they have become an important part of the labor force. As a result, the traditional family model changed to incorporate the social and economic participation of women. In parallel, women's traditional mother role changed and as a result the fertility rate in Iran decreased.<sup>231</sup>

The 1979 Islamic Revolution, followed by eight years of war between Iran and Iraq further transformed the role of women in society and the family dynamic. Women were able to mark

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<sup>228</sup> Aghajanian, 'Family and Family Change in Iran', (

<sup>229</sup> Ibid., at 2-3.

<sup>230</sup> Fazaeli, *Islamic Feminisms: Rights and Interpretations across Generations in Iran* at 18-19.

<sup>231</sup> Sally Weiskopf-Bock, 'The Working Iranian Mother', *Women and the Family in Iran*, 38 (1985), 187-94.

their political and social presence by participating in different protests against the Pahlavi regime, and by participating in the war effort. Many men were killed during the war, such that many families became single parent units. Women became the only economic suppliers of their families<sup>232</sup>. By the end of the war, a time of economic renovation and development started.<sup>233</sup> Many hands were needed to reconstruct and develop Iran, which meant more economic participation for women. Then, in the social and cultural reforms<sup>234</sup> period which promoted civil and political freedoms, many women's rights activists attempted to gain more social, economic, legal and political rights for women. These internal changes simultaneously developed with women's rights on the international scene. With the development of human rights conventions and their related debates, women's rights became an important topic internationally. This directly impacted the advancement of women's rights in Iran.<sup>235</sup>

As a result of the aforementioned social and cultural changes occurring both internally and internationally, today's role of women in the family dynamic is differs from the traditional model. In fact, the family pattern in Iran has been passing the transnational stage from traditional family to the modern one.<sup>236</sup> While the primary role of women remains their domestic responsibility as wives and mothers, many women have also taken on economic tasks in their families, working out of home and earning money. In current Iranian law, women have the same right as men to work outside of home.<sup>237</sup> They do not need to obtain their husband's permission. However, if the nature of a woman's work goes against the family's dignity or interest, her husband can ask the competent court to prevent her from engaging in such work.<sup>238</sup>

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<sup>232</sup> Fazaeli, *Islamic Feminisms: Rights and Interpretations across Generations in Iran* at 5-6.

<sup>233</sup> President Hashemi presidential period which lasted from 1989 to 1997 by insisting on the renovating Iran's economy after eight years of war with Iraq.

<sup>234</sup> President Khatami presidential periods which lasted from 1997 to 2005 by insisting on the right to freedom and social and political freedoms.

<sup>235</sup> Fazaeli, *Islamic Feminisms: Rights and Interpretations across Generations in Iran* at 110 and 40.

<sup>236</sup> Ziba Mir-Hosseini, 'Women and Politics in Post-Khomeini Iran', *Edited by Haleh Afshar and Mary Maynard University of York, UK Series advisers: Kum-Kum Bhavnani, University of California, Santa Barbara*, (1996), 145 at 154.

<sup>237</sup> The Iran's Constitution, Article 28: "People are free to choose whatever profession they wish as long as this profession is not against Islam, public interest, and the rights of others."

<sup>238</sup> The Iran's Civil Code, Article 1117.

Yet while these changes in the family dynamic were important, other aspects of this family dynamic did not follow the same evolution. This is notably the case for domestic household tasks. The problem is that in Iranian society, while certain areas are experiencing swift changes, society remains traditional in other areas, such that certain traditional gender-based roles, like domestic household tasks, strongly persist.<sup>239</sup> At the same time, the current legal system has not completely caught up to such changes in the family dynamic. This is why the Iranian matrimonial regime should be examined again to see if its provisions satisfy the requirements of the current family situation in Iran, considering the changes in the pattern of the married parties' roles.

Iranian family has experienced many tensions in the different stages of its social evolution, such as social transitions, political changes and revolutions, long wars and the interference of World powers, forced westernization and modernization, changing family rules and high inflation. Yet while some aspects of the family unit have been influenced by these pressures, the main family values remain intact. Family is an institution which plays an essential role in the daily lives of individuals as well as in society as a whole.<sup>240</sup>

While 99 percent of the Iranian population is Muslim and Iran's official religion is Islam, the best way to improve Iran's matrimonial regime is to develop a new approach to women's rights and Sharia while taking into consideration the applicable law in the religious and cultural context in which Iranians concretely evolve.<sup>241</sup> Doing a comparative study can help benefit from the experience of another country, and evaluate the results they obtained from the changes they applied to their family system.

In the next chapter, I will look at the financial rights of wife under Iranian family law. Following that, I will examine the matrimonial regime in the current Iranian legal system, in order to better compare it to Quebec law in the second part.

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<sup>239</sup> Aghajanian, 'Family and Family Change in Iran', (at 30-31.

<sup>240</sup> Ibid., at 29.

<sup>241</sup> Safaei and Emami, 'A Concise of Family Law', (at 20-21.

### **3 Chapter Three: Different Types of Economic Rights Given to the Wife in Iranian Family Law**

#### **Introduction**

In recent years, different aspects of family law and women's status have been developed throughout the world. One of the important roles that a woman can take is a role as a wife in a marital relationship. This role entails special rights and responsibilities with regards to men who are a party to the spousal relationship. In other words, marriage brings certain rights and obligations for each party once the relationship is entered into. These rights and obligations vary across perspectives, beliefs, religions and theories. Such different theories and beliefs influence and shape the provisions governing family law in different countries.<sup>242</sup>

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<sup>242</sup> Mahmoud Hekmatnia and Seyed M.Hossein Kazemeini, ' درآمدی بر مسأله‌شناسی حقوقی با تأکید بر نظام حقوقی زن و ' introductory to Legal Methodology in Women and Family Law in Islam', *Nedaye Sadegh* ( ندای )  
*Family Law and jurisprudence*, 15/53 (2011), 68-95 at 71-72. (صادق)

As explained before, Iran is an Islamic country. As such, its civil law system has espoused Sharia as the main source of its judicial system<sup>243</sup>. Marriage holds a very special place in Sharia and is considered as a recommended action (*mostahab*) each person is encouraged to pursue. Permanent marriage is considered as the best way for two persons to live together.<sup>244</sup> It is also considered the best type of private arrangement positively impacting society. Sharia regards marriage as a private civil contract<sup>245</sup> with special characteristics and governing rules. The role of the marriage contract is very important in Sharia, and its absence causes marriage to become illegitimate.<sup>246</sup> Sharia law determines different aspects of the marriage contract, such as the rights and obligations of married parties. This includes the relationship between them, the rights of the woman as a wife, and the right of the man as a husband. (Nasir 2009)<sup>247</sup> However, the influence of Sharia on different fields of private law, such as family law, is highly controversial and has been subject to debates and disagreements. Some believe Sharia promotes a fundamental inequality between men and women and presents a perspective in which women are treated unequally in favor of men.<sup>248</sup> They refer to differences in rulings on financial rights and obligations such as inheritance, alimony, settlement and spousal support.<sup>249</sup> (Kar 2007) They also contend that Sharia rules cannot coexist with fundamental human rights such as the principle of equality. They believe that joining and following the approach of Western countries and international conventions such as the CEDAW, rather than following Sharia, would help to

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<sup>243</sup> Under the Article 4 of Iran's Constitution "All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter."

<sup>244</sup> Jamal J Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (Brill, 2009) at 22-25.

<sup>245</sup> Aqhde Nekah (عقد نكاح)

<sup>246</sup> Marianne Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* (54: IB Tauris, 2015) at 24.

<sup>247</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 31.

<sup>248</sup> See Valentine M Moghadam, 'Patriarchy and the Politics of Gender in Modernizing Societies: Iran, Pakistan and Afghanistan', *Comparative Studies of South Asia, Africa and the Middle East*, 13/1 and 2 (1993), 122-33.

Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari 'Ah', (

<sup>249</sup> See also MIHRANGIZ KAR, *CROSSING THE RED LINE: THE STRUGGLE FOR HUMAN RIGHTS IN IRAN* (Mazda Pub. 2007).

improve the situation of Iranian women. Islamic feminism also espouses this belief even more strongly.<sup>250</sup>

Another group thinks that the legal regime concerning the marital economic relationship should be assessed on a case by case basis instead of looking for one-size-fits-all solutions, which are deemed insufficient for eliminating economic discrimination against women.<sup>251</sup> Such an assessment would require the study of Iranian women's rights and family law in light of Iranian culture and Islamic law. There is a need to improve our understanding of the many aspects and perspectives offered by Islamic family law, and indeed of the whole framework underlying men's and women's rights and their dignity and respect under the Sharia system. Following this method, the main characteristics of the Iranian matrimonial regime will be examined in this section, and a holistic view on that will be rendered. In order to have a better understanding of the Iranian matrimonial regime and its special Islamic underpinnings, all the economic rights to which the wife is entitled under Iranian law will be studied in the third chapter. This is because Iranian family law separates the economic institutions of the family from the general matrimonial regime, as we will explain later. Next, continuing in the second part, the entire economic system of Iranian marital relationships and their characteristics will be studied in the fourth chapter.

In chapter five, the general view on Quebec's matrimonial regime will be examined. Finally, in the sixth chapter, these two different legal regimes will be compared and the possibility of change in the Iranian matrimonial regime, based on Quebec law provisions, will be studied.

## **The Wife's Economic Rights under Iran Family law**

To examine Iran's matrimonial regime, evaluate the critiques and determine the way forward, one must study the economic institutions of family which exist under Iranian law. As man has the unilateral responsibility for financial matters in the family, these institutions mainly allocate

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<sup>250</sup> See Roja Fazaeli, 'Contemporary Iranian Feminisms: Definitions, Narratives, and Identity.', in Chitra Raghavan and James P. Levine (ed.), *Self-Determination and Women's Rights in Muslim Societies* (Massachusetts/US: Brandeis University Press, 2012), 273-303.

<sup>251</sup> Hekmatnia and Kazemeini, 'درآمدی بر مسأله‌شناسی حقوقی با تأکید بر نظام حقوقی زن و خانواده در اسلام', (at 78-79).

some financial rights to the wife in family law. Therefore, it seems necessary to study the main categories and features of the wife's financial rights.

Here, the wife's economic rights refer to rights which have a demonstrated positive aspect and financial value for women. These rights are divided into four main categories;

Firstly, some rights originate from the direct commandments of Sharia or the Islamic or Iranian legislator in family law, such as the right to *Mahr*.

Secondly, some rights result from the application of general legal principles inherent to family law such as the woman's right to a wage for domestic labor.

Thirdly, certain rights flow from the general and basic moral principles which apply to family law, such as *Nahle*.

Finally, the possibility of stipulating certain obligations in the marriage contract can open the way to other rights. Such stipulations can be freely chosen by a party to the marriage or recommended by the government.

The main economic factors of the marital institutions underlying Iran's family law will be explained below:

### **3.1 The Economic Rights of Women Under Sharia Obligatory Law**

A wife's basic economic rights can be regrouped under the category of rights which are binding on the parties to the marriage as a matter of public policy. These are obligatory rules of marriage under Sharia or as a result of the direct ordinance of the legislator. As such, the marriage parties cannot waive them.<sup>252</sup> These rights include the right of women to Dowry (*Mahr*) and Alimony (*Nafaghe*).

#### **3.1.1 Dowry (*Mahr*)**

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<sup>252</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 31.



One of the most important economic rights of women in Islamic and Iranian family law is the right to *Mahr*. *Mahr* is an obligatory part of the marriage contract which parties cannot waive.<sup>253</sup> The Iranian Civil Code mentions the right of the wife to *Mahr* as detailed in Articles 1078 to 1101 under Chapter 7 (*Mahr*).

*Mahr* has been translated to “Dowry” in English, but this translation is misleading as the rights underlying different institutions under different jurisdictions.<sup>254</sup> The example is the meaning of “dowry” in English law and its difference with Iranian law.<sup>255</sup> Their common characteristic is that both are the sole property of the wife.<sup>256</sup> But dowry in English law usually relates to some marriage custom in Indian families where the daughter gives her husband some of her own property at the time of marriage, or each property which a wife owns and with which she comes to her husband’s home at the beginning of marital life. The Oxford English Dictionary also defines dowry in English law as “money or property the bride brings with her to the husband's home.”<sup>257</sup>

Under Iranian law, *Mahr* is something which comes from Sharia and Iranian tradition.<sup>258</sup> It designates a reward (*ajr*) or nuptial gift (*sadogha*). It is thus a form of “Dowry” which rooted in Sharia and has its special characteristics.<sup>259</sup> *Mahr* is a mandatory gift that the husband gives to his wife. It is typically specified in the marriage contract. Both parties must agree on the *Mahr*. It must be something with economic value such as money or any equivalent value or

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<sup>253</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 26.

<sup>254</sup> On the legal translation of *Mahr* in potential contexts of transplantation, see: Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (London: Routledge, 2010).

<sup>255</sup> <http://www.hardwicke.co.uk/insights/archive/articles/family-law-the-dowry-in-law>: for dowry in English law, “The Chambers English Dictionary provides ‘the property which a woman brings to her husband at marriage; sometimes a gift given to or for a wife at marriage’. These definitions provide that dowry has two constituents- the giving of property to the bride from parents and kin and the giving of jewellery from the in-laws.”

<sup>256</sup> Shahin Sardar Ali, Ayesha Shahid, and Mamman Lawan, 'An Introduction to Islamic Family Law (a Teaching and Learning Manual)', (2010) at 17.

<sup>257</sup> Oxford Dictionary available at <https://en.oxforddictionaries.com/definition/dowry>.

<sup>258</sup> Safaei and Emami, 'A Concise of Family Law', (at 156).

<sup>259</sup> Pascale Fournier, 'Flirting with God in Western Secular Courts: Mahr in the West', *International Journal of Law, Policy and the Family*, (2009), ebp011 at 1-3.

possession.<sup>260</sup> It is the man's responsibility to pay the *Mahr* whenever his wife requests it. (Hekmatnia 2012)<sup>261</sup>

*Mahr* is also different from the "Dower", as the translation of *jahizieh*<sup>262</sup>. Sometimes these two notions are confused because of their inexact translation in English. Dower as *jahizieh* in Iran and is an Iranian custom that did not originate from Sharia. Culturally, the woman's family gives her a sum of money or property at the time of marriage corresponding to the cost of preparing for starting a new life. This may include essential goods for her new home including household goods, furniture and personal effects. But the Sharia's purpose in instituting *Mahr* as an integral part of marriage is to please the wife and honor her.<sup>263</sup>

The wife is entitled to *Mahr* in all types of marriage<sup>264</sup> under Iranian law. *Mahr* is one of the economic rights the scope of which must be determined in the marriage contract, but its very existence is mandatory in any Islamic marriage. In another words, *Mahr* is compulsory in Islamic marriage, but its scope is negotiable. *Mahr* is so important to Islamic marriage that its absence will, in the case of temporary marriage, void the marriage contract.<sup>265</sup> Family law provides a mechanism to determine the value of *Mahr* in case parties were silent on the matter. However, any stipulation stating that no *Mahr* is due for the woman in the marriage contract is void and not enforceable under Iranian law.<sup>266</sup> Halper (2005)

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<sup>260</sup> Iran's Civil Code, Article 1078: " Anything which can be called property and which can be owned and possessed can be designated as a marriage portion."

<sup>261</sup> Louise Halper, 'Law and Women's Agency in Post-Revolutionary Iran', *Harv. JL & Gender*, 28 (2005), 85 at 94-95.

<sup>262</sup> It is close to the concept of "dote" in French culture.

<sup>263</sup> Sardar Ali, Shahid, and Lawan, 'An Introduction to Islamic Family Law (a Teaching and Learning Manual)', (at 17).

<sup>264</sup> Permanent and temporary marriage.

<sup>265</sup> Iran's Civil Code, Article 1095:" Absence of marriage portion in the act of a temporary marriage will render the contract void."

<sup>266</sup> Halper, 'Law and Women's Agency in Post-Revolutionary Iran', (at 94).

As a result, paying *Mahr* to the wife is a mandatory duty for the husband, which the parties cannot waive even in case of mutual agreement.<sup>267</sup> The value of *Mahr* is not determined in Sharia and spouses must agree on that before or, at the latest, during the wedding.<sup>268</sup>

In Islamic jurisprudence, *Mahr* has other names such as *Sadogha* or *Nehla*, which are mentioned several times in the Quran and Hadith (tradition). *Mahr* according to its Quranic concept is a sign of kindness and love of the man towards his wife. Islamic law provides the woman with this right to start her marriage. (Hekmatnia 2012)<sup>269</sup>

*Mahr* existed in other cultures and societies before Islam. In the pre-Islamic era, *Mahr* was considered a gift for the wife's family. Islamic law then ruled that *Mahr* was to be a financial gift given to the wife herself.<sup>270</sup> It is not a reciprocal right, meaning that the right is acquired independently from the wife's respecting her marital duties. As such, the wife becomes the owner of her *Mahr*<sup>271</sup> as soon as the marriage contract is concluded.<sup>272</sup>

*Mahr* is considered as an important advantage for women in marriage and in case of divorce. It is obligatory based on Quran<sup>273</sup> and tradition regardless of its value and its form.<sup>274</sup>

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<sup>267</sup> Mohammad Roshan, Naeemi, Zakieh, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالي حاکم بر روابط زوجين', *Journal of Family Research*, 12(4) (2016), 529-53 at 538.

<sup>268</sup> Iran's Civil Code, Article 1080: "Fixing of the amount of marriage portion depends upon the mutual consent of the marrying parties."

<sup>269</sup> Hekmatnia, *Woman's Rights and Family* at 194-95.

<sup>270</sup> Schacht, *An Introduction to Islamic Law* at 162.

<sup>271</sup> Article 1082 of Civil Code states: "Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like."

<sup>272</sup> Ayatollah Murtiza Mutahhari, 'Legal Rights of Women in Islam 8', *انظام مالی حقوق زن در اسلام*, 8th edn. Qom: Sadra Press, (1974) at 200.

<sup>273</sup> Quran, 4(Al-Nisa); Verse 4: "And give the women [upon marriage] their marital gifts graciously" (وآتوا النساء صدقاتهن نحله)

<sup>274</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 26.

### **3.1.1.1. Different Types of Mahr**

*Mahr* is divided into two categories: the first category is the specified *Mahr* (*Mahr ol-Musamma*), which is specified at the time of marriage and registered in the marriage contract.

The second category is the stipulated *Mahr* (*Mahr ol-Mesl*) which the nature and scope of it are not specified at the time of marriage. In this case, since the *Mahr* is a mandatory part of the marriage, it should be determined after the marriage based on the reasonable amount of *Mahr*<sup>275</sup> a girl with a similar social and educational standing as herself and her family would normally be entitled to.<sup>276</sup>

There are also two types of *Mahr* regarding when it must be paid. The first type is the prompt *Mahr*. In this case, the wife is the owner of this *Mahr* and can ask for its payment as soon as the marriage contract is completed. The second type is the deferred *Mahr*<sup>277</sup>, which postpones the due payment to some later time.<sup>278</sup>

### **3.1.1.2. Mahr and the Dissolution of Marriage**

Under the current Iranian life style, *Mahr* is highly correlated to the divorce and other kinds of dissolution of the marriage. While under Sharia and the Iranian Civil Code, the wife becomes the owner of the *Mahr* immediately after the performance of the marriage ceremony,<sup>279</sup> in practice people do not follow this legal obligate. The cultural practice is such that the *Mahr* is

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<sup>275</sup> Iran's Civil Code, Article 1091: "In fixing of the reasonable marriage portion the status of the wife in respect of her family's station and other circumstances and peculiarities concerning her in comparison with her equals and relatives and also the customs of the locality, etcetera, must be considered."

<sup>276</sup> Esposito and Delong-Bas, *Women in Muslim Family Law* at 24.

<sup>277</sup> Iran's Civil Code, Article 1083: "A duration of time or instalments can be fixed for the payment of the marriage portion, as a whole or in parts."

<sup>278</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 90-91.

<sup>279</sup> Iran's Civil Code, Article 1082: "Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like."

normally paid to the wife upon divorce, or at the time of her husband's death. This is the case even if the *Mahr* was set as a prompt *Mahr*.<sup>280</sup> (Anonymous)

In the Iranian Civil Code, marriage dissolution means the termination of marital relations between the married parties. Such a dissolution can be based on different reasons. Marriage is dissolved by divorce, annulment of marriage, or the death of one of the spouses.<sup>281</sup> The right to *Mahr* in all these situations will be explained below:

### 3.1.1.3. *Mahr and Divorce*

The rules pertaining to *Mahr* are very important in instances of divorce. *Mahr* is applied differently depending on the kind of divorce at hand. Under Iranian law, divorce means the dissolution of a permanent marriage by respecting special procedures and rules applied by the husband or his deputy<sup>282</sup>. Divorce is generally divided into two categories: revocable and irrevocable divorces.<sup>283</sup>

In a revocable divorce (*Rejee*<sup>284</sup>), the man can reverse his decision to divorce and return to his wife up to about three months after the divorce was pronounced.<sup>285</sup> After the passing of these three months the divorce becomes final and completed.<sup>286</sup> As a general principle, under Islamic family law, a divorce is revocable. In a revocable divorce, the marriage continues during the revocable time, known as "*idda*", as long as its effects do not conflict with the divorce's effect.<sup>287</sup> Therefore, the Iranian Law of non-litigious affairs stipulates that the woman is considered a wife during the period of time the divorce is still revocable.<sup>288</sup> As prescribed, the wife, during the revocable divorce's *Idda*, has the right to alimony and conserves her inheritance

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<sup>280</sup> Nadjma Yassari, 'Iranian Family Law in Theory and Practice', *YB Islamic & Middle EL*, 9 (2002), 43 at 46-47.

<sup>281</sup> Safaei and Emami, 'A Concise of Family Law', (at 202-03.

<sup>282</sup> *Ibid.*, at 217.

<sup>283</sup> Iran's Civil Code, Article 1143: "The are two forms of divorce, irrevocable divorce and revocable divorce."

<sup>284</sup> طلاق رجعی

<sup>285</sup> Article 1149 - Return to the wife after divorce can be effected by any word or deed which may convey the idea, provided that it is based on an intention to do so.

<sup>286</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 28.

<sup>287</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 127.

<sup>288</sup> Iran's Law of non-litigious affairs, Article 8: 2.

right in case of her husband's death.<sup>289</sup> However, she is forbidden to marry and have sexual relations with another man during the *Idda*.<sup>290</sup>

This allotted time is considered to be a time during which divorcing parties must decide about their final decision. They have the choice to ratify their decision to divorce by expiring the *Idda* time without any need to do any legal action or change their mind and return to the marriage. They have the right to reconsider their decision without any need to have to renew the marriage contract. Any decision must be based on the parties' mutual consent. However, the decision to reverse the divorce is legally effective solely by the man's legal action before a notary.<sup>291</sup>

Irrevocable divorces (*Baen*)<sup>292</sup>, on the other hand, entail that the married parties' relationship is dissolved from the time of the divorce. Their marital rights and responsibilities are thus terminated at that time.<sup>293</sup> The only obligation for the woman is to wait for the *Idda* period to finish before she can marry again. The only obligation for the man is to pay alimony if the woman is pregnant.<sup>294</sup> There are six kinds of irrevocable divorces in Islamic family law, where such divorces are binding and the man cannot reconsider his decision<sup>295</sup>: a divorce that occurs before the marriage is consummated, a divorce when the wife is a minor, a divorce if the wife has attained the age of menopause, the *Khul'a* divorce, the *Mubarat* divorce, the third divorce, performed after three consecutive marriages (of the same parties) whether by mere renouncement by the husband of his desire to divorce the wife or by a new marriage between the two parties.

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<sup>289</sup> Iran's Civil Code, Article 943: "If the husband has divorced his wife in such a way that the divorce is revocable, either one of them who dies before the expiry of the "Iddah" period will inherit from the other; but if the death of one of them takes place after the expiry of the "Iddah" period, or if the divorce was irrevocable, they will not inherit from one another."

<sup>290</sup> Iran's Civil Code, Article 1150: "Iddah consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry."

<sup>291</sup> Safaei and Emami, 'A Concise of Family Law', (at 284.

<sup>292</sup> طلاق بائن

<sup>293</sup> Iran's Civil Code, Article 1144 – "After an irrevocable divorce the husband has not the right to renounce his intention of divorcing."

<sup>294</sup> Safaei and Emami, 'A Concise of Family Law', (at 284.

<sup>295</sup> Iran's Civil Code, Article 1145.

All other divorces other than these six irrevocable categories are revocable.<sup>296</sup>

Under Iranian law, the termination of the marriage is usually initiated and demanded by men. Women have the right to initiate and ask for divorce in special cases. That is why *Mahr* is sometimes considered a bargaining tool during a divorce in Iranian culture. Many women waive their right to *Mahr* to obtain a divorce and convince their husband to accept the termination of the marriage.<sup>297</sup> Divorce can be divided into three categories depending on who the initiator is:

### 3.1.1.3.1. Unilateral Divorce by the Man

While Islamic law permits divorce, it is morally considered as one of the worst actions.<sup>298</sup> Quranic verses referring to divorce state how it should be carried out<sup>299</sup>. As Sharia law tries to restrict the practice of divorce, it is considered as a last resort solution when no other is available.<sup>300</sup> Originally, divorce had to be requested by the man and could be based solely on his will. In other words, divorce by the man was the main kind of divorce and could be done unilaterally, without the women's consent. However, other Islamic principles such as the principle of no harm and no loss<sup>301</sup>, and the principle of avoiding hardship<sup>302</sup>, also govern the rules of divorce.<sup>303</sup>

In the first version of the 1935 Iranian Civil Code, article 1133 gave the man an unlimited right to divorce his wife. It stated that a man could divorce his wife whenever he wanted.<sup>304</sup> This provision opened the door for men to misuse their rights. It did not thoroughly protect women's

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<sup>296</sup> Mohaghegh Damad Mustafa, *حقوق خانواده، بررسی فقهی حقوق خانواده، a Study of Islamic Jurisprudence with Respect to Family Law* at 221-22.

<sup>297</sup> Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (IB Tauris, 2000) at 82.

<sup>298</sup> A religious saying (*hadith*) attributed to the Prophet Mohammad says: "Of all things permissible, divorce is the most reprehensible" <http://family.jrank.org/pages/957/Iran-Divorce.html#ixzz5SBywCR5T>

<sup>299</sup> Quran: 65 (Al-Talagh65): verses 1-2.

<sup>300</sup> Mutahhari, 'Legal Rights of Women in Islam *نظام مالی حقوق زن در اسلام*', (at 271).

<sup>301</sup> See Part I, Chapter 2.

<sup>302</sup> See Part I, Chapter 2.

<sup>303</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 117.

<sup>304</sup>Iran's Civil Code, Article 1133: "A man can divorce his wife whenever he wishes to do so."

rights, and did not reflect the application of other Islamic principles to the basic rules of divorce. Therefore, other statutes restricted this unlimited right by imposing an intermediary legal stage before any effective divorce: obligatory mediation.<sup>305</sup>

In 2002, article 1133 of the Iranian Civil Code was modified. The amended article states that a man can request to divorce his wife before a court, but must comply with existing regulations and laws in doing so. Following that amendment, a man still has the right to request a divorce, but he must pursue his request through the court and the latter must refer the parties to a mediation process. If mediation cannot reconcile the parties, the mediating organ must issue a “permission to divorce”, which the parties must present themselves to a notary in order to legally register their divorce.<sup>306</sup> By imposing this legal procedure on the man’s initial right to divorce, the law seeks to limit extra-judicial, unilateral divorces by men. In addition, other laws, such as the 1975 Family Protection Law, impose criminal penalties on men who decide to register their divorce with their wife without the court’s permission, and on the notary who aids and abets this illegal process.<sup>307</sup>

Imposing limits on a previously unlimited right to divorce was something new in Iranian legislation. It started in 1967 with the Family Protection Law, continued with the revised version of that law in 1975, and further developed under the 2013 Family Protection Law.<sup>308</sup>

As mentioned earlier, there are two kinds of divorce permitted under Iranian law: revocable<sup>309</sup> and irrevocable divorces.<sup>310</sup> The regular kind of divorce usually requested by a man in application of the abovementioned legal procedure is a revocable one. As such women must respect their *Idda* restrictions.<sup>311</sup>

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<sup>305</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 47.

<sup>306</sup> The Family Protection Law 2013. Article 24 and 27.

<sup>307</sup> The Family Protection Law 1975, Article 10.

<sup>308</sup> Safaei and Emami, 'A Concise of Family Law', (at 224-26.

<sup>309</sup> Iran’s Civil Code, Article 1148: “The husband has the right to renounce divorce in a revocable divorce provide the period of “Iddah” has not expired.”

<sup>310</sup> Iran’s Civil Code, Article 1143: “There are two forms of divorce, irrevocable divorce and revocable divorce.”

<sup>311</sup> Mohaghegh Damad Mustafa, بررسی حقوق خانواده, *a Study of Islamic Jurisprudence with Respect to Family Law* at 231.



A word should be said about the relation between *Mahr* and the man's unilateral divorce. Under this regular kind of divorce, the man should respect all the rights of his wife, including her economic rights such as *Mahr*. In this regard, the Expediency Council ratified a law in 1992, which established a rule according to which the divorce only becomes effective and can only be officially registered once the man pays all the religious and legal economic rights of the wife including *Mahr*.<sup>312</sup>

The amount of *Mahr* due after a divorce depends on whether the divorce intervenes before or after the consummation of the marriage. In cases where *Mahr* is registered in the marriage contract (*Mahr ol-Mussama*), if the regular divorce happens after the marriage has been consummated, the wife will be entitled to the total amount of her *Mahr*. But if the divorce happens before any sexual relation, the wife is entitled to half of her *Mahr*.<sup>313</sup> If the man has already paid the full *Mahr* to her, he can ask the woman to return the amounts exceeding half of the total *Mahr*.<sup>314</sup> This means that while the wife becomes the owner of the total amount of *Mahr* through the marriage contract, her effective ownership of half of her *Mahr* is not perfected until she has had sexual intercourse with her husband. In this manner, her ownership of half of the *Mahr* amount is dependent on her having sexual relations with her husband.<sup>315</sup>

In special cases where *Mahr* has not been determined during the marriage, if a regular divorce happens before any sexual relation,<sup>316</sup> the woman is entitled to a *Mahr* determined by the wealth of the man and his ability to pay (*Mahr ol-Mote*).<sup>317</sup> But if the divorce happens after

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<sup>312</sup> Sen Mcglinn, *Family Law in Iran* (2018) at 20-21.

<sup>313</sup> Lawal Mohammad Bani and Hamza A Pate, 'Dissolution of Marriage (Divorce) under Islamic Law', *JL Pol'y & Globalization*, 42 (2015), 138 at 142.

<sup>314</sup> Iran's Civil Code, Article 1092: "Article 1092 -If the husband divorces his wife before the consummation of marriage, the wife be entitled to half of the marriage portion and if the husband has already paid more than half of the marriage portion he has the right to demand the return of the surplus, in original, in the equivalent, or in value."

<sup>315</sup> Hekmatnia, *Woman's Rights and Family* at 198.

<sup>316</sup> Iran's Civil Code, Article 1093: "If no marriage portion is mentioned in the act of marriage and the husband divorces his wife before the consummation of marriage and the fixing of the marriage portion, the wife is entitled to a reasonable marriage portion, and if she is divorced after the consumption of marriage, she will be entitled to the equivalent of marriage portion."

<sup>317</sup> Iran's Civil Code, Article 1094: "The status of the man in respect of wealth or poverty will be considered in fixing the reasonable marriage portion."

consummation, the woman is entitled to the stipulated *Mahr*<sup>318</sup> determined as per her social, economic and educational standing (*Mahr ol-Mesl*).<sup>319</sup>

### 3.1.1.3.2. Divorce Initiated by the Woman

As mentioned earlier, women's access to divorce is not the same as men's under Iranian law. Women may only request for divorce in legally specified cases mentioned in a note under the Iranian Civil Code's article 1133, as amended. According to this note, women can request divorce from the court in case of a violation of the marriage contract's stipulations (article 1119), if the husband does not pay alimony (article 1129)<sup>320</sup>, and in case that the continuation of marriage would cause proven hardship and harm<sup>321</sup> for her (article 1130).<sup>322</sup> Therefore, the wife needs to prove that she would injure harm from continuation of marriage, and that the marital life is intolerable under such circumstances.<sup>323</sup>

In addition, under article 1119<sup>324</sup>, if the parties agree to give the wife the right to divorce at any time during the marriage, she can request a divorce from the court. However, no stipulation may

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<sup>318</sup> Iran's Civil Code, Article 1087: "If a marriage portion is not mentioned, or if the absence of marriage portion is stipulated in a permanent marriage, that marriage will be authentic and the parties to it can fix the marriage portion subsequently by mutual consent. If previous to this mutual consent matrimonial intercourse takes place between them, the wife will be entitled to the marriage portion ordinarily due."

<sup>319</sup> Schacht, *An Introduction to Islamic Law* at 167.

<sup>320</sup> Iran's Civil Code, Article 1129: "If the husband refuses to pay the cost of maintenance of his wife, and if it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her. The same stipulation will be binding in a case where the husband is unable to provide for the maintenance of the wife."

<sup>321</sup> *Osr va Haraj*

<sup>322</sup> Iran's Civil Code, Article 1130: "In the following circumstances, the wife can refer to the Islamic judge and request for a divorce. When it is proved to the Court that the continuation of the marriage causes difficult and undesirable conditions, the judge can for the sake of avoiding harm and difficulty compel the husband to, divorce his wife. If this cannot be done, then the divorce will be made on the permission of the Islamic judge."

<sup>323</sup> Ziba Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', *Farzaneh: Journal of Women's Studies and Research*, 2 (1995), 65-82 at 7.

<sup>324</sup> Iran's Civil Code, Article 1119: "The parties to the marriage can stipulate any condition to the marriage which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another binding contract: for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of cost of maintenance, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgment to that effect."

contain any condition which is deemed to go against the essential spirit of the marriage contract, sharia principles or against public order.<sup>325</sup> Interestingly, the stipulation whereby the wife has complete power of attorney to divorce herself is not incompatible with the nature of the marriage contract based on Sharia and Iranian family law.<sup>326</sup>

In case of a divorce initiated by the woman on the basis of her legal rights, the husband must divorce his wife. This is done by the court either by inducing the husband to divorce his wife or by divorcing her directly instead of her husband. In this case, the wife is still entitled to receive her *Mahr*.<sup>327</sup>

As a woman's grounds for divorce are limited, her ability to initiate divorce is arduous outside such specified grounds provided by law. This is where women's economic rights, and in particular their right to *Mahr*, may be the subject of bargaining strategies to obtain a divorce.<sup>328</sup>

### **3.1.1.3.3. Divorce by Mutual Consent**

Traditionally, following Sharia, there are two types of divorce in the Iranian Civil Code which must be done by mutual consent. In these kinds of divorce, the wife is actively involved in the divorce process. Such divorces are usually done in exchange for the wife's agreeing to financially compensate the husband. Both parties must negotiate the amount of such compensation.<sup>329</sup> In addition to these two kinds of divorce with financial compensation, the recent Family Protection Law introduces a new kind of divorce by mutual consent which we explain below.

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<sup>325</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 47.

<sup>326</sup> Safaei and Emami, 'A Concise of Family Law', (at 234-35.

<sup>327</sup> Tucker 2008: 79

<sup>328</sup>Section 21.1 of Canada's *Divorce Act* t (R.S.C., 1985, c. 3 (2nd Supp.)) addresses this issue. According to this provision, each spouse may apply for divorce irrespective of religious limitations. While Canadian courts do not interfere with religious issues, they prevent spouses from using a religious justification for preventing the other party access to a legal separation in decent economic conditions.

<sup>329</sup> Lynn Welchman, 'A Historiography of Islamic Family Law', *The Oxford Handbook of Islamic Law* (Oxford University Press, 2016) at 13-14.

### 3.1.1.3.3.1. *Khul'a*<sup>330</sup>

In Iranian Family Law, the second most common type of divorce is known as *Khul'a*.<sup>331</sup> This kind of divorce is based on the wife's desire to end the marriage. It must be initiated by the wife but it requires the husband's consent. The wife compensates her husband financially in order to obtain his agreement to the divorce.<sup>332</sup> This compensation must be mutually agreed upon. The amount of such compensation could be identical, more or less than the value of the wife's *Mahr*.<sup>333</sup> It is noteworthy that such a divorce depends on the husband's final decision to accept (or not) the wife's desire to divorce. However, once he has accepted the divorce in exchange for financial compensation, this divorce becomes irrevocable<sup>334</sup> unless the woman asks the man to return her payment.<sup>335</sup> In this case, if husband agrees to return to her compensation for agreeing to divorce, he would have the right to return to the marriage.<sup>336</sup>

### 3.1.1.3.3.2. *Mubarat*

*Mubarat*<sup>337</sup> is another type of divorce by mutual consent. It is based on both parties' desire to end the marriage. In this type of divorce, the wife compensates her husband in order for him to accept divorce, but the amount of this financial exchange must not exceed the wife's *Mahr*

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<sup>330</sup> خلع

<sup>331</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 29.

<sup>332</sup> Iran's Civil Code, Article 1146: A KHUL'A divorce occurs when the wife obtains a divorce owing to dislike of her husband, against property which she cedes to the husband. The property in question may consist of the original marriage portion, or the monetary equivalent thereof, whether more or less than the marriage portion.

<sup>333</sup> Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* at 86.

<sup>334</sup> Iran's Civil Code, Article 1144: "After an irrevocable divorce the husband has not the right to renounce his intention of divorcing."

<sup>335</sup> Iran's Civil Code, Article 1145: "A divorce is irrevocable in the following instances;

3 - (a) a divorce which a wife achieves by giving a consideration to her husband and (*Khul'a*) ... as long as the wife has not demanded the return of the consideration."

<sup>336</sup> Abdolhossein Shiravi, *Family Law (Marriage, Divorce, and Children)* (حقوق خانواده (ازدواج، طلاق و فرزندان) (Tehran/Iran: Samt, 2016) at 177-78.

<sup>337</sup> مبارات

amount.<sup>338</sup> The same as *Khul'a*, when the man ultimately decides to accept the divorce based on the financial agreement reached with his wife, this divorce is irrevocable<sup>339</sup> unless the woman decides to revoke the agreed amount.<sup>340</sup>

As both types of divorce by mutual agreement (*Khul'a* and *Mubarat*) are basically irrevocable, the woman is not entitled to her economic maintenance including the alimony during her *Idda* period anymore.<sup>341</sup>

### **3.1.1.3.3.3. The 2013 Family Protection Law: Divorce by Mutual Consent**

The recent Family Protection Law introduces a new kind of divorce by mutual consent in addition to *Khul'a* and *Mubarat*, the divorce based on the mutual consent under Sharia and the Iranian Civil Code.

Based on article 25 of the 2013 Family Protection Law, if the parties mutually apply for divorce, the court must refer the case to a family consultant center. Based on article 19, this center dispenses consulting services to try to resolve the parties' problems. If the center is able to satisfy the parties, such that they decide to withdraw their filing for divorce, it issues a certificate of reconciliation. If a reconciliation is not possible, the center issues the report which includes the result of the consultation. This includes the reasons the parties maintain their decision to divorce and why the reconciliation did not work out. The center then sends this report to the court. Based on this report, the court issues a "certificate of non-reconciliation"<sup>342</sup> which enables the parties to go to a notary to officially register their divorce.<sup>343</sup>

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<sup>338</sup> Iran's Civil Code, Article 1147: "A "MUBARAT" divorce occurs when the dislike is mutual in which case the compensation must not be more than the marriage portion."

<sup>339</sup> Iran's Civil Code, Article 1145: "A divorce is irrevocable in the following instances:  
3 - (b) a divorce by mutual consent (*mubarat*), as long as the wife has not demanded the return of the consideration."

<sup>340</sup> Mcglinn, *Family Law in Iran* at 65.

<sup>341</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 29.

<sup>342</sup> The 2013 Family Protection Law, Article 26

<sup>343</sup> Safaei and Emami, 'A Concise of Family Law', (at 237-39).

While this kind of divorce is also based on mutual consent, there is no financial compensation unlike *Khul'a* and *Mubarat*. Moreover, unlike the latter, this procedure does not need to refer to mediation. This type of divorce is therefore also only revocable by mutual consent. The reason for this is that since this divorce was based on the mutual consent of both parties, it can therefore only be reversed by mutual consent.<sup>344</sup>

With regard to the *Mahr* under this kind of divorce, since it is based on mutual agreement and there is no financial compensation for it, the woman's right to her *Mahr* remains intact. However, the marriage parties are free to fix an amount to be paid under such a divorce. Other legal rules pertaining to *Mahr*, such as whether *Mahr* was registered or stipulated, or halving the *Mahr* amount if the marriage was not consummated, are applied to this kind of divorce.<sup>345</sup>

#### **3.1.1.3.4. *Mahr* and the Annulment of Marriage**

The annulment of marriage (*faskh*) occurs when one of the marriage parties' main characteristics can cause harm to the other party, or in the case of diseases specifically provided for in Islamic law such as madness<sup>346</sup>, or a shortcoming in the man<sup>347</sup> or woman<sup>348</sup> which would prevent a party from fulfilling their marital obligations, like impotence.<sup>349</sup> The breach of a contractually stipulated characteristic in one party also opens grounds for annulment of the marriage<sup>350</sup>. To annul a marriage based on problems pertaining to the woman, the man must be able to ascertain

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<sup>344</sup> *Ibid.*, at 239-40.

<sup>345</sup> *Ibid.*

<sup>346</sup> Iran's Civil Code, Article 1121: "Madness of either of the married couple, provided that it is settled, whether it is permanent or recurrent, will give the other person the right of cancellation."

<sup>347</sup> Iran's Civil Code, Article 1122: The following defects in man will give the woman the right to cancel the marriage 1 - Castration. 2 - Impotency, provided he has not even once performed the matrimonial act. 3 - Amputation of the sexual organ to the extent that he is unable to perform his marital duty.

<sup>348</sup> Iran's Civil Code, Article 1123: The following defects in a wife bring about the right for a man to cancel the marriage:

1 - Protrusion of the womb (*qaran*). 2- Black leprosy (*juzam*). 3 - Leprosy (*baras*). 4- Connection of the vaginal and anal passages (*ifza*). 5 - Being crippled. 6- Being blind in both eyes.

<sup>349</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 120.

<sup>350</sup> Iran's Civil Code, Article 1128: "If a special qualification is mentioned, as a condition of the marriage, to exist in one of the marrying parties and if after the marriage it is found out that the party concerned lacks the desired qualification, the other party has the right to cancel the marriage. The foregoing is true whether the qualification is mentioned explicitly in the marriage contract or whether the marriage has been performed with the qualification understood mutually by the parties concerned."

that this problem existed before the marriage contract was perfected, and not disclosed properly.<sup>351</sup> For the man however, even if the problem occurs after the marriage, the wife will still have the right to annul the marriage.<sup>352</sup> The cancellation of marriage is an urgent right and must be applied immediately upon knowing the reason of annulment.<sup>353</sup> In this case, the wife conserves her right to *Mahr* and alimony during her *idda* period if the marriage was consummated before annulment.<sup>354</sup> If there was no sexual relation between the married parties, no *Mahr* is due in the case of annulment unless this annulment was based on the impotency of the man<sup>355</sup>. In this exceptional case, the wife is entitled to half of her *Mahr*.<sup>356</sup>

The procedure for cancelling the marriage does not follow the usual divorce procedure in Iranian law.<sup>357</sup>

### **3.1.1.5. *Mahr* and the Death of the Husband**

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<sup>351</sup> Iran's Civil Code, Article 1124: "The defects of the wife entitle the man to a right of cancellation of marriage if they existed at the time of marriage."

<sup>352</sup> Iran's Civil Code, Article 1125: "Madness and impotency create the right for the wife to cancel the marriage even if they occur after the date of the marriage."

<sup>353</sup> Iran's Civil Code, Article 1131: "The option of cancellation of marriage must be exercised immediately and, if the party who is entitled to the option does not cancel the marriage after becoming cognisant of the reason upon which he could cancel the marriage, he forfeits the option, provided also that he had full knowledge of the existence of the option and its urgent character. Determination of the duration of time during which the option can remain valid depends upon custom and usage."

<sup>354</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 30. And Annelies Moors, *Women, Property and Islam: Palestinian Experiences, 1920-1990* (Cambridge Middle East Studies; Cambridge: Cambridge University Press., 1996) at 147-48.

<sup>355</sup> Iran's Civil Code, Article 1101: "If the marriage is cancelled before matrimonial relations for any reason, the wife is not entitled to any marriage portion. If the reason of cancellation is impotency, the wife will be entitled to half the marriage portion notwithstanding the cancellation of the marriage."

<sup>356</sup> Mohaghegh Damad Mustafa, *بررسی فقهی حقوق خانواده* *a Study of Islamic Jurisprudence with Respect to Family Law* at 340-60.

<sup>357</sup> Iran's Civil Code, Article 1132: "The observance of the arrangements stipulated in the case of a divorce is not obligatory in a case of cancellation of marriage."

In the case of a registered *Mahr*, the death of the husband does not change the right of the wife to her *Mahr*, since the *Mahr* is hers after the marriage. Therefore, the wife is entitled to the entire amount of the *Mahr*, even if the death occurs before the marriage is consummated.<sup>358</sup>

In the case where the *Mahr* was not determined in the marriage contract, if the death of husband occurs before the marriage is consummated, no *Mahr* is due to the wife, as it was not predetermined by the married parties before the dissolution of the marriage.<sup>359</sup> But if the husband dies after the consummation of the marriage, the wife is entitled to the stipulated *Mahr* because her right was acquired. The *Mahr* is to be paid from the man's estate.<sup>360</sup>

In the case where the wife dies, her right to *Mahr* in every situation remains intact and is transferred to her heirs. (Safaei and Emami 2017)<sup>361</sup>

#### **3.1.1.4. The Function of Mahr for Women**

In a Sharia-based family law system, the function of the *Mahr* for the woman is very important. Originally, Islam established the *Mahr* as a gift from the husband to his wife. It is given at the start of their marital relation and symbolizes kindness and friendship. However, the function of the *Mahr* serves something more than its original goal and is playing several different functions in Islamic society.<sup>362</sup>

The most important role of the *Mahr* is its financial function for the woman. The matrimonial regime designed by Sharia and Iranian law is that of the separation of property between man and wife. The wife has no economic role and does not bear the family's financial responsibility. Yet the role of the deferred *Mahr* for the divorced or widowed woman is important. This is especially true for women who will not be working during their marital life. The *Mahr* can be

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<sup>358</sup> Safaei and Emami, 'A Concise of Family Law', (at 198-99.

<sup>359</sup> Iran's Civil Code, Article 1101: If the marriage is cancelled before matrimonial relations for any reason, the wife is not entitled to any marriage portion.

<sup>360</sup> Mcglinn, *Family Law in Iran* at 51-52.

<sup>361</sup> Safaei and Emami, 'A Concise of Family Law', (at 199.

<sup>362</sup> Welchman, 'A Historiography of Islamic Family Law', at 6-8.



thus considered as a tool to protect women's economic rights, as long as the marriage does not end in *Khul'a* or *Mubarat* divorce, since in such cases the woman would not be entitled to her *Mahr* as seen above.<sup>363</sup>

The other role of *Mahr* is its role when women ask for the dissolution of the marriage. Women can initiate a divorce using their right to the *Mahr* as leverage. Indeed, women can negotiate with their husbands when initiating a divorce by giving them financial compensation if they agree to divorce. This can happen through the *Khul'a* or *Mubarat* divorce as mentioned before. This negotiated divorce is quite common in practice.<sup>364</sup>

*Mahr* can also be considered as a deterrent for men wishing to initiate a unilateral divorce. Indeed, the man will have to consider his obligation to pay the *Mahr* to his wife before their divorce. That is why people think that the higher is the *Mahr*, the more its role as a deterrent is reinforced.<sup>365</sup>

Therefore, *Mahr* has both an economic function for the woman and a bargaining function or deterrent for divorce.

### **3.1.1.5. The Mahr's Value**

The value of the *Mahr* is not determined in Sharia or the Iranian Civil Code. Sharia insists on the notion that the *Mahr* is a sign of sincerity of the man to his wife. Therefore, while it is mandatory for marriage, and should be something with economic value, the best woman, in this economic concept, is the one who agrees on a very small amount for *Mahr*.<sup>366</sup>

However, in modern Islamic societies, the original goal of the *Mahr* and its religious function have changed. They are now correlated to the economic class and education of the married parties. The amount of *Mahr* is indeed viewed as a symbol of social prestige and thus the wife's

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<sup>363</sup> Moors, *Women, Property and Islam: Palestinian Experiences, 1920–1990* at 147-48.

<sup>364</sup> Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* at 71-82.

<sup>365</sup> Mcglinn, *Family Law in Iran* at 49.

<sup>366</sup> Moors, *Women, Property and Islam: Palestinian Experiences, 1920–1990* at 110.

family will often try to increase its value.<sup>367</sup> In recent years, while the value of the *Mahr* in a marriage contract has increased without any relation to the wealth of the parties or the ability of the husband to pay such a *Mahr*, in practice, the payment of such a high value *Mahr* rarely happens. In fact, *Mahr* has two levels. The “Public *Mahr*” refers to the amount the married parties choose to stipulate and register in the marriage contract. The “Real *Mahr*” refers to the amount the husband actually pays to his wife and usually is less than the amount stipulated as the “public *Mahr*”.<sup>368</sup> This process clearly goes against the Islamic concept of *Mahr*.

Based on this social practice, today, some Islamic countries limit the value of the *Mahr* so that it does not exceed a reasonable amount. Countries such as Sudan, Morocco, Lebanon, South Yemen, and South Somalia introduced such legal limitations. For example, South Yemen limited the amount of *Mahr* to maximum amount of 100 Dinar.<sup>369</sup> Some countries try to limit the value of the *Mahr* through different tools. For example, Morocco restricts the concept of *Mahr* by considering it as a symbolic tradition even though it keeps the *Mahr* mandatory in its family law.<sup>370</sup> However Islamic scholars disagree over whether the *Mahr* should be limited by law. While some of them are against a very expensive *Mahr* because that goes against the goals of Sharia (which are to promote marriage), some of them believe that placing a limitation on the value of the *Mahr* goes against the free negotiation and consent of the parties in determining their *Mahr*, and therefore goes against the Sharia’s spirit.<sup>371</sup>

The Iranian Civil Code follows the most popular Islamic scholars’ idea not to put a limitation on the *Mahr* amount. Therefore, there is no minimum or maximum amount for *Mahr* and the parties are free to decide the amount of *Mahr* by mutual consent.<sup>372</sup> However, the Iranian legislator recently made some changes regarding the limitation of the amount of *Mahr*. This change reflects the ideas of the two mentioned groups of Islamic scholars. The 2013 Iran’s

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<sup>367</sup> *Ibid.*, at 83-84.

<sup>368</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 34.

<sup>369</sup> *Ibid.*, at 37.

<sup>370</sup> Léon Buskens, 'Sharia and National Law in Morocco', *Sharia Incorporated*, (2010), 89-138 at 115.

<sup>371</sup> Mcglinn, *Family Law in Iran* at 51.

<sup>372</sup> The Iran’s Civil Code, Article 1080: “Fixing of the amount of marriage portion depends upon the mutual consent of the marrying parties.”

Family Protection Law achieves this by putting some limitation, in practice, on the amount of *Mahr*, while leaving the parties free to determine their *Mahr* amount by mutual consent.

Article 22 of this law states that if the *Mahr* amount in the marriage contract is at most 110 gold coins<sup>373</sup>, or the equivalent of that, and the husband does not pay this amount to his wife, the recovery of this amount would be governed by article 2 of the Act on the Enforcement of Debts<sup>374</sup>. This article states that if someone owes money or property to another and he does not pay this debt, the court must oblige him to pay this amount or else the court will pay the amount using the debtor's available property. If the debtor has no property but his insolvency has not been proved in court, the latter can sentence him to prison until he makes his payment.

Before the recent change in the Family Protection Law, the entire amount of the *Mahr* registered in the marriage contract was subject to Article 2 of the Act on the Enforcement of Debts, regardless of the amount agreed upon by the parties. As such there were many men in prison because they were unable to pay the due amount of *Mahr* to their wives. The *Mahr* amount was increasing since the 1979 Islamic revolution and many husbands were unable to pay the due amount. That is why article 22 of the 2013 Family Protection law limits the criminal punishment for the non-payment of *Mahr* up to the value of 110 gold coins. This means that while the future spouses are free to agree to whatever amount of *Mahr* they deem suitable, the husband only risks going to prison if he is unable to pay up to 110 gold coins' worth of the *Mahr*. Over 110 gold coins unpaid, the wife can pursue this amount through the civil procedure only.<sup>375</sup>

Through this new law, the legislator encouraged married parties to avoid stipulating huge amounts of *Mahr* simply for the prestige, without any intention to paying, because there is now no guarantee that women will receive more than the legal limitation. On the other hand, it may still encourage men to accept the stipulation of a large amount of *Mahr* since there is no criminal punishment for not paying beyond the legal limit.

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<sup>373</sup> The Iranian gold coin is a piece of golds which is issued by the Iran's Central Bank in the coin shape and with formally ratified shape and weight of gold by central bank. Its worth is determined daily and it is sold and bought by gold shops, banks and exchanges' shops. It is very common to use gold coin as a measuring unit for determining *Mahr* amount in Iranian marriage.

<sup>374</sup> Act on the Enforcement of Debts of 1 November 1998

<sup>375</sup> Nadjma Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (2016) at 134-35.

This new legislation presents the advantage of decreasing the amount of people sentenced to prison for insolvency. Indeed, throwing a man in prison because of his inability to pay his debts does not present any advantage for the family unit. That is why this rule is retroactive.<sup>376</sup> However, some specialists such as Safaee have suggested using other tools to restrict the stipulation of huge amounts of *Mahr* in marriage contracts, such as taxing these amounts or refusing court litigation over unreasonable amounts of *Mahr*.<sup>377</sup>

That being said, it seems stipulating a high amount of *Mahr* is also a cultural issue which needs to be addressed through education and the changing of mindsets in people, so that the marriage is not viewed as a solely economic contract.

#### **3.1.1.6. *The Mahr and Consummation of the Marriage***

There is an important relationship between the *Mahr* and marital sexual intercourse. Indeed, the *Mahr* will become due to the wife once the marriage contract is concluded. She will possess the *Mahr* herself irrespective of her duty to provide sexual access.<sup>378</sup> The wife can refuse to fulfill her sexual duty so long as the *Mahr* is not delivered to her, but if she willingly fulfills her duty, she does not have the right to refuse her sexual duty anymore.<sup>379</sup> However, when spouses have their first marital sexual intercourse, the husband automatically becomes responsible for the payment of the whole amount of the *Mahr*. But if the marriage dissolves before having any sexual relations, the man will have to pay half of the *Mahr* amount.<sup>380</sup>

There are many debates surrounding the relationship between *Mahr* and consummation of the marriage. In fact, this topic is one of the most challenging issues concerning *Mahr* in Islamic law. The central issue at the heart of the debate is determining whether the *Mahr* should be considered a reciprocal right for a woman given in exchange for the man's sexual access. Some

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<sup>376</sup> Safaee and Emami, 'A Concise of Family Law', (at 163).

<sup>377</sup> Ibid.

<sup>378</sup> The Iran's Civil Code, Article 1082: "*Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like.*"

<sup>379</sup> The Iran's Civil Code, Article 1085 and 1086

<sup>380</sup> Lamya Rostami Tabrizi, '(رژیم مالی خانواده در قوانین ایران و انگلیس) Matrimonial Regime in Iran and UK', *Motaleate Rahbordie Zanan*, 31/8 (2006), 116-43. 116-117.

scholars such as Schacht,<sup>381</sup> consider marriage as a reciprocal contract, similar to a sale contract, where the *Mahr* and sexual access are the reciprocal rights. This is because articles 377<sup>382</sup> and 378<sup>383</sup> of the Iranian Civil Code provide a similar right to a buyer or seller to retain their obligation until the other party has prepared to deliver their part. In a similar fashion, if the seller fulfills his obligation to deliver the sale object before receiving its price, he does not have the right to reclaim the said object. However, the predominant conception of the relationship between the *Mahr* and sexual access among scholars rejects this idea.

The most important reason to reject it is found in the Iranian Civil Code, which says that the wife becomes the owner of the *Mahr* through the marriage contract.<sup>384</sup> This is taken to mean that the *Mahr* is not a reciprocal right, because it is acquired irrespective of the wife's respecting her marital duties. In addition, marriage is not considered a reciprocal contract or anything similar to it in Islamic law. This means that the rights and obligations of the married parties are not reciprocal, unlike those in the sale contract. The right of the woman to retain her marital duty is an exception in family law to protect the woman's right to her *Mahr*. If the marriage was a reciprocal contract comparable to a sale contract, both parties would have the right to retain their obligation. But this right is exclusively given to the woman regarding her *Mahr*.<sup>385</sup>

Since this right is an exception in family law, it should be interpreted in narrow manner. For example, this right cannot apply in cases where the *Mahr* is deferred or in cases where the court has divided the *Mahr* amount to be paid in several portions. Some lawyers such as Safaee even believe that the parties in the marriage should respect their mutual rights and fulfil their obligations including sexual access immediately after marriage.<sup>386</sup>

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<sup>381</sup> Schacht, *An Introduction to Islamic Law* at 161.

<sup>382</sup> The Iran's Civil Code, Article 377: "Either the seller or the buyer can retain the goods sold or their consideration until the other party is prepared to deliver his part, unless either the object of sale or the consideration thereof is agreed to be delivered at a subsequent date in which case either the object of sale or consideration which has become mature should be surrendered."

<sup>383</sup> Iran's Civil Code, Article 378: "The seller who has voluntarily delivered the object of sale before receiving the price thereof, cannot reclaim the object of sale, except in the case of the cancellation of the transaction assuming that he has the option to do so."

<sup>384</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 668.

<sup>385</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 156-57.

<sup>386</sup> Safaee and Emami, 'A Concise of Family Law', (at 177-78).

### 3.1.2. Alimony (Nafagha)

In addition to *Mahr*, alimony is another mandatory obligation incumbent upon the man with regard to his wife under Sharia<sup>387</sup> and Iranian law. Alimony, known as *Nafagha*<sup>388</sup> in the Iranian Civil Code, also exists in other countries' family laws such as Quebec. However, there are both convergences and divergences regarding alimony in these legal regimes.

In Iran, following Shia jurisprudence, the husband is sole responsible for all the needs and expenses of the family. The wife does not have any financial responsibility in this regard.<sup>389</sup> While the scope of alimony, in Iranian law and Sharia, encompasses the providing of financial support for wives, children and relatives<sup>390</sup>, this research will only examine the wives' alimony under Sharia and Iranian law.

Iranian law divides responsibilities between man and woman, such that the wife bears no financial responsibility under the marriage contract. Her main responsibility is to manage the household and children. For these duties, she normally does not obtain any remuneration even though these works have financial value. Therefore, the husband is responsible for paying all the regular living costs of his wife.<sup>391</sup>

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<sup>387</sup> Quran: Verse 4(Al-Nisa):34: "Men are protectors of women, because Allah has made some of them excel over others and because they spend their wealth on them..." *الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما أنفقوا من أموالهم...*

<sup>388</sup> نفقه

<sup>389</sup> Under Article 1106 of Iran's Civil Code "The cost of maintenance of the wife is at the charge of the husband in permanent marriages."

<sup>390</sup> The Iran's Civil Code, Article 1196 states: "Only relatives by blood in a direct line ascending or descending are under reciprocal obligation to provide maintenance for each other."

Article 1206 of Iran's Civil Code explains the difference between the wife's and relatives' alimonies: "A wife can always and in any case prefer a claim for her past expenses, and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is arranged. Relatives, however, entitled to provision of maintenance expenses can claim only their expenses for a future period."

<sup>391</sup> Hekmatnia, *Woman's Rights and Family* at 201-00.

### ***3.1.2.1. The Meaning of Alimony in Iranian Law***

The Iranian Civil Code defines alimony as “all reasonable needs relative to the wife’s situation including dwelling, clothing, food, furniture, health and medication costs, and servants in case she is accustomed to having a servant or she needs to have servant because of illness or defects”.<sup>392</sup>

According to this article, alimony is therefore determined by the wife’s situation and her reasonable needs based on custom. As such, the man’s wealth is not the main criteria when determining alimony. In addition, alimony will be different for women depending on their situation, habit and familial social standing.<sup>393</sup> The Iranian Supreme Court confirms this idea in its legal opinion number 23/292 when it says: “article 1107 of the Civil Code stipulates that while the payment of alimony is the man’s responsibility, the quality of this alimony will depend on the wife’s situation and her habits. Therefore, if she has been accustomed to having a servant or a high standard of living such as expensive clothing and dwellings, she could demand such a quality of life through her alimony from her husband.”<sup>394</sup>

The nature of the wife’s alimony is also determined according to custom. Her right will differ depending on consumable goods such as foods and cosmetic products, and non-consumable property such as a dwelling and furniture. In the case of consumable goods, the wife is considered the owner of such goods based on custom. She thus has a right of possession over them. She can therefore sell or donate them. In the case of non-consumable property, the wife’s right will differ depending on custom and the intention of her husband. In this case, her right to use does not confer the right to dispose of the property in all the occasions. For example, with regards to personal items such as clothes and shoes, custom considers them to be the full possession of the wife. But when it comes to the house and furniture, the man usually gives his

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<sup>392</sup> Iran’s Civil Code, Article 1107.

<sup>393</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 131-32.

<sup>394</sup> Ahmad Kamangar, *The Judicial and Legal Principles* اصول قضایی-حقوقی، احکام دیوان عالی کشور و هیأت عمومی (Tehran: Ettehad, 1964) at 178.

wife a right to use, and not full ownership, unless the man's intention was to give his wife the actual right to ownership.<sup>395</sup>

### ***3.1.2.2. The Characteristics of Alimony in Iranian Law***

The wife's alimony in Iranian law has the following special characteristics:

- 1- The wife's alimony takes priority over all other familial alimony.<sup>396</sup> The Iranian Civil Code stipulates that "*If there is a wife and one or more relatives who are to be supported, the claim to support the wife precedes that of others*".<sup>397</sup>
- 2- The wife's alimony is not determined by her wealth. Even if she was already rich when entering marriage, she will still be entitled to alimony. At the same time, the payment of alimony is not determined based on the man's wealth. Paying the wife's alimony is the husband's responsibility regardless of his ability to actually pay it.<sup>398</sup> In cases where the man does not pay his wife's alimony and the court cannot induce him to pay<sup>399</sup>, the wife has the right to demand a divorce from the court.<sup>400</sup>
- 3- The wife is entitled to obtain any past alimony in the future. This means that her right to alimony does not change in time, and any unpaid right to alimony remains due in the future.<sup>401</sup>

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<sup>395</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 189.

<sup>396</sup> Mohsen Anari and Rahmat Dashti, 'The Position of Alimony in Religion Books and Iranian Law', *International Journal of Humanities and Cultural Studies (IJHCS)* ISSN 2356-5926, 3/2 (2016), 178-84 at 180.

<sup>397</sup> Iran's Civil Code, Article 1203.

<sup>398</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 113-14.

<sup>399</sup> Iran's Civil Code, Article 1111: "The wife can refer to the court if her husband refuses to provide for her maintenance. In such a case the court will fix the amount and will compel the husband to pay it."

<sup>400</sup> Iran's Civil Code, Article 1129: "If the husband refuses to pay the cost of maintenance of his wife, and if it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her. The same stipulation will be binding in a case where the husband is unable to provide for the maintenance of the wife."

<sup>401</sup> Iran's Civil Code, Article 1206: "A wife can always and in any case, prefer a claim for her past expenses, and her right to these expenses is preferential..."



- 4- The wife's right to alimony always takes precedence over any other financial responsibilities her husband may have.<sup>402</sup> Even in cases where the husband is insolvent or bankrupt, the wife's right to alimony is privileged and should be paid first and before any payments to other creditors.<sup>403</sup>
- 5- The right to alimony only exists for the wife. There is no right to alimony for the husband under Iranian law.<sup>404</sup>
- 6- The wife's right to alimony is an obligatory part of Islamic marriage. Therefore, the married parties cannot mutually agree to waive this right.<sup>405</sup>

### ***3.1.2.3. Alimony and Consummation of the Marriage***

In Iranian family law, following Shia jurisprudence, the man's responsibility for paying alimony is a guaranteed right for his wife. However, the wife's alimony will be suspended if she refuses sexual relations with her husband without a legitimate excuse.<sup>406</sup> This fact has made the relationship between alimony and marital sexual intercourse controversial, and different opinions have been expressed on the nature of the wife's alimony in Iranian family law.<sup>407</sup>

Some<sup>408</sup> believe the man's responsibility for paying alimony is accepted in return for his right to have sexual intercourse under the marriage contract. Others look at the marriage contract as the sufficient reason and main source of alimony being imposed on man; then, in the absence of sexual access with no legitimate excuse, the payment of the alimony could be suspended. There is a third group of scholars who hold that the man's duty to pay alimony is due to his role as the head of the family. Accordingly, a man's duty to pay alimony stems from the idea that men are

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<sup>402</sup> Iran's Civil Code, Article 1206: "...In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is arranged..."

<sup>403</sup> Farajollah Hedayat Nia, 'The Women's Occupation and the Families' Expediency in Iran Civil Code و اشتغال زنان و مصلحت خانواده در قانون مدني بررسي فقهي حقوقي ماده ۱۱۱۷ ق.م', *The Women's Straregic Study*, 34/9 (2006), 7-46 at 27.

<sup>404</sup> Anari and Dashti, 'The Position of Alimony in Religion Books and Iranian Law', (at 181.

<sup>405</sup> Hekmatnia, *Woman's Rights and Family* at 201-00.

<sup>406</sup> Iran's Civil Code, Article 1108: "If the wife refuses to fulfil duties of a wife without legitimate excuse, she will not be entitled to the cost of maintenance."

<sup>407</sup> Boe, *Family Law in Contemporary Iran: Women's Rights Activism and Shari'a* at 27.

<sup>408</sup> See Welchman, 'A Historiography of Islamic Family Law', at 14-16.

the head of their family due to their physical, mental and spiritual characteristics. The same approach also existed in Roman law, as well as in subsequent civil law regimes that used the concept of *bonus pater familias* (good father of the family or the good family man)<sup>409</sup>. While the Iranian Civil Code states that men are the head of their family<sup>410</sup> and have the duty to pay alimony,<sup>411</sup> it does not further discuss the analytical approach regarding the relationship between alimony and marital intercourse. Adopting any one of the abovementioned theories and opinions would affect the married parties' positions in procedural issues. Indeed, one's position concerning this relationship between alimony and sexual access alters the determination of the party on whom the burden of proof lies. (Almasi 2002; MOHAGHEGH 2009)<sup>412</sup>

Certain legal scholars such as Katouzian<sup>413</sup> and Safaei<sup>414</sup> believe that the Iranian Civil Code has followed the second theory, according to which the entering into the marriage contract is sufficient reason to pay for alimony. According to the Iranian Civil Code, the duty to pay for alimony and the matrimonial regime starts at the time of marriage without any notion of the man's sexual access.<sup>415</sup> However, such duties cease in case the wife is sexually disobedient<sup>416</sup>.<sup>417</sup> Based on this legal opinion and the Iranian Civil Code, in case of conflict between the married parties regarding alimony, the wife only has to bring proof that a marriage contract exists.<sup>418</sup> She does not need to prove sexual obedience. If the husband claims he should not be paying alimony to his wife, he must bring the proof establishing his wife's illegitimate sexual disobedience.<sup>419</sup>

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<sup>409</sup> See <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-309>

<sup>410</sup> Iran's Civil Code, Article 1105.

<sup>411</sup> Iran's Civil Code, Article 1106.

<sup>412</sup> Nejad Ali Almasi, Mohammadi, Morteza 'The Spouses' Property System in Iran and France Laws ترتیب اموال زوجین در حقوق ایران و فرانسه', *Name Mofid* ([www.ensani.ir/fa/content/85161/default.aspx](http://www.ensani.ir/fa/content/85161/default.aspx), 29, 2002), 117-47 at 126-29.126-129.

<sup>413</sup> Naser Katouzian, 'Family Law (حقوق خانواده)', (Tehran University Press: Tehran, 1978) at 186.

<sup>414</sup> Safaei and Emami, 'A Concise of Family Law', (at 154.

<sup>415</sup> Iran's Civil Code, Article 1102: "As soon as marriage takes place in due form, relations of matrimony will automatically exist between the marrying parties and rights and reciprocal duties of husband and wife will be established between them."

<sup>416</sup> In Iranian Law, the wife who does not provide her husband with marital intercourse is considered disobedient (*nashezeh*).

<sup>417</sup> Anari and Dashti, 'The Position of Alimony in Religion Books and Iranian Law', (at 179.

<sup>418</sup> Iran's Civil Code, Article 1106: "The cost of maintenance of the wife is at the charge of the husband in permanent marriages."

<sup>419</sup> Iran's Civil Code, Article 1108: "If the wife refuses to fulfil duties of a wife without legitimate excuse, she will not be entitled to the cost of maintenance."

The Iranian Supreme Court's opinion confirms this legal view in its judgment number 2614: "For demanding alimony, the proof of a marital relation is enough unless other reasons exist which would prevent the wife from her right to the alimony. Therefore, bringing a marriage contract would be enough in the case of an alimony dispute."<sup>420</sup>

In Iranian family law, while the payment of alimony will be suspended by sexual disobedience,<sup>421</sup> the wife's right to alimony presents certain characteristics that make it a powerful legal instrument. The statute of limitation does not apply to a woman's claim to alimony,<sup>422</sup> which is protected by a mandatory law that parties cannot waive by mutual consent.<sup>423</sup>

#### ***3.1.2.4. Alimony and the Dissolution of Marriage***

In the Iranian Civil Code, following Sharia, a woman's right to alimony can, in certain situations, continue after the dissolution of marriage during her *idda* time. A woman's right to alimony can be established during her *idda* period if she is pregnant. Here, the right to alimony will only be examined in cases of divorce (revocable and irrevocable), death of the husband, or the annulment of marriage.

##### **3.1.2.4.1. The Meaning of *Idda* (Waiting Period)**

Before proceeding to examine the aforementioned situation, it is important to provide a general definition of *Idda*. One obstacle to marrying a woman in Islamic law is when she must wait for the passing of her *Idda* period. The *Idda*<sup>424</sup> is the time during which a woman whose marriage

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<sup>420</sup> Kamangar, *The Judicial and Legal Principles* اصول قضایی-حقوقی، احکام دیوان عالی کشور و هیأت عمومی at 249.

<sup>421</sup> Iran's Civil Code, Article 1108.

<sup>422</sup> Iran's Civil Code, Article 1111 and 1129 and Article 642 of Iran's Penal Code.

<sup>423</sup> Hekmatnia, *Woman's Rights and Family* at 201.

<sup>424</sup> Iran's Civil Code, Article 1150: "Iddah consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry."

is dissolved must abstain from marrying another man and having sexual relations.<sup>425</sup> There are different reasons for why the *Idda* must be respected after the dissolution of a marriage, such as being able to identify the father of the child born during the divorce, respecting the past marital relationship, thinking about the marital relationship, and renouncing from separation in case this is possible.<sup>426</sup>

The length of *Idda* is different depending on whether the marriage was ended by divorce, death or annulment of marriage, and whether the woman is pregnant. There is no *Idda* for woman in certain situations which will be explained below.

#### **3.1.2.4.2. The *Idda* period for Divorce and Annulment of Marriage**

The *Idda* period is the same for a divorce and marriage annulment. However, in these situations the *Idda* will be different if the woman is pregnant.<sup>427</sup>

The pregnant woman must respect *Idda* until the end of her pregnancy. Therefore, her *Idda* time expires at the birth of her child even if it is very short time.<sup>428</sup>

For the woman who is not pregnant, the *Idda* is based on her menstruation cycles. The Civil Code stipulates: “The *Idda* for a divorce or for the dissolution of a marriage consists in three consecutive menstruation periods, unless the woman concerned, though she may be of child bearing age, has no monthly period. In this case the *Idda* will be three months.”<sup>429</sup>

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<sup>425</sup> Mohaghegh Damad Mustafa, *بررسی فقهی حقوق خانواده* *a Study of Islamic Jurisprudence with Respect to Family Law* at 234.

<sup>426</sup> Mohammad Ali Ansari, *Meshkat, the Interpretation of Quran* مشکات (Meshkat; Mashhad: Bayane Hedayate Noor, 2016) at Under Al-Baghara: verse 228. Volume 5

<sup>427</sup> Mohaghegh Damad Mustafa, *بررسی فقهی حقوق خانواده* *a Study of Islamic Jurisprudence with Respect to Family Law* at 240.

<sup>428</sup> Iran’s Civil Code, Article 1153: “The period of Iddah for divorce or dissolution of marriage act or waiver or expiry of the period of marriage in the case of a woman who is pregnant will be until she given birth to a child.”

<sup>429</sup> Iran’s Civil Code, Article 1151.

### 3.1.2.4.3. The *Idda* Period upon the Death of the Husband

Upon the husband's death, the *Idda* is four months and ten days and if the woman is pregnant, her *Idda* is until the end of her pregnancy if the latter lasts longer than four months and ten days.<sup>430</sup> It means that the longer period between the pregnancy and four months and ten days must be respected as the widowed woman's *Idda*.<sup>431</sup> It is also notable that in the case where the husband dies, the *Idda* must be respected regardless of the kind of marriage. This rule even extends to the wife who in other cases would not have to respect the *Idda*, like the woman who did not have any sexual intercourse or who has reached menopause.<sup>432</sup>

### 3.1.2.4.4. Women with No *Idda* Period

Based on the Iranian Civil Code, "there is no *Idda* in the case of a wife who has not had any sexual intercourse with her husband, or in the case of a wife beyond the age of conception. These are not affected by any *Idda* for divorce or for the dissolution of marriage. But the *Idda* in case of the husband's death must be observed in both cases".<sup>433</sup>

Having clarified the notion of *Idda*, we now turn to the alimony of women under different kinds of dissolution of the marriage.

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<sup>430</sup> Schacht, *An Introduction to Islamic Law* at 166.

<sup>431</sup> Iran's Civil Code, Article 1154: "The period of *Iddah* in the case of death (of husband) in both permanent and temporary marriages will be four months and ten days, unless the wife is pregnant when the *uddeh* comes to an end with the birth of the child provided that the interval between the death of the husband and the birth of the child is longer than four months and 10 days: if not, the period of *uddeh* will be the same four months and 10 days."

<sup>432</sup> Safaei and Emami, 'A Concise of Family Law', (at 116-18.

<sup>433</sup> Iran's Civil Code, Article 1155

### 3.1.2.4.5. Alimony and Divorce

The alimony of the wife after divorce is different according to whether such a divorce was revocable and irrevocable.

During the *Idda* after a revocable divorce, the woman is entitled to alimony unless the divorce resulted from a sexual disobedience on the wife's part. As previously discussed concerning revocable divorces, marital duties persist until the end of the revocable time.<sup>434</sup> As such, the responsibility to pay alimony also continues unless it expires before divorce pursuant to the wife's sexual disobedience.<sup>435</sup> In cases where the wife is pregnant, the *Idda* lasts until the end of her pregnancy and she is entitled to alimony during this time.<sup>436</sup>

In cases of irrevocable divorce, since the marital relationship and all its effects are completely dissolved, the woman has no right to alimony.<sup>437</sup> However, if she is pregnant, she has the right to alimony until the end of her pregnancy.<sup>438</sup>

### 3.1.2.4.6. Alimony and the Annulment of Marriage

In cases where a marriage is annulled, the effects of marriage disappear at the time of the annulment, much like in the case of irrevocable divorce.<sup>439</sup> Therefore, there is no right to alimony for wife in such cases unless she is pregnant.<sup>440</sup>

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<sup>434</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 127.

<sup>435</sup> Iran's Civil Code, Article 1109: "Cost of maintenance of a divorced wife during the period of "uddeh" is to be borne by the husband, unless the divorce has taken place because of disobedience..."

<sup>436</sup> Anari and Dashti, 'The Position of Alimony in Religion Books and Iranian Law', (at 182).

<sup>437</sup> *Ibid.*, at 183.

<sup>438</sup> Iran's Civil Code, Article 1109: "... if the uddeh arises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless she is with child from her husband in which case she will be entitled to cost of maintenance till her child is born."

<sup>439</sup> Anari and Dashti, 'The Position of Alimony in Religion Books and Iranian Law', (at 182-83).

<sup>440</sup> Iran's Civil Code, Article 1109: "... if the uddeh arises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless she is with child from her husband in which case she will be entitled to cost of maintenance till her child is born."

#### 3.1.2.4.7. Alimony and the Death of the Husband

During a widow's *Idda*, there is no right to alimony even if she is pregnant.<sup>441</sup> However, the husband's heirs are responsible for paying the pregnant widow's alimony because her child inherits from its father.<sup>442</sup>

### 3.2. The Economic Rights of Women Under the General Legal Principles

The second group of women's economic rights under Iran's legislations are the rights which originate from general legal principles and apply in family law. These principles' application to family law can be considered in two ways:

First, some legal rules do not change when they come to the family environment. For example, if a man wants to sell an apartment to his wife, this legal action is not specific to family law and follows the general rules of selling property.

Second, some general legal rules, when applied to family law, mix with family law and specific rules to govern the spouses' financial relations. In this situation, the rights and responsibilities of the parties to the marriage should be examined through the lenses of the general principles. The legislator tries to adapt these general rules to families' various characteristic and features. The main examples of this group are the compensation of the domestic work of the wife during marriage, the compensation of the costs incurred by the wife, the rules of breastfeeding, and the rules of inheritance which need to be studied separately.<sup>443</sup>

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<sup>441</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 197.

<sup>442</sup> Iran's Civil Code, Article 1110: "In the *Idda* time for death of husband, the cost of living of his wife would be paid from his family who are responsible for paying alimony if she demands."

<sup>443</sup> Hekmatnia, *Woman's Rights and Family* at 204.

### 3.2.1. *The Wage of Domestic Labor (Ojrat-ol-mesl)*

Under Sharia and Iranian law, the housekeeping and care of the children is not necessarily the wife's duty. These tasks are deemed to be of economic value, however, and should she choose to pursue such tasks, she will be entitled to receive compensation for her work. As the Iranian matrimonial regime is based on the separation of property, the asset of each party must be specified, and the wife's housework is considered one of her assets in this system.<sup>444</sup>

In Shia jurisprudence, this issue is examined under the chapter "hired labour",<sup>445</sup> which discusses the legal situation of people who do a certain job which is not their ordinarily duty. The chapter examines whether a person has the right to be compensated for the tasks accomplished in different cases where he may or not have had the intention to be compensated for fulfilling those tasks. According to Sharia jurisprudence, two elements are required to allow the wife to receive remuneration for the housekeeping tasks she performs. Firstly, the work she has done must have an obligatory nature. Secondly, she must have had the intention to seek compensation when carrying out the tasks.<sup>446</sup>

In Iranian culture, the wife is the main person responsible for housekeeping and taking care of the children. She is generally not compensated for carrying out these tasks. However, the general rules of hired labor apply to housework accomplished by the wife.<sup>447</sup> According to the Iranian Civil Code<sup>448</sup>, if someone performs an act following the order of another person, he can claim to be paid for this work unless the other party is able to show that the former acted in a gracious manner.<sup>449</sup>

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<sup>444</sup> Roshan, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالي حاکم بر روابط زوجین', (at 535.

<sup>445</sup> *Joalah* (جعلاله)

<sup>446</sup> Almasi, 'The Spouses' Property System in Iran and France Laws ترتیب اموال زوجین در حقوق ایران و فرانسه', at 140-38.

<sup>447</sup> Roshan, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالي حاکم بر روابط زوجین', (at 540.

<sup>448</sup> Iran's Civil Code Article 336: "If a man does an act at the order of another and if according to custom and usage a wage is payable for such an act, or if the man who has acted is accustomed and disposed to undertake such work, then he can claim pay for his work, unless it is shown that he acted gratuitously."

<sup>449</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 290-91.



This general rule was initially used to justify the wife's right to compensation for doing housework. It eventually found its way into family law through the adoption, in 1992, of Note 6 to an amendment to Divorce Regulations.<sup>450</sup> Clause A of Note 6 of the Regulation requires courts to determine the value of the domestic labor performed by the wife during her marital life when this was done according to her husband's wishes and with the intention of being paid. The court obliges the husband to pay a housework wage. However, this obligation is only due in cases where the husband initiates a divorce, and no misbehavior of the wife is being alleged.<sup>451</sup> Therefore, if the wife initiates a divorce or if the wife's misbehavior is being alleged, this clause does not apply.

This clause has been widely criticized by legal scholars, on the basis that it puts the burden of proof on women who must provide evidence of their doing housework because of their husband's order. Critics<sup>452</sup> believe Clause A is a violation of the economic rights of women to be compensated for their housework. The fact that Clause A has established a relation between the right to compensation and the reason of divorce is believed to lead to social problems and even domestic violence against women.<sup>453</sup> In addition, the general rule under Article 336 of the Civil Code was easier to apply on family law rather this Clause.

Consequently, a Note was added to article 336 of the Iranian Civil Code in 2006 and was adopted by the Iranian Expediency Council following the objection of the Guardian Council.<sup>454</sup> The Note provided for the wife's entitlement to monetary payment for her domestic labor performed without the intention to do them gratuitously during marriage time. Courts should calculate this amount and order the husband to pay it.<sup>455</sup> While this text entitles the woman to a housework

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<sup>450</sup> Morteza Mohammadi, 'Divorce and the Women's Share from Marital Life' *طلاق و سهم زن از زندگی مشترک*, *Name Mofid*, 43 (2004), 31 at 34-35.

<sup>451</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 355.

<sup>452</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 52).

<sup>453</sup> Tohidj, 'Iran', at 124-25.

<sup>454</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 140).

<sup>455</sup> Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', at 7-8.

wage, it does not link this right to the separation time and the wife in each situation even in case of death of her husband could apply for her compensation.<sup>456</sup>

The 2013 Family Protection Law repealed the amendment to the Divorce Regulations including Note 6 Clause A discussed above.<sup>457</sup> Instead, article 29 of the new law stipulates that the remuneration for domestic labour during marital life is determined by the court in accordance with the marriage contract's stipulations and agreements. This is based on the note to article 336 of the Iranian Civil Code which gives the wife a right to ask for housework remuneration during her marital relation. While she must show that this work was accomplished to satisfy her husband's demands, she does not need to show she had the intention to be paid for it.<sup>458</sup>

This new rule is more general with regards to the wife's demanding her remuneration. Her right can be combined with other economic arrangements such as the division of the man's property, which shall be explained later. It is notable that under the amendment to the Divorce Regulations, the remuneration could not be combined with other economic arrangements deemed contrary to general legal principles and women's rights.<sup>459</sup>

### ***3.2.2. Compensation of Costs Incurred by the Wife***

In addition to *Ojrat-ol-mesl*, article 30 of the 2013 Family Protection Law provides for an unprecedented rule in Iranian law which is reimbursement of costs incurred by the wife during marital life. This provision originates in the general rules of separation of property and is based on the complete distribution of the wife and husband's roles in the family. In this respect, article

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<sup>456</sup> Safaei and Emami, 'A Concise of Family Law', (at 271).

<sup>457</sup> The 2013 Family Protection Law, Article 58.

<sup>458</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 140).

<sup>459</sup> Safaei and Emami, 'A Concise of Family Law', (at 273).

337 of the Iranian Civil Code<sup>460</sup> sets out the rules for benefiting from another's property. It rules for the right of the wife to claim the expenses which she incurred even though she did not have any obligation to pay for them during the marriage.<sup>461</sup> The wife must prove that she pays for reasonable living costs based on the man's order or permission, while the man cannot prove that the wife paid these costs without the intention to be compensated. In this case, the wife can ask for the equivalent of her payment. (Yassari 2016)<sup>462</sup> As mentioned previously, this new article is based on the general legal principle of benefiting from another's property, applied to family law at the divorce time. As a reminder, the wife does not bear any responsibility for paying the family's living costs. This article protects women's rights at the divorce, in cases where there is a separation of property but no common property for married parties.<sup>463</sup>

### 3.2.3. *Breastfeeding*

The mother's milk is the best food for her baby. In addition, the emotional connection tied to breastfeeding and its role in the baby's mental and physical development has clearly been demonstrated in psychology and related sciences. Islam insists on the mother's breastfeeding in the Quran and in different prophetic traditions.<sup>464</sup> The Quran shows great respect for the mother because she bears the baby for more than nine months, for the difficulties of giving birth and breastfeeding. The latter has a special value in the eyes of God.<sup>465</sup> The breastfeeding is so highly recommended that some scholars<sup>466</sup> believe it is obligatory for the mother to breastfeed her baby. However, this is considered a recommended (*mustahab*) action for her in famous Shiite

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<sup>460</sup> Iran's Civil Code, Article 337: "If anyone benefits from another's property when permission has been clearly expressed or understood, the owner of the property will be entitled to the reasonable equivalent of any such profit, unless it be clear that permission was given without (any question of) payment."

<sup>461</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 291.

<sup>462</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 141).

<sup>463</sup> Safaei and Emami, 'A Concise of Family Law', (at 143).

<sup>464</sup> Saeid Nazari Tavakkoli, *Child Custody in Islamic Jurisprudence* (Islamic Research Foundation Astan-e Quds Razavi, 2011) at 15.

<sup>465</sup> Quran: Surah 46: Al-Ahqaf:15: "We have enjoined man to be kind to his parents. In pain did his mother bear him and in pain did she give birth to him. The carrying of the child to his weaning is a period of thirty months."

<sup>466</sup> Nazari Tavakkoli, *Child Custody in Islamic Jurisprudence* at 21-22.

jurisprudence and an optional job for mothers under Iran's law. However, there are some situations when breastfeeding is obligatory for mother, such as when the health of the baby is in danger because he needs its mother's milk.<sup>467</sup> In this case, even if the father cannot afford to pay for breastfeeding, it is obligatory for the mother to breastfeed the baby if there is no other substitute for the mother's milk.<sup>468</sup>

While breastfeeding is primarily considered to be an emotional and instinctive task for mother, it is also regulated by family law.

### ***3.2.3.1. The Legal Nature of Breastfeeding***

In Iranian law, following Sharia, the children's sustenance is their alimony and the father's financial responsibility.<sup>469</sup>

In addition, as was explained in the *Ojrat-ol-mesl*, under general legal principles, there is a legal rule<sup>470</sup> stating that one is entitled to a wage for work which is usually paid according to custom. Breastfeeding is not a legal obligation for the mother. As such, though she may be breastfeeding her baby because of maternal feelings and love, she is entitled to demand payment for this breastfeeding.<sup>471</sup> In addition, based on general legal principles, there is no reason to oblige a mother to work if she is not willing to. So, a mother could ask for her wage if she is not willing to breastfeed her baby for free. If the father wants her to breastfeed the baby, he will therefore have to accept to pay a wage, unless he is absent and unable to decide what to do, or if the health of the baby is in danger if it does not feed on its mother's milk.<sup>472</sup>

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<sup>467</sup> Mcglinn, *Family Law in Iran* at 48.

<sup>468</sup> Iran's Civil Code, Article 1176: "The mother is not obliged to suckle the child unless the child cannot be fed except with the milk of its mother."

<sup>469</sup> Hekmatnia, *Woman's Rights and Family* at 209-07.

<sup>470</sup> Iran's Civil Code, Article 336: "If a man does an act at the order of another and if according to custom and usage a wage is payable for such an act, or if the man who has acted is accustomed and disposed to undertake such work, then he can claim pay for his work, unless it is shown that he acted gratuitously."

<sup>471</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 185.

<sup>472</sup> Hekmatnia, *Woman's Rights and Family* at 208-07.

### ***3.2.3.2.Payment for Breastfeeding***

The mother is entitled to demand a wage for her breastfeeding while she is living with her husband. However, in a normal, lasting marital relationship, paying for breastfeeding is generally not a concern, since this only becomes an issue when the parents want to divorce after having the child, or during the woman's pregnancy. The Holy Quran addresses these two situations with regards to the costs of breastfeeding, and the Quranic solution is reflected in Iranian law. According to the Quran, when the mother is divorced while still pregnant, the husband must pay her alimony until the baby is born. If she breastfeeds her baby, she is entitled to the maintenance of her alimony for the breastfeeding. She can also ask for a wage in exchange of performing this task. If the mother cannot breastfeed the baby, the father can ask someone else to do it for a salary.<sup>473</sup> While it is clear that there is no food better than the mother's milk, some mothers cannot breastfeed their children because of certain health issues (illness or lack of milk). Some mothers also do not want to breastfeed their baby for other reasons, such as problems with the baby's father or separation. In the past, the easiest way to resolve this problem was to find a woman who could breastfeed the baby instead of its mother. That woman would breastfeed the baby and the baby's father would pay her for this valuable service. It is for that reason that the Quran<sup>474</sup> addresses the financial rights of breastfeeding women.<sup>475</sup>

The amount of wage for breastfeeding depends on the agreement between the man and the woman and is a matter of mutual consent. In case of conflict, the amount is determined based on the financial situation of the man. In this sense it is quite unlike the woman's alimony, which is determined on the basic of the wife's situation and social standing.<sup>476</sup>

In case of separation, the baby's interest must be the parents' priority when considering breastfeeding. They must not harm their baby. Both parents must consider whether the result of

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<sup>473</sup> Quran: Surah 65: Al-Talagh: 6: "... And if they should be pregnant, maintain them until they deliver. Then, if they breastfeed [the baby] for you, give them their wages and consult together honorably; but if you make things difficult for each other, then another woman will breastfeed [the baby] for the father..."

<sup>474</sup> Quran: Surah 2(Al-Bagharah):233: "...And if you want to have your children wet nursed, there will be no sin upon you so long as you pay what you give in accordance with honorable norms, and be wary of Allah, and know that Allah sees best what you do."

<sup>475</sup> Shivram Balkrishan, 'Exploring Gender: Islamic Perspectives on Breastfeeding ', *International Research Journal of Social Sciences*, 2(6) (2013) at 32.

<sup>476</sup> Nazari Tavakkoli, *Child Custody in Islamic Jurisprudence* at 25.

their decision harms their child or not. The Quran emphasizes that parents must decide to wean the baby by mutual consent and consultation.<sup>477</sup> Therefore, any decision in this regard must be taken bilaterally, while taking into consideration the baby's rights and benefits, and not just the parents' interest.<sup>478</sup>

Based on Quranic principles, the reasonable period for breastfeeding is between 21 and 24 months.<sup>479</sup> There is no need and no obligation for the mother to breastfeed more than this time. If she breastfeeds her child more than this time, the father is no longer obliged to pay unless the breastfeeding is considered essential for the child as a result of a special situation, like illness. In this case, the father must pay for the breastfeeding as it will be considered a cost under the child's right to alimony, for which the father is responsible as previously discussed.<sup>480</sup>

In case of the husband's death, the father's obligation to pay for breastfeeding is transferred to his heirs. They must respect the mother's financial rights in breastfeeding the child. The costs of breastfeeding the baby must be paid from the baby's own share of the inheritance and is considered a part of the baby's right to alimony.<sup>481</sup>

#### **3.2.4. Inheritance**

Another right granted to women under general legal principles is inheritance. Under Sharia and the Iranian Civil Code, both husband and wife have the right to inherit from each other. However, the shares will differ depending on whether the inheritance goes to the man or the woman. According to Sharia and Iranian law, the general rule regarding the inheritance of a male and female of the same class of inheritance is that the male's share from the estate is twice

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<sup>477</sup> Quran: Surah2(Al-Bagharah):233: "...And, if the couple desire to wean, with mutual consent and consultation, there will be no sin upon them.."

<sup>478</sup> Balkrishan, 'Exploring Gender: Islamic Perspectives on Breastfeeding ', (at 30.

<sup>479</sup> Quran: Surah2(Al-Bagharah):233:" Mothers shall breastfeed their children for two full years, that for such as desire to complete the breastfeeding."

<sup>480</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 186.

<sup>481</sup> Nazari Tavakkoli, *Child Custody in Islamic Jurisprudence* at 25.

that of the female's, with a few exceptions.<sup>482</sup> According to this principle, for the same inheritance classes, the daughter's portion of inheritance is half the son's portion and the sister's portion of inheritance is half the brother's. This principle also applies to spouses:<sup>483</sup> the husband's portion of inheritance is twice the wife's.<sup>484</sup>

#### ***3.2.4.1. Different Types of Inequality Between Husband and Wife Shares of Inheritance***

The unequal distribution regarding the wife's inheritance from her husband is visible through different stages of inheritance law. According to Iranian civil law, the wife's inheritance in comparison to her husband's faces three different treatments.

First, the wife's share is half of her husband's share in the same situation regarding to have children. Accordingly, absent any children, the husband's share of inheritance is half of the whole estate of his wife while his wife's is a quarter. If the couple had children, the husband is entitled to a quarter of the estate while the wife receives only one-eighth of it.<sup>485</sup>

Secondly, absent any heir other than the spouses, Iranian inheritance law<sup>486</sup> has followed an interpretation of Sharia whereby the husband gets the total amount of his wife's estate, while in the case where there is no heir other than the wife, her share will not increase more than a quarter.<sup>487</sup>

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<sup>482</sup> Mcglinn, *Family Law in Iran* at 80-82.

<sup>483</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 19-20.

<sup>484</sup> Iran's Civil Code, Articles: 913, 907 and 920.

<sup>485</sup> This ruling is explicitly mentioned in Quran, Surah 4: Al-Nisa: verse 12: "And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt..."

<sup>486</sup> Iran's Civil Code, Article 949: "If there be no other heir apart from the husband or wife, the husband takes the whole of the estate of his late wife; but the wife takes only her portion, and the rest of the estate of the husband is considered as the estate of a man without any heir."

<sup>487</sup> Mosayyeb Raeisi and Feysal Saeedi, 'Studying Wife's Inheritance Status in Iran and Lebanon Law', *Journal of Scientific Research and Development*, 2 (5) (2015), 211-17 at 211.

While the first regime above is based on Quranic text and supported by the consensus of Sharia scholars, the second is grounded in a provision of the Iranian Civil Code, which merely reflects one of several opinions presented by Shia scholars. For this reason, this provision has been the subject of criticism and calls have been made to modify it.<sup>488</sup>

The third difference refers to limits on the items the wife may inherit from her husband. According to the Iranian Civil Code till 2009, the wife does not inherit land and trees. She can only inherit the value of such buildings and trees.<sup>489</sup> However, if the heirs refuse to pay her the price of the buildings and trees, the wife has the right to sell the estate such as buildings and trees and realize her estate directly on these items.<sup>490</sup> This regime then, provides for a two-tier system of inheritance under which women do not inherit the land itself; instead, they are only entitled to the value of the trees and buildings attached to the land.<sup>491</sup>

This legal regime was understandably criticized on the basis that it does not reflect societal evolutions and ignores contemporary needs. This led to the modification of some inheritance-related articles concerning women in the civil law by the Iranian Parliament. This modification of the civil law was completed by the Parliament, after the Guardian Council requested an opinion from the Supreme Leader of the Islamic Republic on this particular issue. Following the issuance of a religious opinion given by the Supreme Leader, the Iranian Civil Code was modified in 2009 and new rules were introduced<sup>492</sup> allowing the wife to inherit her husband's property with less limitations. This new rule entitling the wife to the value of land and not just buildings and trees, yet she is not entitled to the land itself.<sup>493</sup>

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<sup>488</sup> Katouzian, 'The Value of Tradition and the Allure of Justice in the Inheritance of Wives ( ارزش سنت و جذبہ ) (عدالت در توارث همسران)', (at 105-06.

<sup>489</sup> Iran's Civil Code, Article 946: "*The husband takes inheritance from the whole of the effects of the wife; but the wife takes only from the following effects: a - From the movable property, of whatever kind. b - From building and trees.*"

<sup>490</sup> Iran's Civil Code, Article 948.

<sup>491</sup> Katouzian, 'The Value of Tradition and the Allure of Justice in the Inheritance of Wives ( ارزش سنت و جذبہ ) (عدالت در توارث همسران)', (at 105.

<sup>492</sup> Iran's Civil Code, Article 946 refers to: "wife inherits from all the assets of the husband and if the husband has a child the wife inherits one-eighth of movable property and one-eighth of the price of real estate including land and building and if the husband has no offspring, his wife share is a quarter of the property as mentioned above " and also Article 948 of the Civil Code provides that "If the heirs refuse to pay the price, a woman can ask for her right from the same property."

<sup>493</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 142-43.



This change was a major step toward improving women's economic rights using dynamic *ijtihad*. However, some differences between the spouses' inheritance still exist in Iranian law, based on the Quran and tradition.

#### ***3.2.4.2. The Difference in the Spouses' Portion of Inheritance and Different Ideas Concerning the Issue***

Inheritance law is one of the most controversial legal issues in Sharia and Iranian law as concerns women's economic rights. Iranian inheritance law is highly criticized by secular sections of feminist movements which claim that inequalities between men and women increase due to their unequal share to the estate.<sup>494</sup>

While there are many discussions concerning this inequality, there are some ideas about why Quran established these rules about inheritance:

Firstly, while Islam seeks to establish justice, the meaning of justice in Islamic law does not imply that men and women must be treated similarly. Instead, Islamic law seeks to treat them equitably based on their distinct physical and emotional characteristics. Men and women have different responsibilities in society as well as in the family. To fulfill these responsibilities, they enjoy different rights better suited to such responsibilities.<sup>495</sup>

Secondly, it is not because the man has a greater share in the inheritance that he automatically obtains more value from it. Indeed, since the man has more financial responsibilities imposed upon him by Sharia, he will need to have more financial resources. The man's main role is to be the head of the family and carry its financial responsibilities. On the other hand, the woman's

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<sup>494</sup> Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', at 14.

<sup>495</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 142-43).

main role is to be a mother. She is exempted from familial financial obligations. Taking such elements into consideration in traditional Islamic law, the overall system of inheritance appears to be fair.<sup>496</sup> This is the reason for the difference between a man and woman's share of inheritance, as mentioned in the Prophetic tradition<sup>497</sup>. Men's responsibility to pay for his family's expenses, including alimony, *Mahr*, and the costs of maintenance of his extended family such as his parents, requires him to have more money.<sup>498</sup> According to this view, the wife's lower share of inheritance is a trade-off against her right to maintenance and *Mahr*, to which she is both entitled through her marriage.<sup>499</sup>

In other words, an equitable solution is reached where the distribution of wealth and its consumption is balanced out through Islamic law.<sup>500</sup> While women get a lesser share of the inheritance, they do not have any financial responsibilities. On the contrary, they have financial rights in the form of *Mahr* and alimony. And while men get a higher share of the inheritance, they bear the entire financial responsibility of for their family, which obliges them to disburse funds for performing their obligations towards their wife, and pay for other costs related to the family, such as child support.<sup>501</sup>

So while, on the one hand, the man enjoys more possessive rights, he must consume what he possesses to meet his financial responsibilities toward his wife and family. Therefore, this double share of inheritance is intended to help the man and compensate for his financial

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<sup>496</sup> Naser Katouzian, *Lessons from Preemption, Wills, Inheritance (10th Ed.)*. درسهایی از حق شفعه، وصیت و ارث (Tehran: Mizan, 2010) at 311.

<sup>497</sup> Ahmad Reza Behniafar and Maryam Saadat Eftekhariyan, 'Analysis and Review of Wife Inheritance and the Parents of the Deceased in the Religions with Holy Book', *Journal of Politics and Law*, 9/7 (2016), 270 at 276. "In the case of inheritance due to less legacy of women than men, there are several Hadiths and reports including a hadith by Imam Sadiq (PBUH) that one of the people opposed to Islam asked him, why women despite the fact that they are weaker and more incapable than men but to inherit half of the men? Imam said: "the woman is not required to jihad, alimony and paying money to others while it is the responsibility of men, therefore, for women and men a fixed share of the contribution is placed."

<sup>498</sup> Ibid. "In another hadith, Imam Reza (PBUH) said, "The reason that women's inheritance is half of the men is that when women marry, something (dowry and alimony) is given to them, but men must pay something (dowry and alimony) therefore men inherit more."

<sup>499</sup> Mehrpour, *The Civil Code of Iran*.

<sup>500</sup> Ansari, *Meshkat, the Interpretation of Quran* مشکات.

<sup>501</sup> Behniafar and Eftekhariyan, 'Analysis and Review of Wife Inheritance and the Parents of the Deceased in the Religions with Holy Book', (at 272).

burden.<sup>502</sup> On the other hand, while the woman ends up with less in inheritance, she is exempted from paying any living costs. Since her property is separate from that of her husband's, she gets to keep all of her possession for her exclusive private use and can even ask her husband to pay a wage for her housework and breastfeeding.<sup>503</sup>

These justifications for a differential treatment of men and women regarding their respective share of inheritance are now challenged by changing lifestyles and new situations such as the increasing numbers of financially-independent unmarried women, and women who work and earn money the same as men. That is why changing the portion of inheritance share was discussed several times in the Iranian Parliament, but was rejected because of religious considerations.<sup>504</sup>

### 3.3. Moral Safeguards to Women's Economic Rights

The third group of economic rights granted to women under Iranian law are the rights which originate in certain general moral rules. These rules come from the Quran and Prophetic traditions which bring up moral rules generally or specifically applicable to family law. While there are many moral rules in marital relations which originate from Sharia, the main economic moral rule applied in Iranian law today is *Nahle* (obligatory gift).

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<sup>502</sup> Mutahhari, 'Legal Rights of Women in Islam', *نظام مالی حقوق زن در اسلام*, (

<sup>503</sup> Katouzian, *Lessons from Preemption, Wills, Inheritance (10th Ed.)*. وصیت و ارث، و شفعه، از حق شفعه، at 310-11.

<sup>504</sup> In this regard, the very recent change in portion of blood money (Dieh: compensation paid to relatives for the death or injury of a family member) of men and women which was approved by the Iranian Supreme Court is very important. The same justifications for the difference in men's and women's share of inheritance were used for explaining the difference of their amount of blood money. Formerly, women received only half as men in blood money and injury compensation. But in July 2019, the Iranian Supreme Court changed this rule and ruled in favor of equalizing the blood money and injury compensation of women with that received by men. This new rule was based on the legal opinions of some Mujtahids, especially Grand Ayatollah Sobhani, who stated that the blood money of men and women is the same and that no differential treatment can now be justified. This change shows that religious law may be adapted to the current needs of society. "The law was structured so as not to contradict Sharia law, which is the basis of the distinction between men and women, but it does effectively circumvent Sharia. Under Sharia law, a woman's *dieh* or blood money is declared to be half of that of a man's. Mandating the fund to provide the other half is a positive step toward equality for women's rights in Iran and ending discrimination based on gender."

<https://www.atlanticcouncil.org/blogs/iransource/blood-money-decision-advances-women-s-rights-in-iran/>

### 3.3.1 *The Obligatory Gift in Divorce (Nahle)*

Although the provisions on housework labor try to protect the financial security of women, in practice claiming the payment can be difficult. Indeed, the burden of proof falls on the wife to demonstrate her intention to be compensated for the housework. As such, the law does not provide the necessary security for this economic right.<sup>505</sup>

To remedy this problem, the Iranian legislator tried to provide additional protection through another financial protection rule in Note 6 Clause B of the amendment to the Divorce Regulation, called *Nahle* (obligatory gift). Clause B of this Note was not repealed by the 2013 Family Protection Law and is still enforceable. The Clause calls on courts, in cases where Clause A of the Note concerning the wage of domestic labour “*Ojrat-ol-Mesl*” cannot apply, to determine an amount of financial compensation for the wife’s marital domestic labor, based on the husband’s wealth and the duration of their marital life.<sup>506</sup> In practice, this Clause is easier for courts to use than Clause A concerning the wage of domestic labour. The court rules on the wife’s entitlement to *Nahle* on the basis of the overall evidences, and determines its amount according to the man’s financial ability. *Nahle* must usually be paid before the divorce’s registration with the notary.<sup>507</sup>

This right finds its origin in the Quran, which says: “And for divorced women is a provision according to what is acceptable - a duty upon the righteous.”<sup>508</sup> Based on this verse, equity and justice requires that the man who desires to divorce his wife gives her a gift. The Iranian legislator took inspiration from this verse to pass laws providing this economic right for the divorced woman. This right can be considered as complementary to the woman’s right to be paid for her housework during her marital life. It is also an advantage for women who do not have any other economic rights or arrangements with their husband.<sup>509</sup>

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<sup>505</sup> Roshan, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالي حاکم بر روابط زوجین', (at 544-45.

<sup>506</sup> Mohammadi, 'Divorce and the Women's Share from Marital Life طلاق و سهم زن از زندگی مشترک', (at 41-42.

<sup>507</sup> Hekmatnia, *Woman's Rights and Family* at 199.

<sup>508</sup> Quran: Surah 2(Al-Baghara): 241: “وللمطلقات متاع بالمعروف حقا على المتقين”

<sup>509</sup> Hekmatnia, *Woman's Rights and Family* at 198-200.

### **3.4. Contractual Safeguards to Women’s Economic Rights (Stipulations in Marriage Contracts)**

The fourth group of economic rights granted to women concerns rights flowing from the married parties’ intent. This appears in the form of the marriage contract, reached through mutual consent. Under the Iranian Civil Code, every private contract is valid if it respects the law.<sup>510</sup>

The legal basis for allowing marriage parties to customize their marriage contract is that under Islamic law, marriage is considered a civil contract, albeit with special characteristics.<sup>511</sup> Therefore, both parties are free to stipulate any mutually acceptable conditions which do not go against a marriage’s substance, public morality and the rule of law. In addition, the possibility of customizing marriage contracts means that the general legal rules of Islamic marriage are more flexible and can adapt to different cultures, social norms and changing societal needs.<sup>512</sup>

Custom clauses in a marriage contract can only be valid if they are a product of the married parties’ mutual consent. Indeed, no one can oblige the married parties to stipulate conditions in their marriage contract. However, the government can suggest certain conditions and encourage the future couple to stipulate them in their marriage contract. The government construes its role as that of guiding future spouses in stipulating certain clauses to their marriage contract. The government distinguishes optional contractual stipulations and governmental contractual stipulations.<sup>513</sup>

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<sup>510</sup> Iran’s Civil Code, Article 10: “Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law.”

<sup>511</sup> Welchman, 'A Historiography of Islamic Family Law', at 5-6.

<sup>512</sup> Sardar Ali, Shahid, and Lawan, 'An Introduction to Islamic Family Law (a Teaching and Learning Manual)', (at 16-17.

<sup>513</sup> Mcglinn, *Family Law in Iran* at 19-21.

### ***3.4.1. Optional Contractual Stipulations***

Following Sharia, the Iranian Civil Code<sup>514</sup> provides that parties to a marriage are free to stipulate any condition in the marriage contract subject to the condition that such stipulations be compatible with the nature of marriage. These conditions are based on the consent of the parties, thus following the general rule of contractual freedom and the rules of legal conditions.<sup>515</sup> Such conditions are known as “optional” and can be adopted at the time of marriage or at any other time deemed convenient by the parties. The latter can stipulate clauses concerning any subject, including economic arrangements.<sup>516</sup> Some examples of optional conditions adopted by married parties are granting the woman the delegated right to divorce herself on behalf of her husband and initiate divorce by recourse to the court where one of the specified inserted conditions is established<sup>517</sup>, or giving the woman the right to determine the place of residency and the right to have the professional career she desires.

### ***3.4.2. Government Guidance to Contractual Stipulation***

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<sup>514</sup> Iran’s Civil Code, Article 1119: “The parties to the marriage can stipulate any condition to the marriage Which is not incompatible with the nature of the contract of marriage, either as part of the marriage contract or in another contract...”

<sup>515</sup> Iran’s Civil Code, Article 232: “The following conditions are of no effect though they do not nullify the contract itself: 1 - Conditions which are impossible to fulfil. 2 - Conditions which are useless and unprofitable. 3 - Conditions which are not legal.”

Article 233: “The following conditions are of no effect and will nullify the contract itself: 1 - Conditions which are contrary to the requirements of a contract. 2- Conditions which are unknown and of which lack of knowledge entails ignorance of the consideration.”

<sup>516</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 60.

<sup>517</sup> Iran’s Civil Code, Article 1119: “. ..for example, it can be stipulated that if the husband marries another wife or absents himself during a certain period, or discontinues the payment of cost of maintenance, or attempts the life of his wife or treats her so harshly that their life together becomes unbearable, the wife has the power, which she can also transfer to a third party by power of attorney to obtain a divorce herself after establishing in the court the fact that one of the foregoing alternatives has occurred and after the issue of a final judgment to that effect.”

In addition to the optional conditions, other types of conditions exist which are called Guiding Contractual Conditions. Based on different social, cultural and economic characteristics of different societies and public interests, different governments can prepare conditions and suggest them to the married parties, who can choose to adopt them in the marriage contract.

In Iran, twelve secondary contractual conditions are stipulated in a model marriage contract prepared by the Iranian Ministry of Justice. This model contract can be signed by the man and woman at the time of marriage. The conditions are written in the marriage's official contract and the notary who registers the contract encourages the parties to sign them. However, the parties remain free to refuse such conditions.<sup>518</sup> In addition to the condition of assigning the woman the right to divorce herself in special cases other than what already presented in the Civil Code, the main condition in this category that gives the economic right to the wife is the dividing of marital property in case of divorce.

### ***3.4.3. Dividing Marital Property in a Divorce***

One of the conditions written in the Iranian model marriage contract establishes that the husband must pay his wife up to half of the wealth acquired during the marriage at the time of divorce, unless the divorce is requested by the wife or the court rules that the divorce was due to the wife's refusal to fulfil her marital duties, such as sexual misbehavior on her part.<sup>519</sup>

The wife's entitlement to up to half of the wealth acquired during the marriage is included in the model and thus signed by most men and women who marry in Iran. This right can be exercised if the following conditions are met:

-The right must be applied only at the time of divorce; during the marriage, there will be no common property and no property division;

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<sup>518</sup> Mcglinn, *Family Law in Iran* at 19-21.

<sup>519</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 354.

- The husband must initiate the divorce. If the wife asks for divorce, the right will not be exercisable;
- The husband's request for divorce must not be due to the wife's refusal to fulfil her marital duties or because of sexual misbehaviour on her part;
- The value or percentage of the property to be given to the wife must be determined by the court. The latter can decide on any amount up to half of the husband's property. In practice, the property's value is determined based on the economic situation of husband, the duration of the marriage, the wife's economic role and the number of children.
- The husband's actual property at the time of the divorce will determine the court's decision. Therefore, any lost property or property the husband had before marriage is to be excluded.<sup>520</sup>

These conditions have been criticized because some men misuse them by forcing their wife to request for divorce. Procedural difficulties also exacerbate the situation. Courts may take a long time to determine the amount of property the wife is entitled to. This has led to the Expediency Council's ratifying a law in 1992 which provides that the divorce only becomes effective and can only be officially registered once the man pays all the religious and legal economic rights of the wife, including dowry, alimony, and paraphernalia the wife brought to the marriage. The new rule also provides for the division of property. The court must determine the amount, and the husband must pay this amount before the divorce is officially registered.<sup>521</sup>

Based on the amendment to the Divorce Regulations, the woman's right to her husband's property at the time of divorce could not be accumulated with other post-divorce financial arrangements, such as the obligatory gift (*Nahle*) or the wage for domestic labor (*Ojrat-ol-mesl*). According to the amendment, the court had to examine whether there was any agreement or contractual stipulation between the parties regarding their financial relationship. If such an agreement existed, the court had to rule based on the latter. In the absence of such an agreement, the woman was entitled to *Nahle* and *Ojrat-ol-mesl*.<sup>522</sup> However, this procedure was criticized,

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<sup>520</sup> Dejkhah, 'Divorce and the Challenge of Dividing Properties (طلاق و چالش تصنیف دارایی)', (at 2-3.

<sup>521</sup>Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 136-37.

<sup>522</sup> Hekmatnia, *Woman's Rights and Family* at 206.



because contractual rights are different than legal and moral rights. As such, women should be entitled to each of them through independent requirements.

By introducing the 2013 Family Protection Law, rules of amendment in this regard were removed. Through the Family Protection Law, a woman is entitled to her contractual economic rights, like the division of marital property, as well as her legal rights such as the wage for her domestic labour and *Nahle*. Therefore, the court must now examine each right separately and determine whether the woman is entitled to such a right or not, without engaging in a holistic examination of all such rights.<sup>523</sup>

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<sup>523</sup> Safaei and Emami, 'A Concise of Family Law', (at 271-73).

# **Part II: Iran's Matrimonial Law: A Constructive Dialogue with its Quebec Counterpart**

## **Introduction**

The matrimonial regime is a set of financial rules governing the marital relation and determining the division of property ownership, if any, between spouses. This regime determines the financial aspects of a marriage, the rights, powers and responsibilities of each spouse over their property during their marital life, and the distribution of property at the end of the marital relationship in case of divorce or death of one of the spouses.<sup>524</sup>

Therefore, the matrimonial regime in each jurisdiction sets:

- 1- The legal rules governing property and whether the spouses can opt out and craft their own agreement.
- 2- The rules concerning the management of property and debts during the marriage.
- 3- The rules regarding the management of the spouses' property at the dissolution of the marriage, in case of divorce (division of property) or death (inheritance rule).
- 4- The rules governing the financial relationship between the spouses and third parties.
- 5- The rules governing property ownership between the spouses. This includes rules providing for the creation, or lack thereof, of a common marital property, and if such

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<sup>524</sup> Roshan, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالي حاكم بر روابط زوجين', (at 531.

marital property is created, which properties are included in it. The management of such marital property is also covered under these rules.<sup>525</sup>

In this part, the main characteristics of the matrimonial regime in Iran and Quebec will be examined. As a result of this comparative study, the last chapter will propose a reform of Iran's matrimonial regime by taking inspiration from Quebec law and considering certain distinctive features of these two legal systems.

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<sup>525</sup> Kohnen & Patton Michael J. Stegman, Cincinnati, Ohio, , *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* (Lisbon, Portugal NYSBA International 2012) at 1-2.

## 4 Chapter Four: The Characteristics of Iranian Matrimonial Regimes

In the last chapter, the economic institutions existing under Iranian law were studied separately. While these institutions are the main components of the current Iranian matrimonial regime, for the purposes of comparing Iranian and Quebec matrimonial regimes, the general marital system governing property must also be examined. As such, in this chapter, the main characteristics of the Iranian matrimonial regime and the rules which apply to this regime will be studied.

### 4.1. The Iranian Matrimonial Regime: An Exclusive System of Separation of Property

Iranian family law regards the separation of property as the only matrimonial regime governing the marital relation. Accordingly, the properties of the married parties are considered to be entirely separate from each other. All property, pre-marital or marital, is owned separately.<sup>526</sup> Under the Iranian separation of property regime, marriage does not create an economic community between the spouses. Therefore, upon marrying, the parties' properties do not form a marital estate. Each party has full authority on their respective property. Any profit, losses and liabilities also remain separate. Under this marital system, there is no concept of common property during marital life nor any concept of post-marital claims except for what the law establishes to protect Woman's rights such as *Nahle*.<sup>527</sup>

Under this system, the wife has financial rights and obligations distinct from those of her husband for the most part. She has the right to own property, sign legal documents, enter into a

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<sup>526</sup> Mahmoud Hekmatnia, *The Philosophy of the Family Law* (فلسفه حقوق خانواده) (2; Tehran: Shoraye Farhangi, Ejtemaeye Zanan, 2007) at 86-87.

<sup>527</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 131).

contract in her name and consume her salary for herself in the way she desires. The Iranian Civil Code states “The wife can independently do what she likes with her own property.”<sup>528</sup>

The Iranian matrimonial regime has certain features which are examined as follows.

#### ***4.1.1. The Absence of Legal Classification of the Matrimonial Regime***

Generally, when two people are married, some form of matrimonial regime is legally applied to them. In this respect, a *de jure* suppletive regime, applicable unless the parties decide otherwise, may be established. Some jurisdictions set the rules governing the matrimonial regime in different legislative texts; others may do so in one single instrument such as a Civil code. The matrimonial regime may automatically apply to the marriage contract by the effect of law or as a result of the spouse’s agreement. However, the legislation of various jurisdictions tends to systematically provide for mandatory rules as well as optional ones for any matrimonial regime.<sup>529</sup>

Depending on the jurisdiction analyzing the marriage, communal property and separate property regimes may be applied. Typically, civil law jurisdictions follow various types of communal property regimes, while such an application may vary across different jurisdictions. This is, for example, the case in different civil law countries in Europe, Mexico and Japan.

Common law jurisdictions typically apply the separation of property regime, albeit under different forms. This can be observed in England, India and most states in the United States of America and provinces in Canada.

Some jurisdictions have a hybrid regime which includes both separation and communal property regimes’ characteristics. They also have opt-out features where married parties can mutually

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<sup>528</sup> Iran’s Civil Code: Article 1118.

<sup>529</sup> Neuman, 'Marriage, Family and Property Rights ', at 17.

agree to an alternative legal regime. Quebec, Ontario and Germany are examples of such hybrid jurisdictions.<sup>530</sup>

In Islamic law jurisdictions, the separation of property is the governing system. However, the matrimonial regime is generally not well defined. Following Islamic law traditions, the elements which are related to the financial aspects of a family are defined, but the concept of a matrimonial regime, understood as a comprehensive system, remains unknown.<sup>531</sup> In Islamic jurisdictions such as Tunisia, Iran<sup>532</sup> and Egypt, the concept of independency of a woman's personality from her husband and her right to manage her property is defined as a legal rule. Accordingly, the couple's property is considered separately, under the rules of separation of property. However, there is no detail clarifying different aspects of the matrimonial regime.<sup>533</sup>

Iranian family law follows the same marital property system. The Iranian matrimonial regime, unlike family law in other civil law jurisdictions like Quebec or France, has not been defined and explicitly established in the Iranian Civil Code. A thorough examination of different legislative texts in Iran shows that there is not one law directly and completely setting out rules pertaining to the Iranian matrimonial regime. Even in the Iranian Civil Code, there is no dedicated section to a "matrimonial regime", contrary to the Quebec Civil Code. It is only by looking at different texts transcribed into the Iranian Civil Code that one may find the rules applying to the Iranian matrimonial regime. Studying the relevant articles and provisions reveals that the separation of property is the obligatory matrimonial regime adopted in the Iranian Civil Code and family law.<sup>534</sup>

In Iranian law, while marriage is considered a civil contract, the economic rights and responsibilities of the parties have not been defined against each other by law. Therefore, marital

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<sup>530</sup> Michael J. Stegman, *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* at 2..

<sup>531</sup> Schacht, *An Introduction to Islamic Law* at 167-68.

<sup>532</sup> For Example, Iran Civil Code, Article 1118: "The wife can independently do what she likes with her own property."

<sup>533</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 135-36.

<sup>534</sup> Mohammadi, 'Matrimonial Regime in Iran and France(رژیم مالی خانواده در ایران و فرانسه)', at 1-3.

obligations cannot be considered as reciprocal obligations.<sup>535</sup> This is because Islamic law promotes an ethical approach to the rights and responsibilities of spouses and is less concerned with a legal approach to the marriage contract, unlike other contracts governed by Islamic law. This is why certain specialists such as Katouzian hold that marriage is more than a simple civil contract. While it requires the formalities of civil contracts, such as an offer and acceptance, mutual agreement to marry, and legal obligations pertaining to each of the married parties, there is an important moral aspect to this legal obligation which gives it a special status.<sup>536</sup>

According to Iranian law, the financial rights and duties of the parties must be understood through independent financial institutions such as *Mahr* and alimony as explained separately in the law. These are not defined as reciprocal rights nor as a whole system.<sup>537</sup> However, the provisions regarding economic institutions -which are mostly explained in the last chapter- regulated the Iranian economic marital system. These institutions mostly describe the wife's economic rights and look at the economic independency of the wife in the marital relation. The economic provisions are not the same for the man and the woman. Their property does not constitute family property, which is why their economic rights and duties must be studied separately.<sup>538</sup> The spouses' duties are planned in a way where both contribute to the family's affairs according to their weaknesses and strengths. In this system, the economic rights and duties of the spouses follow an equilibrium which creates the structure of the Iranian matrimonial regime. This structure is based on the separation of property, which is explained in the following section.

#### ***4.1.2. The Separation of Property***

As mentioned above, the Iranian legislator opted for the separation of property as the sole marital regime. While this is not directly mentioned in the Iranian Civil Code, it is basically understood

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<sup>535</sup> Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', (at 1.

<sup>536</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 11.

<sup>537</sup> Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', (

<sup>538</sup> Roshan, 'Reforming the Financial System Governing the Relationships between Spouses (Marital Life, Common Properties اصلاح نظام مالی حاکم بر روابط زوجین', (at 533-34.

from the article which introduces the wife as the owner of her property<sup>539</sup>, as well as other separately mentioned rights and duties pertaining to the married parties.

Under Iranian law, regardless of when the property was acquired, before or after the marriage, all property acquired by any party to the marriage is owned completely and solely by that person. This system of separation applies to all property and debts, including earnings that occurred before and after marriage, such as salary, property purchased with these earnings, and all debts incurred by each person.<sup>540</sup>

In addition to the fact that there is no common property between spouses during marital life, there is no original post-marital claim at the end of the marriage. While in recent years, *Ojrat-ol-mesl* (the wage of domestic labour) and *Nahle* have been introduced in Iranian law, they are not based on any putative division of common property between spouses. They were created as a result of the legislator's desire to compensate women in case of divorce. Such compensation mechanisms are tools created by the legislator to compensate for deficiencies brought about by the separation of property regime.<sup>541</sup>

Certain contractual stipulations allowing for the division of the husband's property at the time of divorce, also provide example of post marital claims permitted by Iranian law. However, this does not instate a common property system whereby both spouses contribute to the financial assets of the family and share it upon dissolution of the marriage. Rather, such stipulation only applied to the husband's property and cannot therefore be considered as a change in the system of separation of property. The contractual agreement between the spouses only seeks to compensate the wife at the time of divorce. While it only works at the time of divorce, and not during the marital life nor at the death of husband, such a contractual stipulation must meet several conditions before it can be activated. One of them is that it can only be applied if the

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<sup>539</sup> Iran's Civil Code, Article: 1118.

<sup>540</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 130-31.

<sup>541</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 135-37.



divorce was initiated by the husband, and no fault could be attributed to the wife. Therefore, it is not related to achieving any common property in the marital life of spouses.<sup>542</sup>

Marriage is thus not envisaged as a ground for creating common property. However, since the Iranian Civil Code provides for shared and common property, it must be possible for the married parties to have shared or common properties under general rules of partnership. In this case, the property belongs to both spouses according to the number of shares each of them owns in the property. So, it is possible for the married parties to hold property with both their names on a title or deed to a piece of property.<sup>543</sup> In this case, the general rules of partnership will be applied to their shared property and each of them can manage their own share. In this case, it is obvious that none of them could transfer or sell the whole piece of shared property without authorization from the other spouse.<sup>544</sup>

#### ***4.1.3. The Mandatory Application of the Iranian Matrimonial Regime***

When two people are married, financial rules apply to them based on the rules of their applicable legal system.

Some legal systems give the married parties the opportunity to choose their matrimonial regime. This option may give them the opportunity to choose one of the statutory regimes or even give them the option to agree on their proposed regime, within the limits of the law and public order.

Some legal systems automatically apply a determined legal property regime as a default rule if there are no other financial agreements between the married parties. Other legal systems apply a determined matrimonial regime without giving the parties the option to choose their desired regime contractually.<sup>545</sup>

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<sup>542</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 246-47.

<sup>543</sup> Mohammadi, 'Divorce and the Women's Share from Marital Life' (at 31-32).

<sup>544</sup> Katouzian, *Civil Law in the Current Legal Order* (قانون مدنی در نظم حقوقی کنونی) at 737.

<sup>545</sup> Michael J. Stegman, *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* at 5-10.

The separation of property is a model of matrimonial regime existing in several jurisdictions. However, its application differs across jurisdictions. It can apply exclusively as the only option existing under a legal regime or alongside other options permitted by law. In the latter case, the parties can contractually choose their matrimonial regime. Spouses can therefore defer to the default regime or contractually choose a different regime.<sup>546</sup>

The separation of property is the sole mandatory matrimonial regime under Iranian law.<sup>547</sup> One could ask if there is the possibility of contractually creating a regime of common property if the married parties mutually agree to do so at the time of marriage. As mentioned previously, the married parties are free to stipulate any conditions they desire on their marriage contract, as long as it does not contravene the nature of marriage, public morality and public order.<sup>548</sup> The law, therefore, permits them to pass some non-mandatory legal provisions by the mutual consent. The question is, could the married couple opt out of the regulations on marital financial rights and duties, and choose to abide by the common property system instead of the separation of property? As Iranian law does not directly prohibit such an agreement, it is not clear whether opting out of the separation of property system is illegal. The point is that the separation of property as a comprehensive system with its legal aspects is not defined. As such, its financial elements should be considered separately. While all the financial aspects of the marital relation are not obligatory, a cursory glance at mandatory institutions such as *Mahr* and alimony shows that the parties cannot agree against these rules. If they do agree against them, such stipulations are not enforceable.<sup>549</sup>

Therefore, the separation of property is considered the only option governing the marriage contract in Iranian law. The idea is that separation of property originated from Islamic law and is therefore a binding rule of Sharia. Therefore, other choices for a matrimonial regime, such as communal property or partnership, cannot be considered under Iranian family law.<sup>550</sup>

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<sup>546</sup> Shiravi, *Family Law (Marriage, Divorce, and Children)* (حقوق خانواده (ازدواج، طلاق و فرزندان) at 128.

<sup>547</sup> Ibid.

<sup>548</sup> Seyed Mahdi Mir-Dadashi, *The Stipulation to the Marriage Contract* (شروط ضمن عقد ازدواج (Tehran: Jungle, 2012) at 97-100.

<sup>549</sup> Hekmatnia, *The Philosophy of the Family Law* (فلسفه حقوق خانواده) at 92-93.

<sup>550</sup> Mohammadi, 'Divorce and the Women's Share from Marital Life' (طلاق و سهم زن از زندگی مشترک) (at 31-32).

The general prevailing legal idea is that spouses cannot agree on any other kind of matrimonial regime. If they do so, their agreement will not be legally valid. According to some Iranian lawyer such as Katouzian, the marriage cannot be considered as a reason for creating joint property. Creating joint property is limited to that which existed in business law under the rules of partnership.<sup>551</sup>

In addition, another reason is that a family has no independent personhood in Iranian and Islamic family law. The wife and husband have separate personalities and bring those to the family. Therefore, the same view behind the separate property system applies in Islamic law, which holds that marriage is an interpersonal union.<sup>552</sup>

The main theory behind the community of property regime is that the wife and husband enter into an interpersonal community by marriage. They establish an economic community between them. All the marital property they earn belongs to this community rather than to the spouses themselves. Therefore, the patrimony of the spouses is considered as a unity and their financial rights and duties are joined together. This unification of property is the legal justification for creating marital property. Under this theory, the wife and husband become one person through marriage and both own the unified marital property.<sup>553</sup> This theory has no justification under Islamic law, which posits the rule of ownership states that the property of each person's belongs to him/her self. The financial relation between married parties also follows this rule. This obligatory application of the separation property is considered as the interpretation of Islamic law originating from the Quran and Islamic principles.<sup>554</sup> The main Islamic sources for this rule are set out below.

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<sup>551</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 246.

<sup>552</sup> Hekmatnia, *Woman's Rights and Family* at 139.

<sup>553</sup> Scott Greene, 'Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women', *Creighton L. Rev.*, 13 (1979), 71 at 77-78 and 82.

<sup>554</sup> Shiravi, *Family Law (Marriage, Divorce, and Children)* (حقوق خانواده (ازدواج، طلاق و فرزندان) at 129-28.

#### 4.1.3.1 Quran

The economic independency of man and woman is directly mentioned in the Quran:” ...Men shall have a share according to what they have earned, and women shall have a share according to what they have earned...”<sup>555</sup>.

This is the main verse stating that both men and women have a right to their own property in an Islamic society. The general legal principle of financial independency of married parties also flows from this verse. This principle encompasses the complete independency of married parties in ownership, disposition and consumption of their properties.<sup>556</sup>

#### 4.1.3.2 The Islamic Principle of Respect to Other Peoples' Property

There is a general rule in Islamic law regarding property (ownership), which states that peoples' ownership rights must always be respected.<sup>557</sup> The importance of protecting everyone's ownership rights in an Islamic society is very important. Indeed, this principle is mentioned several times in different Islamic texts.<sup>558</sup> The main Islamic texts for this principle are the following:

**Quran:** The verses of the Quran insisting on the respect owed to each other's property: “do not consume your property among yourselves by unlawful means, except in trading by your mutual agreement.”<sup>559</sup> This verse prohibits all unlawful means of possession of another's property and establishes that the only way to possess other peoples' property is through establishing legitimate contracts agreed to by the owner of the property.<sup>560</sup>

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<sup>555</sup> Quran: Surah Al-Nisa(4): 32 للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبن

<sup>556</sup> Hedayat Nia, 'The Women's Occupation and the Families' Expediency in Iran Civil Cide اشتغال زنان و مصلحت خانواده در قانون مدني بررسي فقهي حقوقي ماده ۱۱۷ ق.م.خ', (at 10-11).

<sup>557</sup> "لا يحل مال امرء مسلم الا بطيب نفسه"

<sup>558</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدني در نظم حقوقي كنوني at 46-47.

<sup>559</sup> Quran: Al-Nisa(4): Verse 29 "يا ايها الذين امنوا لاتاكلوا اموالكم بينكم بالباطل الا ان تكون تجارة عن تراض"

<sup>560</sup> Almasi, 'The Spouses' Property System in Iran and France Laws ترتيب اموال زوجين در حقوق ايران و فرانسه at 120-21.

**Tradition:** The tradition shows the importance of this rule in Islamic law by the way the Prophet Mohammad's discussed it. The Prophet said: "we should respect the property of others as we would respect their life."<sup>561</sup> In another tradition, he said: "God has prohibited for you the violation of the right to life as well as the right to property."<sup>562</sup> He also holds that "the possession of another's property is not permitted except in the case where he has allowed you to do so."<sup>563</sup>

In the Quran and tradition, the importance of respecting the right to property is thus as important as the importance of respecting another person's life. The meaning of this rule is to protect the property of others; therefore, any violation of this right is forbidden and someone who violates this rule is responsible for this violation and must compensate any illegal possession.<sup>564</sup>

Because of these two reasons, there is no community of property between husband and wife under Islamic law. Each spouse is the owner of her/his property and should respect the ownership rights of the other spouses.

#### ***4.1.4 Independency of the Married Parties' Financial Rights and Responsibilities***

One important aspect that arises when applying separation of property in Iranian law is that the separation system applies to all the financial rights and responsibilities of the married parties. Accordingly, each party is considered as independent when entering into any financial contract.<sup>565</sup> Each spouse's liability is limited to him/her self, and his/her separate property is the only asset available to the creditors. Creditors of one spouse have no right over the other spouse's property, unless there was a fraudulent transfer between spouses to hinder the creditor's right over the liable spouse's property. In addition, in case of bankruptcy of one of the spouses, the other spouse is free to continue his/her financial activity without any interference of the other spouse's financial difficulties. A spouse's financial liabilities toward

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<sup>561</sup> حرمة ماله كحرمة دمه

<sup>562</sup> ان الله حرم بينكم دماؤنكم و اموالكم

<sup>563</sup> لايجل دم امرء مسلم و لاماله الا بطيب نفسه

<sup>564</sup> Almasi, 'The Spouses' Property System in Iran and France Laws و فرانسه', at 121.

<sup>565</sup> Shiravi, *Family Law (Marriage, Divorce, and Children)* (حقوق خانواده (ازدواج، طلاق و فرزندان) at 129.

the other spouse is also the same as the other creditors in case of bankruptcy. The only exception is the wife's right to alimony which is considered as a privileged debt over any other creditor's liabilities on the assets of the bankrupt husband.<sup>566</sup>

#### **4.1.5 Property Distribution upon Separation**

As mentioned previously, marriage is not considered as a sufficient reason for unifying the spouses' assets in Iranian law. As a result, there is no community of property during the marriage and therefore no post marital claim upon dissolution of the marriage by separation. When they separate, each spouse remains the owner of her/his property irrespective of what she/he owned before the marriage or during it. If some marital claim such as *Mahr*, alimony or wage is due, the husband must pay such claims to the wife. And if the husband holds some financial claim against his wife, she must pay him this claim. Through separation, the husband must also pay any financial rights a court has ordered him to pay to his wife such as *Nahleh* (nuptial gift), or the share of his property which may have been based on marital stipulation.<sup>567</sup>

If the married parties have some shared property through legal agreements, such property must be separated and divided according to the share of each party and without any interference in the marital relation.<sup>568</sup> If some marital properties became mixed as a result of living together, the mixed properties must be separated, and the ownership of each spouse must be determined.<sup>569</sup>

For the distribution of certain personal properties such as the wedding ring and personal clothes, such properties are assumed to be the personal property of the spouse who consumed them. In addition, the "gender specific" rule also applies when the ownership of certain specific properties is not clearly determined. In such cases the court assumes that the item belongs to

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<sup>566</sup> Mohammadi, 'Matrimonial Regime in Iran and France(رژیم مالی خانواده در ایران و فرانسه)', at 13.

<sup>567</sup> Mohammadi, 'Divorce and the Women's Share from Marital Life طلاق و سهم زن از زندگی مشترک', (at 31-32.

<sup>568</sup> Hekmatnia, *Woman's Rights and Family* at 139.

<sup>569</sup> Mohammadi, 'Divorce and the Women's Share from Marital Life طلاق و سهم زن از زندگی مشترک', (at 32.

one of spouses according to whether its use was for men or women. In cases where the “gender specific” rule does not apply, co-ownership will be applied to that specific property.<sup>570</sup>

#### **4.1.6 Property Distribution upon Death**

When one of the spouses passes away, his/her property is distributed independently from the surviving spouse’s property according to Iranian inheritance law. The distribution of the spouses’ mixed property will be done after determining the deceased spouse's share in the said property. While every spouse’s share of estate is recognized, the right to inheritance considered independently from the share of the deceased spouse. The property of the deceased spouse will be distributed to whomever he/she desired according to the prepared will, if there was one. Up to the one third of all the estates can thus be distributed to any person under the general rules of wills.<sup>571</sup> The remaining part of the estates will be distributed according to the inheritance rules, which always include spouses.<sup>572</sup> It means that the rules of inheritance regarding spouses is based on their marital bond and not on blood relation. As such, any existing blood heir would not be able to prevent the spouses from inheriting from each other. Spouses inherit from each other along with all other categories of heirs. Only their gender or the presence of descendants can change their share of inheritance, as mentioned previously in the section on inheritance.<sup>573</sup>

## **4.2. The Man’s Role as Head of Family and its Legal Effects**

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<sup>570</sup> Naser Katouzian, *Property and Ownership* اموال و مالکیت (Tehran: Mizan, 2008) at 209.

<sup>571</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 522-23.

<sup>572</sup> Behniafar and Eftekhariyan, 'Analysis and Review of Wife Inheritance and the Parents of the Deceased in the Religions with Holy Book', (at 274-75).

<sup>573</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 141-42).

#### 4.2.1. The Man's Familial Role and its Place in Iranian Law and Tradition

In Islamic and Iranian law, the position and responsibilities of man and woman are divided based on their abilities, nature, and main characteristics. In the distribution of the spouses' roles in the internal management of the family, the man is considered the head of the family.<sup>574</sup> This rule is mentioned in the Iranian Civil Code: "In relations between husband and wife, the position of the head of the family is the exclusive right of the husband."<sup>575</sup>

As the abovementioned provision shows, Iranian family law follows the traditional conception of the man as occupying the head position of the family and separates the roles of the wife and husband.<sup>576</sup> The reasons the Iranian legislator appoints the husband as the head of the family are as follows.

First, this provision is based on Quranic verses establishing that "Men are protectors of women, because Allah has made some of them excel over others and because they spend their wealth on them..."<sup>577</sup> Protectors, "*Qavvam*", in this verse means the person who stands up and helps another to stand as well. It shows the responsibility of the man to protect the women in the family.<sup>578</sup> Therefore, in Qur'anic family theory, the man is the head of the family and responsible for managing it.

Second, the family has a very important place in Islamic society as it is considered as one of the main pillars of a balanced and healthy society. Man and woman are the main pillars of the family since they contribute to all family affairs. Both man and woman have responsibilities which are the rights of the other party. In the balanced family structure Islam aims to promote, the responsibilities are distributed based on gender characteristics and qualities. Because of their physical ability and natural qualities, men are deemed fitter to deal with the responsibilities and

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<sup>574</sup> Hedayat Nia, 'The Women's Occupation and the Families' Expediency in Iran Civil Code اشتغال زنان و مصلحت خانواده در قانون مدنی بررسی فقهی حقوقی ماده ۱۱۱۷ ق.م.ا.ج، (at 20-21).

<sup>575</sup> Iran's Civil Code, Article : 1105.

<sup>576</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 676.

<sup>577</sup> Quran: Verse 4(Al-Nisa):34: "الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما أنفقوا من أموالهم ..."

<sup>578</sup> Ansari, *Meshkat, the Interpretation of Quran* مشکات at Under Al-Baghara: 2:222.Volum 5th.



burdens of life, such as earning money for and more generally being the economic backbone of the family.<sup>579</sup> In general, a man's typical responsibilities regard matters considered as external to the household and or representing economic support for family. On the other hand, a woman's main responsibilities will be inside the household and concern familial activities. On that view, women have a nature more befitting to motherhood and upholding the home and family activities with love and kindness, rather than facing economic responsibilities.<sup>580</sup> (Yassari 2002)

Some scholars such as Mir-Hosseini have challenged this distribution of roles through a feminist approach.<sup>581</sup> They argued that appointing the man as a head of family obscure the abilities of women. Men are therefore privileged over women since the latter are relegated to motherhood and in need of a man to "protect" them. As such, they hold that such a distribution of roles has led to an unequal gender distribution of roles in Islamic society, resulting in inequality between men and women.

The argument is basically answered by the fact that the Quran and other Islamic sources consider men and women to be spiritually equal. The Quran's teachings are not based on the difference between men and women. It does not prefer one gender over another. However, each gender's rights and responsibilities are different based on their differing characteristics and the way in which they complement one another to create a balanced family and society. Since both men and women's contributions to the family are not the same, their roles differ, and it is therefore not discriminatory against women.<sup>582</sup>

In addition, in the Islamic legal system, advantages are distributed in a way that is compatible with the responsibilities of man and woman. For example, the main role of the woman is to manage the home and children. She therefore bears no responsibility in financially maintaining

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<sup>579</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 45.

<sup>580</sup> Yusuf Qaradawi and Muhammad Mustafa Gemea'ah, *The Status of Women in Islam* (Islamic Incorporated, 1997).

<sup>581</sup> Ziba Mir-Hoseini, 'Sexuality and Inequality, the Marriage Contract and Muslim Legal Tradition', in Anisa Helli and Homa Hoodfar (eds.), *Sexuality in Muslim Context: Restrictions and Resistance* (London/New York: Zed Books, 2012b), 124 at 128-29.

<sup>582</sup> See Ziba Mir-Hosseini, 'Sexuality, Rights, and Islam: Competing Gender Discourses in Postrevolutionary Iran', in Lois Beck Guity Neshat (ed.), *Women in Iran from 1800 to the Islamic Republic*, (University of Illinois Press,, 2004) at 6-7.

the family. Accordingly, this is an advantage granted to women where they are freed from any economic obligations to fulfill their role as mothers. While women can freely choose to contribute to the financial support of the family, they do not bear any responsibility in financial matters.<sup>583</sup> On the other hand, the man is responsible for earning money and maintaining his family. He therefore has the right to certain financial advantages such as a greater share in the inheritance since this is compatible with his economic responsibilities. Therefore, different rights and advantages arise from differing responsibilities.<sup>584</sup> Opponents to this idea argue that this idea of differences of character between men and women is based on stereotypes that have long proven false in many societies. They see this kind of argument as a way to justify the gender-based discrimination which is rooted in many cultural and religious traditions.<sup>585</sup>

Third, any human grouping exceeding one person needs to have a managing member in order to avoid dissension and friction. Proper management ensures the interest of each group is protected. As such, the man, as the head of the family group was appointed. He organizes internal family matters and makes the final decision on any controversial issues based on his characteristics. This position comes with the responsibility to protect his wife and the family by supporting them in financial matters as well as in other aspects of private and societal life.<sup>586</sup> Indeed, from a traditional Islamic perspective, the discipline and interest of the family and its proper function in society calls for appointing the man as the head of the family and dividing the roles and responsibilities between man and woman.<sup>587</sup>

#### ***4.2.2. The Effects of the Husband's Position as Head of the Family in Iranian Law***

As head of the family, the husband has certain rights and duties. The man's position as head entails certain legal effects on the marital relation. The woman's right to use the husband's

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<sup>583</sup> Behniafar and Eftekhariyan, 'Analysis and Review of Wife Inheritance and the Parents of the Deceased in the Religions with Holy Book', (at 276.

<sup>584</sup> Khurshid Ahmad, *Family Life in Islam* (Islamic Foundation, 1974) at 22-23.

<sup>585</sup> Ziba Mir-Hosseini, 'Beyond 'Islam'vs 'Feminism'', *IDS Bulletin*, 42/1 (2011), 67-77 at 68-70.

<sup>586</sup> Sheikh A. The Muslim Family: Predicament and Promise. *Western Journal of Medicine*. 2000;173(5):352-356. Dhami S, (at 353.

<sup>587</sup> Safaei and Emami, 'A Concise of Family Law', (at 133.

family name with his consent,<sup>588</sup> the wife's possibility to use the same legal address as her husband<sup>589</sup>, the father's legal guardianship of a minor child<sup>590</sup> and the responsibility of financially maintaining the wife and children<sup>591</sup> are all results of appointing the husband as the head of the family.

In addition, there are three main legal effects flowing from this position, leading to the following financial consequences.

#### ***4.2.2.1. The Husband's Right to Determining Residency (The Wife's Right to Have Adequate Housing)***

In Iranian law, one of the effects resulting from the husband's position as head of the family is his right and responsibility to determine the family's place of residence. This subject is generally studied as part of alimony, or the man's responsibility to provide his wife with appropriate housing. The wife has the right to ask her husband to provide housing and courts will force him to perform his obligation.<sup>592</sup>

In addition to the man's responsibility in this regard, it is the man's right to choose the place of residence and marital home. The wife must generally live in the marital home chosen by the husband, unless a stipulation in the marriage contract delegates the right to choose the marital

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<sup>588</sup> Article 42 of the Act of Registry of Civil statuses (Ghanoone Sabte Ahval)

<sup>589</sup> Iran's Civil Code, Article 1005: "The domicile of a married woman is the same as that of her husband. Nevertheless, where the husband has no known domicile and also when the wife has a separate domicile with the consent of her husband or by sanction of a court, she can have a separate domicile."

<sup>590</sup> Iran's Civil Code, Article 1180: "A minor child is under the guardianship of its father..."

<sup>591</sup> Iran's Civil Code, Article 1199: "Maintenance of children is the duty of the father on his death or his incapacity for maintenance, this duty devolves on the paternal grandfathers, the nearer of his kin coming before the father. In the absence of a father or paternal grandfathers or in the event of their incapacity, the duty of maintenance devolves on the mother..."

<sup>592</sup> Mohaghegh Damad Mustafa, بررسی حقوق خانواده, *a Study of Islamic Jurisprudence with Respect to Family Law* at 309-10.

home to the wife.<sup>593</sup> This possibility is provided in the Iranian Civil code: “The wife must stay in the dwelling that the husband allots for her unless such a right is reserved to the wife.”<sup>594</sup> Some scholars such as Safaee hold that this right could be delegated to the wife at any time, even after the marriage contract, since the Civil Code’s wording on this issue is general and not limited to a stipulation in the marriage contract.<sup>595</sup>

In case of conflict between the married parties, if the right to choose residency was not delegated to the wife, she should follow her husband’s decision and live in his chosen place of residence, unless doing so entails some kinds of danger for her.<sup>596</sup> The Iranian Civil Code explains this legal notion as follows: “If the existence of the wife and husband in the same house involves the risk of bodily or financial injury or slight to the dignity of the wife, she can choose a separate dwelling. And if the alleged risk is proven the court will not order her to return to the house of the husband and, so long as she is authorized not to return to the house, her cost of maintenance will be borne by her husband.”<sup>597</sup>

In such a case, the wife does not need to have the court order to leave her husband’s house if there is a probable risk for her. Consequently, the wife’s right to alimony would remain intact, even if there is no intercourse between the wife and husband. This is because there is some risk for her in staying in the same place of residence as her husband.<sup>598</sup> This rule is applicable for as long as the risk exists, and the court accepts this as a reason for the wife to not return to her husband’s home.<sup>599</sup>

Therefore, the husband’s right to determine the place of residency must not entail any damage for his wife.

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<sup>593</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 136.

<sup>594</sup> Iran’s Civil Code, Article 1114.

<sup>595</sup> Safaei and Emami, 'A Concise of Family Law', (at 134-35.

<sup>596</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 81.

<sup>597</sup> Iran’s Civil Code, Article 1115.

<sup>598</sup> Iranian Supreme Court, the order number 366, the branch number 6, (majmoeye raviyeye ghazaee Matin, p.121)

<sup>599</sup> Safaei and Emami, 'A Concise of Family Law', (at 135-36. Mcglinn, *Family Law in Iran* at 47.

Another issue in determining residency is how it should be chosen, and what criteria must be taken into consideration when choosing. As mentioned previously, according to Iranian law, the wife's right to live in appropriate housing falls under the rule of alimony, which is determined by the personal, social and economic standing of the wife and her family.<sup>600</sup>

Similarly, the right to adequate housing has also been recognized by international human rights instruments, which have established a minimum entitlement to housing. Article 25 of the Universal Declaration of Human Rights (UDHR)<sup>601</sup> and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establish the right to an adequate standard of living which includes the right to adequate housing<sup>602</sup>. The international organizations and conventions call on governments to oversee the enforcement of this right. Such a right affects the standards of adequate housing that a husband grants to his wife.

On the one hand, under Iranian family law and following Sharia, the wife's right to have appropriate housing is determined by the social and economic condition of the wife in society. This method of determination provides subjective and personal criteria for deciding on the appropriateness of the housing. On the other hand, the criteria used by human rights instruments for determining adequate housing is a global and objective standard of appropriateness of housing, which differs from the subjective personal criteria of Sharia. Therefore, if Iran implements and enforces international human rights instruments, the combination of Sharia rules and human rights provisions will affect the integrity of marital rights and responsibilities. This has resulted in a difference between international human rights minimum standards of appropriate housing and the Sharia's personal standards.<sup>603</sup>

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<sup>600</sup> Almasi, 'The Spouses' Property System in Iran and France Laws و فرانسه', at 136.

<sup>601</sup> Article 25.(1) of the *Universal Declaration of Human Rights* states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

<sup>602</sup> Article 11/1 of International Covenant on Economic, Social and Cultural Rights states: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

<sup>603</sup> Hekmatnia, *Woman's Rights and Family* at 246-52.

Yet the combination of Sharia-rooted provisions in Iranian law and international standards on adequate housing could improve women's economic rights.

#### 4.2.2.2. *The Wife's Occupation*

Another legal effect resulting from the husband's position as head of the family is his right to consult with his wife when deciding on her occupation. Since the husband ensures financial support for the family, the wife bears no financial responsibility even if she is wealthy.<sup>604</sup> Her career must therefore be adapted to her family's interests and in line with her main familial responsibilities.<sup>605</sup>

The wife does not need permission from her husband to work. However, the husband can legally<sup>606</sup> limit his wife's work to jobs deemed compatible with the family's interests and the dignity of family.<sup>607</sup>

Depending on each family's situation, society and time, the type of work considered to be against its interests and dignity will vary. This is normally determined based on current social customs. The court must decide on this issue on a case by case basis.<sup>608</sup>

In addition, article 18 of the 1975 Family Protection Law establishes that both husband and wife can ask the court to prevent the other from work deemed incompatible with the interests and dignity of the family (Hedayat nia 2006).<sup>609</sup> However, in the husband's case, the court must first examine whether preventing the husband from doing his job would entail financial difficulty for

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<sup>604</sup> Iran's Civil Code, Article 1118: "The wife can independently do what she likes with her own property."

<sup>605</sup> Shiravi, *Family Law (Marriage, Divorce, and Children)* (ازدواج، طلاق و فرزندان) at 215.

<sup>606</sup> Iran's Civil Code, Article 1117: "The husband can prevent his wife from occupations or technical work which is incompatible with the family interests or the dignity of himself or his wife."

<sup>607</sup> Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', at 7.

<sup>608</sup> Hedayat Nia, 'The Women's Occupation and the Families' Expediency in Iran Civil Cide اشتغال زنان و مصلحت خانواده در قانون مدني بررسي فقهي حقوقي ماده ۱۱۱۷ ق.م. (at 16-17).

<sup>609</sup> Roshan, Sadeghi, and Hosseini, 'The Right of the Wife to Occupation and the Head Position of the Husband in the Family in Fiqh and Iranian Legal System حق زوجه بر اشتغال و رابطه آن با رياست شوهر بر خانواده در فقه اماميه و نظام 'حقوقي ايران', *Nedaye Sadegh, Family Law and Jurisprudence* 20/62 (2015), 95-122 at 110.

his family. Since the man is the family's bread-winner, he must be capable of earning money from a legal occupation. Any other criteria pertaining to dignity must be examined after. Therefore, spouses have the same right to prevent the other spouse from fulfilling work deemed to be against the family's interest or dignity, but the effective exercise of this right is not the same because their duties are not similar.<sup>610</sup>

It is notable that work a spouse can legally bar another spouse from is not illegal work, since illegal work is already forbidden by the law. This kind of work is therefore legal work regarded as incompatible with the family's interest or dignity, even if it is protected by the law and compensates the person fulfilling it. An example of work that could be viewed as going "against family interest" is a job requiring the wife's full time and attention and therefore preventing her from fulfilling her role as a mother. For example, a woman desiring to work as a household maid while her husband is a rich lawyer could be barred from doing so by her husband, based on family dignity.<sup>611</sup>

The legislator's goal in establishing this limitation is to protect the family's interest and dignity. Since the husband is the head of the family, the legislator gives him the right to apply this rule. Therefore, the husband's right to prevent the wife from going against the family's interest or dignity in her work is not a right which can be waived through a clause in the marriage contract. This right is established to maintain the family's interest. It is thus not a right the husband can do away with. Consequently, if the married parties agree on such a waiver, it is considered against public order and the family's interest and will hence not be legally valid.<sup>612</sup>

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<sup>610</sup> Shiravi, *Family Law (Marriage, Divorce, and Children)* (حقوق خانواده (ازدواج، طلاق و فرزندان) at 215.

<sup>611</sup> Mohaghegh Damad Mustafa, *a Study of Islamic Jurisprudence with Respect to Family Law* at 313-15.

<sup>612</sup> Roshan, Sadeghi, and Hosseini, 'The Right of the Wife to Occupation and the Head Position of the Husband in the Family in Fiqh and Iranian Legal System' (حق زوجه بر اشتغال و رابطه آن با ریاست شوهر بر خانواده در فقه امامیه و نظام حقوقی ایران), (at 115-16.

#### 4.2.2.3. Woman's Submission

Another legal effect arising from the husband's being head of the family is that the wife must obey his decisions. This is known as submission (*Tamkin*)<sup>613</sup> in Iranian law. Submission is divided between general and special submission which are as follows.

##### 4.2.2.3.1. General Submission

General submission (*Tamkin-e aamm*)<sup>614</sup> is the general act of obeying the husband and his decisions in the marital relation and preparing a comfortable peaceful home for the family. This obedience means that the wife accepts the husband's leadership in marital decisions. This is limited to the framework of law, Sharia and custom. Therefore, in case of conflict regarding different decisions in the marital life, the husband and wife must try to decide based on mutual consent. If it is not obtained, the wife must obey her husband's decision.<sup>615</sup> This rule is limited by another rule which applies to the marital relation: the principle of "good-treatment"<sup>616</sup> of the married parties. This principle, in the Iranian Civil Code,<sup>617</sup> is inspired by Quranic verses<sup>618</sup> and demands the good treatment of both the wife and husband in the marital life. The married parties must not abuse each other's rights in the family.<sup>619</sup> Living together in kindness, respecting each other's rights, performing their respective duties and responsibilities and resolving conflicts peacefully are some examples of the good-treatment principle. Both the wife and husband have the right to refer to court if one party does not fulfil his/her duty of good-treatment in the family. The wife's responsibility to obey her husband's decisions is also limited to the framework of

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<sup>613</sup> تمكين

<sup>614</sup> تمكين عام

<sup>615</sup> Morteza Mohammadi, 'Marriage, Alimony and Obediance'، نفقه و تمكين، *Womens Strategic Studies*, 25 (2009), 180-216 at 183-85.

<sup>616</sup> اصل حسن معاشرت

<sup>617</sup> Iran's Civil Code, Article 1103: "Husband and wife are bound to establish friendly relations."

<sup>618</sup> Quran: Verses: 4 (Al-Nisa): 15: "وعاشروهن بالمعروف"

<sup>619</sup> Hekmatnia, *Woman's Rights and Family* at 148-51.



the good-treatment principle. The wife owes her husband obedience as long as there is no abuse of this right by the husband.<sup>620</sup>

#### 4.2.2.3.2. Special Submission

In addition to the general submission, there is another concept in Iranian family law known as special submission (*Tamkin-e khass*)<sup>621</sup>.

The principle of good-treatment requires that both wife and husband attempt to have a loving family environment and respect each other's rights and marital requirements. Both husband and wife have the right to have marital intercourse. In fact, it is their duty to provide each other with a pleasant marital intercourse. However, the wife's duty to respect her husband's demands to have marital intercourse is traditionally known as the special submission, or "*tamkin*".<sup>622</sup> Its antonym is "*nushuz*". "*Nushuz*" literally means "to stand up" and in legal literature it refers to the rebellion and disobedience of one of the spouses regarding his/her marital duties. (Safaei and Emami 2017)<sup>623</sup> In Islamic jurisprudence, this word is typically used for the wife with regards to the disobedience in the special case of sexual relations. This notion has some important legal impacts on the wife. The wife who does not provide her husband with marital intercourse is considered a disobedient (*nashezeh*)<sup>624</sup> wife. This situation has a financial impact for the wife. By not fulfilling her marital duties, the wife might have her right to alimony interrupted until she reverts to obedience.<sup>625</sup> However, if the wife fails to fulfil her marital duty

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<sup>620</sup> Safaei and Emami, 'A Concise of Family Law', (at 131-32.

<sup>621</sup> تمکین خاص

<sup>622</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 230-32.

<sup>623</sup> Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', (at 14.

<sup>624</sup> ناشره

<sup>625</sup> Iran's Civil Code, Article 1108: "If the wife refuses to fulfil duties of a wife without legitimate excuse, she will not be entitled to the cost of maintenance."

but has a reasonable justification for not doing so, such as the risk of disease,<sup>626</sup> she would be entitled to her right to alimony.<sup>627</sup>

The husband's refusal to fulfil his wife's right to marital intercourse is also forbidden under Iranian law. However, it has no economic impact. The legal consequence of the husband's violating his wife's right is that she may have this right enforced by the court. If the situation continues and creates hardship for the wife, she is entitled to file for the divorce before the court on this ground.<sup>628</sup>

### **4.3. The Relation Between Men's Financial Responsibilities and Women's Responsibilities in the Marriage Contract**

#### ***4.3.1. The Spouses Mutual and Special Responsibilities***

Following Islamic law, Iranian law regulates the roles of the wife and husband and determines for each of them their respective rights and responsibilities in the family. In other words, marriage is a civil contract whereby each party accepts to fulfill their responsibilities and respect the rights of the other party. However, these rights and responsibilities are not fulfilled in consideration of how one performs his or her obligations. They have to perform them, but not concurrently. Marriage can therefore not be considered an exact reciprocal contract.<sup>629</sup>

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<sup>626</sup> Iran's Civil Code, Article 1127: "If the husband contracts a venereal disease after the performance of the marriage act, the wife has the right to refuse to have any sexual relations with him and this refusal will not debar her from the right to cost of maintenance."

<sup>627</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 110-11.

<sup>628</sup> Safaei and Emami, 'A Concise of Family Law', (at 140-41).

<sup>629</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 31.

A valid marriage contract creates effects that bind the married parties. It is their responsibility to perform their duties.<sup>630</sup> Some of these duties are common to both married parties. These are typically moral duties including:

- 1- The responsibility to respect the good-treatment principle<sup>631</sup>: both married parties must treat each other with friendliness and in good faith. They must live together with respect and in a manner akin to companionship.<sup>632</sup>
- 2- The responsibility to cooperate in family matters<sup>633</sup>: the married parties must cooperate and assist each other in the affairs of the family. This responsibility varies according to different societies and customs. However, it typically includes collaborating in all family activities such as educating children or taking care of internal and external household affairs.<sup>634</sup>
- 3- The responsibility of loyalty to the spouse: The married parties must be loyal toward one other. Committing adultery is highly forbidden in Islamic law as well as in Iranian law and severely, criminally punished.<sup>635</sup>

In addition to these common responsibilities toward the family, the husband and wife each assume parental responsibilities. The husband's main responsibility as head of the family is his duty to support his family financially.<sup>636</sup> This includes providing his wife with her *Mahr* and alimony and paying for everyday household costs and needs, including the children's needs. The wife's main responsibility is to support her family with love and patience. She must make the home comfortable and suitable for a peaceful and healthy family. This includes her role as wife and mother, educating and raising the children, making the family environment warm and hearty through her love toward her family and accepting her husband as head of the family. In

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<sup>630</sup> Iran's Civil Code, Article 1102: "As soon as marriage takes place in due form, relations of matrimony will automatically exist between the marrying parties and rights and reciprocal duties of husband and wife will be established between them."

<sup>631</sup> Iran's Civil Code, Article 1103: "Husband and wife are bound to establish friendly relations."

<sup>632</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 45-46).

<sup>633</sup> Iran's Civil Code, Article 1104: "Husband and wife must cooperate with each other for the welfare of their family and the education of their children."

<sup>634</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 46).

<sup>635</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 81.

<sup>636</sup> Roshan, Sadeghi, and Hosseini, 'The Right of the Wife to Occupation and the Head Position of the Husband in the Family in Fiqh and Iranian Legal System' *حقوق زن و اشتغال و رابطه آن با ریاست شوهر بر خانواده در فقه امامیه و نظام حقوقی ایران*, (at 97-98).

general, the husband's role is providing for the family's financial and administrative affairs while the wife's role is providing for the family's emotional health, moral improvement and non-financial aspects of marital life. As such, traditionally, one of the wife's duties is to provide her husband with marital intercourse.<sup>637</sup>

The common duty to cooperate means that both wife and husband must collaborate with each other in pursuing the family's affairs. The goal is that the complementary roles of the wife and husband and their mutual rights and responsibilities create a balanced family environment. It is believed that only in such an environment will mentally and physically healthy children grow.<sup>638</sup>

#### **4.3.2. *The Spouses' Marital Responsibilities and The Enforcement of Spousal Rights***

According to the marriage contract, the wife and husband are the two main pillars of the marital relation. It is obvious that in this relationship, the responsibilities allocated to each spouse are the rights of the other spouse. For example, the man's responsibility to pay his wife's alimony is indicated by the wife's right to alimony.<sup>639</sup>

Therefore, if one of the spouses does not fulfill his/her spousal duties, he/she violates the other spouse's rights. This would normally lead to some legal enforcement of a right. Under the general rules of legal contracts, the contractual party whose right is violated can refrain from performing their own duty to oblige the other party to fulfill their responsibility.<sup>640</sup> This rule does not exactly translate into family law and marital duties, mainly because marriage is distinct from other legal contracts. A marriage contract is the relation between two human beings. It is important for the legislator to keep a friendly environment within the family. Islamic law seeks to force the failing party to perform their responsibility while striving to cause the least possible damage to the family relation.<sup>641</sup>

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<sup>637</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 131).

<sup>638</sup> Ahmad, *Family Life in Islam* at 22-23.

<sup>639</sup> Yassari, 'Iranian Family Law in Theory and Practice', (at 45).

<sup>640</sup> Iran's Civil Code, Article 377, 378

<sup>641</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 145-46.

The main challenge regarding this is the relation between the husband's economic responsibilities toward his wife to provide her with her *Mahr* and Alimony, and the wife's responsibility to provide her husband with marital intercourse.<sup>642</sup>

The relationship between the *Mahr* and marital intercourse was examined with detail under the relevant section pertaining to *Mahr*. As explained in this section, *Mahr* is not classified as a reciprocal right to marital intercourse because it is due immediately upon completion of the marriage contract.<sup>643</sup> However, in order to protect the wife's right, she has the limited right to withhold from sexual relations with her husband until he delivers her *Mahr*.<sup>644</sup> However, once the wife has sexual relations with her husband, she can no longer exercise this right, even if her husband does not fulfil his duty to pay her *Mahr*.<sup>645</sup> This shows that these two responsibilities are not reciprocal. The legal enforcement of the husband's payment of *Mahr* to his wife is done by mentioning the *Mahr*'s amount in the official documents of the marriage. With this official document, the wife can sentence her husband to deliver the *Mahr* through the registry or court. If the stipulated property which was the object of the *Mahr* can no longer be delivered, the *Mahr*'s equivalent financial amount must be delivered. If the husband refuses to pay her *Mahr*, he faces criminal as well as civil penalties, unless he is legally declared to be bankrupt.<sup>646</sup>

The husband's economic responsibility to pay his wife's alimony and the wife's responsibility to provide her husband with marital intercourse leads to the idea that these rights are reciprocal. This is because if the wife does not obey her husband and provide him with sexual intercourse, she is no longer entitled to her alimony.<sup>647</sup>

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<sup>642</sup> Welchman, 'A Historiography of Islamic Family Law', at 14-15.

<sup>643</sup> Iran's Civil Code, Article 1082: "Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like."

<sup>644</sup> Iran's Civil Code, Article 1085: "So long as the marriage portion is not delivered to her, the wife can refuse to fulfil the duties which she has to her husband provided, however, that the marriage portion is payable at once. This refusal does not debar her from right of maintenance expenses."

<sup>645</sup> Iran's Civil Code, Article 1086: "If the wife proceeds to fulfil the duties that she has towards her husband by her own free will, she cannot subsequently avail herself of the provisions of the foregoing Article, but never the less she will not forfeit the right that she has for demanding the payment of the marriage portion due to her."

<sup>646</sup> Yasser Mirza Jafari, 'Demanding the Mahr in Recent Legal Provisions', *Mizan Press Agency*, 2016.

<sup>647</sup> Welchman, 'A Historiography of Islamic Family Law', at 14-15.

Consequently, some scholars such as Mir-Hosseini have considered that marriage under Islamic law is a reciprocal contract whereby the wife comes under her husband's full domination. In this relation, the husband pays his wife's alimony and in exchange the wife must obey him through general and special submission. This means that special submission is granted against a compensation, alimony.<sup>648</sup>

This idea does not correctly reflect the legislator's goal under Islamic law. The reasons are as follow.

First, if the man does not provide his wife with her alimony, the woman can legally enforce this responsibility under Islamic jurisprudence by terminating the marriage.<sup>649</sup> Under Iranian law, the courts will first try to force the husband to pay the wife's alimony. If this enforcement is not possible for the court, the wife has the right to ask the court for divorce. Therefore, when the husband is unable to fulfill his main marital responsibility, which is maintaining his wife financially, she has the right to finish the relation.<sup>650</sup> The wife cannot however refuse to have sexual intercourse as a way of contractually enforcing payment of her alimony, as this would treat sexual intercourse as a reciprocal right to alimony. Both husband and wife must to do their best to fulfil their marital responsibilities and protect the family.

Second, the woman's right to alimony is an immediate result of the marriage contract. The marriage does not need to have been consumed for the wife to become entitled to her right to alimony. However, if the husband claims that the wife does not provide him with sexual intercourse, and he can prove this claim, the wife's alimony will be interrupted.<sup>651</sup> This means that the marriage contract is the complete cause for the wife's right to alimony, and not sexual intercourse. But if the wife refrains from her marital responsibility to engage in intercourse, this refusal is considered as a legal obstacle prevents her right to be established until she reverts to fulfil her marital duties.<sup>652</sup>

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<sup>648</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 2.

<sup>649</sup> Mohammadi, 'Marriage, Alimony and Obediance نفقه و تمکین و ازدواج', (at 184.

<sup>650</sup> Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* at 106.

<sup>651</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 675.

<sup>652</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 172-73.

Third, in Islam marriage has a very important place, both personally and in society. It is the only relation allowing members of society to engage in sexual activity. Indeed, extramarital sex is strictly forbidden in Islamic law. Marital intercourse is the only accepted way of fulfilling sexual urges under Islamic law, to the point where even masturbation is forbidden in Islamic law. (Hekmatnia 2012)<sup>653</sup> As a consequence, the married parties are encouraged to love each other and make the family environment pleasant in order to have a high quality marital relation. In addition to moral advice from Sharia, the legislator attempts to punish spouses who refrain from their sexual duties in this way. Both spouses must satisfy each other's sexual needs. The spouse who does not respect this right is punished by having her/his available rights limited.<sup>654</sup>

If the husband does not respect his wife's right to have marital intercourse, it is against the legal principle of good-treatment. The wife can therefore ask the court for divorce. This violation causes hardship for the wife and is a legitimate reason for giving the wife the right to initiate divorce.<sup>655</sup> The importance of this is demonstrated by the fact that if the husband is sexually impotent or unable to have sexual relations, the wife has the right to annul the marriage.<sup>656</sup>

On the other hand, if the wife violates her husband's right to sexual intercourse without any legitimate excuse, her right to alimony will be limited until she fulfills her responsibility. The importance of this issue is also shown by the fact that if the wife is unable to have marital relations, the husband has the right to annul the marriage. This is why the only legitimate way of having sexual intercourse is through marital relation. Therefore, if one of the spouses cannot provide the other party with sexual intercourse because of a natural impediment, the other party can opt out of the marriage contract. And if one of the spouses intentionally withholds from sexual relations the other party, the legislator attempts to put pressure on him/ her to fulfil this duty.<sup>657</sup>

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<sup>653</sup> Hekmatnia, *Woman's Rights and Family* at 228-29.

<sup>654</sup> Mohammadi, 'Marriage, Alimony and Obediance نفقه و تمکین و ازدواج', (at 187-88).

<sup>655</sup> Safaei and Emami, 'A Concise of Family Law', (at 141).

<sup>656</sup> Iran's Civil Code, Article 1122.

<sup>657</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 231-32.

## Conclusion

In the previous chapters, the different economic institutions and the Iranian matrimonial regime were studied. Examining this regime shows that the current governing Iranian matrimonial regime reflects Islamic jurisprudence in the family economic system. Islamic jurisprudence also provides for separate economic marital institutions without a general regime. As such, many Islamic countries have adopted a similar system in their legislation.<sup>658</sup>

The Iranian matrimonial regime establishes a reasonable separation of property system, which attempts to treat wife and husband according to their balanced rights and responsibilities. They each have their special responsibilities and rights divided along gender-specific lines. This system, with all its advantages, does not completely reflect the needs of modern Iranian society, while the exact distribution of roles has changed in the modern Iranian life style. In the contemporary period, the Iranian legislator has attempted to improve the current legal regime by enhancing women's rights and creating new financial institutions for them. This improvement has also been executed in the framework of the distribution of the wife and husband's roles in the family. While distributing the roles in the family has many advantages and is driven by a certain dynamic that holds true in traditional societies, such a distribution is no longer suitable for all Iranian families. The current Iranian matrimonial regime therefore needs to be re-examined and reshaped according to the needs and practices of current marital relations.

In practice, the existing legal matrimonial regime is not chosen by all Iranian families. This is because the exact distribution of roles does not exist there as it would in traditional families. Women work, earn money and contribute to the costs of their family. Even for the woman who does not work outside her home, her inside family's activities' value has increased and can be considered as the economic contribution to the family. Many families prefer different matrimonial regimes and agree on an ad hoc contractual system reflecting the roles they desire in practice. In practice, such families go beyond the legal border and consider their property as

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<sup>658</sup> Michael J. Stegman, *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* at 11.



joint property based on their different situations, morality and even following the ideal of Islamic law in justice and good-treatment of spouses. It is obvious that the law and legal system must satisfy the current practices of ordinary people. (Mir-Hosseini 1995)<sup>659</sup> Therefore, the matrimonial regime needs to be improved and adopted by taking into consideration current marital life and necessities.

The next chapter will examine the Quebec matrimonial regime, which serves as an example of a system where the matrimonial regime is mainly contractual. The elements which create this regime and the legislator's legal considerations will be examined. Accordingly, any suggestions and positive aspects which could apply and improve the Iranian regime will be considered.

In the last chapter, the results obtained from comparing the Iranian and Quebec matrimonial regimes will be discussed and suggestions for improving the Iranian system will be examined. The discussion surrounding possible suggestions to the Iranian regime will include a thorough examination of how such suggestions are suited to the current Iranian regime, and how they could be adopted in light of Islamic legal requirements.

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<sup>659</sup> Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', (at 2-3.

## 5 Chapter Five: THE DISTINCTIVE FEATURES OF QUEBEC'S MATRIMONIAL REGIME

### 5.1. An Overview of Quebec's Legal System

Quebec is Canada's largest province. It neighbours other provinces such as Ontario as well as the United States. Along with Ontario, Quebec is considered one of the central provinces of Canada and has played an important role in Canada's history. Quebec is considered the only French province of Canada, with a dominant French culture and French as its official language.<sup>660</sup>

Canada has a federal regime, which implies a division of powers between the federal government and the federated entities (provinces). Quebec's legal system is different from that of other Canadian provinces, which all follow the common law tradition. For its part, Quebec's public law is anchored in the common law tradition, while its private law draws on the civil law tradition, which makes this jurisdiction a relevant comparator for Iran. As such, it has a unique civil law legal system in Canada while sharing some features of Canadian common law in certain respects. That is why it is known as a mixed legal system.<sup>661</sup> In another word, Canada is bijural<sup>662</sup>, while Quebec is mixed.

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<sup>660</sup> Barbara Billingsley, 'The Civil Code of Quebec: A Distinct Legal System', *LawNow*, 20 (1995), 195 at 195-96.

<sup>661</sup> Robert Leckey, 'Harmonizing Family Law's Identities', *Queen's LJ*, 28 (2002), 221 at 223-24.

<sup>662</sup> "Bijuralism is defined as the coexistence of two legal traditions within a single state. Since the common law and civil law coexist in Canada in both official languages, Canada is said to be a bijural country."

For bijuralism in Canada, see <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b2-f2/bf2.pdf>

### ***5.1.1. Quebec's Civil Law Tradition and its Difference with the Common Law Tradition***

As we just saw, the presence of both civil law and common law traditions in Canada creates a special legal environment, called “bijural”, which is thus inherently legally plural from a legal perspective. Quebec’s civil law tradition, inherited from France’s past sovereignty over the region, dominates Quebec’s private law. The Quebec civil law system was recognized by the Westminster Imperial Parliament in the 1774 Quebec Act and, later, in the 1867 Constitution Act, through the allocation to provinces of the jurisdiction over “property and civil rights.”<sup>663</sup>

Canada’s common law tradition was inherited from England and is the governing legal tradition dominating private law in the other Canadian provinces. Both traditions now coexist in Canada. Throughout the centuries, Quebec’s civil law and the other provinces’ common law traditions have developed and have been altered through different legislations and judicial decisions.<sup>664</sup>

There are some important differences between these two traditions which have impacted family law:

(I)The main generic difference is that the sources of law are not envisaged in the exact same way by each tradition. Quebec’s main source of private law is its Civil Code, which is the first reference for judges. The 1866 Civil Code of Lower Canada was followed by the 1991 Civil Code of Quebec, which now governs Quebec private law. Family law in Quebec is largely set out in the Civil Code.<sup>665</sup>

On the other hand, in common law provinces, the law is not codified. It is composed of a system of rules based on the doctrine of precedent, which implies that decisions are made based on previous similar cases. As a matter of principle, it is more flexible since judges have a greater interpretive latitude. This is also the case in family law, which is mainly based on the case law.<sup>666</sup>

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<sup>663</sup> Billingsley, 'The Civil Code of Quebec: A Distinct Legal System', (at 196.

<sup>664</sup> H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, USA, 2014).

<sup>665</sup> Denis Lemay, 'The Quebec Legal System: An Overview', *Law. Libr. J.*, 84 (1992), 189 at 189-90.

<sup>666</sup> Billingsley, 'The Civil Code of Quebec: A Distinct Legal System', (at 196-97.

That being said, with the rise of the welfare state decades ago, and with various contemporary dynamics of legal migration, these archetypical differences between the civil law and common law have started to recede. In many civil law jurisdictions, judges are increasingly activist, and the common law world has not escaped the phenomenon of legislative inflation. Thus, while the theory of legal sources still diverges between these traditions, an increasing convergence is observable in legislative and judicial practices.

(II) Another difference lies in these traditions' approach to rightsholders. The civil law tradition focuses on substantive rights, and seeks to establish the legal rules by comprehensively setting them out in the Civil Code, subject, in the Canadian context, to the peculiarities of the federal division of powers. So, for family law, the Quebec Civil Code theoretically sets out all the rules which apply to interpersonal relationships, their related institutions, and different concepts. The civil law's main goal is to leave as little room for the judge's interpretation as possible.<sup>667</sup> Still, even codified law is confronted on a daily basis to facts, and bridging law and facts implies some form of well-tempered interpretive discretion on the part of judges.

The Civil Code defines all the legal rights and obligations in family relationships. In all parts of the Civil Code, the legislator uses the same meaning for each legal notion and term.

On the other hand, the common law tradition stems from facts, to which are applied principles and precedents, and from which remedies are devised. In the elaboration of statutes, each legal term may have its own special meaning in accordance with the legal concept at hand.

(III) Another difference is in the formality and functionality of these two traditions. While family law in Quebec is based on the combination of functionality and formality, the latter predominates. As the Quebec civil law system seeks to protect rights recognized in the Civil Code, its legal system is more formal. This formality impacts the substance. For example, starting from the federal legislative definition of marriage – the federal Parliament has jurisdiction over marriage and divorce, while provinces possess jurisdiction over the celebration

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<sup>667</sup> Hw Baade, 'John Ec Brierley & Roderick A. Macdonald, Eds., Quebec Civil Law: An Introduction to Quebec Private Law. Toronto: Emond Montgomery, 728 . Reviewed by Hans W. Baade', (1995) at 572-73.

of marriage-, the Civil Code elaborates a comprehensive set of legal consequences flowing from marriage, such as marital support.<sup>668</sup>

On the other hand, common law provinces rely more on functionality than formality. This functional approach in common law provinces means that the legal consequences of a marriage, such as marital support, also apply to cohabitants who meet the criteria of being married on *de facto* basis, irrespective of their formal status.<sup>669</sup> In Quebec, judges would not alone be able to proceed to such an extension of rights, which, as a matter of principle, is a prerogative of the legislator.<sup>670</sup>

(IV) Another difference between these two traditions is that the Quebec civil law system strongly emphasizes individual freedom, the freedom to contract and the importance of the contracting parties' consent. This can be seen in concepts like marriage, which is recognized as a contract whereby the parties have agreed to marry based on their freedom and mutual consent, and to choose a matrimonial regime. If the marriage contract does not exist, Quebec law does not recognize any other kinds of cohabitation that would trigger the legal consequences of marriage like spousal support.<sup>671</sup>

On the other hand, common law provinces recognize a couple's living together as providing sufficient basis for satisfying the legal criteria that would normally be obtained through marriage, such as spousal rights and matrimonial property.

The Quebec civil law's formalist approach accepts the validity of prenuptial agreements based on freedom of contract and holds valid all marriage contracts which are formed legally and which do not go against public order.<sup>672</sup> This is why same-sex union was legally recognized

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<sup>668</sup> Nicholas Bala and Rebecca Jaremko Bromwich, 'Context and Inclusivity in Canada's Evolving Definition of the Family', *International Journal of Law, Policy and the Family*, 16/2 (2002), 145-80 at 145.

<sup>669</sup> Robert Leckey, 'Family Outside the Book on the Family', *Can. B. Rev.*, 88 (2009b), 541 at 545.

<sup>670</sup> *Quebec (A.G.) v. A.*, [2013] 1 S.C.R. 61.

<sup>671</sup> Robert Leckey, 'Cohabitation and Comparative Method', *The Modern Law Review*, 72/1 (2009a), 48-72 at 48.

<sup>672</sup> Q.C.C: Article 431: "Any kind of stipulation may be made in a marriage contract, subject to the imperative provisions of law and public order."

under the form of a civil union in Quebec, before same-sex marriage was formally authorized by the federal Parliament.<sup>673</sup>

By comparing civil law in Quebec to common law traditions in other Canadian provinces, it becomes clear that Quebec's legal system can be chosen as a comparative system for this study of Iranian law. Both legal systems follow the civil law tradition, which they both inherited from France. Both systems have a Civil Code and espouse, at varying degrees, a formal approach when applying legal rules. This is why by looking at the Quebec matrimonial regime and its recent changes, the Iranian legislator could find new ideas for reforming the Iranian matrimonial regime.

### ***5.1.2. The Division of Powers in Canada and the Impact on Family Law***

To understand the power the province of Quebec holds in making its decisions on family law reforms and specifically its matrimonial regime, the division of powers with the Canadian federal system must be briefly examined with a particular attention to family law matters.<sup>674</sup>

#### ***5.1.2.1 Federal Jurisdiction over Marriage and Divorce***

The Canadian Constitution is the supreme law governing Canada's political organization, including all the provinces and territories. It includes the Canadian Charter of Rights and Freedoms which sets out rules guaranteeing the civil rights and freedoms of Canadian citizens. The Canadian Constitution also determines the division of powers between the federal and provincial jurisdictions.<sup>675</sup>

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<sup>673</sup> Leckey, 'Cohabitation and Comparative Method', (at 52-53).

<sup>674</sup> See Gaudreault-Desbiens Jean-François Poirier Johanne, 'Federalism, a Federalism in Canada, from Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism', in Patrick Macklem Peter Oliver, Nathalie Des Rosiers (ed.), *The Oxford Handbook of the Canadian Constitution* (Oxford, 2017), 391.

<sup>675</sup> Leckey, 'Harmonizing Family Law's Identities', (at 227-29).

In the 1867 Constitution Act<sup>676</sup>, the idea behind having a Canadian federal legislator enacting rules on family law was to avoid dealing with a diversity of legal personal and familial status hailing from different provinces. This had already been the case in the US legal system, where each person's legal status was held under their respective State's jurisdiction. By placing family law, or some parts of it, under federal jurisdiction, diversity in personal statuses, notably as a result of religion, would be limited. As such, the 1867 Constitution Act of Canada, in its section 91(26), recognized the federal government's exclusive jurisdiction over "marriage and divorce." However, section 92(12) of the same Constitution Act grants exclusive jurisdiction to provinces for the "solemnization of marriage". In addition, under section 92(13) and section 92(16), matters regarding property and civil rights and matters of a local or private nature fall under the jurisdiction of provincial governments. This division was based on the theory according to which each province is in a better position to legislate on the private aspects of its peoples' lives. Giving the authority over the solemnization of marriage was also a response to Lower Canada's (Quebec) concerns about recognizing the civil marriage as the legal one, which conflicted with that society's catholic culture at the time.<sup>677</sup>

According to the Constitution, the federal parliament has exclusive jurisdiction over lawmaking regarding divorce. The federal parliament exercised its jurisdiction by enacting the Divorce Act in 1968, which was followed by the current Divorce Act of Canada enacted in 1985. This statute deals with matters related to separation and divorce, child custody, child support, access and spousal support, in addition to other provincial remedies. However, in practice, federal laws do not apply uniformly across the provinces. The latter conserve some leeway for applying their own laws and interpretations, thus effectively introducing diversity.<sup>678</sup> For example, while the general rule is that matters regarding divorce, divorced parties and rules of procedure for divorce fall under federal jurisdiction, matters relating to other kinds of cohabitation, parental issues and married couples' issues without intention to divorce falls under the jurisdiction of provinces.

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<sup>676</sup> *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.).

<sup>677</sup> Peter W Hogg, *Constitutional Law of Canada, Vol. 1* (Toronto: Thomson Carswell, 2007) at 27-31.

<sup>678</sup> Robert Leckey, Carol Rogerson, and 'Marriage, Family, and Federal Concerns', in Patrick Macklem Nathalie Des Rosiers, & Peter Oliver. (ed.), *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), 573 at 582-83.

Yet, the essential conditions of the validity of a marriage, and related issues, fall under the jurisdiction of the federal Parliament. Matters relating to the solemnization of marriage, which encompass the formal or procedural dimensions of marriage, fall under provincial jurisdiction. These include granting marriage licenses, determining the requirement of minimum age for marriage and the consent of parents.<sup>679</sup>

Federal jurisdiction was applied over marriages for the first time in the 1990 *Marriage (Prohibited Degrees) Act*, modifying the existing judge-made rules in common law provinces regarding prohibitions of marriage between related persons. In 2005, the Canadian Parliament adopted the *Civil Marriage Act*, legalizing same-sex marriages throughout Canada, though these had already been legalized through judicial rulings in some common law provinces and territories – since these rulings did not apply to civil-law Quebec, the federal legislator had to intervene, and it did. This was achieved by considering marriage as a civil union between two persons, thus eliminating the traditional condition that marriage could only be recognized between parties of different sex.<sup>680</sup> The 2015 Amendment to the Act also set the minimum age for marriage to 16 years old.<sup>681</sup> The provinces must now respect that minimum threshold age, though they can increase the minimum age if they wish. The *Civil Marriage Act* also prohibited polygamy,<sup>682</sup> - although it was already prohibited in the Criminal Code - and forced marriages<sup>683</sup>.

In some important cases such as those involving spousal support and child custody, the law-making process differs, and the federal government usually exercises its jurisdiction more

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<sup>679</sup> Leckey, 'Harmonizing Family Law's Identities', (at 227-28.

<sup>680</sup> *Civil Marriage Act of Canada*: certain aspects of capacity: “2 Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”

<sup>681</sup> *Civil Marriage Act of Canada*: Minimum age: 2.2 “No person who is under the age of 16 years may contract marriage.” 2015, c. 29, s. 4.

<sup>682</sup> *Civil Marriage Act of Canada*: Previous marriage:2.3 “No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.”2015, c. 29, s. 4.

<sup>683</sup> *Civil Marriage Act of Canada*: Consent required:2.1 “Marriage requires the free and enlightened consent of two persons to be the spouse of each other.”2015, c. 29, s. 4.



strongly. For example, in the case of spousal support, the federal government attempted to unify its application by paying more attention to judgments rendered by the Supreme Court of Canada through the Divorce Act. The federal government also prepared the Spousal Support Advisory Guidelines under the Divorce Act, setting forth the rules for determining the amount and duration of spousal support. This guideline minimizes the impact of provincial and local culture on the understanding of family law. It is used as a uniform guideline for spousal support under the provincial and federal legislations.<sup>684</sup> However, Quebec is the exception to this trend. The Guideline in Quebec is a useful tool, amongst others, which is not binding, but judges can use it in their judgement in divorce cases.<sup>685</sup>

In the case of child support, federal government also sought to determine a more uniform application by preparing a guideline and seeking cooperation of the provinces. The Federal Child Support Guidelines established the standards of child support, and the common law provinces integrate this Guideline in their provincial laws to achieve a unified system regarding the payment of child support. Yet Quebec has its own system of child support which is compatible with its Civil Code and its own civil law system. It is possible for the provinces to have their own guideline of child support under the Divorce Act.<sup>686</sup>

### ***5.1.3. The Canadian Charter of Rights and Freedom***

The Canadian Charter of Rights and Freedom was added to the Canadian Constitution in 1982. It is a part of the Canadian constitution and has the authority of supreme law in Canada, like the Constitution Act, 1867. It plays a great role in implementing Western principles of human rights and democracy to the Canadian Constitution. While many Charter rights were initially recognized in the 1960 Canadian Bill of Rights, the main difference is that the Charter is considered a part of the Constitution and, as such, applies to both federal and provincial

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<sup>684</sup> Leckey, Rogerson, and 'Marriage, Family, and Federal Concerns', at 585.

<sup>685</sup> Jodi Lazare, 'Spousal Support in Quebec: Resisting the Spousal Support Advisory Guidelines', *Les Cahiers de droit*, 59/4 (2018), 929-72.

<sup>686</sup> Divorce Act of Canada: Ss. 2(1) and 2(5).

legislatures and governments. The rights that are mentioned in the Charter are those necessary to live in a free and democratic society. However, they are not considered absolute rights and may be limited by other rights and values, within reasonable limits prescribed by law.<sup>687</sup>

The Charter has important effects on family law. The notions of equality and elimination of discrimination in section 15 of the Charter helped shape many provisions of family law. Based on the Charter's guarantee of equality, the rules protecting children under a traditional relationship were extended to same-sex relations.<sup>688</sup> The principle of equality also prevents any discriminatory approach to same-sex marriages and requires governments to recognize this kind of marriage.<sup>689</sup> The equality principle further prohibits discrimination based on marital status and provides equal rights for unmarried partners living under other kinds of relationships.<sup>690</sup> Local laws must not discriminate unmarried cohabitants on matters such as accident indemnities based on their marital status.<sup>691</sup> However, while Quebec has not recognized marriage rights for unmarried cohabitants, the Supreme Court has confirmed that this position is not incompatible with constitutional requirements. In this case, the Supreme Court of Canada confirmed that the application of matrimonial property law was limited to married parties, this idea stemming from another value advocated by both the Charter and the Civil Code, e.g. liberty.<sup>692</sup> Under this reasoning, one must first consider the parties' freedom of decision and contracting, such that if there is no marriage contract, granting this non-marital relationship legal consequences that would normally stem from marriage would violate the parties' freedom of choice.<sup>693</sup>

In some cases, federalism's requirement to respect diversity is referred to in court decisions on family law cases. For example, in a case concerning Quebec's legal approach of distinguishing between marital and non-marital relations, while the court confirms that Quebec's approach did discriminate in not recognizing any marital rights for cohabitants, the court also recognized that under section 1 of the Charter, provinces can exercise their power in applying limits to some

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<sup>687</sup> Nicholas Bala and Robert Leckey, 'Family Law and the Charter's First 30 Years: An Impact Delayed, Deep, and Declining but Lasting', *Canadian Family Law Quarterly*, 32/1 (2013), 21 at 23-25.

<sup>688</sup> Robert Leckey, 'Family Law as Fundamental Private Law', *THE CANADIAN BAR REVIEW*, 86 (2007) at 72.

<sup>689</sup> *Ibid.*

<sup>690</sup> *Ibid.*, at 72-74.

<sup>691</sup> Leckey, 'Cohabitation and Comparative Method', (at 53).

<sup>692</sup> *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61.

<sup>693</sup> Leckey, 'Cohabitation and Comparative Method', (at 53-54).

rights, as long as these limits are reasonably justifiable in a free and democratic society. While the values of federalism were highlighted in this case, the court also underlined each province's responsibility to respect the Constitution in its law-making process.<sup>694</sup>

In another case on Quebec distinctive family policy, regarding the Child Support Guidelines in particular, while the court accepted Quebec's discriminatory approach to divorced or divorcing single mothers, it also stated that 'in a free and democratic society, cooperative federalism must have effect'.<sup>695</sup> Therefore, the federal government's family law policy allows provinces some discretion in exercising their distinctive powers, resulting in further provincial diversity, sometimes at the cost of certain fundamental rights.<sup>696</sup>

Yet, equality concerns inspire the legal reasoning in the new approach taken towards matrimonial regimes, which contributes to promoting the equality of genders in the distribution of marital roles by shifting to the community of marital assets.

#### ***5.1.4. Provincial Jurisdiction over the Solemnization of Marriage, Property and Civil Rights***

As explained previously, the Canadian Constitution of 1867 determines the division of powers between the federal and provincial jurisdictions. Based on the Constitution, the solemnization of marriages and other matters related to marriage, such as matrimonial property, enforcement of maintenance, parentage, adoption, child custody, child protection and access of child, fall under the provincial jurisdiction's powers.

In common law provinces, family law is mostly similar due to unifying policies, the fact that some provinces simply reproduce other provincial provisions, and the absence of distinct common law precedents. At the federal level, the volunteer organization of the Uniform Law Conference of Canada has developed a model of uniform laws which have influenced certain

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<sup>694</sup> Quebec (Attorney General) v A 2013 SCC 5, [2013] 1 SCR 61:at para 440 and 449.

<sup>695</sup> Droit de la famille—111526 2011 QCCS 2662, [2011] RJQ 907 at para. 280.

<sup>696</sup> Leckey, 'Family Law as Fundamental Private Law', (at 91-92).

provincial legislations. Decisions from the Supreme Court of Canada have also influenced provincial legislations. The Supreme Court of Canada's rulings typically play a unifying role in interpreting provincial legislations, since its decisions on one province affects the legal decisions of all other provinces.<sup>697</sup>

Through such unifying federal and provincial actions, provincial family law mostly evolves in a similar fashion across Canada. However, there are some aspects of family law that differ from one province to another. These differences can be seen both in the principles of family law and in their application. The law on unmarried cohabitation, parentage and matrimonial regime are the main examples of variations in family law.<sup>698</sup>

The matrimonial regime of each province is determined by the provincial legislature. With the advent of gender equality and the prohibition of any kind of discrimination based on gender since the 1970s, all provincial matrimonial regimes had to be adapted. The new approach has been to consider marriage as an equal partnership between parties. Accordingly, by sharing the matrimonial property, spouses are entitled to an equal share of the marital property when the marriage ends. However, legal differences exist regarding how to determine which property is to be considered marital property. Some consider all the property generated after the marriage contract as marital property, while others divide the property between family property and business property, and hold that only family property is to be considered marital property to be shared between spouses.<sup>699</sup>

In practice, gifts, inherited property, and property earned before marriage are to be distinguished from other property. For distributing marital assets, provinces distinguish between equal payment to the spouses and payment based on the interest of each parties' assets.<sup>700</sup>

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<sup>697</sup> Leckey, 'Harmonizing Family Law's Identities', (at 226-32.

<sup>698</sup> See Leckey, 'Cohabitation and Comparative Method', (

<sup>699</sup> Leckey, Rogerson, and 'Marriage, Family, and Federal Concerns', at 593-94.

<sup>700</sup> Julien D Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', *Chitty's LJ*, 24 (1976), 289 at 290-92.

The Canadian Constitution provides for a division of powers allowing each province to have distinct matrimonial regimes. This supplements provincial legislatures jurisdiction over property and civil rights.

In addition, the legal recognition of unmarried cohabitants and their rights and obligations also fall under the provincial jurisdictions. While the main approach across Canadian provinces has been to recognize unmarried cohabitants and give them marital rights and obligations, no uniform treatment is discernible, the social policy of each province varying in this regard. It determines the degree to which couples choose not to marry, how the law treats such a relation, the meaning of marital relations, and what should be included in them. Therefore, the law of each province differs regarding the treatment of unmarried relationships and the application of marital rights and obligations to them. Provinces are not delegates of the federal Parliament. The federal government exercises its power over federal matters such as taxation and immigration according to the provinces' definitions and recognition of marital relationships. Accordingly, whether spouses are married or not depends on provincial legal criteria concerning the solemnization of marriages, which in turn entitles the couple to enjoy marital rights under federal provisions.<sup>701</sup> One such example is the entitlement to spousal support in different provinces. As mentioned, common law provinces typically recognize spousal support for unmarried cohabitants, though the criteria for entitlement vary in each province. The kind of spousal rights and obligations that each province recognizes for unmarried cohabitants also varies. For example, only half the common law provinces include unmarried cohabitants in the matrimonial regime for spouses. Quebec does not recognize any marital rights or obligations for unmarried cohabitants, whether spousal support or a matrimonial regime, though it has the highest rate of unmarried cohabitants.<sup>702</sup>

This is because Quebec has a special regime for family property, as it follows a civil law system based on the Quebec Civil Code. This Code governs the most important patrimonial aspects of marital relationship.

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<sup>701</sup> Leckey, 'Family Law as Fundamental Private Law', (at 72-73.

<sup>702</sup> Leckey, 'Cohabitation and Comparative Method', (at 51-52.

A general examination of the interaction of federal law and provincial laws on family matters shows that the common law features of federal law dominate family law in Canada. This is one of the reasons why common law provinces easily accommodate and abide by federal laws. In Quebec, the Civil Code's legal concepts are not always the same as those introduced by federal family law. For example, the concepts of custody and spousal support under the federal Divorce Act are taken from common law concepts but are different in Quebec's civil law system. That is why federal family law allows provinces to make exceptions for their general private law.<sup>703</sup>

Quebec's legal system also has a language that is different from that of federal family law and other common law provinces. While both French and English are guaranteed by the Canadian constitution, the Quebec's French civil law tradition differs from the English common law tradition of other provinces. This is not a mere linguistic difference, but rather a difference in legal traditions where two different languages and groups of scholars work on different approaches to civil law and common law. This is why these two rich legal traditions cannot merge. The Canadian Constitution respects this difference by granting provinces jurisdiction to pursue their legal tradition.<sup>704</sup>

These differences cause Quebec's matrimonial regime to have special characteristics, to which we turn in the following sections. (Billingsley 1995)

## **5.2. The Concept of the Marriage Contract**

Peoples' attitudes towards marriage have changed since the 1970s. Many people choose not to marry, preferring other kinds of cohabitation instead. Cohabitation has gradually become more socially acceptable and increasingly people choose to live together more freely. Furthermore, the divorce rate has increased according to statistics. Divorce has become more accessible and obtainable by law. The economic aspects of a marriage have also become more important.

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<sup>703</sup> Lemay, 'The Quebec Legal System: An Overview', (at 189-90).

<sup>704</sup> Billingsley, 'The Civil Code of Quebec: A Distinct Legal System', (at 196-97).

People are more concerned than ever about the economic consequences of terminating their marriage.<sup>705</sup>

The law has also considered this social change. Since marriage is no longer the only way to live together, spouses now carefully consider the economic and legal aspects of entering into a marriage by stipulating different conditions in the marriage contract. This is why the law allows spouses to manage the economic aspects of their marriage through different types of prenuptial or postnuptial marital contracts. Spouses are legally allowed to determine their marital rights and duties and guarantee their future rights in case of divorce. Quebec's civil law system legalized this kind of marriage contract and therefore ensures their legal enforcement.<sup>706</sup>

At first, signing a marital contract and following its legal procedures was not very greeted with enthusiasm by all spouses in North America. For example, in the United States only wealthy families would enter into a marriage contract. However, with time, spouses from different economic levels have become increasingly interested in using the full extent of their contractual freedom to execute a desirable marriage contract. They realized that their contracts would be legally enforceable, and that they could determine beforehand the division of their property in case of marriage termination.<sup>707</sup>

Quebec's civil law system, like France's, has started encouraging spouses to determine beforehand the economic aspects of their marital relationship, including the division of property in case of termination of their marriage. It is indeed desirable for spouses to agree and make decisions before their marriage by entering into a marriage contract. The marriage contract is considered a legal contract in which spouses or future spouses agree on their marital economic decisions such as their marital economic regime, the gifts they want to give to each other or to their children, and any decision relative to the division of property in case one of spouses dies.

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<sup>705</sup> Susan Vogt Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', *BC Int'l & Comp. L. Rev.*, 6 (1983), 475 at 475-77.

<sup>706</sup> Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', (at 290.

<sup>707</sup> Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', (at 480.

This contract can be signed at the time of solemnization of marriage.<sup>708</sup> It can also be signed after marriage, in which case it will be effective on the date of signature.<sup>709</sup>

There are several alternative regimes legally available depending on the needs of a couple. Spouses can choose between one of these alternative regimes for their marriage contract. These alternative regimes mainly include separation of property, community of property, or different kinds of combinations of these two regimes.

In addition, the future spouses are free to create the rules they desire to govern their marital relation, as long as they respect principles of morality and public order. If the spouses do not select any alternative regimes nor create their own matrimonial regime, the “legal matrimonial regime” applies by default to their relation. Therefore, Quebec’s civil law approach to the marriage contract allows for a certain degree of freedom. In addition, people better understand their marital rights and responsibilities through the process of selecting their desired marital contract.<sup>710</sup>

### **5.3. The Quebec Matrimonial Regime (Article 431-492 CCQ)**

#### ***5.3.1 The Broader Canadian Context***

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<sup>708</sup> Q.C.C, Article 433: “A matrimonial regime, whether legal or conventional, takes effect on the day when the marriage is solemnized. A change made to the matrimonial regime during the marriage takes effect on the day of the act attesting the change. In no case may the parties stipulate that their matrimonial regime or any change to it will take effect on another date.”

<sup>709</sup> Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', (at 500.

<sup>710</sup> Rudyanto Wijaya, 'Marriage Contracts', (Éducaloi, 2019), <https://www.educaloi.qc.ca/en/capsules/marriage-contracts>.



Quebec's matrimonial regime has certain characteristics in common with other civil law jurisdictions such as France. It has also been influenced by neighbouring common law jurisdictions such as Ontario and other Canadian provinces. (Wijaya 2019) <sup>711</sup>

As mentioned previously, community property appeared in Canadian provinces in the 1970s. In the United States, most states conserved the 1973 Marriage and Divorce Act rules for dealing with family property and its distribution at the end of marriage. Instead of reforming through law, US judges adapted the law by deciding on a case by case basis what should be considered fair regarding the separation or community property system. <sup>712</sup>

In the 1973 *Murdoch v. Murdoch*<sup>713</sup> case, the Supreme Court of Canada neither recognized any rights for the wife in the property of her husband nor considered any of the housework and labour she had fulfilled at home and on the farm.<sup>714</sup> However, very soon after this case, in 1978, the Supreme Court changed its approach in *Rathwell v. Rathwell*<sup>715</sup>. The Supreme Court recognized the wife's and cohabitants' right to marital property, based on the principle of unjust enrichment, in this case and in later cases such as *Pettkus v. Becker*<sup>716</sup> in 1980. Accordingly, the woman now has a right at common law to share the property which was acquired during marital life or cohabitation. Therefore, different provinces started to change their legislations and adopted this view in different ways in their statutory matrimonial regime. The changes were conducted with a view to recognizing that marital property should be shared at the end of the marital regime, whether brought about by divorce, death, or annulment of the marriage. This was done to prevent economic difficulties for the woman in such cases. Determining the joint responsibility of the spouses in the marriage and their contribution to marital life establishes a fair division of marital property at the termination of the marriage.<sup>717</sup>

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<sup>711</sup> Lemay, 'The Quebec Legal System: An Overview', (at 189-90.

<sup>712</sup> Mary Ann Glendon, 'Family Law Reform in the 1980's', *La. L. Rev.*, 44 (1983), 1553 at 1556.

<sup>713</sup> *Murdoch v. Murdoch* (1973) 41 D.L.R. (3d) 367, at p.377

<sup>714</sup> Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', (at 289-90.

<sup>715</sup> *Rathwell v. Rathwell* 83 D.L.R. (3d) 289, at p.305.

<sup>716</sup> *Pettkus v. Becker* 117 D.L.R. (3d) 257.

<sup>717</sup> Mary Welstead, 'Domestic Contribution and Constructive Trusts: The Canadian Perspective', *Denning LJ*, 2 (1987), 151 at 151-53.

Various legislative attempts were made to clarify the legal aspects of property sharing at the end of the marital relation.

**-Property subject to the division of property:** The difference between family property, which belongs to spouses, and individual property like commercial or business property, which belongs to each spouse, is discussed in different legislations. Property associated with family use is different than property associated with personal use. In addition, a difference is usually made between the premarital property of each spouse and post-marital property. Regarding the notion of post-marital property, any property acquired as an inheritance, gift or monetary compensation of personal injuries such as physical or mental damage must be separated from other post-marital properties. It is also important to determine whether the property of both spouses should be considered for the purpose of the division or only the husband's property. While the spouse holding the title on some property normally has the right to control and manage this property, there are some types of property which form an exception to this principle, like the marital home. Many legislators make an exception regarding the marital home and its furniture, whereby the permission of both spouses is required to sell, rent or mortgage them.<sup>718</sup>

**-The value of property subject to the division of property and how its value is assessed:** Determining the value of property to be able to divide it properly is also important. Varying methods of assessing this value, either by reference to the market or by the court, are used in different jurisdictions.

There are also certain deductible debts and liabilities that must be determined to know the total amount of family property available.<sup>719</sup>

**-The procedure for dividing the property and its payment:** The possibility of dividing the property or its value is another dimension to be considered when sharing the property. Determining how the property should be shared in the most just manner to fit both spouses' needs is important.

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<sup>718</sup> Julien D Payne and Marilyn A Payne, *Canadian Family Law* (Irwin Law Toronto, 2013) at 587-88.

<sup>719</sup> *Ibid.*, at 588.

### 5.3.2. *The Quebec Context*

In Quebec, the 1964 *Act respecting the legal capacity of married women* introduced many changes concerning married women's legal capacity and gave equal rights to both husband and wife, reserving any limitations that may result from the choice of matrimonial regime.<sup>720</sup>

In 1989, *the Act respecting matrimonial regimes* removed the community of assets as Quebec's default matrimonial regime and replaced it with the partnership of acquests. This applies automatically if there is no prior marital contract. With this Act, spouses can modify their matrimonial regime or marriage contract during the marriage. This Act also removes more inequalities between the spouses, such as the need to obtain an authorization to accept an inheritance or gift.<sup>721</sup>

While Quebec has started to integrate the community of property into its matrimonial regime, the parties' freedom of marriage and their consent have been very important issues under the Q.C.C. Freedom of marriage means that the parties can agree on any marriage contract if there is mutual consent and free will in contracting. The parties can choose any arrangements appropriate for their situation within the limitations of their contract and public order. Moreover, parties must respect moral standards and certain imperative legal rules, like inheritance rules, which cannot be waived. If there is no contract chosen by the married parties, the default marital regime governs their property during and at the termination of the marriage. The married parties

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<sup>720</sup> *An Act respecting the legal capacity of married women*. Statutes of the Province of Quebec, 1964, chapter 66.

<sup>721</sup> *An Act respecting matrimonial regimes*. Statutes of the Province of Québec, 1969, chapter 77

also are free to change their matrimonial regime during their marital life by adopting another regime and validating it before a notary.<sup>722</sup>

The spouses' entire property is included in the matrimonial regime except "family patrimony" which will be explained later. As such, debts are also included in marital property.

Two exceptions are always applied to all matrimonial regimes, as follows.

### **1- The Family Residence**

The legislator has protected the marital residence. This is the case even if one of the spouses is the sole owner of the family residence. This protection means that the home cannot be sold, rented or mortgaged without the agreement of both spouses. If one of spouses did not consent to a transaction involving the family residence, he or she may apply to annul the contract with the third party.<sup>723</sup>

In addition, movable property in the family residence serving for the use of the household are also protected, regardless of the owner.<sup>724</sup> According to Article 401 of Q.C.C. "Neither spouse may, without the consent of the other, alienate, hypothecate or remove from the family residence the movable property serving for the use of the household." For the purpose of this article, the movable property only includes that which is used to furnish the family residence or decorate it.<sup>725</sup>

Just like the family residence, if movable property is transferred without both spouses' consent, the contract can be annulled.<sup>726</sup>

### **2- The Family's Everyday Needs**

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<sup>722</sup> Q.C.C: Article 440.

<sup>723</sup> Q.C.C: Article 403: "Neither spouse, if the lessee of the family residence, may, without the written consent of the other, sublet it, transfer the right or terminate the lease where the lessor has been notified, by either of them, that the dwelling is used as the family residence."

A spouse having neither consented to nor ratified the act may apply to have it annulled."

<sup>724</sup> Robert Leckey, 'Strange Bedfellows', *Marital Rights: The Library of Essays on Family Rights* (London and New York: Routledge, 2017) at 193.

<sup>725</sup> Q.C.C, Article 401.

<sup>726</sup> Q.C.C, Article 402.

Both spouses must contribute to financing the family's everyday needs. They are also responsible for any debts incurred for the everyday needs of the family. Therefore, the spouses do not need each other's permission to contract with third parties, barring any exceptions to this rule. A contract binding one spouse also binds the other except in the following cases:

-The spouses are separated from bed and board.

- If one of the spouses had previously informed the other contracting party of his or her unwillingness to be bound.<sup>727</sup>

#### ***5.4. Quebec's Hybrid Matrimonial Regime***

The Quebec matrimonial regime, like Ontario and Germany, is an example of a hybrid matrimonial regime. The main characteristic of hybrid regimes is that they mix certain characteristics of the common property and separation of property regimes. In fact, the current legal default regime in Quebec, the partnership of acquests, is obtained from both the separation and community of property regimes. In this regime, the spouses have the right to keep their ownership in some property designated as personal property, while the property held in acquest gives the right to both spouses to individually dispose of it, with the exception of large donations from acquests which need the consent of the other spouse. However, at the end of the regime, the acquests are divided between the spouses and each of them has a right over half of it.<sup>728</sup>

Therefore, the partnership of acquests combines the main principle of the separation regime, which are respect of the equality and independency of the spouses, with the main principle of

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<sup>727</sup> Q.C.C, Article 397: "A spouse who enters into a contract for the current needs of the family also binds the other spouse for the whole, if they are not separated from bed and board.

However, the non-contracting spouse is not liable for the debt if he or she had previously informed the other contracting party of his or her unwillingness to be bound."

<sup>728</sup> Talpis Jeffrey, 'Matrimonial Regimes in Quebec Private International Law: Where Are We Now?', *Revue du Barreau*, 63 (2003), 181 at 192.

the community regime, which is that of sharing property. Moreover, the separation and community regimes can also be picked by spouses under Quebec law.

### **5.5. Quebec's Different Kinds of Matrimonial Regimes**

The legislator facilitates the way future spouses can choose their matrimonial regime by publicizing the various available regimes. Under Quebec law, the legislator proposes three kinds of property regime to future spouses, one being the default legal regime and the other two through a marital contract. These regimes are:<sup>729</sup>

- 1- The Partnership of Acquests
- 2- The Separation of property
- 3- The Community of property

#### ***5.5.1. The Partnership of Acquests: The Current Legal Matrimonial Regime (Articles 448 - 484 of Q.C.C)***

The default legal regime in Quebec is currently the partnership of acquests. It means that if spouses do not agree on a specific kind of matrimonial regime, this regime automatically applies to their relation. Previously, Quebec had chosen the community of property as its legal default regime. Today, spouses have the choice to agree on the community of property regime.<sup>730</sup>

In 1966, the Quebec Civil Code Commission appointed a sub-committee to examine the proportionate matrimonial regime in Quebec. The Committee report<sup>731</sup> was published in 1966. This report included some changes in the Quebec matrimonial regime and recommended that

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<sup>729</sup> Q.C.C, Article: 485-492

<sup>730</sup> Michael Mcauley, 'The Wanting of Community Property', *Tul. Eur. & Civ. LF*, 20 (2005), 57 at 66-67.

<sup>731</sup> Report of the Matrimonial Regimes Committee, Mimeographed Text, Montreal, 1966.

the Partnership of Acquests be the legal regime applied across Quebec instead of the Community of Moveables and Acquests.<sup>732</sup>

While spouses are free to agree on any regime that suits their needs, the legal regime has an important place in family law and must consider the main needs, current customs and circumstances of average people. It should be practical, adequate and acceptable for spouses who do not enter into alternative contracts. It should be easy to understand for average people and comply with the customs of average people in the province.<sup>733</sup>

Based on different factors in Quebec society, the Committee rejected both the separation of property and the Community of movables and acquests. It proposed a hybrid regime which shares some characteristics with both the separation and community systems. It combines both the equality and independency of spouses present in the separation regime with participation in the marital economic results of the community regime.<sup>734</sup>

The partnership of acquests regime is based on the spouses' joint ownership of the assets generated after the marriage contract. Thus, each spouse's property acquired before marriage is not considered to be a family asset. There are also certain properties which are not considered to be community property, instead remaining the separate property of each spouse. It is for this reason that this marital property regime is considered a hybrid regime.<sup>735</sup>

It divides the property of spouses into two categories explored below.

**“Private property”:** This typically includes (i) property acquired before the marriage contract by each spouse, (ii) property acquired from gifts or inheritance, even if this was received during the marriage, (iii) property having a personal nature, even if it was acquired during marriage, such as clothing, personal documents, jewellery, instruments used for a spouse's personal occupation and support payments or disability pensions.<sup>736</sup>

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<sup>732</sup> Payne and Payne, *Canadian Family Law* at 588.

<sup>733</sup> Douglas H Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', *McGill LJ*, 14 (1968), 113.

<sup>734</sup> *Ibid.*, at 114.

<sup>735</sup> Jeffrey, 'Matrimonial Regimes in Quebec Private International Law: Where Are We Now?', (at 188.

<sup>736</sup> For the complete list of the composition of the Partnership of Acquests, look at Articles 449 to 460 of the Q.C.C.

Each spouse's private property is considered separate and is determined by the law. Each spouse's private property belongs to its owner and does not enter into consideration for the division of marital property at the dissolution of the marriage.<sup>737</sup>

**“Acquests”**: all property other than the above constitutes the community of property, which is also known as acquests. The acquests are typically formed of revenues and fruits originating from private property and revenues derived from each spouse's economic activities during the marriage. In this system, the value of acquests is obtained during the marriage and divided at the dissolution of marriage, while each spouse's private property remains theirs. Both spouses have the right to manage and dispose of acquests, except where gifting this property requires another spouse's consent. The acquests continues until the end of the marital regime, and its value is divided equally between spouses at the dissolution of the marriage.<sup>738</sup>

In the partnership of acquests, the presumption is that all the property is included in it, unless proven otherwise. Where spouses are unable to prove who owns which property, this property is considered to be owned by both and divided equally between them under co-ownership rules.<sup>739</sup>

Whenever some property is acquired using a combination of private wealth and acquests, this property is to be considered private property if the value of the private wealth used to acquire this property is greater than half the latter's total cost. The acquests value must, in this case, be compensated. Otherwise, the property in question is considered to be an acquests, and the private property used to acquire it must be compensated. The compensation must be equal to the value of the enrichment incurred by using the private property or acquests in obtaining the property.<sup>740</sup>

This matrimonial regime is a “joint economic endeavour” since its default presumption is that property obtained under this partnership must be divided equally. The “acquest” refers to the fact that property acquisition is the result of both spouses' joint efforts in the marriage, and not

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<sup>737</sup> Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', (at 501-02.

<sup>738</sup> Jeffrey, 'Matrimonial Regimes in Quebec Private International Law: Where Are We Now?', (at 192.

<sup>739</sup> Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', (at 293.

<sup>740</sup> Q.C.C, Article 451.



an individual endeavour. As such, the property should be divided between the spouses as long as it can be shown that this property was acquired during the marriage.<sup>741</sup>

### **5.5.1.1. The Power of Spouses Over Property**

In the partnership of acquests regime, the spouses have an equal right to manage and use their private property as well as the acquests.<sup>742</sup> This excludes exceptional decisions like making valuable gifts, which requires the consent of the other spouse. Otherwise, the other spouse could ask the court to cancel the gift.<sup>743</sup>

Under this regime, debts are also considered property and each spouse is responsible for the debts they incur. Any debts predating marriage are also allocated to the debtor spouse. Creditors have the right to collect this debt not only from the spouse's separate property, but also from the property which entered in to acquests and generated through the actions of debtor spouse such as his/her income.<sup>744</sup>

The exception is for debts incurred during marital life by each spouse and relating to the daily needs of family and marital matters, such as the children's education or maintenance of the household. This kind of debt can be paid from acquests. However, if a debt belongs to acquests because of one of the spouses, the creditors cannot claim the other spouse's separate property.<sup>745</sup>

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<sup>741</sup> Nicholas Kasirer, 'Testing the Origins of the Family Patrimony in Everyday Law', *Les Cahiers de droit*, 36/4 (1995), 795-841 at 798.

<sup>742</sup> Q.C.C, Article: 461.

<sup>743</sup> Q.C.C: Article 462: "Neither spouse may, however, without the consent of the other, dispose of acquests *inter vivos* by gratuitous title, with the exception of property of small value or customary presents."

<sup>744</sup> Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (at 115-16.

<sup>745</sup> Aj Easson, 'The Reform of Family Property Law', *BTR*, (1973), 80 at 80-83.

### 5.5.1.2. The Dissolution of the Partnership of Acquests Regime

The value of acquests, excepting the properties such as the family's patrimony, will be divided equally at the dissolution of the regime and paid to the relevant spouse in the form of money or property. The partnership of acquests regime may be dissolved by the death of a spouse, a nullity of marriage, the separation of bed and board, a divorce judgment, a change of regime before a notary, or the absence of one of the spouses for at least one year. The court determines the matrimonial regime's time of dissolution and whether it applies retroactively to the date when the parties stopped cohabiting.<sup>746</sup>

At the end of the marriage, the process of dividing the marital property begins with the family patrimony. The concept of family patrimony was defined in 1989 in the Q.C.C. It is made up of the property not included in the separate property of each spouses at the dissolution of the marriage. The rules of family patrimony prevail over other marriage contracts or matrimonial regimes. The rules pertaining to family patrimony are mandatory, and spouses cannot waive them in any kind of marriage contracts, as will be explained later.<sup>747</sup>

Spouses' private property belongs to them if it is not included in the family patrimony. After determining each spouse's private property, the value of the acquests and the share of the parties must be determined. Therefore, when determining any division, it becomes necessary to list the family patrimony, private property, acquests, debts and any other compensation in order to adjust the amount of private property used to buy acquests or vice versa.<sup>748</sup>

Spouses have the option to accept or refuse the division of the acquests' value regardless of the other spouse's decision.<sup>749</sup> However, the spouse who refuses the division of the acquest must still share their acquests with the other spouse. Any renunciation of the division of acquests must

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<sup>746</sup> Look at <http://www4.gouv.qc.ca/en/Portail/Citoyens/Evenements/separation-divorce/Pages/regimes-matrimoniaux-union-civile.aspx#>.

<sup>747</sup> Nicholas Kasirer, 'Couvrez Cette Communauté Que Je Ne Saurais Voir: Equity and Fault in the Division of Quebec's Family Patrimony', *Revue générale de droit*, 25/4 (1994), 569-603 at 574.

<sup>748</sup> Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (at 116-17).

<sup>749</sup> Q.C.C: Article: 467.

be recorded by notarial act or by a judicial declaration and must be registered with the personal and movable real rights within one year from the date of termination of the regime.<sup>750</sup>

If both spouses agree not to share their acquests, they can keep their private property as well as their acquests for themselves. They have the option to agree whether they want to divide the property in another way. If they are unable to reach an agreement, they must go resolve their dispute through a mediator or before the court.<sup>751</sup>

However, in the case where one of the spouses dies, if the surviving spouse does not accept the division of the acquests, the heirs of the diseased spouse cannot accept the division on behalf of the latter.<sup>752</sup>

If one of the spouses dies, the heirs or the surviving spouse may ask for the division of the acquests irrespective of which spouse acquired the property in question.<sup>753</sup> The exception to this rule is the mandatory rule of “family patrimony”.

Finally, in some cases, the spouse can be prevented from receiving their share of acquests. These cases can arise if the spouse has wasted acquests, has administered acquests with bad faith, sold, gave away or misused their or their spouse’s acquests with the intention of preventing them from being divided, or if the spouse has interfered in the administration of their spouse’s acquests after the latter’s death or divorce.<sup>754</sup>

### ***5.5.2. The Community of Property (Article 492 of Q.C.C)***

The community of property was Quebec’s default matrimonial regime for spouses married before the first of July 1970. Currently, spouses can choose this regime in their marriage contract.

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<sup>750</sup> Q.C.C: Article: 469.

<sup>751</sup> <http://www.fsdlawgroup.com/divorce-family-law.html>

<sup>752</sup> Q.C.C: Article: 473.

<sup>753</sup> Q.C.C: Article: 473.

<sup>754</sup> Q.C.C: Article: 471.

Under the community of property, the husband and the wife do not have the same power over their property. According to this regime, the property of the spouses is divided into three categories:<sup>755</sup>

**-Private property:** this kind of property typically includes immovable property obtained before marriage, gifts, inheritance and certain debts. Both spouses have a full right to manage, dispose and use their private property.

**-Community of property:** this includes all the spouses' movable property obtained before marriage and all the movable property acquired during marriage. Excluded from the latter are private property, the husband's income, his salary and the spouse's debts. The husband can manage community property alone, but he needs the consent of his wife or the court's permission to make a valuable gift from community property or to sell or mortgage community property and the family's or business' movable property.

**-The wife's reserved property:** this includes the wife's salary, her savings and any property that she bought using her salary. The wife has the right to manage her reserved property independently, but she needs her husband's consent or the court's permission to make a valuable gift, sell or mortgage an immovable property which is her reserved property, or sell or mortgage movable property belonging to the family or business.<sup>756</sup>

### ***5.5.2.1. The Dissolution of the Community of Property Regime***

If the community of property ends, firstly, the family patrimony should be divided between the spouses. After this division, the wife can accept or waive the community property. If she accepts it, the community property and her reserved property will be divided equally between the spouses. Under the community of property rules, by dividing the community and reserved

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<sup>755</sup> Mcvay Ryan, 'Matrimonial Regimes: Community of Property', (ÉDUCALOI, 2019).

<sup>756</sup> Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (at 117-19).

property, both spouses become co-owners of this property. This is unlike the community of acquests where the value of the property is divided between the spouses. In case the wife waives the community property, she remains the owner of her reserved property and the husband will be the owner of the community property. The husband does not have the same option as the wife to decide about the division process.<sup>757</sup>

#### ***5.5.2.2. Separation of Property (Articles 485 to 491 of Q.C.C)***

The matrimonial regime of separation of property is one of the Q.C.C.'s elective regimes which can be agreed to by the spouses before a notary. This regime is based on the separate property of each spouse, who remains the exclusive owner of the property under their name during the regime. Spouses have complete power over their property and revenues, and each of them has the right to manage, dispose and sell their property. They have independent responsibility over their property as well as their debts. However, they have joint responsibility for debts which result from the day to day needs of the family.<sup>758</sup>

At the end of the regime, each spouse remains the owner of their property. No property, including property obtained during marriage, will be divided. Under this regime, the principle is that there is no property jointly owned by the spouses. The separation of property regime has two notable exceptions.

Firstly, the rules of family patrimony apply to all the matrimonial regimes, including separation of property. As such, family patrimony would be divided between the spouses at the end of the marriage.

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<sup>757</sup> Ryan, 'Matrimonial Regimes: Community of Property'.

<sup>758</sup> See <http://www4.gouv.qc.ca/en/Portail/Citoyens/Evenements/separation-divorce/Pages/regimes-matrimoniaux-union-civile.aspx#>.

Second, the property for which the spouses are unable to determine ownership is treated differently. Here, both spouses are recognized as the co-owners of this property, which is to be divided into equal shares between the spouses, unless one of spouses can prove ownership.<sup>759</sup>

### **5.6. Family Patrimony**

In Quebec's family property system, there are rules created by the legislator that have superiority over all other matrimonial regime rules at the time of the dissolution of the marriage. These rules, called "Family Patrimony" rules, cannot be contractually waived by the married parties. Family patrimony is one of the direct effects of marriage and civil unions and applies automatically to any kind of matrimonial regime. In fact, every marriage or civil union in Quebec is subject to these rules, which determine the legal share in property for each spouse at the end of their marriage. In doing so, it is looking to promote economic equality between the spouses at the end of their marriage.<sup>760</sup>

Family patrimony entered the Quebec Civil Code in 1989 and was enacted as a public order provision in family property law. Since June 24<sup>th</sup>, 2002, this legal institution also applies to civil unions.<sup>761</sup>

Traditionally, the marital relation was protected by governments and its different aspects were regulated by the law. In other words, governments controlled marriage relations. The law largely determined the rights and responsibilities of the married parties and determined their rights to terminate their marriage.

However, since 1970, civil law countries have promoted the role of individual choice in their family law. As such, contractual freedom found a greater role in matrimonial regimes than in normative family law. However, the 1989 enactment of family patrimony in Quebec law, with

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<sup>759</sup> Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', (at 290-91).

<sup>760</sup> Colin Kennedy, 'Loving and Leaving Quebec Style', (2016), <http://www.lawquebecdivorce.com/download/quebec.pdf> at 5.

<sup>761</sup> Kasirer, 'Couvrez Cette Communauté Que Je Ne Saurais Voir: Equity and Fault in the Division of Quebec's Family Patrimony', (at 574).

its mandatory nature, goes against this general trend. It creates an important space for the state to interfere in the private sphere of the family. It clearly limits the contractual freedom of the spouses through its imperative and automatic regime and limits the scope of marriage contracts. It is automatically applied to all parties, whether they were already married or future spouses, and obliges family patrimony to be divided equally at the end of the relation. The married parties cannot contractually waive this provision at the time of marriage.<sup>762</sup>

The main historical reason behind this law abides in the financial difficulties experienced by women after ending their marriage in the separation of property system. After the termination of a marriage based on separation of property, the divorced or widowed woman who did not have any independent financial resources faced financial difficulties. If she had been a housewife during marital life, she was not entitled to any financial compensation. Through the imposition of family patrimony, the obligatory division of certain assets at the end of marriage improved women's economic situation at the end of a marital relation.<sup>763</sup>

Therefore, the main idea behind enacting this regime was to compensate economic equalities between spouses by dividing some property in case of the termination of marriage, irrespective of the selected marital regime, bearing in mind the often asymmetrical status of women regarding the division of property within the family.<sup>764</sup>

The main property included in the family patrimony is property directly linked to marital life, such as the family residence, furniture, motor vehicles used by the family and any retirement plans or benefits accumulated during the marriage. These properties are divided between the spouses equally, regardless of which spouse is the owner, upon termination of the matrimonial regime.<sup>765</sup>

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<sup>762</sup> Anne Revillard, 'Women's Rights Meet Family Law: Family Patrimony in Quebec', *Droit et société*, 62 (2006), 95 at 95-96.

<sup>763</sup> *Ibid.*, at 95-97.

<sup>764</sup> *Ibid.*, at 95.

<sup>765</sup> Q.C.C: Article 414 - 426.

Family patrimony is enacted under the rules of property and is recognized for marriage and civil unions. It is applied regardless of who owns the property, and supposedly demonstrates the value of the personal, physical, emotional and financial contribution of the spouses to family life.

While the family patrimony regime was enacted in 1989, it had been practiced by marriage parties before 1989 as an informal law. By enacting this regime, this customary practice became a legal rule.<sup>766</sup> The same legal notion also existed in Ontario. That is why some scholars hold that “family patrimony” was in fact borrowed from Ontario. But Kasirer believes that family patrimony was not new law enacted in 1989, but rather a “customary norm” already in force in Quebec. By enacting it as a law, family patrimony was generalized to cover all couples, including those who chose the separation of property.<sup>767</sup>

Another reason to enact the family patrimony is the uneven relations in love and economic issues at the time of marriage which result in emotional decisions. Love and hate affect economic relations in a marriage and lead the married parties to treat each other irrationally. Through family patrimony, the legislator found the balance between the married parties’ economic relationship, especially in case of divorce, when the financial struggles become stronger. By sharing the value of property essential to marital life, a just outcome is reached with an economic equilibrium.<sup>768</sup>

Another reason to enact family patrimony is to guarantee equality and an economic equilibrium between the spouses. The main philosophy behind this is that marriage must be considered a “joint economic endeavor”. As such, property obtained during marital life must be considered a result of both the spouses’ efforts. Therefore, some property should be shared equally regardless of who the actual owner is. It must be noted that, the property must belong to one of the spouses or both, and not to some third party.<sup>769</sup> As a result, all property accumulated during marital life

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<sup>766</sup> Nicholas Kasirer, “Testing the Origins of the Family Patrimony in Everyday Law” (1995) 36:4 *Les Cahiers de droit* 795 at 807, online: *Erudit*. 798.

<sup>767</sup> Kasirer, 'Testing the Origins of the Family Patrimony in Everyday Law', (at 795).

<sup>768</sup> Hania M. Hammoud, 'Clearing Away the Legal Mist of the Family Business', (University of Montreal, 2016) at 57-58.

<sup>769</sup> Kasirer, 'Couvrez Cette Communauté Que Je Ne Saurais Voir: Equity and Fault in the Division of Quebec’s Family Patrimony', (at 572).



and linked to the marriage should be considered a joint economic endeavor and therefore family patrimony. This marital property should be like acquests, that is, shared equally between the spouses because its acquisition was the result of both spouses' efforts during the marriage. The same idea underlying acquests is broadly applied here.<sup>770</sup>

The rules on family patrimony consider marriage as a partnership in property closely related to marital life. In fact, the legislation on family patrimony considers marriage as a shared economic life with no consideration for issues like unjust enrichment or respect of the selected matrimonial regime. The rules on family patrimony help establish a balanced system regarding individual property. The property of the family is regarded as the product of the spouses' partnership. Therefore, economic equilibrium between spouses as individuals is the main goal of family patrimony rather than the interest of the family.<sup>771</sup>

Another justification for the establishment of the family patrimony regime is the protection of creditors from any withdrawal in the separation of property system between spouses. Family patrimony allows the judge to prevent any fraudulent partnerships or arrangements between spouses without being concerned about unjust enrichment.<sup>772</sup>

Preventing unjust enrichment in marriage is another theory that helps understand the adoption of family patrimony laws. The idea is that the different kinds of contribution of both spouses have resulted in the collection of family assets, and thus this would not be fair if just one of them is recognized as the owner of such assets. If we do not consider each spouse's share in family assets and recognize what is obtained during marital life by each spouse as his/her private property, this could lead to a form of unjust enrichment. Therefore, to prevent unjust enrichment, the legislator recognizes the right of both spouses to family assets. However, article 422 of Q.C.C. stipulates that the right of a spouse to an equal share of the family patrimony can be altered by the court. The decision of the court may be the result of the "brevity of marriage", the "waste of certain property", or the "bad faith" of one of spouses.<sup>773</sup> Some specialists like Kasirer

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<sup>770</sup> Welstead, 'Domestic Contribution and Constructive Trusts: The Canadian Perspective', (at 161).

<sup>771</sup> M. Hammoud, 'Clearing Away the Legal Mist of the Family Business', (at 56).

<sup>772</sup> *Ibid.*, at 56-57.

<sup>773</sup> Q.C.C., Article 422: "The court may, on an application, make an exception to the rule of partition into equal shares, and decide that there will be no partition of earnings registered pursuant to the Act respecting the Québec

have criticized this article using the legal notion of unjust enrichment in marriage. Kasirer holds the view that an equal share in the family patrimony is not a “bonus for good behavior” which can be removed as a result of a spouse’s “bad faith”. Each spouse should have the right to family patrimony, based on their contribution to family life. As such, disentitling any spouse based on Article 422 is simply a form of unjust enrichment profiting the other spouse.<sup>774</sup>

This article seems to form an exception to the partition of family patrimony into equal shares. In such a case, partitioning the family patrimony into equal shares would have been unjust according to the court. In addition to the situation noted in the article above, the case law shows that certain other variances could also result in an unequal share of family patrimony ordered by the court. These include the age of the spouses, the disproportionate nature of the patrimony, the exceptional contribution made by one of the spouses to family patrimony, or the unequal share of responsibilities within the couple.<sup>775</sup>

### ***5.6.1. The Application of Family Patrimony***

Since July 1989, family patrimony rules have applied to all marriages and, later, civil unions making use of property recognized as family patrimony. It is applied regardless of a spouse’s ownership claim over these properties.

This regime applies even to marriages predating its entry in to force. However, exceptionally, couples married before the first of July 1989 could agree to opt out of family patrimony rules until the end of December 1990. This exclusion did not include registered earnings under the Quebec Pension Plan.<sup>776</sup>

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Pension Plan ([chapter R-9](#)) or to similar plans where it would result in an injustice considering, in particular, the brevity of the marriage, the waste of certain property by one of the spouses, or the bad faith of one of them. “

<sup>774</sup> Kasirer, 'Testing the Origins of the Family Patrimony in Everyday Law', (at 797).

<sup>775</sup> Jeffrey, 'Matrimonial Regimes in Quebec Private International Law: Where Are We Now?', (at 192).

<sup>776</sup> <https://www.educaloi.qc.ca/en/capsules/opting-out-family-patrimony-rules>

While spouses cannot contractually opt out of family patrimony rules, there is a possibility for them to renege their family patrimony rights, in whole or in part, by signing different sharing agreements at the time of their marriage's termination.<sup>777</sup>

In Quebec, family patrimony does not apply to unmarried couples, except those who have formally entered into a civil union.<sup>778</sup>

Article 3089 of Q.C.C.<sup>779</sup> determines whether a marriage falls under Quebec's rules of family patrimony or whether, through international private law mechanisms, another state's laws should be applied. Family patrimony rules apply to spouses who have elected Quebec as their place of domicile. If Quebec is not the spouses' place of domicile, the law of their common residence is applicable to their relation. Failing that, the law of the last common residence is applicable. If this also fails, the law of the place where their marriage was solemnized is applied to their relation.

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<sup>777</sup> Q.C.C., Article 423: "The spouses may not, by way of their marriage contract or otherwise, renounce their rights in the family patrimony."

A spouse may, however, from the death of the other spouse or from the judgment of divorce, separation from bed and board or nullity of marriage, renounce such rights, in whole or in part, by notarial act *en minute*; that spouse may also renounce them by a judicial declaration which is recorded, in the course of proceedings for divorce, separation from bed and board or nullity of marriage.

Renunciation shall be entered in the register of personal and movable real rights. Failing entry within a period of one year from the time when the right to partition arose, the renouncing spouse is deemed to have accepted."

<sup>778</sup> Leckey, 'Cohabitation and Comparative Method', (at 51.

<sup>779</sup> Q.C.C., Article 3089: "The effects of marriage, particularly those which are binding on all spouses regardless of their matrimonial regime, are subject to the law of the domicile of the spouses."

Where the spouses are domiciled in different States, the applicable law is the law of their common residence or, failing that, the law of their last common residence or, failing that, the law of the place of solemnization of the marriage."

### ***5.6.2. The Property Included in Family Patrimony***

The property which must be included in family patrimony is determined by the legislator. This property may or may not be owned by each of the spouses, and are as follows according to article 415 of the Q.C.C.:

- The residences of the family or the rights which confer use of them, which thus encompasses both the primary and secondary residence.
  
- The movable property with which they are furnished or decorated, and which serves for the use of the household.
  
- The motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan.
  
- The payment of contributions into a pension plan, which entails an accrual of benefits under the pension plan.
  
- The accumulation of services recognized for the purposes of a pension plan.
  
- The registered earnings, during the marriage, of each spouse pursuant to the Act respecting the Québec Pension Plan (chapter R-9) or similar plans.

According to this article, the following property is generally excluded from family patrimony, though this is not an exhaustive list:

- Property devolved to one of the spouses by succession or gift before or during the marriage. According to article 418 of the Q.C.C, the succession or gift received by one of the spouses is not excluded from family patrimony but may be subject to deduction from the net value of family patrimony.<sup>780</sup>

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<sup>780</sup> Q.C.C, Article 418: "Once the net value of the family patrimony has been determined, a deduction is made from it of the net value, at the time of the marriage, of the property then owned by one of the spouses that is included in the family patrimony; similarly, a deduction is made from it of the net value of a contribution made by one of the spouses during the marriage for the acquisition or improvement of property included in the family patrimony, where the contribution was made out of property devolved by succession or gift, or its reinvestment.

- The registered earnings of each spouse during the marriage, pursuant to the *Act Respecting the Quebec Pension Plan* or similar plans and accrued benefits under a retirement plan governed or established by an Act which grants a right to death benefits to the surviving spouse, where the marriage is dissolved as a result of death.
- Any other property not included in the family patrimony is excluded from coverage such as investments and income properties.

### **5.6.3. *The Partition of Family Patrimony***

For the partition of the family patrimony, in the event of separation from bed and board, or if the marriage was dissolved or annulled, the net value of the family patrimony after deduction of the all debts is equally divided between the spouses. In this division, the net value of the family patrimony is calculated and divided between the spouses, and not the property itself.<sup>781</sup> To calculate the net value of family patrimony, the following items are considered:

- 1- The date from which to start calculating the value of family patrimony is the date of the death of the spouse or on the date of the institution of the action in which separation from bed and board, divorce or nullity of the marriage, as the case may be, is decided.<sup>782</sup>
- 2- The court may, however, upon the application of one or the other of the spouses or of their successors, decide that the net value of the family patrimony will be determined according to the value of such property and such debts on the date when the spouses ceased sharing a community of life.<sup>783</sup>

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A further deduction from the net value is made, in the first case, of the increase in value acquired by the property during the marriage, proportionately to the ratio existing at the time of the marriage between the net value and the gross value of the property, and, in the second case, of the increase in value acquired since the contribution, proportionately to the ratio existing at the time of the contribution between the value of the contribution and the gross value of the property.

Reinvestment during the marriage of property included in the family patrimony that was owned at the time of the marriage gives rise to the same deductions, adapted as required.”

<sup>781</sup> Q.C.C : Article 417.

<sup>782</sup> Q.C.C : Article 417.

<sup>783</sup> Q.C.C : Article 417.

- 3- The market value of family patrimony is considered for calculating its net value.<sup>784</sup>
- 4- The net value of the family patrimony is determined according to the value of the property composing the patrimony and the debts.
- 5- The debts contracted for the acquisition, improvement, maintenance or preservation of the property are deducted from the net value of the family patrimony.<sup>785</sup>
- 6- Once the net value of the family patrimony has been determined, a deduction is made from it, at the time of the marriage, by the property then owned by one of the spouses that is included in the family patrimony. A further deduction from the net value is made of the increase in value acquired by the property during the marriage, proportionately to the ratio existing at the time of the marriage between the net value and the gross value of the property.<sup>786</sup>
- 7- A deduction is made from the family patrimony of the net value of a contribution made by one of the spouses during the marriage for the acquisition or improvement of property included in the family patrimony, where the contribution was made from property devolved by succession or gift, or its reinvestment. A further deduction from the net value is made of the increase in value acquired since the contribution, proportionately to the ratio existing at the time of the contribution between the value of the contribution and the gross value of the property.<sup>787</sup>
- 8- Reinvestment during the marriage of property included in the family patrimony that was owned by one party at the time of the marriage gives rise to the same deductions, adapted as required.
- 9- Finally, the partition of property is effected by giving in payment or by payment in money. If partition is effected by giving in payment, the spouses may agree to transfer ownership of other property than that composing the family patrimony.<sup>788</sup>

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<sup>784</sup> Q.C.C : Article 417.

<sup>785</sup> Q.C.C : Article 416.

<sup>786</sup> Q.C.C : Article 418.

<sup>787</sup> Q.C.C : Article 418.

<sup>788</sup> Q.C.C, Article 419.

## 5.7. *Formalities for Completing a Marriage Contract or Changing It*

### 5.7.1. **Formalities at the Time of Marriage**

At the time of marriage, as explained previously, if the spouses did not select any specific marriage contract, the default matrimonial regime is automatically applied. In this case, there are no required formalities for the spouses to perform at the time of marriage.

If spouses agree to select a regime other than the default regime, they must sign a contract before a notary. This contract must include the rules which will apply to their marital property.<sup>789</sup>

In Quebec, all marriage contracts must be executed by a notary. At civil law, the notary has an important role in the execution of legal contracts. The notary plays a legal role in drafting contracts, authenticating legal documents and taking records of important documents. He often advises his clients on certain legal details regarding the execution of legal contracts, while he has no interest in the execution of the contracts.<sup>790</sup>

In marriage contracts, spouses must comply with the stated procedural requirements explained by the notary. Then, the notary prepares the marriage contract and the spouses sign it. The notary must keep the marriage contract in his records. He conserves the contract along with the marriage certificate.<sup>791</sup>

The notary also has the obligation to submit the notice relating to the marriage contract to the register of personal and movable real rights. In doing so, the marriage contract becomes officially binding on third parties such as creditors.<sup>792</sup>

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<sup>789</sup> Q.C.C, Article 440.

<sup>790</sup> John Henry Merryman and David Scott Clark, *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials* (Bobbs-Merrill Company, 1978) at 456-547.

<sup>791</sup> Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', (at 502-03.

<sup>792</sup> Q.C.C: Article 442.

### 5.7.2. *Subsequent Changes in the Types of Marriage Contracts*

All spouses have the right to change their initial matrimonial regime. This is also the case for spouses who did not choose any special regime initially. However, changing matrimonial regime during marital life must satisfy certain formalities.

Any decision to change the matrimonial regime must be mutually agreed upon by the spouses, and such an agreement must not adversely affect the rights of third parties. Moreover, any change must be effected before a notary. The notary officially registers and makes such a change effective. In doing so, the new matrimonial regime becomes valid and opposable to third parties and creditors.<sup>793</sup>

In addition to executing the change in the marriage contract, the notary must mention all the changes in the original contract and any copy of this contract that is held elsewhere.<sup>794</sup>

To change the matrimonial regime, the spouses' property must be determined under the previous regime and partitioned. The new system of property starts on the date of effectiveness of the new regime. The marital property in the last regime is liquidated, which requires the division of marital property and liabilities. As an example, if the spouses desire to change their matrimonial regime from a partnership of acquests to one based on the separation of property, the acquests acquired between the start of the marriage and change of regime must be distributed, much akin to divorce cases. In the new regime, the new system of property will hereafter apply to the spouses.<sup>795</sup>

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<sup>793</sup> Merryman and Clark, *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials* at 457.

<sup>794</sup> Q.C.C. Article 441: "The notary executing a marriage contract changing a previous contract shall immediately notify the depositary of the original marriage contract and the depositary of any contract changing the matrimonial regime. The depositary is bound to enter the change on the original and on any copy he may make of it, indicating the date of the contract, the name of the notary and the number of his minute."

<sup>795</sup> Formalities for the adoption of a marriage contract or a subsequent change in the type of contract at <https://guichet.public.lu/en/citoyens/famille/vie-maritale/mariage/regime-matrimonial.html>



## 5.8. The Spouses' Marital Rights and Duties

Under Quebec law, marriage is a serious commitment bringing marital rights and duties on the spouses. According to the Q.C.C, the spouses have the same rights and obligations in marriage. These rights and duties include owing each other respect, fidelity, succor and assistance. Spouses are bound to share a community of life.<sup>796</sup> They must live together, though living together does not necessarily mean living under the same roof. Rather, it refers to having a loving relationship, treating each other as family members, and having the same goals and common interests in marital life.<sup>797</sup> They have the obligation to manage the family together, take care of the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom.<sup>798</sup>

Spouses must choose the family residence together.<sup>799</sup> They must contribute to the expenses of marriage such as housing, clothing and food proportionately to their respective means.<sup>800</sup> This contribution may take different forms, and include activities within the home.<sup>801</sup>

Under Article 393 of the Q.C.C, in marriage, both spouses retain their respective names, and exercise their respective civil rights under those names. However, marital life allows one spouse to represent the other in daily family tasks. This is to avoid involving both spouses in daily and routine family decisions. The Q.C.C states that for the current needs of a family, contracts binding one spouse binds the other entirely, unless they are separated from bed and board, or unless one party previously informed the other that she/he does not want to be bound.<sup>802</sup> To morally and materially direct the family, each spouse may give the other a mandate to be represented in such acts that may be necessary for the family.<sup>803</sup>

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<sup>796</sup> Q.C.C: Article 392.

<sup>797</sup> Carlisi Emanuele, 'Marriage: A Serious Commitment', (ÉDUCALOI, 2019).

<sup>798</sup> Q.C.C: Article 394.

<sup>799</sup> Q.C.C: Article 395.

<sup>800</sup> Leckey, 'Cohabitation and Comparative Method', (at 51.

<sup>801</sup> Q.C.C: Article 396.

<sup>802</sup> Q.C.C: Article 397.

<sup>803</sup> Q.C.C: Article 398.

Marriage also brings certain economic rights and protection to the spouses during their relation and at the end of the marriage. These legal rights and protection include the protection of the family residence and its furniture, the right to one's share of marital property at the end of marriage, the inheritance right between spouses if there is no will, and the right to spousal support between spouses, as further explained in the following section.<sup>804</sup>

## 5.9. Spousal Support

Spousal support is one of the rights resulting from the marriage which is recognized under Canadian and Quebec law. The 1985 Divorce Act of Canada and the 1991 Quebec Civil Code apply to spousal support in Quebec. Theoretically, the Spousal Support Advisory Guidelines released by the Canadian department of justice apply across Canada. These guidelines were prepared and revised by a group of professors and experienced practitioners as practical guidelines to assist lawyers, courts and any other users. While the Guidelines are not legally binding, they have been used by lawyers, mediators and judges because they provide basic principles and structure to determine the reasonable balance in each case. However, Quebec courts resisted the application of the Guideline.<sup>805</sup>

Spousal support, also called alimony, is one of the obligations incumbent on each spouse following a legal separation, divorce or dissolution of a civil union. It is a payment from one spouse to the other to compensate any economic advantage or disadvantage arising from the marriage or its dissolution. Alimony seeks to help each spouse to achieve economic self-sufficiency within a reasonable time-frame. Alimony is based on the needs, resources and situation of each spouse and is generally considered to be a temporary measure.<sup>806</sup>

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<sup>804</sup> Emanuele, 'Marriage: A Serious Commitment'.

<sup>805</sup> Lazare, 'Spousal Support in Quebec: Resisting the Spousal Support Advisory Guidelines', (at 972).

<sup>806</sup> Kennedy, 'Loving and Leaving Quebec Style', at 13.

All spouses who are either married or bound by a civil union are obliged to support each other during their relation. This obligation includes basic needs like food, care and a place of residence. While this obligation continues during marital life, it may be extended following the end of the relation if a spouse is granted it by a court.<sup>807</sup>

Spousal support is not automatically payable and must be requested. It may be requested in an application for separation from bed and board, also called a legal separation, a divorce, or in an application for the dissolution of a civil union.<sup>808</sup>

### ***5.9.1. The Meaning of “Spouse” in Spousal Support***

Spousal support refers to the meaning of “spouses” under the definition of Canada’s Civil Marriage Act. Section 2 of the Civil Marriage Act stipulates: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” Therefore, same sex spouses are included under Canadian law. Section 2(1) of the Divorce Act of Canada ratified the same idea by defining spouses as “either of two persons who are married to each other”.<sup>809</sup>

While the term “spouse” is used under this notion, in some provinces it includes couples who are living together without a marital relation. In Quebec, however, the notion of “spouse” can only be applied within the scope of a marriage or civil union, except for certain laws which deem de facto partners to be “spouses” for their application, such as fiscal laws. In Quebec there is no legal obligation to pay spousal support in a de facto relation.<sup>810</sup> However, de facto spouses

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<sup>807</sup> Payne and Payne, *Canadian Family Law*.

<sup>808</sup> Alison Diduck and Helena Orton, 'Equality and Support for Spouses'(1994)', *MLR*, 57 (681 at 682).

<sup>809</sup> Payne and Payne, *Canadian Family Law* at 215.

<sup>810</sup> For the legal situation of de facto relationships in Quebec, see Quebec (Attorney General) v A, 2013 SCC 5 which is known as Eric v. Lola. This case is about de facto spouses who, in Quebec, have no right to claim spousal support or to apply for a division of family property upon separation. The main question in this case was whether this legal regime violated the equality rights of such spouses under s. 15 of the Canadian Charter of Rights and Freedoms.

While a majority of the Canadian Supreme Court judges found that the Quebec’s legal treatment of de facto spouses violated such rights, it decided that these rules could be upheld from a constitutional standpoint, notably as they reflected a legislative choice favoring freedom, as enshrined in the Quebec Civil Code. See more about this case, in Leckey, 'Strange Bedfellows'; Alain Roy, 'Affaire Éric C. Lola: Une Fin Aux Allures De Commencement', *XXe Conférence des juristes de l'État* (2013), 259-308.

may themselves agree on spousal support in their cohabitation contract or in any separation agreement.<sup>811</sup>

Spousal support includes the former spouse support, which does not have the ordinary meaning of “spouse”. That is why the Canada Divorce Act says: “In sections 15.1 to 16, *spouse* has the meaning assigned by subsection 2(1), and includes a former spouse.”<sup>812</sup>

### ***5.9.2. Equality Between Spouses***

Both spouses are entitled to receive spousal support if they are legally qualified to do so. Legal equality entails that the same rights and obligations exist for both married parties. Therefore, both the husband and wife may be legally subject to a court order to receive payment if they have a financial deficiency. However, in practice, husbands rarely obtain a spousal support order.<sup>813</sup>

### ***5.9.3. The Different Kinds of Spousal Support Orders***

The court may order different types of spousal support. Based on section 15.2(1) of Divorce Act<sup>814</sup>, a courts’ spousal order must be made at the request of one or both spouses and may be:

- To secure a lump sum
- To pay a lump sum
- To secure and pay a lump sum
- To secure periodic sums
- To pay periodic sums

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<sup>811</sup> Leckey, 'Strange Bedfellows', at 211-13. Also see Leckey, 'Cohabitation and Comparative Method', (at 51.

<sup>812</sup> Section 15 of Divorce Act.

<sup>813</sup> Payne and Payne, *Canadian Family Law* at 215.

<sup>814</sup> The Divorce Act of Canada: 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

- To secure and pay periodic sums.

The court's order follows one of these types of orders or a combination of various orders. As such, the court's decision is not limited to the form of these orders. The court can consider the case on its merits and apply a proportionate order to the situation.<sup>815</sup>

An order may also be granted in the form of an interim or permanent relief and may be changed if there is a material change of circumstances. According to section 15(2).3, in both cases, the court may make its order for a definite or indefinite period, or until a specific event occurs. The court may impose terms, conditions or restrictions in connection with the order as it sees fit and just.

If there are no specific terms and conditions directing spousal support after the death of a spouse, the spousal support order terminates by upon the death of one of the spouses. However, the order could stipulate otherwise.<sup>816</sup>

#### ***5.9.4. Different Factors Considered for Spousal Support Orders***

Different factors must be considered by the court to decide if there is a right to receive spousal support, and if so, the kind of spousal support order, the amount required and the length of the support. Section 15.2(4) of the Divorce Act determines the factors relevant to determining spousal support. These factors include the conditions, means, needs and other circumstances of each spouse, such as the following:

- the length of time the spouses cohabited.
- the functions performed by each spouse during the cohabitation.
- any order, agreement or arrangement relating to the support of either spouse.<sup>817</sup>

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<sup>815</sup> Diduck and Orton, 'Equality and Support for Spouses'(1994)', (at 682-83.

<sup>816</sup> Payne and Payne, *Canadian Family Law* at 234-35.

<sup>817</sup> Divorce Act of Canada: Article 15. (2): 4

The terms “needs” and “means” must be interpreted according to each special case and with regard to the situation of each spouse. In other words, a spousal support decision is derived from the particular facts in each case.

Examples in applying the meaning of “needs” and “means” can be seen in assessments of matrimonial property settlements. Based on these assessments, entitlement to spousal support and the amount needed can be ordered by the court. Different factors, such as a long marital life, the standards of living before separation and the kinds of assets shared in the matrimonial property settlement will be considered. Property division based on the matrimonial regime is legally exercised before spousal support decisions and therefore affects the order.<sup>818</sup>

The standard of living before separation, especially when there has been a long marital life, can be considered as a “need” for the purposes of the spousal support order. The kinds of assets which are divided between income-producing and non-income-producing can be considered as “means”. Therefore, in considering the matrimonial property assessment, the court can understand the means available to the spousal support’s applicant to produce income such as employment and investment income. The applicant’s needs of spousal support, based on the standard of living during marital life, can also be determined. It is up to the applicant to show their need for spousal support based on their available budget and the reasonable budget sufficient to cover the applicant’s costs of living according to the standard lifestyle they had before separation.<sup>819</sup>

The word “means” in *Strang v. Strang*<sup>820</sup> is defined to include “*all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which a person received gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person.*”

“Means” includes capital assets. However, it is important to consider the overall financial capability of each former spouse. In other words, the overall means of both spouses must be comparable. Using each spouse’s capital and income assets to support themselves or their

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<sup>818</sup> Diduck and Orton, 'Equality and Support for Spouses'(1994)', (at 682-83.

<sup>819</sup> Payne and Payne, *Canadian Family Law* at 235-36.

<sup>820</sup> *Strang v. Strang*, (1992)2 S.C.R. 112 at 119.

former spouse must be determined case by case. The goal, as stated in *Moge v. Moge*<sup>821</sup>, is to equally distribute the economic consequences of the marriage and its termination.<sup>822</sup>

“Needs” must be considered on a case by case basis as it is a flexible and relative concept. One of the determining factors for needs is the standard by which the spouses lived a long marital life, which varies from case to case. Another factor to consider is each former spouse’s standard of living after separation. The former spouses’ post separation living standard must not be too far apart. Spousal support must consider both the spouses’ needs and their standard of living, to be adjusted in case the financial situation of a spouse changes.<sup>823</sup>

“Condition” refers to the spouses’ personal condition including their age, needs, obligations, health, marital situation and dependents. Special conditions like being sick or disabled must be considered in the spousal support order. The illness may have different causes and it does not need to be related to marriage or its termination to be considered by the court.

It is also notable that in case of intentional unemployment or underemployment by a spouse, their earning capacity is also considered in the amount of spousal support entitlement.<sup>824</sup>

“Other circumstances” of the spouses include a wide range of circumstances which it is not possible to enumerate. The Act states three main categories of such circumstances. These circumstances must be “so nearly touching the matter in issue as be such that a judicial mind ought to regard it as a proper thing to be taken into consideration.”<sup>825</sup>

In practice, these circumstances are considered “other circumstances” affecting spousal support orders: language skills’ deficiency, unemployment, weakness of professional qualifications, general skills deficiency, the chance of remarriage, possibility of inheritance and many other conditions.<sup>826</sup>

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<sup>821</sup> *Moge v. Moge*, (1992) 3 S.C.R. 813, 43 R.F.L. (3d) 345.

<sup>822</sup> Carol Rogerson, 'The Canadian Law of Spousal Support', *Family Law Quarterly*, 38/1 (2004), 69-110 at 80-81.

<sup>823</sup> *Ibid.*, at 71-72.

<sup>824</sup> Payne and Payne, *Canadian Family Law* at 236-37.

<sup>825</sup> *Rogers v. Rogers* (1962), 3 F.L.R. 398 at 402 (N.S.W.S.C.).

<sup>826</sup> Craig Martin, 'Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law', *U. Toronto Fac. L. Rev.*, 56 (1998), 135 at 140.

The duration of the marriage is also considered to be an important circumstance affecting spousal support order. A short-term marriage is generally a circumstance which causes spousal support entitlement to be refused, unless there was a significant sacrifice by a spouse for the marriage. On the other hand, a long-term marriage wherein the wife contributed in different aspects, mainly by taking care of the home and children, allowing the husband to promote his skills and extend his business activities and lead to the husband's income increase after separation, is considered a textbook case for courts to order an increase in spousal support even if these promotions happen after the separation. This is because both man and woman have contributed to the economic consequences of the marriage and its termination.<sup>827</sup>

It is notable also that there is no time limitation for applying for spousal support under the Divorce Act. The former spouse is free to apply for spousal support at any time after the separation. However, a considerable delay in applying for spousal support may weaken the claim, though there is no ban on it.<sup>828</sup>

#### ***5.9.5. The Effect of Misconduct on the Spousal Support Order***

Based on the Divorce Act, spousal misconduct of any kind in marriage is not to be considered by the court.<sup>829</sup> Therefore, spousal misconduct is excluded from the relevant factors determining the spousal support application. The underlying idea is that spousal support is not a tool to punish guilty spouses and reward innocent ones.<sup>830</sup> However, the Supreme Court of Canada has distinguished between misconduct in itself, which does not have any impact on spousal support, and misconduct towards the economic condition of the spouse, which may affect spousal support determination and must be considered by the court. One example clarifying the Supreme Court's position is adultery, which often results in the termination of marriage.<sup>831</sup> By itself, adultery is not an effective factor in determining spousal support under the Divorce Act.

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<sup>827</sup> Payne and Payne, *Canadian Family Law* at 240-41.

<sup>828</sup> Miller v. Miller, (2009) NSSC 294

<sup>829</sup> Divorce Act of Canada: Article 15. (2): 5.

<sup>830</sup> Connelly v. Connelly (1974), 16 R.F.L. 171 at 176-78 (N.S.C.A); Hockey-Sweeney v. Sweeny, (2004) O.J. No.4412 (C.A.).

<sup>831</sup> Payne, 'Family Property Reform as Perceived by the Law Reform Commission of Canada', (at 295.



However, the economic impact of this misconduct, such as a depression resulting in the spouse's inability to work, therefore impacting her economic status, is a relevant factor which must be considered by the court when determining spousal support. As such, the economic consequence of a spousal misconduct may change and affect the spousal support order.<sup>832</sup>

#### **5.9.6. Objectives of the Spousal Support Order**

Section 15.2(6) of the Divorce Act states the objectives of spousal support as follows:

- (a)** To recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.
- (b)** To apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage.
- (c)** To relieve any economic hardship of the spouses arising from the breakdown of the marriage.
- (d)** In so far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

These four objectives are met through different orders of the court, depending on each case. These are not specifically achieved through the application of one policy. The court must consider how its order can lead to the best result given the present and future financial situation of both spouses and their children in each case. For this reason, there is no fixed rule applied by the court. Rather, the court must analyze the appropriate kind of orders achieving specific objectives in each case.<sup>833</sup>

The four abovementioned objectives are not absolutely independent. Depending on each case, these objectives may be combined or sought independently. In addition, none of these objectives prevails over others. That is why all the objectives in the Divorce Act must be examined on a

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<sup>832</sup> Leskun v. Leskun (2006) 1 S.C.R. 920.

<sup>833</sup> Easson, 'The Reform of Family Property Law', (at 81.

case-by-case basis. For example, if one objective such as self-sufficiency is achieved in a case, this does not mean other objectives will not be examined. All the objectives must be satisfied.<sup>834</sup>

Some stated objectives have a compensatory role while others are based on the equitable contribution of spouses to the marriage and its breakdown.

The first objective mentioned above refers to the idea that any economic advantage and disadvantage arising from marriage and its dissolution must be equally distributed between the spouses. This objective serves to recognize the fact that any contribution of a spouse, especially the contribution of the wife at home and with the children, must be considered in the spousal support order. If the wife lacks financial resources because she took on these activities, she must be adequately compensated. The wife's sacrifices during marital life for her husband and children may potentially have caused her to not earn income, instead helping her husband develop his career. This would justify spousal support order. Therefore, this objective has a compensatory nature.<sup>835</sup>

The second objective refers to parents bearing the financial consequences of child caring in addition to direct living costs. This refers to the economic loss resulting from child care, particularly personal financial consequences resulting therefrom, such as obstacles to a career and skills development. These financial consequences must be compensated and as such, the objective has a primarily compensatory nature.<sup>836</sup>

The third objective is "to relieve any economic hardship of the spouses arising from the breakdown of the marriage". This objective refers to a spouse's obligation take on the economic burden of separation. The objective insists that it is the family member's primary obligation to relieve economic hardship, and not that of the State.<sup>837</sup> This objective is not exclusively compensatory, since it is not about compensating the economic consequences of the marriage's breakdown, but rather to establish greater objective when a loss under the first objective cannot be proven, yet the separation nevertheless caused economic hardship. This can, for example, be the case when a person who lived under a marital relation and enjoyed marital support suddenly

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<sup>834</sup> Martin, 'Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law', (at 141.

<sup>835</sup> Ibid., at 140-41.

<sup>836</sup> Rogerson, 'The Canadian Law of Spousal Support', (at 102.

<sup>837</sup> Moge v. Moge, (1992) 3 S.C.R. 813, 43 R.F.L. (3d) 345.

finds herself alone after the separation. Also, under this objective, economic disadvantage as stated in the first objective is distinguished from an economic disadvantage resulting from a breakup with no compensation.<sup>838</sup>

The fourth objective is to promote economic self-sufficiency. This is like the third objective in that it also does not have an exclusively compensatory nature. A spouse's lack of economic self-sufficiency may arise as a result of disadvantages caused by marriage or separation. These may or may not be related to the marriage or separation, and can have a completely independent cause such as career or health related reasons.<sup>839</sup> This objective also underlines the responsibility of each spouse to attempt to achieve economic self-sufficiency, as practicable in a reasonable time. Many judges focus on the needs and abilities of the former spouse when determining their spousal support order in Canada. This is done to adapt to the economic realities of the spouse, especially if the latter decides to enter into a new marital life after separation.<sup>840</sup> In addition, the court may achieve this objective by ordering a periodic spousal support requiring review after a specific time. Life-time support is not appropriate for a spouse who has a reasonable potential to achieve economic self-sufficiency. As an exception, life-time support may be granted to a spouse whose economic disadvantage resulting from marriage or its breakdown prevents him or her from promoting themselves.<sup>841</sup>

A dependent spouse must aim to achieve economic self-sufficiency. The spousal support order must not cause spouses to be dependent on the support and neglect promoting themselves economically. It is for this reason that a court may order a spouse to provide the other spouse with support and information to achieve economic self-sufficiency.<sup>842</sup>

The term "economic self-sufficiency", such as "needs" and "means", does not have an absolute meaning. Rather, these terms must be examined and interpreted on a case by case basis, with regards to the situation of each spouse. These terms are also given meaning by considering the marketplace. While the court does not require former spouses to be equal, it should consider

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<sup>838</sup> Diduck and Orton, 'Equality and Support for Spouses'(1994)', (at 690-91.

<sup>839</sup> Bracklow v. Bracklow, (1999), 44 R.F.L. (4<sup>th</sup>) 1 at 28-29 (S.C.C).

<sup>840</sup> Bracklow v. Bracklow, (1999), 1 S.C.R. 420, 44 R.F.L. (4<sup>th</sup>) 1 at para.57.

<sup>841</sup> Shields v. Shields, 2008 ABCA 213.

<sup>842</sup> Romanoff v. Romanoff (1992), 41 R.F.L. (3d) 433(Man.Q.B).

fairness.<sup>843</sup> Economic self-sufficiency is considered a relative term and the court should consider the financial situation of the spouse during marriage and at the time of separation. As an example, an economically dependent long-term spouse, who has the responsibility of taking care of the home and raising children, is entitled to spousal support of an extent sufficient to cover the costs for maintaining the same standard of living as that of her married life, if this is feasible. If this is not feasible, the spouse's financial situation should at the very least not significantly differ from that of her ex-spouse's.<sup>844</sup> After a long-term marriage affecting the earning capacity of the working spouse, the spousal order must seek to provide a similar lifestyle for both spouses until any economic disadvantages resulting from marriage and its breakdown have been removed.<sup>845</sup>

On the other hand, a short-term marriage with no children probably had little effect on the economic situation of spouses, and therefore does not usually entail periodic spousal support. However, a lump sum support may be ordered to compensate a spouse if there was any economic loss. In the case where there is a child, a marriage of short-term nature does not prevent ordering a periodic spousal support for the spouse who cannot work full-time due to the need to raise the child.<sup>846</sup>

It is notable that the spouse who receives spousal support for having suffered an economic disadvantage from the marriage or its breakdown is not prevented from receiving support even if this spouse eventually achieves economic self-sufficiency.<sup>847</sup>

### ***5.9.7. The Principle of Entitlement to Spousal Support***

The first step in determining spousal support is analysing the entitlement. There are three main grounds which can be used by the court to recognize whether a spouse is entitled to receive spousal support;

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<sup>843</sup> *Faulkner v. Faulkner* (1986), 4 R.F.L. (3d) 182 (B.C.S.C.).

<sup>844</sup> *Atwood v. Atwood*, (1968) P. 591(Eng.).

<sup>845</sup> *Moge v. Moge*, (1992) 3 S.C.R 813 at 870.

<sup>846</sup> *Diduck and Orton*, 'Equality and Support for Spouses'(1994)', (at 682-83.

<sup>847</sup> *Leckey*, 'Family Law as Fundamental Private Law', (at 73.

1. Compensatory Principle
2. Non- compensatory Principle
3. Contractual Principle

The judge has broad judicial discretion to determine whether a spouse is entitled to spousal support under the Divorce Act, and related questions like its amount and duration. The three above principles provide grounds on which the judge orders spousal support entitlement. These principles are derived from statutory provisions and relevant cases.<sup>848</sup> While there is no absolute principle in each case, the role of the judiciary is to find relevant factors according to the statutory objectives of spousal support and apply them in the different cases, so as to ensure that the best balance is struck between the parties to achieve a just outcome.<sup>849</sup>

The decision of the court regarding spousal support must comply with legal provisions, objectives and factors determined in the Divorce Act and provincial legislations. This is why the authority of the court in ordering spousal support is statute-based.<sup>850</sup>

Entitlement to spousal support is driven by a combination of factors and objectives stated in section 15.2(4) and (6) of the Divorce Act. They are stated in *Bracklow v. Bracklow*:

*“the law recognizes three conceptual grounds for entitlement to spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory.”*<sup>851</sup>

The Spousal Support Advisory Guidelines of Canada defines compensatory spousal support as follows:

*“Compensatory claims are based either on the recipient’s economic loss or disadvantage as a result of the roles adopted during the marriage or on the recipient’s conferral of an economic benefit on the payor without adequate compensation.”*

The Guidelines continue with common examples of compensatory spousal support:

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<sup>848</sup> *Bracklow v. Bracklow*, (1999), 1 S.C.R. 420, 44 R.F.L. (4<sup>th</sup>) 1 at 21.

<sup>849</sup> Rogerson, 'The Canadian Law of Spousal Support', (at 74-75).

<sup>850</sup> *Willick v. Willick*, (1994) 3 S.C.R. 670.

<sup>851</sup> *Bracklow v. Bracklow*, (1999), 1 S.C.R. 420, 44 R.F.L. (4<sup>th</sup>) 1 at 21.

*“Being home with children full-time or part-time, being a “secondary earner”, having primary care of children after separation, moving for the payor’s career, supporting the payor’s education or training; and working primarily in a family business.”*

The compensatory principle must be distinguished from non-compensatory principle. Compensatory support is not based on the spouses’ economic interdependency and loss of standard of living.<sup>852</sup>

The Guideline defines the non-compensatory principle of entitlement as follows:

*“Non-compensatory claims involve claims based on need. “Need” can mean an inability to meet basic needs, but it has also generally been interpreted to cover a significant decline in standard of living from the marital standard. Non-compensatory support reflects the economic interdependency that develops as a result of a shared life, including significant elements of reliance and expectation, summed up in the phrase “merger over time”. “*

Common examples for claiming non-compensatory spousal support are:

*“the length of the relationship, the drop-in standard of living for the claimant after separation, and economic hardship experienced by the claimant.”*

Entitlement may be based on both compensatory and non-compensatory principles. A long marriage with children is a common example granting entitlement to spousal support based on both compensatory and non-compensatory principles. Generally, the early years of a marriage entail factors for compensatory entitlement, while long-lasting marriages also come with factors for non-compensatory entitlement.<sup>853</sup>

The third type of entitlement is based on the contractual principle. The contractual principle includes both formal domestic contracts and informal agreements. Spouses may agree on different kinds of agreements regarding economic support before or during marriage. It is worth noting that any pre-nuptial or nuptial agreement must respect the requirements imposed by imperative provisions of law and public order. Future spouses can agree on certain kinds of gifts

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<sup>852</sup> Martin, 'Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law', (at 141-42.

<sup>853</sup> Diduck and Orton, 'Equality and Support for Spouses'(1994)', (at 690-91.

in the form of property, money or some other support. However, agreements regarding future economic support, such as child support or spousal support, are not enforceable. They may however be taken into consideration at the time of divorce by the judge.<sup>854</sup>

All entitlement principles, including both compensatory and non-compensatory principles, must be considered by the judge in each case. The compensatory principle exists to provide a more equitable distribution of economic rights after divorce, while the non-compensatory principle serves to protect a spouse who remains alone in economic hardship after the termination of the marriage. This is why the non-compensatory principle must consider the needs, means and economic self-sufficiency of such a spouse. These principles of entitlement may be considered complementary to provide justice and as such do not exclude one another in each case.<sup>855</sup>

It is important for the court to consider all relevant factors stated in section 15.2(4) of the Divorce Act and attempt to achieve the objectives stated in section 15.2(6) of the Divorce Act by ordering proportionate spousal support. As was stated in the *Bracklow v. Bracklow*:

*“Judges must exercise their discretion in light of the objectives of spousal orders as set out in section 15.2(6), and after having considered all the factors set out in section 15.2(4) of the Divorce Act. By directing that the judge considers factors like need and ability to pay..., the Divorce Act left in place the possibility of non-compensatory support.”*<sup>856</sup>

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<sup>854</sup> <https://iclg.com/practice-areas/family-laws-and-regulations/canada-quebec>

<sup>855</sup> Rogerson, 'The Canadian Law of Spousal Support', (at 75-76.

<sup>856</sup> *Bracklow v. Bracklow*, (1991) 1S.C.R 420, 44 R.F.L. (4th) 1 at 22.

## **6 Chapter Six: Conclusions and Recommendations: Potential Quebec-Inspired Reforms of the Legal Regime of Matrimonial Unions in Iran**

### **Introduction**

Family law is an important part of every legal system, as it deals with one of the main pillars of every society. In civil law jurisdictions, codified law is the most important source of law for the courts.

Having examined in turn the Iranian and Quebec matrimonial regimes, we can now turn to the main goal of this research consisting in probing whether the Iranian matrimonial regime can be enhanced by importing certain Quebec concepts. There are three main purposes for this research.

The first purpose is to study the economic rights and responsibilities of wives in the Iranian legal system, so as to provide a more refined understanding of Iran's matrimonial regime. To achieve



this goal, the first and second chapters have explained the roots of the Iranian legal system, its sources and history, and its approach to civil law and Sharia. Chapters three and four have examined the economic rights of the wife in a marital relation under Iranian family law, as well as details of the Iranian matrimonial regime. Unlike family law in Quebec and other civil law jurisdictions, the legal matrimonial regime has not been defined and explicitly established in the Iranian Civil Code. Yet a study of the relevant articles and provisions reveals that separation of property is the obligatory matrimonial regime in Iranian family law.<sup>857</sup>

The second goal of this research is to compare the Quebec matrimonial regime, another civil law jurisdiction, with the Iranian regime. Chapter five has lighted the essential components of the Quebec matrimonial regime and its recent evolutions. Quebec's matrimonial regime is based on freedom of choice for the spouses, who can freely choose their matrimonial regime. Under Quebec's legal regime the parties to the marriage can change or modify their matrimonial regime or marriage contract at any time. This change or modification can be done with the consent of both spouses, before a notary, without being required to obtain the court's approval. Upon signing the contract, the new matrimonial regime takes effect. This is not retroactive, and will only affect their relation from the time of signature onwards.<sup>858</sup> Therefore, Quebec's matrimonial regime is grounded on two pillars. First, the spouses' freedom to choose the matrimonial regime, with the exception of family patrimony. Second, the immutability of the matrimonial regime, which makes the agreed matrimonial regime valid and unchangeable unless both spouses agree to change it by mutual consent.<sup>859</sup>

The third goal of this research is to examine the possibility of change and renovation of the current Iranian matrimonial regime by adapting certain rules from the Quebec matrimonial regime. Their transferability, through codal enactment, is assumed in this research. However, the question is to determine which changes are possible, considering the delicate combination

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<sup>857</sup> Mohammadi, 'Matrimonial Regime in Iran and France(رژیم مالی خانواده در ایران و فرانسه)', at 1-3.

<sup>858</sup> See Hahlo, 'Matrimonial Property Regimes: Yesterday, Today and Tomorrow', (

<sup>859</sup> Almasi, 'The Spouses' Property System in Iran and France Laws ترتیب اموال زوجین در حقوق ایران و فرانسه', at 121-22.

of Sharia and civil law systems in Iranian law. This chapter attempts to provide an answer to this question and put forth some suggestions to improve Iran's current matrimonial regime.

In Western legal systems, like Quebec's, both men and women are now generally treated in a similar manner. Iran's legal system does not provide such a similar treatment between spouses. Iran's family law follows the Sharia model, with different sets of rights and responsibilities for each the husband and wife. This research aims to introduce some novelty by proposing reforms of Iran's matrimonial regime which, however, must be acceptable in the Iranian legal system. The following points should help us clarify what legal rules would be fit for Iranian society, and they can improve the economic rights of wives while remaining acceptable from a systemic standpoint.

First, Islamic rules are the main reference for Iran's family law. The function of "*ijtihad*" is to introduce and provide modified opinions and interpretations of Islamic texts on women's financial rights and duties in their marital relation. While the general rule in Sharia is that the main rules and principles are unchangeable and timeless, the Shia school of jurisprudence, through "*ijtihad*", is able to adapt to social evolutions and new needs of the time.<sup>860</sup>

Since the marital relationship is one of those institutions that have much evolved and changed, a revision and new understanding of the applicability of current Sharia rules seems necessary. "*Ijtihad*" opens the door for new approaches and possible changes by considering the internal dynamics and external elements influencing the methods of deduction and arguments. This study examines where *ijtihad* could be brought in order to provide a more balanced and fairer situation in matrimonial regimes. "*Ijtihad*" informs us on how Sharia rules could be updated in order to fit with the current requirements of Iranian society.

Secondly, this research examines marital relationship holistically, as part of a legal system with distinct sets of rules and targets. Islamic law is a unique set of laws and regulations with specific views on society and its members. In conducting a comparative study between Iranian/Sharia law and Canadian/Quebec law, which is a secular legal system, special attention must be paid to the targets and goals of these two legal systems, as well as to the functions of legal rules.

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<sup>860</sup> Hallaq, 'Was the Gate of Ijtihad Closed?', (at 3.

Therefore, the fundamentals of the two regimes and their differences must be taken into consideration in this research. Suggestions pertaining to Iran's matrimonial regime must then be made with respect to those fundamentals, the purposes of every legal regime, and the cultural background of the societies in which these legal regimes are applied.

Finally, this research seeks to renovate Iran's matrimonial regime according to the needs of Iranian society. This study does not deal with women's rights separately, but rather seeks to integrate women's rights into the general legal system. Therefore, a concrete road map and appropriate regime will be put forward, using "*ijtihad*" in its general approach to Islamic law regarding women and family. This concept is applied in Iranian law through the doctrine of expediency and social necessity. The Expediency Council (*Majmae Tashkhise Maslahate Nezam*) can decide on the provisions which need to be adopted using this doctrine. (Abghari 2008)<sup>861</sup>

In this chapter, I examine the doctrine of change and renovation which is needed for reforming the economic aspects of Iran's marital regime. To do this some questions are to be answered in it. They are as follows: Why do we need change in Iran's matrimonial regime? Why does change seem necessary in the current situation? If we need to change the current regime, which factors and criteria should be considered in our suggestions to change? The most important and the final question is: what suggestions can this research bring forward for the current Iranian matrimonial regime? What are the implications of this comparative study for Iran's legal system? If we accept that we need to change, and we have identified the factors relevant for adapting this change, what is the appropriate way to renovate the current regime?

Quebec's current matrimonial regime may inspire changes to the Iranian regime, which, to accept those changes, has to preserve its particularities such as respecting to the needs of Iranian society and maintaining the coherence of Iran's legal system. Suggestions must be based on several considerations examined in this chapter.

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<sup>861</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 335.

## 6.1. Why We Need Change

In this section, we are going to see why change is necessary to Iran's current legal matrimonial regime. Family matrimonial law's most important aim is to regulate the economic aspects of marriage to enhance the quality of marital life. It also sets the governing rules of a family in a manner that improves the spouse's situation in marriage and in case of its termination. How could a change in Iran's marital regime improve the quality of the spouses' marital life and how could it help the regime achieve more justice and fairness in a marital relationship? In addition, in what is the current marital regime not adequate in grasping cotemporary marital relationships, and why does it need to change?

The answer to the questions will be explained under the three following points.

### *6.1.1. The Compatibility of Legal Provisions with the Practice of Ordinary People*

Marriage is practiced and experienced by almost all Iranian citizens. Its rules follow the customary relations of a people, which are not limited to legal provisions. Some of these customs are taken from Sharia and Islamic tradition, while others arise from the socio-economic context, needs and requirements of spouses in marital relationships.

The current Iranian matrimonial regime was introduced in Iran's Civil Code in 1928 and is still in force.<sup>862</sup> This regime provides for the mandatory rule of separation of property, which precludes parties to agree on the adoption of another regime.

In order to ensure their effectiveness, laws and legal provisions must be compatible with the reasonable practices of ordinary people in a society. As examined under the Quebec rules of matrimonial regime, while the Quebec legal system was moving towards the notion of freedom of contract, giving more freedom to the spouses under the marriage contract, the reasonable customs of Quebecers seeking to create marital property after the termination of a marriage gave

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<sup>862</sup> Mohammadi, 'Matrimonial Regime in Iran and France(رژیم مالی خانواده در ایران و فرانسه)', at 1.

rise to the mandatory patrimonial regime in 1982. While this obligatory rule was against the civil law approach underlying the Quebec legal regime, which upheld a freedom of contract approach,<sup>863</sup> the rule was based on the practice of the people. Since such a rule was already implemented in other Canadian provinces and seemed to reasonably improve the economic rights of parties to the marriage, it became law in Quebec.<sup>864</sup>

While there is no formally defined concept of matrimonial regime in Iranian law, in practice, a matrimonial regime is established in any marriage. In that respect, separation of property is not the only matrimonial regime practiced by the spouses. Rather, the matrimonial regime varies depending on the social and economical backgrounds of the spouses, on whether they live in a big city or a smaller town, on their family customs, and on their individual characteristics. However, the current legal provisions do not allow the spouses to choose their regime and do not cover all possible situations.<sup>865</sup>

In the practice of ordinary people, many spouses decide to deviate from the separation of property regime, distributing the marital assets according to a more egalitarian structure and assuming that both spouses have rights in marital resources, irrespective of the legal regime in place. These spouses may reach such conclusions based on the morality and main goals of Sharia, such as justice and fairness.<sup>866</sup>

Currently applicable legal provisions do not prevent spouses from making internal decisions about their property or giving gifts to each other. However, there is no formal legal basis for them to legalize their decision to establish a common property regime upon entering marriage. Therefore, if they decide to informally adopt such a regime, but later disagree on its performance, there is no legal guarantee that this regime will be respected and enforced, unless the spouses can show that their course of action was taken pursuant to another legal contract. Such a scenario may occur in instances where a spouse has a change of heart or the marriage terminates by the death of one of the parties without any written will.

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<sup>863</sup> Revillard, 'Women's Rights Meet Family Law: Family Patrimony in Quebec', (at 95-96.

<sup>864</sup> Kasirer, 'Testing the Origins of the Family Patrimony in Everyday Law', (at 798-99.

<sup>865</sup> Mir-Hosseini, 'Divorce and Women's Options: Law and Practice in Iran', (

<sup>866</sup> Ibid.

Since different regimes are used in practice by Iranians, there is a need to change the current matrimonial regime by providing more options, such that spouses can choose the regime most adapted to their situation with the certainty that such agreements will be enforced by courts. This appears more reasonable and indeed desirable than the current obligatory regime.

### ***6.1.2. Economic Difficulties Faced by Women upon the Termination of Marriage***

The second reason Iran requires a change in its mandatory separation of property regime concerns the poor legal protection it offers to women upon termination of their marital relationship. While the economic arrangements of Iran's family law such as alimony may correspond to the wife's requirements during marital life, it is not enough to ensure the wife's protection upon termination of the marriage. The legal economic protection offered to the economically dependent wife who played an important role in house-keeping and rearing children during marital life is insufficient. Upon separation, the death of the husband or any other kind of marriage breakdown, the wife often remains alone to face economic hardship. While Iran's legal system tries to improve the rights of the wife in these cases by introducing novel institutions like *Nahle* (nuptial gift) and *Ojrat-ol-mesl* (the wage of domestic labor), these are not sufficient to cover the needs of a separated or widowed woman. The economic hardship of wives upon termination of a marriage is the reason why many legal jurisdictions reformed their matrimonial regime, Quebec being one such example. The wife's difficulties under the regime of separation of property was one of the reasons the province enacted bills establishing family patrimony regime, which is now applied, in a mandatory fashion, across all matrimonial regimes, including separation of property. Ensuring a better economic protection of the wife was also one of the reasons leading to Quebec's change of default matrimonial regime to that of common marital property and then to the "partnership of acquests".<sup>867</sup>

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<sup>867</sup> Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (at 117-19).

Iranian family law attempts to protect the wife's economic situation during marital life by making the husband the sole responsible for the cost of family life. This right is guaranteed through different economic tools such as *Mahr*, alimony and other financial arrangements. However, these tools do not adequately protect the wife if the marriage is terminated. The fact that women ask for a high amount of *Mahr* in order to accept a marriage proposal reflects a deficiency in the wife's protection. This has generally been to secure their situation in case the marriage is terminated. Under Islamic law, the aim of *Mahr* is to make the beginning of marital life pleasant to the wife. In modern society, *Mahr* is considered by most as a way for the wife to dissuade her husband from divorcing.<sup>868</sup> It is also considered to be the woman's main source of money after marriage. Until very recently, the payment of *Mahr* was protected by law through civil and criminal penalties. But it created many difficulties for the families. Spouses contracted high amounts for *Mahr* at the time of marriage without considering the financial consequences of such commitments. As a result, in cases of marital conflict, when the wife asked for the payment of the whole amount of her *Mahr* before a court, the husband was usually unable to perform this commitment. Since law also protected the wife through criminal sanctions, many men were jailed because of their not performing their marital commitment to pay the *Mahr*.<sup>869</sup>

This explains why in a very recent change in the 2013 Iran's Family Protection Law, the Iranian Parliament limited the amount of *Mahr* that could be asked before courts and that could lead to criminal sentences in case of non-performance. It is noteworthy that future spouses are still free to contract any amount of *Mahr*.<sup>870</sup>

The law must sufficiently cover all situations of marriage and its breakdown, and propose solutions for all foreseeable circumstances. One of the reasons for introducing a change in the current system is to legally protect women in case the marriage is terminated without women having to resort to personal means of protection.

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<sup>868</sup> Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* at 82.

<sup>869</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (at 134-35.

<sup>870</sup> The 2013 Iran's Family Protection Law: Article 22.

### 6.1.3. Moving from Compensation to Contribution

Iranian family law espouses a traditional system dividing marital roles between the wife and the husband. As head of the family, the husband is responsible for maintaining his wife and children. The wife's main responsibilities are taking care of the home and children. In this system, the husband bears all economic responsibilities, such as alimony and *Mahr*. He also disposes of larger economic rights than his wife to perform these duties. For example, the man's inheritance rights are usually greater than a woman's rights to inheritance. Moreover, the husband enjoys a leadership position within the family circle to perform his duties as he sees fit. Wives are exempted from familial economic responsibilities, which is why they have less economic rights than their husband. This was the logic underlying the traditional Iranian Islamic society. While the Iranian legal system seeks to maintain this gendered distribution of roles and bases its legal provisions on such assumptions, this division of marital roles and duties no longer exists in most Iranian families.<sup>871</sup> As mentioned in the second chapter, many social, cultural and political events occurred in the last decades. These led to a change of the socio-economic context, in which the traditional roles of wife and husband hardly fit, especially in big cities. Many women work away from home and do not feel that they alone are responsible of taking care of the home. On the contrary, spouses may help each other in taking care of the home and children, as well as sharing economic responsibilities.<sup>872</sup> Based on Iran's family law, the wife's earnings represent her personal assets. She does not bear any economic responsibility to pay for the family's costs. If she does so, she can later claim compensation from her husband. In this situation, marital life may not be considered as a compensating relationship in which the wife does not have any economic responsibility and must be compensated by the husband for the work she has done during marital life. In cases where the wife and husband both contribute to marital life, their relation would better be viewed as contributive, where the wife may not claim compensation later.

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<sup>871</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (p. 142-143.

<sup>872</sup> Aghajanian, 'Family and Family Change in Iran', (at 30-31.



In recent years, the Iranian legislator tried to improve women's economic rights in marital relations by building on women's existing rights and introducing new legal notions like *Nahle* and *Ojrat-ol-mesl*. However, these reforms are not sufficient to protect the wives, since they do not allow to take stock of the contemporary lifestyle of all the spouses. Indeed, they remain based on a compensatory approach to the marital relation instead of applying a contributive approach. If these notions are truly applied in traditional marital relations, they bear positive results. However, they do not match the current economic role of married women in their family and society. Moreover, these new notions may create additional conflicts between spouses. Such conflicts may happen in cases where the wife works outside the home, earning money for herself, while her husband helps her manage household responsibilities. In such a scenario, the wife's earnings still remain hers and will not be shared if the marriage is terminated. Conflict may also arise in cases where the wife takes care of all household responsibilities, while the husband bears all economic responsibilities. Here, the husband may enjoy professional development, which cannot be shared with the wife other than through his paying her living costs.

In modern society, the wife can work outside her home and produce income. As such, she contributes directly to the marital responsibilities. In such a situation, spouses may decide to alternatively divide their marital responsibilities. The wife performs household responsibilities and the husband performs economic responsibilities. In doing so, the wife's contribution to earning money and enhancing her husband economically and professionally is clear. Here, the wife has the potential to work and earn money, but she decides to forego this and perform her family's household responsibilities instead. In this situation, the wife's work at home is also her contribution to the economic responsibilities of her marital life.

This is also the case when the husband contributes, with his wife, to managing the household and children, allowing the wife to work outside the home and earn money. This contribution in the marital duties should lead to the spouses' sharing their marital assets.

This is why many jurisdictions in recent decades have changed their family law towards a contribution model for property accumulated during marital life. This was the case in Canadian and Quebec law.

In Canada, we saw how the Supreme Court of Canada quickly changed its approach to espouse a contribution system in family law in the 1970s. Indeed, in the 1973 *Murdoch v. Murdoch* case<sup>873</sup>, the Supreme Court of Canada did not recognize any right to the wife in the property of her husband, despite the efforts she had pursued at home and on the farm. Yet in 1978, the Supreme Court changed its approach in the *Rathwell v. Rathwell* case<sup>874</sup>, in which it recognized the wife's right to marital property for the efforts she pursued during her marital life. The Court based its reasoning on the theory of unjust enrichment. After this case, the Supreme court of Canada recognized the wife's right to a share in property acquired during marital life in other similar cases, like the 1980 *Pettkus v. Becker*<sup>875</sup> case.<sup>876</sup> By adopting a contributive approach, the Supreme Court introduced the wife's right to marital property in common law Canadian provinces, causing the latter to pursue legal reforms, and Quebec followed suit. This resulted in the current Canadian approach consisting in sharing marital property between the spouses. The main goal of this change was to better protect the wife economically, in cases where the marriage was terminated. It was especially relevant for wives who had been performing household or child rearing tasks which had prevented her from exercising a profession.<sup>877</sup>

This change in Canadian law finds a basis in the joint responsibility of spouses during marriage and their obligation to contribute to marital life. This must necessarily lead to sharing marital property at the end of the marriage. Article 1104 of the Iranian Civil Code also recognizes that spouses must share the responsibility to contribute in the marital duties:

*“Husband and wife must cooperate with each other for the welfare of their family and the education of their children.”*

While this article figures in the Iranian Civil Code, it is always construed as a moral concept. Indeed, the duties of the spouses to cooperate in marital life and child rearing are always categorized as moral duties. Here cooperation means performing the gendered responsibilities examined earlier and the contribution of each spouse to the performance of another spouse's

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<sup>873</sup> *Murdoch v. Murdoch* (1973) 41 D.L.R. (3d) 367, at p.377.

<sup>874</sup> *Rathwell v. Rathwell* 83 D.L.R. (3d) 289, at p.305.

<sup>875</sup> *Pettkus v. Becker* 117 D.L.R. (3d) 257.

<sup>876</sup> Welstead, 'Domestic Contribution and Constructive Trusts: The Canadian Perspective', (at 151-54.

<sup>877</sup> Payne and Payne, *Canadian Family Law* at 587-88.

duties and shared responsibilities of marital life. Such a contribution in marital duties bears mostly a moral impact while failure to fulfill some of them has legal consequences under Iranian law. However, such a contribution in marital duties does not entail that the wife has any entitlement to marital assets.<sup>878</sup>

Instead of the concept of spousal contribution to marital duties, Iranian family law recognizes the concept of spousal compensation for marital duties. While the contribution to marital duties is an obligation for spouses and has legal consequences, Iranian family law does not translate this into an economic concept. By switching from a compensatory approach to a contribution approach, this article in the Iranian Civil Code could be turned into an economic concept. The contribution of each spouse to marital duties, regardless of the form this contribution takes, should be considered as holding economic value for the family. The wife's contributions, like taking care of the household and children, has economic value since it allows the husband to pursue a career and reach his fullest professional potential.

In the Quebec Civil Code, article 396 enshrines to the contribution approach in family life:

*“The spouses contribute towards the expenses of the marriage in proportion to their respective means. The spouses may make their respective contributions by their activities within the home.”*

This contribution approach in Quebec law recognizes both spouses' contributions as economic, thus allowing both spouses to share in the marital assets based on this contribution.

This is the change needed in Iranian legislation to improve family law. Marriage should be construed as an economic partnership between spouses, where each spouse contributes to different aspects of the marital duties. The socio-economic change must be considered by the legislator and the legal provisions must be adapted to the current Iranian lifestyle. If legal provisions preserve a compensation approach in marriage, such provisions will not account for the social change within modern marital relations, even if they seek to give more compensatory

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<sup>878</sup> Katouzian, *Civil Law in the Current Legal Order* قانون مدنی در نظم حقوقی کنونی at 676.

economic rights to the wife. It is only by embracing the contribution approach that family law can answer one of the main issues prevalent in Iranian society today.<sup>879</sup>

## **6.2. Criteria for Reform**

The goal of legal reform is to renovate or update the law to enhance the quality of life, or not make the law more responsive, by adapting provisions no longer considered appropriate for a society. Reforms must always be adapted to the customs, religions and social features of a society.<sup>880</sup>

While this comparative study takes inspiration from the Quebec matrimonial regime to propose reform in Iran, it is important to consider certain distinctive features of these two legal systems. In the previous section, we saw why Iran's matrimonial regime needed reform. In this section, I will explore what criteria must be considered to properly adapt a reform to Iranian society.

### ***6.2.1. The Reform Must Be Deemed Acceptable by Ordinary People***

The first criteria to be considered is that any change in the legal system, especially in family law, must be acceptable for the ordinary people. Ordinary people must feel that the change is compatible with their life and answers their needs. The change must not be far from the current lifestyle of the people. In addition, it must be compatible with their ideology and values.<sup>881</sup>

While the law guides people in each society and leads them, it must also be compatible with the current approach of the society to the subject of law. Regarding matrimonial regime, while changing the legal provisions may change the approach of Iranian people toward their economic

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<sup>879</sup> Yassari, 'The Financial Relationship between Spouses under Iranian Law—a Never-Ending Story of Guilt and Atonement?', (p. 142-143.

<sup>880</sup> Ali Borjian and Harith Al-Dabbagh, 'Reform of Legal Systems through the Evolution of Comparative Law', *Public Law Research*, 20/60 (2018), 183-206 at 183-85.

<sup>881</sup> *Ibid.*, at 188-89.

relation in marriage and its termination, this change must be acceptable by the ordinary people. In another words, changing the matrimonial regime must makes sense to the ordinary people and fit with their customs.

### ***6.2.2. The Reform Must Be Applicable in the Iranian legal System***

The Iranian family law reform must be readily applicable in Iran. This suggests a realistic approach to adapt such a reform to Iran's legal jurisdiction.

The goal of this research is to suggest a feasible reform for Iranian family law. The practical application of such a reform the Iranian legal system must therefore be considered.

It is obvious that any change in Iranian family law must be compatible with public order and imperative laws contained in the rules of Sharia and Iranian customs. These are the limitations to be taken into consideration when making any suggestion for reforming Iranian family law. Without respecting such imperatives, no reform will ever be ratified by the Iranian legislator. Such imperatives are further described below.

#### ***6.2.2.1. Islamic law Imperatives***

Any change in Iranian law must satisfy the rules and principles of Islamic law, according to article 4 of the Iranian Constitution. Iran's Guardian Council is the body that adjudicates on the compatibility of any law with the rules of Sharia. This is why any legal reform must comply with Islamic law requirements.

The separation of property in Iranian family law and Sharia is part of a general approach to women's economic freedom. The wife is completely independent in the ownership, administration, possession and use of her property. She does not need to obtain any authorization from her husband to possess her assets.<sup>882</sup> This rule is part of the general Sharia regime, in which

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<sup>882</sup> Iran's Civil Code, Article 1118: "*The wife can independently do what she likes with her own property.*"

general rules of justice and fairness applies. The main purpose of Sharia is to establish justice and fairness between members of society. The general principles are in place to make sure that legal provisions and measures are applied in a fair and reasonable manner.<sup>883</sup>

In Islamic law, economic responsibility is not borne in the same way by the husband and the wife. They each have distinctive rights and responsibilities in the family, based on their abilities. Islamic law insists on the importance of equality and justice in a marital relationship, as opposed to a mere similarity between the rights and responsibilities of husband and wife.<sup>884</sup>

This research suggests a reform relying on the general principles of Sharia to determine a just and fair distribution of economic responsibilities in marital life. While Sharia defends separation of property as the means of establishing justice and removing inequality, social evolutions have caused this mandatory matrimonial regime to create some injustices. With changes in current society, there are many cases where mandatory separation of property goes against the general principle of justice. This dissertation highlights the necessity of introducing a certain degree of flexibility and a new set of measures in the matrimonial regime. Through *ijtihad*, we could open the way to strike a better balance between men and women in matrimonial regimes. So, while change must consider the limitations of Sharia law, it must also use the flexibility of *ijtihad* to open a new path.

#### **6.2.2.2. Legal limitations**

Some legal limitations originate from the Sharia sources of Iranian law, while others arise from Iranian customs and morality. Any family law reform must be compatible with imperative legal rules. Understanding the philosophy behind these imperative rules may help the reforms envisaged to comply with such limitations.

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<sup>883</sup> Almasi, 'The Spouses' Property System in Iran and France Laws', *ترتیب اموال زوجین در حقوق ایران و فرانسه*, at 120-21.

<sup>884</sup> Hekmatnia, *The Philosophy of the Family Law* (فلسفه حقوق خانواده) at 87-91.

It is also important to not simply copy the existing legal provisions from another jurisdiction: legal transplants are neither obvious nor easy. While legal provisions can be inspired from other jurisdictions, they must be tailored to the society they will benefit. Quebec law will serve as an inspiration for the new Iranian matrimonial regime. However, it cannot be simply imported, but must rather be readapted to comply with Iranian culture and customs. Thus, to introduce a new regime for Iranian family law, Iranian customs reflected in certain fundamental legal rules must be respected.

In the next section, we present the reforms envisaged for the Iranian matrimonial regime, along with their limitations.

### **6.3. Recommendations for Reforming the Iranian Matrimonial Regime**

This section submits two recommendations. The first recommendation seeks to complement the current separation of property regime by introducing the notion of family patrimony. The second recommendation seeks to challenge the obligatory nature of the separation of property regime and propose to make it optional. A community property regime should be introduced into Iranian family law as an alternative optional regime.

#### ***6.3.1. Introducing the Concept of Family Patrimony***

The Iranian matrimonial regime needs to improve the economic protection of the wife when a marriage is terminated. Women generally face economic hardship at the end of a marriage if they were too dependent on their husband economically and did not develop some profession during their marital life. The separation of property regime means each spouse remains the owner of their property. No common property is created by the marriage. In this situation, if the wife has some personal property acquired through her work, personal income or inheritance, she will be able to pursue her post-marital life without too much difficulty. However, this is generally not the case, especially in small cities and rural areas. Therefore, Iranian law must provide general solutions applicable to any situation that would prevent women from facing

economic hardship in such situations. This solution can complement the separation of property regime currently applied under Iranian law. Therefore, a first suggestion for the Iranian matrimonial regime would be to provide supplementary provisions guaranteeing certain economic rights for the wife upon termination of the marriage.

Such a solution exists in Quebec. By creating the notion of family patrimony, Quebec was able to rectify certain economic inequalities befalling women upon the termination of their marriage without having to give up on the separation of property regime.

Family patrimony is a notion allowing judges to recognize that some marital property must be considered shared property of the spouses upon the termination of their marriage, irrespective of which spouse holds the ownership title. Family patrimony is a mandatory rule, meaning that spouses cannot waive their right to family patrimony. Family patrimony also holds supremacy over all other matrimonial regime rules in Quebec. The property considered as family patrimony is determined by law. However, it generally includes property shared during the marital life, such as the family residence, furniture and the family motor vehicle.<sup>885</sup>

The Quebec legislator tried to eliminate economic hardship suffered by the woman upon the dissolution of the marriage, especially when this woman was financially dependent on her husband under the separation of property system.

The same problem exists in the current separation of property regime in Iran. The Iranian legal system could create a similar concept to family patrimony in Iranian family law. Most importantly, the Iranian legal system does not contain any principle or provision that would prohibit the introduction of family patrimony in family law. There are two legal justifications we would suggest using to introduce the concept of family patrimony in Iranian family law.

### ***6.3.1.1. Preventing Unjust Enrichment***

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<sup>885</sup> M. Hammoud, 'Clearing Away the Legal Mist of the Family Business', (at 57).



Assets acquired during marital life are the result of both spouses' contributions, both in monetary and non-monetary forms. Ignoring the economic rights of a wife who has contributed in marital life by taking care of the household and children goes against justice. It also goes against the Sharia's main principles such as principle of no harm and no loss.<sup>886</sup> Similarly, granting that all assets acquired by the man during the marriage can only be his property must be considered as a case of unjust enrichment, prohibited under Iranian law.

Unjust enrichment is a well-known legal principle in Iranian law. Certain legal provisions, like article 301 of the Civil Code, are based on this principle.<sup>887</sup>

Under the Iranian legal system, three conditions must be demonstrated by a claimant suing for unjust enrichment.

First, the claimant must demonstrate an increase in the defendant's property or other benefit obtained by defendant.

Second, the claimant must demonstrate that they experienced a loss in some benefits. This loss may be in any form, such as the loss of money, property or certain other benefits provided by the work they performed.

Third, the claimant must establish a causal relation between the defendant's increase in benefits and the claimant's loss of benefits. This causal relation cannot be evidenced through a legal reason like a contract or law, as otherwise this enrichment would be legally justified.<sup>888</sup>

Such a situation exists in the property obtained by a man in the separation property system during marital life while there is no place in the man's property for the works of wife in home making and child rearing. In other words, the marriage contract allows the husband to accumulate wealth using the services of wife to the family. This would justify the enrichment and hinder the establishment of a causal relation between the wife's impoverishment and the

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<sup>886</sup> See Chapter 2.

<sup>887</sup> Iran's Civil Code, Article 301: "Any person who intentionally or inadvertently acquire goods to which he has no claim, is bound to deliver such goods to the actual owner."

<sup>888</sup> Naser Katouzian, *Elementary Courses of Iranian Civil Law: Juridical Facts, Tort Liability*. دوره ی مقدماتی حقوق مدنی: وقایع حقوقی / مسئولیت مدنی (18 edn.; Tehran/Iran: Sherkate sahime Enteshar, 2016) at 37. Interestingly these conditions largely reflect those existing in Quebec for unjust enrichment: Q.C.C. Articles: 1493-1496.

husband's enrichment. Therefore, preventing unjust enrichment can be used as the juristic justification for incorporating the family patrimony regime in Iranian family law.

### ***6.3.1.2. Expanding the Existing Concept of Common Marital Property***

A second justification for introducing family patrimony in Iranian family law is that this notion simply expands upon certain existing family law notions.

In Iranian family law, the movable furniture in the marital home is common equipment used by both spouses. As such, the law recognizes this as shared property between the spouses and divides it between them in case of separation. Article 56 of the Regulation of Execution of Official Documents' Content states that if the spouses live in the same place, the furniture of the marital home is considered common property between the spouses unless the property is normally used by the man. In the latter case, it would be considered as property of the husband. Conversely, property normally used by the woman would be considered the property of the wife. This rule is used by the court to determine the ownership of the marital movable furniture upon the termination of the marriage, or if there is a claim against a spouse's property.<sup>889</sup>

This rule is applied without consideration for the original owner of the property. The legislator could expand this rule to include more than just the movable furniture of the marital home. Other common marital properties, such as the family vehicle and the place of family residency, could also be included. Custom can justify this change in the meaning of movable property of the marital home. Indeed, the meaning of marital movable property has been changed in the custom of ordinary people to include more items. Nowadays, custom recognizes home furniture, family vehicles and the common residence of the family as marital property. The legislator could use this updated understanding of common marital property to introduce family patrimony. Based on this suggestion, the legislator could work on new legal provisions which define basic marital property to include family furniture, vehicles and their place of residency. This marital property would apply irrespective of ownership titles held by a spouse on these properties.

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<sup>889</sup> Katouzian, *Property and Ownership* مالکیت و اموال at 210-08.

### **6.3.2. Introducing the Community Regime into the Iranian Family law**

The second recommendation for Iranian family law is to introduce the community regime into Iranian family law. While the first suggestion above was a supplementary solution to the current system, seeking to add safeguarding measures to the existing regime, the second suggestion seeks a novel solution to protect women's economic rights. Separation of property, as the only matrimonial regime in Iran, does not meet all the needs of the current society. Iran's family law must reconsider the economic aspects of marriage and re-evaluate the legal options given to spouses. The Iranian legislator unreasonably limits the freedom of contracting parties to choose the marital regime adequate for their relationship. The Iranian legislator could allow spouses to opt out of the separation of property regime if they deem it inadequate to their lifestyle, similarly to the way it is done in Quebec. There are many advantages in introducing a new matrimonial regime into Iranian family law.

Firstly, introducing the community regime may decrease conflicts pertaining to the economic aspects of marital life, such as claims regarding *Mahr* and alimony. By achieving a more balanced marital economic relation from the current system where economic responsibility is fully borne by the husband, claims regarding the husband's economic responsibility would diminish.

Secondly, moving from a compensation to contribution system would enhance the economic rights of women. Considering the contribution of the wife to marital life would cause to protect her rights in the marital property.

Thirdly, the recent economic institutions created to enhance women's rights under the compensation system, such as *Nahle* and *Ojrat-ol-mesl*, are difficult to apply. The introduction of a community regime would allow for the elimination such concepts from family law.

Fourth, many young men in Iran find it difficult to get married because of the costs of marriage such as a high amount of *Mahr*. Moreover, since non-marital relations are forbidden, many face economic and psychological pressures. Giving more freedom and options to the spouses to

choose their marital economic regime would decrease the young people's stress when entering into marriage. The financial balance between spouses in the community regime would also decrease the stress of being solely responsible for the marital costs. This would perhaps result in an increase in the number of marriages.

Finally, the new regime would stop women from foregoing their economic rights to demand a divorce. Under the current regime, the husband must initiate the divorce for the wife to be able to enjoy certain economic rights. If the wife asks for a divorce, the rights will not be exercisable. These conditions are sometimes misused by abusive men who force their wife to request a divorce, so that they will not have to pay anything to her. With a community regime, women would be guaranteed economic rights through the division of marital property, whether the divorce was initiated by the wife or husband.

Introducing the community regime in Iranian law requires reforming certain aspects of Iranian family law. The reform must follow the following steps to be successful.

### ***6.3.2.1.Reconsidering the Existing Matrimonial Regime as a General System***

As examined previously, unlike family law in France and Quebec, the Iranian matrimonial regime does not exist as a closed system. Rather, it is composed of many legal principles and provisions found in various legal texts and regulations. The first step in reforming the Iranian matrimonial regime should be to regroup all rules and legal provisions pertaining to economic matters in a marital relation, and to consider them as a general, closed system. Currently, the relevant articles and provisions establish the separation of property as the obligatory matrimonial regime in Iran's family law.<sup>890</sup>

To establish a general legal system pertaining to the matrimonial regime in Iranian family law, some steps must be taken:

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<sup>890</sup> Mohammadi, 'Matrimonial Regime in Iran and France(رژیم مالی خانواده در ایران و فرانسه)'. 1-3.

First, we need to identify legal principles and provisions relevant to the economic aspects of a marital relation under the general regime. These rules must be regrouped to enable us to evaluate the general marital regime. Research on the Iranian matrimonial regime that does not review and consider the general rules and principles of that system cannot provide a just, coherent, and sustainable solution. This step has been accomplished in the first part of this research. The advantages and disadvantages of the current marital economic system have thus become clearer, helping us to clarify how the current regime could be reformed.

Secondly, once regrouped, the relevant provisions must be thoroughly studied to determine which part of the current regime must be and can be reformed effectively.

We have seen that the current Iranian matrimonial regime is facing some challenges. Its rules are in place since 1928. Change in Iranian family law has been very slow, and the legislation has not moved toward adopting rules needed by the current society. As previously examined, Iran's legal system is derived from both Shia jurisprudence and Western legal systems. Iran's Civil Code was inspired from the French Civil Code, both in structure and substance. An inadequate combination between Islamic principles and French civil law codification led to difficulties in Iran's family law.

An important difficulty lies in the poorly constructed economic rights granted to women in the Iranian marital regime. This combination has led to situations where women's economic rights are severely undermined. Some imbalances are caused by the piecemeal adoption of new concepts, such as the wage for domestic labor (*Ojrat-ol-mesl*). This concept, which is neither an exact adoption of a Western concept, nor a reflection of the precise framework elaborated in Sharia, seeks to provide a privilege for the wife in case of divorce. This privilege, which is not a permanent right for the wife, has been implemented in a manner which, in a considerable number of cases, has undermined the interest of the wife, and the judge has no power allowing him to remedy the situation. Indeed, in civil law systems, and particularly in Iran, judges are bound to apply the law and cannot overstretch its interpretations to prevent injustice.<sup>891</sup>

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<sup>891</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 5.

The inadequate combination of Sharia and civil law has created visible problems in women's rights. Such rights have been approached in recent decades from both a human rights perspective and different schools of feminist. These standpoints (which vary) have shaped women's rights in Western legal systems, causing further developments inputs in this area. These new approaches have further entrenched the differences between the Islamic and Western approaches to law.

Islamic law has its own family law system with a distinct set of rights and responsibilities. Some criticize Iran's approach to family law, which aims at bringing together both human rights and religious laws. These critics emphasize the conflicts that have arisen because of this combination.<sup>892</sup> This is evidenced in the wife's economic marital rights and responsibilities in Iran's family law. On the one hand, Iran's family law bases its matrimonial system on Sharia and establishes an obligatory separation of property in the marriage. On the other hand, it recognizes certain modern rights for wives which had no prior existence in Sharia. One such example is that Iranian family law grants wives the possibility to stipulate in a marriage contract a claim over half of her husband's property if a divorce occurs.<sup>893</sup>

This approach on the part of the legislator and the partial amendment of particular provision have been criticized by mainstream Iranian jurists and legal scholars. They view this process as an unsuccessful attempt to adopt the matrimonial common property system known in Western law. They believe that Iran's matrimonial regime is completely different in nature and structure from Western matrimonial regimes. For these critics, a cherry-picking approach to the reform of matrimonial regime is not an appropriate manner of promoting women's rights.<sup>894</sup>

On the other hand, due to its cultural background and deep roots in Sharia, Iranian family law cannot simply copy international conventions and modern rules on women's rights. This was demonstrated by Iran's Guardian Council's refusal to ratify the Convention on the Elimination

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<sup>892</sup> Mir-Hosseini, '8 Sharia and National Law in Iran', at 363-66.

<sup>893</sup> Katouzian, *Family Law* (دوره حقوق مدنی: خانواده) at 5-6.

<sup>894</sup> *Ibid.* 5-6.

of all forms of Discrimination against Women (CEDAW) in 2000.<sup>895</sup> (Abbasi-Shavazi and McDonald 2007; Moghadam 2004)

The combination of Sharia and modern law has led to a unique, hybrid system of rights and responsibilities, differentiating it from other Islamic and Western countries. This combination has made it difficult to change rules and legal provisions. For instance, modifications to the wife's inheritance law and the "Amendment to Divorce Regulations" were rejected by the Guardian Council. They finally passed into law after the intervention of the Expediency Council. This shows how reform is a particularly time-consuming process in Iran.<sup>896</sup>

This difficulty to reform laws has triggered diametrically opposed critiques. While some traditional Islamic clerics have called to the return to a full implementation of the primary provisions of Sharia, certain Iranian feminist activists have called for full equal rights by pushing for the implementation of international human rights conventions such as CEDAW.

Considering the matrimonial regime as a whole allows us to determine the regime we need and identify the changes needed to achieve this regime.

### ***6.3.2.2. Using Ijtihad to Determine the Appropriate Regime***

Having examined Iranian matrimonial law and identified certain issues therein, we must now turn to examining what criteria would make a reform acceptable in Iranian culture and religion. We need to build a system fitted to Iranian customs and sharia law.

Regarding Iranian custom, we observed that many Iranian people actually practice the community regime in their lives. This regime would thus be acceptable to middle-class people, at least as an optional regime.

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<sup>895</sup> Moghadam, 'Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action', at 4-5.

<sup>896</sup> Mir-Hoseini, 'The Politics of Divorce Laws in Iran: Ideology Versus Practice', at 74-78.

According to Islamic law, Islamic jurisprudence is changeable and develops based on social realities including time and place. Therefore, to keep Islamic principles alive, Sharia must remain in touch with peoples' daily lives and contextualize specific rulings accordingly.<sup>897</sup>

We can distinguish rules originating from sharia law and elements prohibited by it. We mentioned that many Islamic jurisdictions following sharia do not have a general matrimonial regime. They follow the separation of property regime without defining it as a matrimonial regime.<sup>898</sup> However, Islamic law is open for change in its rules. The marital relationship is one of those institutions which has evolved and changed over time. As such, a revision of the applicability of current Sharia rules in this domain seems both necessary and possible. While Sharia law holds separation of properties as the means to establish justice and removing inequality between men and women, the changing lifestyle of people may lead sharia to adapt its rules to uphold just outcomes. Through “*ijtihad*”, sharia can accept changes in its legal system.

### ***6.3.2.3. Fitting the Community Regime to Current Iranian Rules***

Having identified and regrouped Iran's matrimonial regime, and set out a method for reforming the sharia components of Iran's matrimonial laws, we must now turn to public order, imperative and non-imperative rules within the Iranian legal system. Each legal system has its own imperative rules and special characteristics. Such imperatives are stronger in legal systems inspired by religion. We must consider the obligatory and non-obligatory nature of legal rules in Iranian law to determine which rules can easily be modified in the Iranian matrimonial regime. The treatment for imperative and non-imperative rules is different in this research's recommended regime, and we must specify them.

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<sup>897</sup> Katouzian, 'The Value of Tradition and the Allure of Justice in the Inheritance of Wives ( ارزش سنت و جذبیه )', (at 93-94. عدالت در توارث همسران

<sup>898</sup> Michael J. Stegman, *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* at 11.



Here we study these two categories of rules in Iranian family law and their possible treatment within a reformist agenda.

### 6.3.2.3.1. Current Imperative Rules

To adapt the community property regime to Iranian family law, imperative rules for Iranian family law must be identified. Community property must be designed in such a way as to respect these imperative rules. By studying the existing marital economic rules in Iranian family law, it becomes clear that the rules on *Mahr*, inheritance and alimony are imperative rules. This means we must respect them in any recommendation to reform the Iranian matrimonial regime. These rules are so important that their place must be determined in any matrimonial regime, whether separation of property or the community regime. More importantly, this means we must consider how these provisions can be articulated within a community regime to ensure the equality of treatment of man and woman.

Some economic rights, such as alimony and *Mahr*, are direct consequences of the man's position as head of the family. Therefore, we must also determine how the man's position as head of the family can be treated under a community regime.

This research suggests certain solutions to adapt such imperative rules to the community regime.

***Mahr***. While *Mahr* and alimony are mandatory rules in Iranian family law, the place of *Mahr* in the community regime is different than alimony, and their treatment is not the same. *Mahr* is a non-reciprocal gift from the husband to his wife which is protected by law.<sup>899</sup> Since *Mahr* is a gift, it must be treated the same as any other gift in the community regime. In Quebec's current suppletive matrimonial regime, the partnership of acquests, any gift made to a spouse belongs to that spouse and does not enter into the acquests. Therefore, similarly to Quebec law, in a putative Iranian community regime, *Mahr* could keep its place and fit into the community

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<sup>899</sup> Welchman, 'A Historiography of Islamic Family Law', at 6-8.

regime under the category of gift. *Mahr* would belong to the wife and would not enter into the marital common property.

**Alimony.** How alimony may fit into the community regime is more complicated. Alimony is the economic responsibility of the man towards his wife. The man must pay all living costs during marital life. It is the unilateral obligation of the man to pay such costs without any obligation for the wife to contribute, even if she is rich. This notion is the main reason Islamic law sharply divides the familial roles between the wife and the husband, and the main reason behind the separation of property in Iranian law.

A solution could be found to this issue. However, we need to reconsider certain aspects of alimony under Iranian family law and redefine alimony under a reformed community regime.

Under Quebec's partnership of acquests regime, the spouses are jointly responsible for all marital responsibilities, including living expenses. Therefore, both spouses' income and salaries enter the family property, and both of them are responsible for paying the daily and necessary costs of living. In other words, the spouses' incomes are added to the family property and the costs of living are paid from this property.<sup>900</sup>

Alimony could be adapted to the community regime in Iran by changing the approach to the spouses' income. The income of both spouses would enter into the family's common property and the marital costs would be paid from this common property. However, the husband would retain the main economic responsibilities and the head position of the family. This means that if the family's income does not cover the costs of the household, the man would be sole responsible for paying such family costs. In this sense, the man's position as head of the family along with his main economic responsibilities would be respected. At the same time, the wife's income would contribute to the family property. She would share her income with her husband if she has any, while the final economic responsibility of the family would remain on the man. In this system, while both spouses would contribute to the family's economic needs and pay the costs of living, any contribution, even in non-monetary form, would be considered as an economic contribution.

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<sup>900</sup> Q.C.C: Article 394.

**Inheritance.** Inheritance is a different subject from alimony and *Mahr*. While *Mahr* and alimony relate to marriage and marital life, inheritance relates to the end of the marital relation caused by the death of a spouse. The general Islamic principles on the inheritance of the same class of males and females propound that the male's share from the estate is twice that of the female's, with a few exceptions.<sup>901</sup> This general principle applies to the wife and husband's inheritance and is one of the imperative rules of Iranian family law.

The imperative rules of inheritance law must be reconsidered under the new community regime. When spouses agree to choose the community regime, they agree to divide their marital property at the end of their marital relation. Therefore, when a marriage is terminated upon the death of a spouse, the marital property is divided between the surviving spouse and the heirs of the deceased. In this situation, half of the marital property is considered the estate of the deceased spouse, irrespective of whether the deceased is a man or woman. Accordingly, the share of the deceased spouse would be divided between the heirs. One of them would be the surviving spouse according to the imperative rules of inheritance law. This division of property and difference in the spouses' share of inheritance at the end of marital regime does not conflict with the community regime. It can therefore be feasibly applied with in the new regime.

#### **6.3.2.3.2. Non- Imperative Rules**

All rules under the current Iranian marital regime other than imperative rules on *Mahr*, alimony and inheritance are considered non-imperative. Therefore, it is easier to change these rules since they are more flexible. The history of these rules under Sharia law and their place in the Iranian legal systems are different, as examined in the last chapters.

Some of these rules are designed to further protect women's rights under the compensation system. These rules do not find their origin in Sharia, though they do not go against it. The Iranian legislator created them to enhance women's economic rights, based on the compensation

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<sup>901</sup> Mcglinn, *Family Law in Iran* at 80-82.

approach and the division of responsibilities between the husband and the wife. Institutions such as *Ojrat-ol-mesl*, *Nahle*, breastfeeding and the possibility of stipulating the division of property at the termination of the marriage are examples of such laws. These economic institutions would be impracticable in the community of property regime, which is based on the economic contribution of each spouse to marital life. In the suggested community regime, the works performed by both spouses, irrespective of economic or non-economic efforts, are considered to be their contribution to marital life. Therefore, there is no place for compensating the domestic labor of a wife nor her breastfeeding.

Under the community regime, marital property would be considered the common property of both spouses. As such, compensating the wife at the end of the marriage using the obligatory gift under the institution of *Nahle*, or stipulating that marital property will be divided between the spouses at the end of marriage does not make sense in the community regime. In this new regime, and under its contribution approach, the wife's economic rights would be protected through the division of marital property.

It is notable that these economic institutions are considered to be essential requirements of marriage neither under Sharia nor under Iranian family law. In addition, they are not practiced by ordinary people and do not arise from custom. Therefore, modifying such rules is feasible under Iranian family law and does not conflict with Sharia, Iranian law, or custom.<sup>902</sup>

#### ***6.3.2.4. Determining the Legal Regime and the Optional Regime***

To effectively reform the current regime, it is important to determine the legal regime which would automatically apply to all the marriages in the absence of a choice from the parties.

The default (or suppletive) regime is very important for a legal system and must satisfy the requirements of ordinary people who do not enter into alternative contracts. Even in jurisdictions giving spouses the option to agree on a suitable regime, like Quebec, the legal regime has an

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<sup>902</sup> See Hekmatnia, *Woman's Rights and Family*.

important place and should be practical, adequate and acceptable for the average person. It must comply with their customs.<sup>903</sup>

This research emphasizes giving spouses the option to choose their desired matrimonial regime. This is possible under Iranian family law through its civil law perspective, which encourages the freedom to contract.<sup>904</sup> In Iranian law marriage is considered a contract. This means parties have the possibility to stipulate various clauses in it. In Iranian family law, the economic aspects of a marriage, such as agreement on the *Mahr*, are all stipulated in the marriage contract. The marriage contract is not a contract establishing ownership in Iranian law but is the reason underlying the ownership of *Mahr*. The agreement on *Mahr* is a separate contract between the spouses. However, it is a simultaneous agreement to the marriage contract and its existence is dependent on the marriage contract. It is for this reason that customarily the marriage contract was not considered as separate from its economic aspects, though the marriage and its economic regime are stipulated in separate contracts.<sup>905</sup>

Thus, in order to separate and apply the legal regime of separation property and the alternative regime of community, the following steps should be followed:

The first step is to distinguish the marriage from its economic aspects when signing the agreements. While this separation already exists in Iranian law, we need to apply this separation in the marriage contract signed before the Iranian notary. The judiciary must prepare the different models of economic contracts pertaining to the marriage and make them available through the notary. These forms must indicate the different economic marital regimes available to the spouses.

The second step is to determine the default legal regime and the alternative regime. It is still too early for the current Iranian legal system to accept the community regime as the default regime. However, it would be acceptable to suggest the community regime as an alternative regime which spouses could freely agree to. Therefore, while a reform of the matrimonial regime is

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<sup>903</sup> Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (

<sup>904</sup> Iran's Civil Code, Article 10: "Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law."

<sup>905</sup> Katouzian, *Property and Ownership* مالکیت و اموال at 82.

underway, the separation of property regime would remain the default legal regime. The defects in the current separation of property regime would be covered by moving towards the contribution system instead of the current compensation approach. In practice, this change in approach could be implemented by introducing the supplementary family patrimony regime in Iranian family law, as an obligatory legal regime. As mentioned previously, it would be feasible to introduce family patrimony into Iranian law using two justifications: (i) preventing unjust enrichment and (ii) expanding on notions that already exist in current family law regarding the treatment of marital movable furniture as the common property of the spouses.

The alternative regime would be the community regime. Under this regime, spouses would contractually agree to enter into a partnership of assets from the time of marriage. They would decide to share their income acquired during their marital life. They would keep their private ownership over property obtained before marriage. The common property accumulated during marital life would be divided between the spouses at the end of the marriage.

The community regime suggested for Iranian family law must fit the Iranian legal system. It must follow the essential principles of Iranian family law and its legal system. It must respect the principle of private ownership of each spouse. It must also preserve the legal personality of each married spouse. Family is not considered a single legal entity under Iranian law. That is why the community regime must be limited to the property of the spouses acquired during marital life. The community regime may be based on the legislator's legal assumption that the partnership of spouses during marital life was agreed by them and limited to the time of marriage. The regime is also based on the contribution of both spouses to the marital responsibilities and as such, does not include gifts or inheritance obtained without the owner's efforts to own them. As such, the best form of community regime is a hybrid regime close to the partnership of acquests as currently applied in Quebec's default matrimonial regime. This regime is considered to be a hybrid regime sharing some characteristics with both the separation and community systems. It respects the independence of spouses, like the separation regime,

while recognizing each spouse's participation in the economic result of marriage, like the community regime.<sup>906</sup>

It is for all these reasons that the community of property regime could be a proper alternative regime in the Iranian legal system. It would easily adapt to requirements in Iranian law. The requirement that each person own their assets under Iranian law would be respected through each spouse's private ownership of their private property. This would be the case for assets obtained before marriage, through inheritance or gifts. At the same time, marital property obtained during the marital life would be owned jointly by both spouses, as the regime would respect the contribution of both spouses in building common familial property. It would moreover prevent unjust enrichment by dividing this common property at the end of the marriage and would enhance women's economic rights.

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<sup>906</sup>Brown, 'The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec', (at 502. and Tees, 'The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec', (at 118.

# Conclusion

*"À vouloir dissocier un acte ou un comportement de la qualification que lui confère la tradition juridique dans laquelle il s'insère, le juriste s'enfermerait dans des contradictions insurmontables, oubliant que c'est un conflit de modes de penser et de civilisations juridiques qui affleure, au cas par cas."<sup>907</sup>*

One of the most important aspects of marriage is its economic aspects. Novelist Éliette Abécassis once wrote that "(t)outes ces histoire a'avoire commencent dans le mystique et se terminent dans l'romatic et la politique."<sup>908</sup> Yet this aspect of marriage is treated differently in each jurisdiction. In the last decades of the nineteenth century, the way marriage was construed changed radically, especially with regards to women's rights. This change has been more evident in Western countries.

Since the 1970s, marriage has become less crucial for couples wishing to live together. Today, couples consider the economic advantages granted by marriage as one of the most important decisive factors for getting married. Spouses want the freedom to choose the economic aspects of their marriage. As such, the law sometimes provides a space for spouses to freely choose how the economic aspects of their marital life are governed by providing different kinds of matrimonial regimes.

In addition, the desire to further develop women's rights and equality between men and women promoted further scrutiny regarding the economic aspects of marriage. Women needed to be better protected financially, especially upon the termination of a marital relation. Recognizing the wife's role as having economic value in marital life is one of the most important achievements of this evolution. Under this new approach, an economic contribution is not reduced to merely earning money, but rather extended to any contribution a spouse may have added to the marital property, whether monetary or not. Accordingly, each effort produced by a

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<sup>907</sup> Marie-Claire Foblets, *Les Familles Maghrébines Et La Justice En Belgique: Anthropologie Juridique Et Immigration* (Karthala Editions, 1994) at 37.

<sup>908</sup> Eliette Abécassis, *Et Te Voici Permise À Tout Homme* (Albin Michel, 2011) at 166.



spouse during their marital life is considered valuable and must be recognized when dividing the marital property upon the termination of the marriage.

In Quebec, this approach was enshrined in the Civil Code and enforced through different legal tools.

Firstly, the spouses were given the freedom to choose their desired matrimonial regime, barring any limitations posed by morality and public order provisions. The default marital regime selected by the legislator is a hybrid regime known as the partnership of acquests. This regime recognizes the common property of the spouses as property acquired after marriage. It also recognizes that spouses can each have private property.

Next, the Quebec Civil Code introduced family patrimony as a mandatory rule. Family patrimony divides the ownership of certain assets between the husband and wife, irrespective of the original ownership title of this property. This regime applies to all matrimonial regimes, including the separation of property regime. It cannot be waived by the spouses at the time of marriage.

Finally, Quebec sought to legalize the contribution approach underpinning the roles of the husband and the wife during marital life. As such, marriage is now considered to be both the husband and wife's joint responsibility. Any efforts exerted by either the husband or the wife during the marital life must be considered as their contribution, which entitles them to a share of the marital assets at the end of the marriage. This approach also applies in the case of a spousal support order, which considers the wife's role in the professional development of her husband, as well as any home-making or child caring which may have prevented her from developing her professional career.

One of the most important goals of these changes was to improve women's economic rights during a marital relation and prevent economic difficulties in case of marriage termination.

On the other hand, the traditional division of responsibilities between man and woman entails a compensation approach to the economic aspects of marital life in Iranian family law. Under this approach, the man is the responsible for maintaining his wife and children. On the other hand, the wife does not have any economic responsibility in marital life. This approach explains why

Iranian family law applies the separation of property regime in marriage. Each spouse remains the owner of what they have obtained. The wife does not have any economic responsibility; the man must pay for all marital living costs. Since the wife is the owner of all her earnings, if she contributes to any living costs, she would be entitled to ask for compensation.

Under this approach, the wife and the husband do not have the same rights and responsibilities. Each of the spouses has special responsibilities. Some economic advantages are given to each of them according to the division of their roles in the family. The compensation concept is well developed in Iranian law. The Iranian legislator has attempted to create more economic rights for the wife, to protect her financially in this system. However, all these rights are based on the compensation approach. As such they work as a solution to deficiencies in the compensation system only.

In recent years, marital life has changed in Iranian society. The spouses' lifestyles do not necessarily match the requirements of the compensation system. Yet the separation system is the default regime in Iranian law and the only available matrimonial regime for spouses. Applying this system conflicts with the modern lifestyle of most spouses, who no longer follow the traditional division of roles between the husband and the wife. In addition, this regime does not work when the wife could work outside her home and earn money, but her housework duties prevent her from doing so. As such, we see that a compensation approach to marital regimes is no longer adapted to all spousal life in Iran; yet spouses do not have the possibility to apply the matrimonial regime of their choice.

In addition, Iran's matrimonial provisions are not regrouped under a general system. This causes lawyers and specialists to often disregard the economic aspects of marital life and not consider them within a coherent regime. Such a disregard prevents specialists from seeing existing deficiencies in the current provisions and suggesting appropriate policy changes. In this situation, changes usually happen on a smaller scale, adopting partial and piecemeal solutions to mend the matrimonial regime, but that fail to envisage such solutions from a genuine systemic prospective.

By comparing the general matrimonial regimes of Quebec and Iran, we can imagine the contours of a different legal regime for the Iranian matrimonial system. Quebec's matrimonial regime,

including its recent changes, may inspire paths for reform of the Iranian one. For this we assume that matrimonial regimes are transferrable from one civil law jurisdiction, Quebec, to another, Iran. However, to ease the transition, each putative reform must consider the specific characteristics of Iranian family law. As such, any suggestion to reform Iranian family law must be adapted to fit Iran's cultural and religious specificities.

This research suggests certain changes to the structure of the Iranian matrimonial system.

Firstly, the Iranian matrimonial system must be regrouped under a general matrimonial regime. In doing so, we can make better suggestions to enhance the Iranian matrimonial regime, based on the needs and deficiencies of the current regime.

Secondly, while the separation of property may fit some spouses' marital life, its obligatory nature is unjust in light of the realities of the life of most couples today. We need to change the obligatory nature of the separation of property regime in Iranian family law to allow spouses to freely choose alternative regimes which may be more adequate to their situation, as long as such a regime is compatible with morality, public order provisions and sharia rules.

Thirdly, community property can be introduced into Iranian family law as an alternative matrimonial regime. For this, we need to introduce the community regime in a way which fits Iranian law's requirements. Imperative provisions in Iranian family law must be respected and considered in the new regime. Alimony, *Mahr* and inheritance are the most important imperative rules, and the design of any new matrimonial regime must take them in to account.

Fourth, in addition to introducing the community regime, we need to protect women financially, regardless of the matrimonial regime's situation. If we keep separation of property as the default regime, but give the spouses the freedom to choose the community regime as an alternative regime, we must improve women's economic rights in the default regime. To do this, we must change our approach to the marital economic relation. This means shifting from the compensation of the wife to a contribution approach. This can be achieved by introducing family patrimony, which is a regime close to that applied in Quebec law. Under family patrimony, the legislator would consider certain marital assets as shared property of both spouses upon the

termination of the marriage, irrespective of which spouse effectively owns the assets on the paper. This would prevent economic hardship for the wife at the end of the marriage.

Finally, any suggestion to change any legal system would be confronted with some resistance. This resistance to change is usually formulated on the basis of certain religious limitations. This would notably be the case for a change from the separation regime to the community regime in Iranian law. However, this research shows that the community regime can be applied in Iranian law while respecting sharia rules. It is important to reconsider the main imperative rules of sharia for the marriage contract and marital life. These rules must be redefined in the community regime. The fact is that the community regime has never existed in Islamic law. At the advent of Islam, importance was placed on giving the woman and girls independence. Islam insisted on the important role of wives as mothers in the family, as a pillar for building a healthy society. This is why Islamic law insists on the giving both man and woman the same rights regarding legal personality and the ability to possess and use private property. In our current society, changes in the economic roles of the wife and husband leads us to consider necessary change in the relevant legal rules. A new approach must be taken in considering different matrimonial regimes. Sharia law is open to change through its concept of *ijtihad*, which allows Islamic jurists to adapt new rules according to the needs of the time, place and society.

Improving women's economic rights in the family and considering their contribution to marital life in any forms, whether monetary or non-monetary, is feasible in Iranian family law. Recent changes in Quebec law can inspire this change and be used to design a pathway to reform the Iranian matrimonial regime. The comparative method makes it easier for lawyers and the legislator to measure the result of change in other societies and use the experience of other jurisdictions. Studying the way in which Quebec law evolved to achieve today's system helps us find a good example for inspiring Iranian law. The history of improving the Quebec legal system by considering the contributions of the wife to marital life and guaranteeing some economic rights for the wife upon the termination of marriage, notably by legalizing family patrimony rules, is very valuable. The change of legal regime from the community to the partnership of acquests shows that legislator strives to adapt to society's needs. Spousal support orders and the principle of entitlement, which mix both compensatory and non-compensatory principles, demonstrates a good balance in protecting women's economic rights after the

termination of the marriage. All these efforts by the Quebec legislator must be analyzed by Iranian lawyers as a valuable legal experience, within another civil law jurisdiction, using a comparative method. Iranian lawyers could elaborate on these subjects and find best methods to adapt such concepts to Iranian family law. These subjects must be analyzed and adapted to the Iranian society and legal system. This is why comparative law is considered a constructive method and has brought about significant improvement in the process of law-making. We hope that our contribution in this research has highlighted the potential of such an endeavor.

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