



Gender inequality and discrimination: The Case of Iranian Women

**IHRDC Legal Commentary By
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Gender Inequality and Discrimination: The Case of Iranian Women

Mohammad Hossein Nayyeri

Introduction

Iran's legal system changed dramatically when the Pahlavi regime (1920-1979) was overthrown. In many respects, it was a point of "no-return" for women's rights. During the reign of Reza Pahlavi—the Shah, or monarch of Iran—and the subsequent rule of his son Mohammad Reza Pahlavi, women's rights reached new heights and many legal barriers obstructing women's rights were dismantled. For instance, in 1963, despite the strong objections of religious clerics such as Ayatollah Khomeini¹, the prohibition on the women's vote was removed and women obtained the right to run for Parliament. Then, arguably the greatest stride towards equality for women by that point in time came with the enactment of the Family Protection Act in 1967, which gave Iranian women the power to seek a divorce, deny their husband a second wife and win custody of their children in case of divorce. The Act also increased the minimum age of marriage for girls from thirteen to fifteen years old. In addition, Islamic Shari'a and its discriminatory rules against women did not determine criminal law and procedure. However, these advances did not secure the true emancipation of women and lasting gender equality. Rather, this was part of a long term process during the Shah's reign which was slowed, in some respects regressed and in other ways reversed entirely, after the Islamist regime took power.

After the 1979 Revolution, some achievements, including several laws favoring women's rights, were simply overturned by hardliner clerics in power. A new Constitution was adopted which established Islam as the basis for the legal system. The new Constitution paid special attention to women, allegedly because of "the greater oppression that they suffered under the old regime". However, the Constitution viewed women through the lens of Islamic ideology—upon closer scrutiny, it is clear that these Constitutional provisions do not recognize women as individuals but rather as "family" and "women as mothers and wives". The language of Article 21 of the

¹ He argued that "granting the vote to women was a violation of Islamic principles, and an attempt to corrupt our chaste women." <<http://www.nybooks.com/articles/archives/1985/jan/17/how-khomeini-made-it/?pagination=false>> accessed 20 Sept 2012.

Constitution (Women's Rights) reflects the deep roots of patriarchy which views women as human beings with undeveloped personalities who only fit traditional roles in a family:

“The government must ensure the rights of women in all respects, in conformity with Islamic criteria, and accomplish the following goals:

1) Create a favorable environment for the development of a woman's personality and the restoration of her rights, both the material and intellectual;

2) The protection of mothers, particularly during pregnancy and child-rearing, and the protection of children without guardians;

3) Establishing competent courts to protect and preserve the family;

4) The provision of special insurance for widows, senior women, and women without support;

5) Granting the guardianship of children to worthy mothers, in order to protect the interests of the children, in the absence of a legal guardian.”

In addition, the section of the constitution that guaranteed equality has omitted gender equality and provided equality to women only if Islamic law is observed. According to Article 20 of the Constitution of the IRI, all members of the nation, both men and women, shall receive equal protection under the legal system and shall enjoy all human, political, economic, social and cultural rights, but with a fundamental condition at the end which changes everything: “...in conformity with Islamic criteria”. This condition has had a significant impact on the legal framework of the IRI, and as will be discussed in this commentary, has increased gender inequality and injustice.

This is while equal rights and equality before the law, without any exception, are among the basic principles articulated in different international instruments on human rights. For example, Article 2 of the Universal Declaration of Human Rights (UDHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR) protect every person's human rights “without distinction of sex.” The IRI's national laws fail to uphold these principles and instead apply an unequal and discriminatory system on the basis of gender.

In order to promote women's rights in Iran and protect women from all forms of violence, discrimination and injustice, it is crucial first to trace the cultural, social and legal roots of these unjust practices. This commentary reviews the status of women's rights in the IRI's legal system; and, specifically, focuses on the disadvantages and injustice experienced by women solely because of their gender. Chapter One of this commentary addresses cases of gender inequality in the criminal laws of the IRI such as, *inter alia*, the lower age of criminal responsibility for girls and the lower value of blood money for women. Chapter Two analyzes the IRI's family law which deals with marriage and the violation of human rights of women as wives and mothers. Chapter Three discusses women's inheritance and ownership and Chapter Four addresses women's employment and right to work (Chapter Four). Finally, Chapter Five examines whether the status of women's rights in Iran constitutes a violation of international human rights law and reviews obligations of the IRI under international human rights instruments.

1. Criminal Law

One of the most central human rights principles is that all persons are equal before the law and entitled to the same legal protections. The International Covenant on Civil and Political Rights (ICCPR) stipulates that "all persons shall be equal before the courts and tribunals" (Article 14) and that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" (Article 26). Under classical Islamic law, as under other pre-modern legal systems, the principle of legal equality of persons is not recognized. The Islamic Penal Code, which was enacted by the Iranian government soon after the 1979 Revolution, clearly follows the classical Islamic law doctrine and violates the principle of legal equality by provisions that discriminate, *inter alia*, on the basis of gender.² Under the IRI's criminal law, men and women are treated differently with regard to the age of criminal responsibility, *diya* (blood money) and *qisas* (retaliation), evidence, etc.

² Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press 2005), 177.

1.1. Age of criminal responsibility

According to Islamic sources, the criterion for criminal responsibility is when an individual reaches the age of maturity which, according to the *Shi'ite* school of Islam practiced by the IRI, is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. For years, lawyers have argued that the recognition of criminal responsibility for a girl of 8 years and 9 months old and a boy of 14 years and 7 months old conflicts with the modern needs of society and violates international standards including the Convention on the Rights of Child.

Article 147 of Iran's new Penal Code, which was approved in January 2012, stipulates the age of maturity as 9 lunar years for girls and 15 lunar years for boys. Despite this stipulation in the Penal Code, some Iranian Shi'a clerics consider the age of maturity for girls to be higher. Ayatollah Yousef Sanei, for example, set the age of maturity for girls at 13 years old and not 9 years old. But the Penal Code has followed the *fatwa* by the majority of conservative clerics who deem 9 years to be the age of maturity for girls. Therefore, the age of maturity under Islamic *Shari'a* is stipulated as the criterion for criminal responsibility and *fatwas* (i.e. religious opinions) which offer older ages of maturity are dismissed.³ So in fact, the hope that, with time, the minimum age of criminal responsibility in the IRI will be changed has yet to be realized.

If the different ages of criminal responsibility for boys and girls are combined with different categories of crimes (i.e. *hudud*⁴, *qisas*⁵ and *ta'zirat*⁶) under the new Penal Code, we arrive at a range of possibilities with different rulings.⁷ These changes demonstrate that there have been

³ To see the *fatwas* in this regard go to <<http://marjaeyat.com/fa/pages/?cid=116>> accessed 30 March 2012.

⁴ Crimes punishable by *hudud* (i.e. the limits, or the limits prescribed by God; singular: *hadd*) are those with fixed and severe punishments in Islamic sources, such as illicit (out of marriage) sex (*zina*), sodomy and homosexual acts between men (*livat*), homosexual acts between women (*mosahaqa*), procuring (*qavvadi*), etc.

⁵ Crimes punishable by *qisas* (retaliation) are a category of crimes under Islamic criminal law, in which, homicide and bodily harm are punishable by the same harm (i.e. the death penalty for murder and inflicting the same injury for bodily harm).

⁶ Crimes punishable by *ta'zir* are less serious crimes for which punishments are not fixed and instead are left to the discretion of a *Shari'a* judge. In principle, all forbidden or sinful acts that do not constitute *hadd* offences, homicide or bodily harm, are punishable under this category. The Islamic judges may, at their discretion, impose punishments on those who have committed such acts. However, most of the *ta'zir* crimes are dealt with in the Penal Code and the judge applies the punishments stipulated in the Code. (Nayyeri, Mohammad Hossein, New Islamic Penal Code of the Islamic Republic of Iran: An Overview, Human Rights in Iran Unit, University of Essex, 31 March 2012, 9, <http://www.essex.ac.uk/hri/documents/HRIU_Research_Paper-IRI_Criminal_Code-Overview.pdf> accessed 29 August 2012)

⁷ For an overview of the eight possible scenarios with varied outcomes for the punishment of juvenile offenders see, e.g.: Nayyeri, M H, 'Criminal Responsibility of Children in the Islamic Republic of Iran's New Penal Code', Iran Human Rights Documentation Center (IHRDC);

some desirable changes in respect to *ta'zir* punishments. As a result, if children commit *ta'zir* crimes before turning 18 years old, whether they are boys or girls, and whether they have reached the age of maturity or not, they shall be sentenced merely to correctional measures. So, there is no possibility for the application of adult *ta'zir* punishments to children and juveniles. In comparison with the old Code, in which reaching the age of maturity resulted in full criminal responsibility, these changes may be regarded as positive, especially for girls.⁸

However, in the case of the commission of crimes punishable by *hudud* and *qisas*, children may still be sentenced to such punishments. In fact, in respect to *hudud* and *qisas*, the Code still relies on the age of maturity under Islamic *Shari'a*. Therefore, if a boy—after reaching the age of 15 lunar years (14 years and 7 months)—and a girl—after reaching the age of 9 years (8 years and 9 months)—commits crimes punishable by *hudud* and *qisas*, instead of correctional measures as for *ta'zir* offences, they may be subject to *hudud* and *qisas* rules and will be treated as adults.

So, the assertion made by IRI authorities that the new Penal Code ensures gender equality⁹, is not true in respect to *hudud* and *qisas*. Therefore, it must be stressed that the application of *hudud* and *qisas* punishments on people under 18 years old has not been abolished, and, contrary to some assertions, the new Code, like the old one, clearly discriminates between boys and girls.

1.2. *Diya* (Blood money)

According to the available scholarship, amongst the different laws of Islamic countries, the Iranian Penal Code is the only one that still specifies that a woman's *diya* (blood money) is not equal to the blood money of a man.¹⁰ In fact, the blood money for a Muslim man is the standard

<http://www.iranhrdc.org/files.php?force&file=pdf_en/LegalCom/juvenile_executions_MHN_282791825.pdf>
accessed 25 March 2012.

⁸ Ibid.

⁹ The Spokesperson of the Judicial and Legal Commission of Parliament declared: “the age of criminal responsibility in the old Penal Code was 9 and 15 lunar years which was different between girls and boys and the age of maturity under *Shari'a* was the criterion. But, in the new Code, we defined the age of criminal responsibility in a way that girls and boys under 18 years old are considered as children and juvenile and the punishments of adults are not applied on them anymore.”, *ibid*.

¹⁰ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press 2005) 162.

against which the values of all other categories of persons are measured, both for life and for injuries. According to traditional *Shari'a*, the standard blood money is 100 camels or 200 cows or 1,000 sheep, which was given a monetary value of 675,000,000 IRI Rials [around \$34,000 US Dollars in the same period, when the average annual wage in Iran was approximately \$4,400 US Dollars¹¹] for the Iranian year 1390 (2011-12)¹² by the Head of the Judiciary.¹³ Article 544 of the new Penal Code (similar to Article 300 of the old Code) provides that:

“The diya (blood money) for murdering a woman is half that of a man”.

In addition, according to Islamic *Shari'a*, retaliation for homicide or bodily harm is only allowed if the victim's blood money (*diya*) is the same as or higher than the offender's. If the value of the blood money of the offender is higher than that of the victim, the victim or his/her next of kin would have to pay the difference to the perpetrator for retaliation. Thus, if a woman is killed by a man, the murderer may be sentenced to death if the woman's next of kin demand it, but they must pay one half of the blood money of a man to the offender¹⁴, since the blood money of a woman is half that of a man. Article 379 of the new Penal Code provides:

“When a Muslim woman is murdered, the right to qisas (retaliation) is created; however, if the murderer is a Muslim man, prior to qisas, the heir(s) of the victim [vali-e-dam] should pay the murderer half of the diya (blood money) of a man...”.

Interestingly, although the new Penal Code insists on this unequal treatment, it has prescribed a new solution to alleviate the inequality of *diya* between men and women. The note to Article 545 provides that:

“In all cases of homicide where the victim is not a man, the difference between the diya and the diya of a man shall be paid from the Fund for Compensation of Bodily Harms.”

The Fund for Compensation of Bodily Harms was established to exclusively compensate bodily harms caused by car accidents when the perpetrator escaped or was not identified or when the

¹¹ Source:<<http://ilna.ir/newsText.aspx?ID=220046>> accessed 30 March 2012.

¹² Source:<<http://rc.majlis.ir/fa/law/show/798088>> accessed 24 March 2012.

¹³ According to Article 543 of the new Penal Code the Head of the Judiciary is supposed to announce the annual monetary value of *diya* at the beginning of every year.

¹⁴ “Article 379- When a Muslim woman is murdered, the right to *qisas* (retaliation) is created; however, if the murderer is a Muslim man, prior to *qisas*, the heir(s) of the victim [*vali-e-dam*] should pay the murderer half of the *diya* (blood money) of a man...”.

vehicle was not insured. In fact, the IRI, while still insisting on this inequality, has found an unusual solution to the problem. This is one of the rare occasions that Parliament has taken a step forward from the original Bill provided by the Judiciary. However, this should not be viewed as a significant step towards equality for women: in the case of bodily injury that does not cause death, the *diya* for men and women is still only equal until it reaches to one-third of the full *diya*. That is, the one-third mark acts as a kind of trigger: once the *diya* of the injuries of a woman is higher than one-third of the full *diya*, it will be decreased to half that of a man's *diya* for the same injuries.

Article 554- "The diya of [harm to] limbs and bodily abilities, up to one third of the full diya, is the same for man and woman; however if it reaches, or exceeds, one third of the full diya, the diya of woman shall be decreased to half."

For example, if someone causes a man to go blind in both eyes, the man would be given full *diya*, while a woman, if incurring the same injury, would only be given half of the full *diya* of a man, and this is not payable from the Fund for Compensation of Bodily Harms. Therefore assertions about the equality of men and women under the new Islamic Penal Code have much to be desired.

According to Shi'a jurisprudence as reflected in the Penal Code, a father, and any male paternal ascendant (e.g. father's father), cannot be put to death for killing his child (or descendant). This rule does not apply to the mother and the ascendant (e.g. mother's mother) and has its roots in patriarchal systems where fathers hold authority over women, children and property. According to Article 299 of the new Penal Code

"Qisas shall be delivered only if the perpetrator is not the father, or a paternal grandfather, of the victim ..."

Cases in which fathers kill their own children are usually cases of honor killing. For example, in 2009, a father killed his 16 year old daughter in Tehran. He told the police that he had been suspicious of his daughter's behavior for some time. According to him, his daughter left the house in the early morning to meet a friend and when she came back around 9 p.m. he shot her twice and killed her. According to the police, the family seemed happy and some family

members even thanked the father for killing her.¹⁵ In such cases, the *qisas* punishment cannot be delivered against the father and he may only be sentenced to between three to ten years of imprisonment, at the discretion of the judge.

1.3. Different punishments

Under the IRI's criminal law, some crimes and their elements are based on gender discrimination and some punishments differ between the genders. In some exceptional cases, the law gives a lesser punishment to women as compared to men for the same crime, such as the crime of homosexuality for which men get the death penalty, while women receive 100 lashes.¹⁶ However in most other cases the law, as written and as applied, imposes harsher punishments on women. One example of a punishment which is applied with more frequency and severity to women is stoning to death for the crime of adultery. Under the *Shari'a* law, sexual intercourse is only permitted within a marriage and sex out of marriage is considered to be a *hadd* crime. The crime of *zina* has been defined as sexual intercourse between a man and a woman who are not married to each other. To prove this offense, very strict standards of evidence are required, including the testimony of four eyewitnesses or the making of a confession four times.

Persons who have committed *zina* can be punished with the *hadd* penalties of either 100 lashes or death by stoning, depending on their legal status. For a specific group of married people, called *mohsan* (man) and *mohsaneh* (woman), the *hadd* punishment for *zina* is stoning to death:

(a) *A 'mohsan' man is a man who is married to a permanent wife and has had sexual intercourse with her whilst he has been sane and can have sexual intercourse with her whenever he so wishes.*

(b) *A 'mosaneh' woman is a woman who is married to her permanent husband and the husband has had sexual intercourse with her whilst she was sane and she is able to have sexual intercourse with her husband.*"¹⁷

¹⁵ Source: <<http://iranhr.net/spip.php?article970>> accessed 30 March 2012.

¹⁶ See Article 237 of the new Penal Code and Article 129 of the former Penal Code.

¹⁷ Article 83 of the old Penal Code.

Although the punishment of stoning applies to men as well, it is applied in greater proportion to women. For example, in 1998 (a year with high recorded rates of punishment by stoning) five of the seven people reportedly sentenced to death by stoning were women.¹⁸ In fact, women are more readily accused and convicted of adultery, while men are rarely punished for adultery because they can easily claim that they engaged in those relations in the bounds of a temporary marriage.¹⁹ Claiming a temporary marriage permits sexual relations outside of formal marriage. Men can more easily claim a temporary marriage because under Iranian laws they may have multiple wives, allowing them to have both a permanent wife and be temporarily married at the same time. On the other hand, women cannot have multiple spouses under Iran's laws, thus making stoning more likely for women than men since they cannot evade punishment for adultery by claiming that the relations occurred in a lawful temporary marriage.²⁰

Moreover, men have an incontestable right to divorce, whereas women have only a limited right to divorce their husbands and a resulting freedom to marry another man. Due to cultural, economic and societal factors, many women are not permitted to exercise any personal choice over the man they marry and many are married at a young age. Poverty, drug addiction and domestic violence also play a part in making women more likely than men to engage in actions that can be deemed as adultery under Iranian laws and therefore render women more vulnerable to the ultimate punishment of stoning as compared to men. As demonstrated in some documented cases of stoning, married women are sometimes forced into prostitution by their husband to feed their drug habits.²¹ Or sometimes they are forced into selling their bodies as a result of an abusive relationship.²² If arrested, they are at risk of being charged with adultery and, if convicted, they could be sentenced to execution by stoning.²³

¹⁸ Amnesty International, Amnesty International Report 1998 - Iran, 1 January 1998, available at: <<http://www.unhcr.org/refworld/docid/3ae6aa070.html>>, accessed 22 Sept 2012

¹⁹ Temporary marriages are marriages for a specific period of time (usually a short period), where a man and woman may lawfully have sexual relations but the wife is not entitled to support from the husband and cannot inherit from him.

²⁰ Javaherian, Maryam, Women's Human Rights in Iran: What can the International Human Rights System Do?, 40 Santa Clara Law Review (2000), 840-41.

²¹ See Amnesty International, Iran: End executions by stoning, 2008, 10, available at: <<http://www.unhcr.org/refworld/docid/478dbce72.html>>, accessed 24 August 2012.

²² Ibid.

²³ Ibid, 7.

In addition, although the details of execution by stoning are omitted in the new Penal Code, Islamic sources are specific about the procedure by which execution by stoning should be implemented, right down to the size of the stones that should be used.²⁴ According to this guidance, men shall be buried up to their waists and women up to their chest for the purpose of execution by stoning. The fact that men are only restrained up to their waists gives them a greater opportunity for escape than women subjected to the same punishment, since it is mandated that the latter be buried more deeply. The ability to escape the stoning pit is significant: in cases where an individual is convicted on the basis of their own confession, their life can be spared if they manage to escape from the pit during the execution.

1.4. Honor killing and a husband's right to kill his wife *in flagrante*

Honor killing is an act of murder carried out by a husband, father, brother, or other relatives, to punish a family member perceived to have brought dishonor upon an entire family. The behavior—or the suspicion of such behavior—that is usually perceived as bringing dishonor upon a family include engaging in an extramarital relationship, electing to marry according to personal choice and refusing an arranged marriage, being a victim of rape, homosexual acts, or even dressing in an inappropriate manner in the eyes of the family. By virtue of culture and other factors, women and girls are the primary victims of honor killings. Honor killings are committed globally but the practice occurs with the most frequency in the Middle East and South Asia.

Due to the clandestine nature of such practices, a lack of government reporting and other factors, there are no precise statistics about the rate of honor killings in Iran. However some official figures are occasionally revealed in the news. For instance, according to a Police Commander, 50 honor killings were committed in the first seven months of the Persian calendar year of 1387.²⁵ Additionally, in provinces such as Khuzestan, Kordestan, Azerbaijan, Fars, Lorestan, Eilam, and Kermanshah, which are home to rural tribal communities that more frequently engage in the

²⁴ Stones shall not be so large as to kill the convict at once nor shall they be so small that they cannot be considered to be stones (Article 104 of the old Penal Code).

²⁵ The Persian calendar year of 1387 began on March 20, 2008. Etemad Daily, 29 Nov 2008, <<http://www.etemaad.ir/Released/87-09-09/97.htm#124602>>.

practice, the rates of honor killing are higher than in the rest of Iran.²⁶ According to Abbas Jafari-Dolatabadi, the then Chief of the Judiciary of Khuzestan, “honor killings are a serious problem in this province and this is an accepted practice in this area. The offenders, therefore, escape from prosecution and the victim’s families often do not pledge—or pursue—the complaint against the offender”.²⁷ In just Ahvaz, the capital of the province of Khuzestan, fifteen women were killed in the Persian calendar year of 1388 (2008/2009) in alleged honor killings.²⁸

This inhuman practice is primarily caused by different cultural and social factors—and while Iranian laws fall short of calling for the outright implementation of honor killing, they are nonetheless remiss in not prescribing a harsh punishment for the practice. Additionally, in one specific case honor killings are even condoned by the Penal Code. Article 630 of the previous Penal Code expressly allowed a husband to kill his wife and her lover, if he caught them *in flagrante*, (“in blazing offense” in Latin; legal term that indicates a criminal has been caught in the act of committing an offense). However if he knows that his wife acted under coercion, he may only kill her rapist (Article 630).²⁹ While in the new Penal Code Article 630 is unchanged, a paragraph has been added to Article 300 which again stresses the exemption of husband from *qisas* (retaliation) in cases where he kills his wife and her lover *in flagrante*. In fact, not only has Article 630 not been repealed, the IRI has solidified its approval of this practice.

Moreover, as already discussed, a father cannot be sentenced to *qisas* (retaliation) for killing his child, rather he can only be sentenced to three to ten years’ imprisonment. This gives fathers legal immunity if they kill their children and opens the door to more honor killings without any effective and deterrent punishment. In addition, when another family member, such as the victim’s brother, kills a girl or woman in the family, the Islamic Shari’a gives the victims’ next of kin (*awliyā-al-dam*) the right to determine whether the condemned should be sentenced to death or be forgiven. In cases where the victim’s family committed the murder, they rarely even lodge a complaint, and if they do so, they will more likely forgive the offender which leaves no option but for the judge to sentence the offender to only three to ten years’ imprisonment.

²⁶ Bakhtiyarnejad, Parvin, Silent Disaster: Honor Killings, p 15 <http://www.feministschool.com/IMG/pdf/_-.pdf>

²⁷ Hamshahri Online, 28 July 2009, <<http://www.hamshahrionline.ir/details/86451>>.

²⁸ ISNA, 26 May 2010, <<http://old.isna.ir/ISNA/NewsView.aspx?ID=News-1546380&Lang=P>>.

²⁹ It must be noted that this rule was not an innovation of the IRI and that a similar article (Article 179 of the General Penal Code) was part of Iran’s legal system before the 1979 Revolution.

When the IRI was questioned about Article 630 of the Penal Code during the periodic reviews of the UN Human Rights Committee in 2011, the response of the IRI was that the IRI considers ‘honor killings’ as being disagreeable and forbidden and asserted that it was intent upon battling the practice of honor killing. However the Iranian state cannot allege that it is intent upon battling the practice of honor killing when legal rules such as Article 630 are still in force, and provisions like paragraph 4 of Article 300 of the new Penal Code were just added.³⁰

1.5. Testimony of women

According to Islamic Shari’a, the testimony of a man is often given twice the weight of that of a woman. Further, the testimony of a woman is not accepted at all for certain types of crimes. For instance, according to the old Penal Code, the *hadd* punishment for *livat* (a homosexual act between men) shall only be proved by the testimony of four men (Article 117) and “the testimony of women, whether alone or together with men, shall not prove *livat*” (Article 119). Similarly, under the old Penal Code, the testimony of women was inadmissible to prove several other *hadd* crimes such as *qavvadi* (pimping) (Article 137) and consumption of intoxicants (Article 170). This exclusion of women had been criticized by women’s rights lawyers.³¹

However, under the new Islamic Penal Code, the testimony of women regarding these types of crimes has been deemed admissible, yet with two conditions: there must be at least one male witness to the purported crime; and, the old rule, that, every two female witnesses equal one male witness. Article 198 of the new Penal Code provides:

“The standard of testimony in all crimes is the testimony of two men, except in zina (illicit sexual intercourse), livat (homosexual act between men), tafkhiz (homosexual act between men without penetration), and mosaheqeh (homosexual act between women)”

³⁰ Nayyeri, Mohammad Hossein, An Analysis of the Responses Given by the Iranian Delegation to the Human Rights Committee, <http://www.iranhrdc.org/files.php?force&file=pdf_en/LegalCom/Analysis_of_Response_to_List_of_Issues_Nayyeri_555232008.pdf> accessed 2 September 2012.

³¹ For example see Kaar, Mehrangiz, Woman and Gender in the IRI Criminal Law, available at <www.mehrangizkar.net/archives/000190.php> accessed 27 July 2012.

which shall be proven by the testimony of four men. Zina may [also] be proven by the testimony of two men and four women, except in cases where zina is punishable by execution or stoning in which then the testimony of at least three men and two women is required. In such cases, if two men and four women give testimony, it is only punishable by flogging. Bodily injuries, which require diya (blood money), may also be proven by the testimony of one man and two women.”

It might be asserted that exempting women from testifying in some criminal cases is for their own benefit. Moreover, giving testimony is not a right but a duty and therefore exempting women from a difficult burden should not be regarded as a violation of human rights. However, this response, which has been employed as a routine response of supporters of Islamic Shari’a, is misleading and distractive. Pro-women’s rights activists do not pursue the “right” to equal testimony, but rather object to the discriminatory nature of the current rules. What makes this a gender inequality and a concern for women’s rights activists is the underlying thinking, principally that women are less reliable than men.

The rule concerning the disparate weight of witness testimony between genders has its roots in one of the most controversial parts of the Islamic Shari’a that views women as inferior to men in respect to mental abilities. According to this traditional perception, women are not reasonable beings but rather consumed with emotion and with a tendency for forgetfulness. Therefore, the view is that their testimonies should not be given full value and should not be accepted in all cases but only in less important cases and only when accompanied by the testimonies of men. What must be challenged is this discriminatory view towards women that also deprives women from taking up some decision making positions such as working as a judge.

1.6. Compulsory *hijab*

Hijab is a generic term for the proper Islamic dress for women. According to Islamic sources, women are required to cover their whole bodies with the exception of their face and their hands from the wrist and their feet from the ankle. They are allowed to uncover their head to a certain

group of male family members called *mahram* including their father, grandfather, brother, and of course their husband. Men are only required to cover their private areas, although social norms require more.

When Reza Shah Pahlavi came to power in 1926, he aimed to lead Iran towards modernity in the twentieth century by ushering in industrial, cultural and social changes and progress. Reza Shah attempted to implement “Western” values, inter alia, by mandating Western-style dress. In 1936, he specifically deemed veiling to be against the law.³² This measure was opposed by the religious sectors of the public and resulted in many clashes. After the abdication of Reza Shah in 1942, the compulsory ban on *hijab* was abandoned in practice. Once Islamists came to power following the Revolution in 1979, the laws on veiling moved to the other extreme with the enforcement of compulsory *hijab*. Although Ayatollah Khomeini, the eventual leader of the Revolution and later the Islamic Republic, first denied that Islamic *hijab* would be compulsory, it eventually became mandatory and the penal Code prescribed a severe punishment (seventy lashes) for violating Islamic *hijab*. Flogging was later replaced by more lenient punishments: including imprisonment and fines.

Article 683- “Those women that appear in the streets and public places without the Islamic hijab, shall be sentenced from ten days to two months’ imprisonment or fined from fifty thousand to five hundred thousand Rials.

There is no similar rule for men in the Penal Code and the rule clearly denies women the freedom to dress as they see fit. Moreover, there are no certain rules and measures for these restrictions; instead, its implementation has been left to the discretion of law enforcement forces, which are not limited to official police officers but also include numerous fanatical Basij forces. These forces seize every opportunity to remind women of the implications of violating the *hijab*. For example, during holy periods, such as Moharram and Ramadan, checks on violations of the *hijab* increase³³ and special units stop at busy places or patrol the streets in search of violations. The interference with a woman’s appearance, including her hair, makeup and clothing, can sometimes border on the ridiculous. For instance in 2007, the Chief Commander of Police for

³² Maryam Javaherian, “Women’s Human Rights in Iran: What can the International Human Rights System Do?”, 40 Santa Clara Law Review (2000), 821.

³³ Ibid 840.

greater Tehran announced that women were not allowed to wear long boots over their trousers, and if seen doing so they would be arrested.³⁴

In other areas, the compulsory *hijab* and Islamic teaching that bans the mixing of the sexes has resulted in gender segregation in the educational system. Gender segregation was first enforced in all primary and secondary schools following the 1979 Revolution. However, in universities, male and female students still attended classes together but sat in separate rows of chairs. In the 1980s, attempts were made to separate male and female students in several universities around the country. Curtains and room dividers were placed in classrooms but were taken away without explanation days later.³⁵

The aim to completely segregate students by gender, however, has not been abandoned since then. In the most recent phase in 2011, the Science Minister Kamran Daneshjoo started a new wave of Islamization of Universities and promised to establish more single-sex universities. He stressed that “women’s colleges will be established in every province, to keep Islamic customs and limits, and the Islamization of universities will go much further than this.” He added that students have a right to gender-segregated universities, and establishing such colleges is his ministry’s top priority.³⁶

Advocates of gender segregation in universities say the mixture of male and female students in universities "causes moral corruption" and distracts students from their studies. They are also troubled that more women are attending university than men. For more than a decade girls have surpassed boys in the national university entrance exams at the undergraduate level. In 2009, 62.7 per cent of students who passed exams and enrolled in undergraduate courses were women and only 37.3 per cent were men. The IRI has been taking measures to change this disparity, such as limiting women's admission to certain courses. Iran University of Science and Technology, for instance, is not admitting women in any but two of its post-graduate courses this

³⁴ Keyhan Daily, Dcember 9, 2007, 15.

³⁵ Maryam Sinaiee, “Iran may separate sexes at universities”, Jul 1, 2011, available at: <<http://www.thenational.ae/news/world/middle-east/iran-may-separate-sexes-at-universities>> accessed Dec4, 2012.

³⁶ Source: <<http://www.radiozamaneh.com/english/content/minister-answers-call-gender-segregation-universities>> accessed Dec 4, 2012.

year. Several courses, such as mining engineering or gas industries, have been off the list of choices for women for many years.³⁷

In August 2012, news spread that 36 Iranian universities banned women from 77 critical fields of study including engineering, education, and counseling.³⁸ The news garnered serious concern among women's rights activists and led to many campaigns and protests. It also ignited a strong international response, with even the spokesperson for the US State Department issuing a statement to announce concerns about the significant regression in educational rights for women in Iran.³⁹ However, the IRI Assessment Organization (*Sazman-e-Sanjesh*), the body responsible for holding the entrance exams of State universities, proclaimed that only 77 "courses" out of a total of 22,800 courses from all over the country (so a total of roughly % 0.3) had become exclusive for male students in the current year; and the news about banning women from 77 "fields of study" was a misunderstanding by news agencies. It concluded that these changes would not affect the rate of admission of female students and the total seats available for male and female students were unchanged in comparison to the previous year.⁴⁰ It was also officially announced that this year 60.24 percent of successful candidates of the entrance exam were women.⁴¹ The IRI official reports, nevertheless, were rejected by some rights groups. For instance, a report submitted to the UN Working Group on Discrimination against Women in Law and Practice, suggested that women are actually banned from studying in 14 fields of higher education and severely restricted from admission in 241 additional fields.⁴²

2. Family Law

Family law covers a significant part of women's lives and has a critical impact on their rights. Human rights activists have long recognized women's vulnerability under Iranian family law and

³⁷ Ibid.

³⁸ For more details see: <<http://www.roozonline.com/english/news3/newsitem/article/77-academic-subjects-announced-not-suitable-for-women.html>> accessed Dec 2, 2012.

³⁹ Source: <<http://www.state.gov/r/pa/prs/ps/2012/08/196783.htm>> accessed Dec 2, 2012.

⁴⁰ Source: <<http://ana.ir/detail.aspx?id=53750>> accessed Dec 4, 2012.

⁴¹ Source: <<http://hamshahrionline.ir/details/184333>> accessed Dec 4, 2012.

⁴² Justice for Iran, Absence of Women in Iranian Universities, <<http://justiceforiran.org/reports/sahmieh/?lang=en>> accessed Dec 4, 2012.

urged the reform of the discriminatory laws and unjust treatment of women in Iran. As discussed in previous sections of this commentary, major changes were introduced in the area of family law under Mohammad Reza Shah with the passage of the Family Protection Law of 1967 (significantly amended in 1975) which abolished extra-judicial divorce, required judicial permission for polygamy and only for limited circumstances, and established special Family Courts. When the 1979 revolution brought an end to the Pahlavi dynasty (1925-79), the Supreme Judicial Council issued a proclamation directing courts that all un-Islamic legislation was suspended. The Council was given remit to revise all existing laws to Islamize the legal system, with Ayatollah Khomeini's *fatwas* serving as 'transitional laws'.⁴³ However, according to the Constitution, the Guardian Council retained the right to revise the laws. Furthermore, special courts established by the Family Protection Act of 1967 were dissolved after the revolution.⁴⁴ This chapter analyzes the development of family law in Iran, and examines the unequal position of women and discriminatory laws regarding marriage and divorce.

2.1. Marriage

Under Islamic Shari'a marriage is not considered as a sacrament but defined as a civil contract between a man and his wife, patterned by the logic of a contract of sale. The three elements of an Islamic marriage contract constitute (1) the offer of marriage made by the woman or her guardian, (2) the acceptance by the man, and (3) *mahr* (or *mahriyeh* i.e. the marriage gift) which is money or a valuable item that the husband pays or pledges to pay the wife. The contract makes sexual relations between a man and woman lawful, and establishes a set of default rights and duties for each party, some supported by legal force, others by moral sanction.⁴⁵ However, before this commentary turns to a discussion of the rights and duties of parties to a marriage, issues including the minimum age for marriage, freedom of marriage and polygamy need to be discussed.

⁴³ Letter No. 1143/1 dated 14 April 1981 of the Supreme Judicial Council.

⁴⁴ An-Na'im Abdullahi Ahmad, *Islamic Family Law in a Changing World: A Global Resource Book*, 108.

⁴⁵ MirHosseini Ziba and Zainah Anwar, *Decoding the "DNA of Patriarchy" in Muslim family laws*, 21 May 2012, <<http://www.opendemocracy.net/5050/ziba-mir-hosseini-zainah-anwar/decoding-%E2%80%9Cdna-of-patriarchy%E2%80%9D-in-muslim-family-laws>> accessed 23 Sept 2012.

2.1.1. Minimum Age for Marriage

As discussed earlier, after the 1979 Revolution, the Guardian Council was established and, in addition to revising the new laws passed by the Parliament, the Council began to revise any existing laws found to be in contradiction with *Shari'a* law. Thus, for example, Article 1041 of the Civil Code, which set a minimum age for marriage at 15 years old for girls and 18 years old for boys,⁴⁶ was amended in 1982 to prohibit marriage prior to the age of puberty under *Shari'a*, i.e. 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. In addition, the amended law gave the right to the natural guardian (*vali*)⁴⁷ to marry at his own discretion for and on behalf of the child even before the age of puberty. Legalizing marriage for 8 year and 9 month old girls and removing the absolute minimum age of marriage could result in an increasing number of the cases of forced marriage, which, could only be considered as a serious step backwards for women's rights in Iran. Article 1041 (29/12/1982) read:

“Marriage before the age of puberty is prohibited.

Note- Marriage before puberty by the permission of the natural guardian (vali) is valid subject to taking the child's best interest into consideration.”

In 2002, a number of legislative initiatives seeking to bring Iranian laws into greater conformity with human rights standards were either proposed or passed. Several articles of the Civil Code were among those targeted for revision. Although the conservative Guardian Council opposed the changes, the Expediency Council, a constitutional body that, *inter alia*, mediates between the Parliament and the Guardian Council, made the changes happen. Hence, when the majority-reformist Parliament passed legislation that increased the age of marriage for girls from 9 to 15 years of age, the Guardian Council rejected the resolution on the grounds that it contravened Islamic law. However, after the MPs maintained their opinion and refused to accept the decision of the Guardian Council, the Bill was sent to the Expediency Council and the Council decided to

⁴⁶ The former Article 1041 adopted in 1928 provided: “Marriage of the female before reaching the age of a full 15 years old and the male before 18 years old is forbidden. In the cases of expediency, with the proposal of the Public Prosecutor and approval of the court, exemption from the age limit may be granted; however, in any case, the exemption may not be granted to the female of less than 13 years of age and the male of less than 15.”

⁴⁷ That is, father or paternal grandfather.

increase the age of marriage for girls to 13 years of age. It also made the intervention of the court mandatory for marriages before the minimum age. This was not an ideal outcome, but it was considered by legal authors as a human rights victory.⁴⁸ Article 1041 (22/6/2002), which is still in force, provides:

“Marriage of girls before reaching the age of 13 full solar years and boys before reaching the age of 15 full solar years is subject to the permission of the Guardian and on condition of taking the child’s best interest into consideration and approval of the relevant court.”

The violation of this article has criminal consequences as well. Article 646 of the former Penal Code provides:

“Marriage before puberty without the permission of the guardian is forbidden. If a man violates Article 1041 of the Civil Code and marries a girl before she reaches the age of puberty, he shall be sentenced to six months to two years’ ta’zir imprisonment.”

There are not many official statistics published about marriages before the minimum age. However, on September 2, 2012, the Chief of the Personal Status Registration Office of the province of Tehran revealed that, in the province of Tehran in the Iranian year 1390 (2010-11), 75 boys and girls younger than 10 years old were married. Also, in the same period, 3,929 boys and girls between the ages of 10 to 14 years old were married.⁴⁹ Although there is no detailed information about the age gap between these child brides and grooms with their married parties, it is possible that a number of these girls are married to men much older than them. Moreover, knowing that in some other provinces this practice is more common, it is clear that the total number of such marriages throughout the country is much higher.

When the Advisor of the Minister of Justice was questioned by a journalist about marriages of children who are less than ten years of age, she asserted that “marriage is a personal issue and the State and government may not intervene in it”.⁵⁰ In a similar stance, the IRI General Attorney, Mohseni Ejei, confirmed that there was no legal prohibition on such marriages. He asserted that

⁴⁸ Shadi Mokhtari, 477.

⁴⁹ Source: <<http://www.farsnews.com/newstext.php?nn=13910327001249>> accessed 14 September 2012.

⁵⁰ Source: <<http://ilna.ir/news/news.cfm?id=858>> accessed 19 September 2012.

“there might be marriages just for the families to become *mahram*⁵¹ to each other, but there is no sexual relation”.⁵²

This is while, according to an infamous opinion by Ayatollah Khomeini in his *fiqh* book *Tahrir-al-Vasileh*, which has long been criticized by his opposition and denied or poorly justified by his supporters, taking sexual pleasures other than sexual intercourse (penetration) with a minor girl is allowed:

*“Anybody who has a wife who is less than nine years of age is not allowed to have sexual intercourse with her whether she is his permanent or temporary wife; however taking other forms of sexual pleasures such as touching with lust, hugging, and tafkhiz (rubbing penis between the buttocks and thighs) are permitted, even if she is a nursing baby.”*⁵³

In the end, it must be noted that, the best interest of children mandates that they never marry prior to reaching the age of maturity. It goes against the personal freedom of an individual for someone else to enter them into a marriage before the mental and physical abilities of the former are developed. Taking sexual pleasure from children, before they develop into an adult, is a clear instance of child abuse and must be strictly banned. The modern world cannot endorse Bedouin and tribal traditions that condone such behavior, nor immoral religious opinions that take this position. Child marriage, as well as the sexual abuse of children under the cover of marriage, must be ended without any reservation. Therefore, like what existed prior to the 1979 Revolution⁵⁴, there must be an absolute minimum age for marriage before which no child can marry, regardless of the permission of their guardians or the court.

⁵¹ Those are *mahram* to each other are not required to wear full Islamic *hijab* in front of each other. For example, women are free not to cover they head in front of *mahram* members of their family (e.g. a son-in-law and his mother-in-law).

⁵² Source: <<http://www.dw.de/dw/article/0,,16248124,00.html>> accessed 19 September 2012.

⁵³ Khomeini, Ruh-allah, *Tahrir al-Vasileh*, Vol 2, 241.

⁵⁴ See no 35.

2.1.2. Freedom of Marriage

As discussed above, the natural guardian (*vali-ye-qahri*: father or paternal grandfather) has the right to marry for and on behalf of his minor daughter, in compulsory marriage. While in other Islamic schools the natural guardian has the right to marry even for his adult daughter, in Hanafi and Shi'ite law, only minor girls may be contracted in compulsory marriage, and adult women may conclude their own marriage contracts.⁵⁵

However, even adult women are not completely free to marry for the first time at their own discretion. There is still a restriction which affects their freedom of marriage as long as they are a "virgin". It is agreed by all Islamic schools that the marriage of a virgin girl (even after puberty) requires permission of her *vali-ye-qahri* (natural guardian). There is no such restriction for boys and they can marry after they reached the age of puberty without the permission of their natural guardians.

However, the natural guardian's authority over the marriage of his virgin daughter is not absolute and can be challenged if he abuses his right. In such cases, the court may grant permission to the marriage if the guardian refuses to give his permission without any valid reason. Article 1043 of Civil Code provides:

"The marriage of a virgin girl, even if they have reached the age of puberty, is dependent on the permission of her father or her paternal grandfather. However if the father, or the paternal grandfather, withholds permission without justifiable reason, he loses his right to grant permission and the girl can seek relief from the Special Civil Court [now General Court] by giving the full particulars of the man she wants to marry and also the terms of the marriage and the mahriyeh agreed upon to apply for permission. With the permission of the court she can refer to a Marriage Registry and register her marriage."

However, in cases where the natural guardian has no objection, but he is not present to give his permission, the girl needs to apply to the court for the judicial permission. Article 1044 provides:

⁵⁵ Encyclopedia Britannica, Shari'a: Family Law, <<http://www.britannica.com/EBchecked/topic/538793/Shariah/68932/Family-law>> accessed 17 Sept 2012.

“If the father, or the paternal grandfather, is not present in the place, and obtaining their permission is customarily impossible, and the girl is in need of marriage, she can marry.

Note - Registration of such marriage in the Marriage Registry shall be pending on proving the above mentioned conditions in the Special Civil Court [now General Court].

Another restriction to the right to freedom of marriage is about the religion of spouses. According to Quran (2:221) Muslim men are free to marry fellow-Muslim women but they are forbidden to marry women from idolatrous communities unless they embrace Islam. They are, however, expressly allowed to marry upright women from the *ahl-al-kitab*, "people of the book", meaning Jews and Christians, and, according to Shi'a, Zoroastrians, who are followers of the divine religions with a revealed scripture (5:6).

However, this concession is allowed to Muslim men only. Muslim women are not allowed to marry adherents of another religion under any circumstances. It is asserted that a Muslim woman who marries a non-Muslim man, under his influence, will convert from Islam to her husband's religion. The Civil Code is not detailed about the issue and only one article deals with this requirement. Article 1059 of Civil Code stipulates:

“Marriage of a female Muslim with a non-Muslim is not allowed.”

As a result, a non-Muslim man, in order to marry an Iranian Muslim woman, must convert to Islam. Moreover, this requirement must continue through the whole period of marriage; otherwise the marriage will be at risk. So, if for example, a Christian woman becomes Muslim while her husband retains his Christian faith, she is entitled to apply for divorce.

If the above mentioned restrictions could be seen as a religious rule, the restriction of marriage of Iranian women with foreigner men, even in cases where there is no religious barrier, is absolutely political. Article 1060 of Civil Code, provides a bizarre rule which violates the freedom of marriage of Iranian women even further:

“Marriage of an Iranian woman with a foreign national, even in cases where there is no legal impediment, is dependent upon special permission of the Government.”

2.1.3. Polygamy

Under Iranian law, while women may contract only one marriage at one time, it is a man's religious and legal right to marry more than one woman. One man can enter into up to four permanent marriages at a time. Although this right is not stipulated in Civil Code, it can be deduced from several articles. For example, Article 942, although dealing with the issue of inheritance, expressly refers to the polygamy of men:

“If there are more than one wife, one fourth or eighth part of the assets, which belongs to the wife, will be divided equally among them.”

There is no limitation on the number of wives stipulated in the law; but according to the Quran and Islamic rules it is limited to up to four permanent wives at the same time. Verse 4:3 of Quran is the basic source of this rule:

“... marry those that please you of [other] women, two or three or four. But if you fear that you will not be able to treat them justly, then [marry only] one... That is nearer to prevent you from doing injustice.”

In addition to the principles about multiple permanent marriages, Iran, as a Shi'ite State, has a unique institution: the *Mut'a* (temporary marriage). *Mut'a* allows a Muslim man to contract an unlimited number of temporary marriages, i.e. for a fixed time period, in addition to his permanent marriages. In fact, in Shi'ite Islam this institution has remained through the centuries though it has long been forbidden in Sunni Islam. Articles 1075 to 1077 of Civil Code exclusively deal with temporary marriage.

Until 1968, men could marry up to four permanent wives without any interference of the court or any other bodies investigating their ability to “treat their wives justly”. Although it did not prohibit polygamy, the Family Protection Act of 1968 was the first law that tried to restrict polygamy and made the permission of the court mandatory for additional marriages. According to Article 14 of this Act:

“When a man, already having a wife, desires to marry another woman, he shall obtain permission from the court of law. The court shall give the permission only when it has taken the necessary steps, and, if possible, has made an inquiry from the present wife of

the man, in order to assure the financial ability and [physical] power of the man for doing justice [to the wives].”

This article also prescribed six months to two years’ imprisonment for a man who violated this rule and married another woman without obtaining the required permission from the court. Moreover, in such cases, the first wife, whose husband re-married without her consent, could apply for divorce (Article 11(3) of the same law). In other words, the husband marriage to a second wife without the first wife’s express consent constituted sufficient grounds for divorce.

Seven years later, as a result of the efforts of women’s rights activists, the Family Protection Act was revised. The new Act, again, failed to abolish polygamy but imposed more restrictions on the practice and even prescribed criminal prosecution for the second wife if she was aware of the first wife but married the man without the first wife’s consent and the court’s permission. According to Articles 16 and 17 of the new Family Protection Act of 1975, a man was given permission to marry a second wife only under specific circumstances and after following specific procedures:

Article 16- “A man, already having a wife, may not marry a second wife unless in the following situations:

- 1) First wife’s consent.*
- 2) Inability of first wife in performing marital duties.*
- 3) Non-submission of the first wife to the husband.*
- 4) Affliction of the wife to insanity or other difficulty to cure diseases mentioned in article 8(5-6).*
- 5) Conviction of the wife according to article 8(8).*
- 6) Addiction of the wife according to article 9(8).*
- 7) Wife’s abandonment of family life.*
- 8) Wife’s infertility.*
- 9) Disappearance of the wife according to article 8(14).”*

Article 17- “The applicant must present two copies of the application to the court and explain his reasons. A copy of the application shall be sent to his wife. The court shall give the permission only when it has taken the necessary steps, and, if possible, has made an

inquiry from the present wife of the man, in order to assure the financial ability of the man and doing justice in the case of article 16(1). It is however the first wife's right in all cases to apply for divorce if she wishes.

Any man who already has a wife and marries another woman without obtaining the due permission from the court, shall be sentenced to six months' to one year of imprisonment. The same punishment shall be imposed on the Registry Officer and the new wife if she is aware of the former marriage of the man...”.

However, after the 1979 Revolution when the repeal of anti-Islamic laws was declared, the status of the Family Protection Law of 1975 became unclear. Although some judges refused to refer to the Act, it has never been expressly repealed. On the contrary, only small parts of the Act have been repealed which shows that it is still valid as a whole. On July 31, 1984, the Guardian Council—without repealing the whole article or the Act—only declared that the punishment of violation of Article 17 against Shari'a and therefore marrying a further wife without the court permission was not punishable any more:

“The punishment of parties to the [further] marriage and the Registry Officer... prescribed in article 17 of the Family Protection Law is against Shari'a.”

During the third periodic review of the situation of human rights in Iran by the UN Human Rights Committee, the IRI, when questioned about polygamy in Iran, responded:

“By virtue of [a]rticle 16 of the Family Protection Law and article 645 of the Islamic Penal Code, polygamy is prohibited in the Islamic Republic of Iran, but could take place under particular conditions, including insanity of the woman, conviction to prison, infertility.”⁵⁶

This response is inaccurate and far from the truth. First, Article 645 of the Islamic Penal Code has nothing to do with polygamy. It deals with and criminalizes marriage and divorce without

⁵⁶ Replies from the Government of the Islamic Republic of Iran to the list of issues to be taken up in connection with the consideration of its third periodic report, CCPR/C/IRN/Q/3/Add.1, para 24, 28 July 2011, available at <<http://www.iranhrdc.org/english/human-rights-documents/united-nations-reports/3522-september-2011-reply-of-the-islamic-republic-of-iran-to-the-un-human-rights-committee%E2%80%99s-list-of-issues.html#.UGG7HY11RXg>> accessed 24 September 2012.

registration. Second, as discussed above, Article 17 of the Family Protection Law of 1975, which used to criminalize polygamy in specific cases, was declared as against *Shari'a* by the Guardian Council in 1984. Therefore Article 16 of the same law was abandoned and has no legal effect anymore. Since then, polygamy is neither a crime nor prohibited. To the contrary, according to Civil Code, it is permitted and men do not need to prove “particular conditions” nor obtain the court permission to remarry (i.e. permanent marriage) up to four times. In addition, there is also no limitation to the number of temporary marriages at the same time.⁵⁷ In the end, it must be said that polygamy has been one of the most controversial issues in women’s rights debates in Iran and will be discussed more when examining the new Bill of Family Protection Law (See 2.4).

2.1.4. Rights and duties of both parties to a marriage

As discussed earlier, under Islamic law, marriage is considered to be a civil contract between a man and his wife. So, similar to other contracts, the marriage contract sets forth certain rights and duties for both parties. Each one’s duty is the other one’s right and there is a direct link between rights and duties. These include the woman’s duty to *tamkin* (sexual submission and obedience) and the man’s duty to pay *mahriyeh* and provide *nafaqa* (maintenance). If one party fails to perform his/her duties s/he may lose his/her rights. For example, Article 1108 of the Civil Code provides:

“If the wife refuses to fulfill the duties of a wife without a legitimate excuse, she will not be entitled to nafaqa (maintenance).”

In this legal regime of exchanges, the husband is appointed by law as the head of the family and his wife must obey him. Article 1105 of the Civil Code provides:

“In relations between husband and wife, the position of the head of the family exclusively belongs to the husband.”

⁵⁷ Nayyeri, Mohammad Hossein, An Analysis of the Responses Given by the Iranian Delegation to the Human Rights Committee, (n 30).

This specifically mandates male authority over women. And, in general, Islamic family law has been criticized by pro-women's rights activists for justifying and institutionalizing a patriarchal model of the family.

Islamic jurists, on the other hand, have their own reasons and invoke the Quran. The Quranic verse (4:34) seems to be at the heart of their argument:

“Men are qawwamun [protectors/maintainers/in charge, according to different interpretations] of women, for what God has favored some over others and for what they pay for maintenance from their wealth. Righteous women are obedient guarding in the unseen [in the husband's absence in some sources] what God would have guarded. Those [women] whose disobedience you fear—admonish them, and refuse to share their beds, and strike them. But if they obey you, seek no means against them. Indeed, God is Exalted, Great.”

It would be true to say that “the entire edifice of family law in Muslim legal tradition is built on the ways in which classical jurists understood this verse and translated it into legal rulings”.⁵⁸ Specifically, the word “*qawwamun*” has been viewed as the most problematic concept in the verse and the source of conflicts. Based on their understanding of the verse 4:34, Islamic jurists have postulated the validity and inviolability of men's superiority and authority over women. This has affected all areas of Islamic law relating to gender rights, but its impact is most evident in the laws that the jurists devised for the regulation of marriage.⁵⁹

As a result, under Islamic law, marriage is defined as a contract that establishes a set of default rights and obligations for each party, some supported by legal force, others by moral sanction; those with legal force concern sexual access and compensation and are embodied in two legal concepts: *tamkin* (obedience or submission) and *nafaqah* (maintenance). The wife loses her claim to maintenance if she is in a state of *nushuz* (disobedience).⁶⁰ She is obliged not to do anything that denies, or interferes with, her husband's rights. Therefore, for example, she is not allowed to leave home without her husband's permission, for it may conflict with her duty to

⁵⁸ MirHosseini Ziba and Zainah Anwar, Decoding the “DNA of Patriarchy” in Muslim family laws, 21 May 2012, <<http://www.opendemocracy.net/5050/ziba-mir-hosseini-zainah-anwar/decoding-%E2%80%9Cdna-of-patriarchy%E2%80%9D-in-muslim-family-laws>> accessed 23 Sept 2012.

⁵⁹ Ibid.

⁶⁰ Ibid.

meet her husband's desires (in particular sexual access) at all times.⁶¹ In the next sections, these rights and duties will be examined in more detail.

2.1.4.1. *Mahriyeh*

A key feature of all Muslim marriage contracts that differs from a standard Western civil marriage license is a provision regarding *mahriyeh* (or *mahr*), a sum of money or any other valuables that the husband gives or undertakes to give to the bride upon marriage.⁶² According to Article 1082 of the Civil Code:

“Immediately after the conclusion of the marriage contract, the wife becomes the owner of the mahriyeh and can take possession of it or spend it in any way that she wishes.”

Islamic family law specifies that all marriages must involve a transfer from groom to bride, and even if no *mahr* is stipulated, the wife is entitled to claim *mahr-ul-methl*, a “fair” amount based on what is received by others of her social standing.⁶³ Under Shari'a rules, *mahriyeh* is divided into prompt *mahr*, which is payable immediately at the marriage, and deferred *mahr*, which is payable either on demand of the wife (*ind-al-motalebeh*), or when the husband is financially able to pay (*ind-al-isteta'ah*), or on the termination of the marriage by death or by divorce. The default practice in Iran, however, is to specify the amount of *mahriyeh* as deferred and only payable on demand of the wife (*ind-al-motalebeh*) or in the case of divorce.

⁶¹ “A permanent wife is not allowed to leave the home without her husband's permission and must submit herself for every pleasure he wants and not to prevent sexual intercourse without an acceptable excuse according to Shari'a. If she obeys her husband in the said affairs, providing her with food, clothes, shelter and other means mentioned in [fiqh] books is her husband's duty...” (Khomeini Ruh-allah, *Resaleh Tozih-al-masa'el*, 2412)

⁶² Ambrus Attila and others, Muslim family law, prenuptial agreements and the emergence of dowry in Bangladesh, Harvard University (2008), available at: <http://www.economics.harvard.edu/faculty/field/files/revision_january_24_2009.pdf> accessed 14 September 2012.

⁶³ Article 1087 of Civil Code provides: “If a *mahriyeh* is not mentioned, or if the absence of *mahriyeh* is stipulated in a permanent marriage, that marriage will be authentic and the parties to it can fix the *mahriyeh* subsequently by mutual consent. If previous to this mutual consent sexual intercourse takes place between them, the wife will be entitled to the *mahr-ul-methl*.”

The first advantage that *mahr* gives to the wife, in cases the *mahr* is prompt or demanded, is the right to refuse starting sexual relations with her husband until he pays the entire amount of *mahr*. Article 1085 of Civil Code provides:

“As long as the mahr is not paid to her, the wife can refuse to fulfill her duties toward her husband, provided that the mahr is prompt. This refusal does not debar her from the right to nafaqa (maintenance).”

Continuing hyper-inflation in Iran, however, prompted lawmakers to find a solution for *mahrs* agreed to in cash which were losing their value on a daily basis. On July 20, 1997, a note was added to the above cited article which stipulated that women’s *mahriyeh*, if in cash⁶⁴, should be recalculated to take account of inflation:

“Note: If mahriyeh is [agreed] in cash, it shall be paid in accordance with the change of the annual price index at the time of payment in comparison with the time of the contract, which shall be calculated by the Central Bank of Iran, unless otherwise agreed by the spouses at the time of contract...”

But, the dilemma of *mahriyeh* was too complicated to be solved by such minor changes. As will be discussed in more detail later, under Islamic family law, only men have unilateral and unconditional divorce rights. As a result, a married Muslim woman in traditional settings lives under the ever-present threat of being divorced without having the guaranteed right to initiate divorce herself. Although under Islamic law women have little ability to influence marriage outcomes directly, they see *mahr* not only as an effective deterrent against husband-initiated divorce, but also as a tool with which to obtain a divorce from their husbands. Since in the majority of cases *mahriyeh* is payable on demand of the wife (*ind-al-motalebeh*) whenever she decides, she may sue her husband in court and demand the payment. If the husband refuses to pay, he will be sent to jail.

This potential use of *mahr* had a direct effect on the amount of *mahr* women preferred to specify in their marriage contracts. In fact, its potential use has led to an unbridled increase in average

⁶⁴ Today, due to continuing inflation, the majority of women prefer to set other capital assets as their *mahr*, for example gold coins or real states.

mahr levels in Iran; sometimes bizarre amounts of *mahr* are agreed to,⁶⁵ and many husbands have been sent to jail due to their inability to pay the agreed *mahr*. Although there are no precise official statistics about prisoners sent to jail for inability to pay their wives' *mahr*, it was revealed by a judicial official that, between April 2010 and September 2011, around 20,000 men have been imprisoned for *mahriyeh* cases.⁶⁶

The conflicts surrounding payment of the *mahr* have, over time, encouraged the IRI Parliament to find a solution. Because deciding the amount of *mahr* is the right of the spouses and because they enjoy freedom of contract, lawmakers did not set a maximum amount for the *mahriyeh*, rather, they set a maximum limit for the enforceable payment of *mahriyeh*, beyond which, the husband may not be forced to pay or sent to jail, unless it is proved that he has the financial ability to do so. In a recent development on April 2, 2012, The IRI Parliament passed an article of the new Bill of Family Protection Law which sets the enforceable *mahriyeh* limit as 110 gold coins.⁶⁷ It must be noted that the imprisonment of persons for their inability to make a financial payment is against human rights standards. Article 11 of the ICCPR stipulates: “no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation”. However, the rights of men in this regard cannot be considered without taking the rights of women on the issue of *mahriyeh* into consideration. If the lawmaker gives men the option to make empty promises of enormous *mahrs* and then removes the legal sanctions—then, in return, it must guarantee women's equal marital rights. This issue will be discussed further in the section on divorce, *see infra*.

⁶⁵ For example, in one case a *mahriyeh* of 600,000 gold coins was agreed to and the wife sued the husband for *mahr* only three months into the marriage. See: <<http://www.javanonline.ir/vdcc4mq142bq4s8.ala2.html>> accessed 28 Sept 2012.

⁶⁶ Source: <<http://www.asriran.com/fa/news/202069/20-%D9%87%D8%B2%D8%A7%D8%B1-%D9%86%D9%81%D8%B1-%D8%A8%D9%87-%D8%AE%D8%A7%D8%B7%D8%B1-%D9%85%D9%87%D8%B1%DB%8C%D9%87-%D8%B2%D9%86%D8%AF%D8%A7%D9%86-%D8%A7%D9%81%D8%AA%D8%A7%D8%AF%D9%87-%D8%A7%D9%86%D8%AF>> accessed 28 Sept 2012.

⁶⁷ The new Bill of Family Protection Bill is still under discussion and has not been finalized. For more details see section 2.4.

2.1.4.2. *Nafaqa* (maintenance)

The second financial consequence of the marriage contract is the man's duty and women's right to maintenance. A husband, under Islamic law, is obliged to provide his wife with the required maintenance (Article 1106). According to Article 1107 of the Civil Code:

*“Nafaqa includes all reasonable and appropriate needs of the wife such as dwelling, clothing, food, furniture, the cost of health and remedy, and a servant if the wife is accustomed to have servants or if she needs one because of illness or defects of limbs.”*⁶⁸

The wife can even sue her husband in court if her husband refuses to provide her with maintenance. In such cases the court shall decide on the amount of *nafaqa* and force the husband to pay it (Article 1111). Moreover, Article 542 of the Penal Code⁶⁹ prescribes 91 days to five months' imprisonment for a husband that, despite his financial ability, refuses to pay *nafaqa* to her wife.

However, a woman's right to *nafaqa* is not unconditional. A woman merits *nafaqa* as long as she obeys her husband (*tamkin*). As soon as she begins to display disobedience (*nushuz*), she has no right to claim for *nafaqa*. According to Article 1108 of the Civil Code, if she refuses to fulfill the duties of a wife without legitimate excuse, she will not be entitled to *nafaqa* (maintenance). The following section will examine the two concepts of *tamkin* and *nushuz*.

2.1.4.3. *Tamkin* (obedience)

At the core of the marriage contract is the wife's *tamkin* (submission), defined as an unhampered sexual availability that is regarded as a man's right and a woman's duty. In exchange for the *mahriyeh*, which is analogous to a “sale” price, the husband gains a type of ownership over his wife, in the form of sexual access. The wife has to be sexually available to him at all times, such that he has total control over her, including her movements to and from the home. In return, he is

⁶⁸ The cost of health and remedy is added to the article in 2002.

⁶⁹ Part of the Fifth Book of the old Penal Code which is not affected by the recent Bill of new Penal Code.

required to provide her *nafaqa* (maintenance).⁷⁰ Without an acceptable excuse, the wife's failure to comply with the lawful wishes of her husband constitutes "*nushuz*" (disobedience) and means that she may lose her right to maintenance.

A wife is *nashezeh* (disobedient) when she, for instance, refuses to have sex with her husband or leaves her husband's home against his will. As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be *nashezeh*. As already discussed, this legal framework is reflected in Iran's family law. Article 1105 of the Civil Code exclusively recognizes the husband as the head of the family which means that his orders must be obeyed by his wife and children. Then Article 1108 stresses that, if the wife refuses to *tamkin* (obey her husband) without a reasonable excuse⁷¹, she loses her right to the *nafaqa* (maintenance). A wife's disobedience can also create legal grounds for polygamy, divorce, or domestic violence (wife battery).

It is said that *tamkin* is a mutual duty of both parties; but, a husband's *tamkin* is hardly discussed in Islamic sources. A rare example mentioned in some sources is that "a husband shall not refrain from having sex with his wife for more than four months".⁷² This means that, while a wife is obliged to have sex with her husband whenever he wishes, she does not enjoy the same right. In other words, the sexual needs of women are ignored under Islamic family law and what is important is the pleasure and satisfaction of men. In addition, giving men this authority over women such that only men can choose the time and place of sexual relations even without the consent of the wife, may result in marital rape which is punishable and constitutes a crime in many countries.⁷³ In addition, according to the UN Declaration on the Elimination of Violence against Women, marital rape is established as violence against women and a human rights violation.⁷⁴

⁷⁰ Anwar Zainah, and Jana S. Rumminger, "Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform", *Washington and Lee Law Review* (2007), 64, 1543.

⁷¹ For example, the wife's refusal of sexual relations where the husband has contracted a venereal disease is not seen as disobedience.

⁷² Khomeini, Ruh-allah, *Resaleh Tozih al-Masa'el*, No 2418.

⁷³ Marital rape may be prosecuted in at least 104 States. See: United Nations, In-depth study on all forms of violence against women, Report of the Secretary-General, 6 July 2006, A/61/122/Add.1.

⁷⁴ United Nations, Resolution adopted by the General Assembly 48/104, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

2.1.4.4. Right to leave the country

The traditional authority of men (fathers and husbands) over girls and women sometimes takes modern forms. Under Iranian laws, a woman, if married, needs her husband's consent to obtain a passport and travel outside the country. Husbands can forbid their wives from leaving the country by refusing to sign the papers that will allow them to apply for a passport and travel. According to Article 18 of Passport Law 1973:

“A passport shall be issued for the following persons according to this article: ... 3- Married women, even if under 18 years old, with the written agreement of their husbands...”

According to Article 19 of the same law, husbands even have the ability to notify the government and forbid their wives from leaving the country. In such cases their wives' passports will be seized. In fact, even if they give their consent at first, husbands are not bound to their previous consent and are free to change their minds at any time. This exclusive right of the husband may cause many difficulties for their wives and can be abused by husbands. It is possible, especially in cases of dispute, for a husband to use this right as a punishment or as revenge. As natural guardians, fathers can also forbid their underage children from leaving the country. Wives and mothers do not have the same right.

In the most recent development on this issue, on November 13, 2012, the IRI Parliament's National Security and Foreign Policy Committee (NSFPC) introduced a new amendment to Article 15 of the current Law of Passport that obliges every unmarried woman under 40 to obtain her natural guardian's (i.e. father or paternal grandfather) consent when applying for a passport. The NSFPC was commissioned by Parliament to survey and prepare the new Bill of Passport which was originally proposed by the government.

The spokesperson of the NSFPC, Naghavi Hosseini, said Parliament was persuaded to consider the government's proposed Bill after hearing reports from experts about problems with the current regulations. He added that if the natural guardian does not give his permission, then the court may issue a judicial permit and therefore there is no restriction on unmarried women to

travel outside the country. He also stressed that the proposed rule is aimed "to protect women's well-being".⁷⁵

Although the draft is far off from becoming a law, and is still pending a parliamentary vote, it has attracted widespread attention and concern from women's rights activists and even some IRI officials.⁷⁶ It is believed to be discriminatory and to violate a woman's right to travel since the law intends to keep women under the guardianship of their fathers even after they reach the age of maturity. In order to make it more acceptable, a group of women MPs proposed that the new restriction not apply to those women that go outside the country for known reasons such as studying or attending conferences. However, on January 13, 2013, the Spokesman of the NSFPC stated that according to the latest changes, "all unmarried women over 18 years of age need their guardians' permission to exit the country, but there is no restriction for them to apply for a passport".⁷⁷ Finally, on February 20, 2013, it was asserted that the controversial article of the Bill was removed and no change is going to be made to passport laws in respect to unmarried women.⁷⁸

2.1.4.5. Right to work

As already discussed, it is the duty of the husband to work for a living and provide *nafaqa* (maintenance) for his family while the wife has no such duty. However, if she decides to work, whether on account of her personal desire or due to insufficient income of the family, she does

⁷⁵ Daily Jam-e-jam, November 18, 2012, available at:

<<http://www.jamejamonline.ir/papertext.aspx?newsnum=100828142862>> accessed Dec 4, 2012.

⁷⁶ Referring to the recent Bill, the Spokesperson of the Judicial and Legal Commission of the IRI Parliament deemed it a naive proposal that has no chance of being adopted as a law and has no basis in the Shari'a. Source:

<<http://isna.ir/fa/news/91091004666/%D9%85%D8%AD%D8%AF%D9%88%D8%AF%DB%8C%D8%AA-%D8%AF%D8%AE%D8%AA%D8%B1%D8%A7%D9%86-%D8%A8%D8%B1%D8%A7%DB%8C-%D8%AE%D8%B1%D9%88%D8%AC-%D8%A7%D8%B2-%DA%A9%D8%B4%D9%88%D8%B1-%D8%AC%D9%86%D8%A8%D9%87-%D8%B4%D8%B1%D8%B9%DB%8C>> accessed December 4, 2012.

⁷⁷ <<http://isna.ir/fa/news/91102414177/%D8%B2%D9%86%D8%A7%D9%86-%D9%85%D8%AC%D8%B1%D8%AF-%D8%A8%D8%A7%D9%84%D8%A7%DB%8C-18-%D8%B3%D8%A7%D9%84-%D8%A8%D8%B1%D8%A7%DB%8C-%D8%AE%D8%B1%D9%88%D8%AC-%D8%A7%D8%B2-%DA%A9%D8%B4%D9%88%D8%B1>>

accessed Jan 13, 2013.

⁷⁸ Bahar Newspaper, February 21, 2013, available at: <<http://www.baharnewspaper.com/News/91/12/03/6240.html>> accessed February 28, 2013.

have the right to work. This right, nevertheless, is conditional and can be restricted by the husband. Article 1117 of Civil Code provides:

“The husband can prevent his wife from an occupation or technical profession which is incompatible with the family’s interests or the dignity of him or his wife.”

This article does not forbid or deny the wife’s general “right to work”, but instead gives the husband the right to prevent his wife from a “specific job or profession”. At first blush, a primary issue with this article is of course, *who* decides what is “incompatible” with the interests of the family or dignity of the husband or wife. From the wording of the provision, it seems that the husband makes the decision. But what is even more problematic, is that the article is silent on whether the same right is accorded to the wife. In other words, the Civil Code has not prescribed the same right for the wife to prevent her husband from a job that she sees incompatible with the family’s interests or her position. This is one reason why some women do not see the laws as protective of their rights, and when marrying their husbands, they add a binding condition to their marriage contract according to which the husband cannot forbid them from working; or, the woman stipulates that she can keep her current job even after marriage.

The Family Protection Law of 1967, however, tried to address the first issue by requiring court approval of a husband’s decision to prevent his wife from working. Article 15 of that Act provided that: “a husband may, with the approval of the court, prevent his wife from an occupation...”—therefore a husband could not, simply at his own discretion, prevent his wife from working, rather he was required to apply to the court for such relief. Still, the decision on whether or not a wife could work was left to the discretion of another person, i.e. the judge. Also, there was no criterion for this judgment—which meant that what could be considered as against a family’s interests in one case might be considered as quite acceptable in another case. However, if this rule was interpreted and applied in a reasonable and uniform way, it would likely cause less problems, at least when it concerned consistency of application. Under a standard application, only occupations such as beggary, and other occupations raising moral or ethical concerns, could be considered as incompatible with the interests and the dignity of the family. The Family Protection Law of 1975 took a further step and prescribed a similar right for the wife:

“A husband may, with the approval of the court, prevent his wife from an occupation that is incompatible with the family’s interests or the dignity of him or his wife. The wife, too, may sue for the same reason. The court, if it does not interfere with the livelihood of the family, shall prevent the husband from that occupation.”

Although similar, the right was not the same because the condition tacked on to the last sentence of the article retained the inequality between husband and wife. Even if the husband’s occupation is incompatible with the family’s interest or dignity, the wife can only prevent her husband from taking such employment “if it does not interfere with the livelihood of the family”. There is no similar requirement for men who lodge a complaint against their wives, even if their wives are the breadwinner of the family. Despite the fact that this article has not been repealed by any other law, it is abandoned in practice; and, due to its non-precedence in Islamic *fiqh*, it is unlikely that a woman can win such a case and forbid her husband from an occupation unless the occupation is against the law or Islamic rules, which invokes a different set of circumstances.

2.2. Divorce

The general rule in Islamic Shari’a is that divorce is the husband's unilateral right and he can end his marriage by following a simple procedure: reciting the divorce formula in the presence of two “just” (*ādel*) witnesses. He does not need any grounds and can divorce his wife without the wife’s consent or even her presence. Article 1133 of the previous Civil Code (1928) followed the same rule and provided: “A man can divorce his wife whenever he wishes to do so.” This rule, however, was modified over time and the laws that were passed in the 1960s and 1970s sought to put limits on this boundless right. Despite the efforts to restrict the breadth of this right, as detailed below, in the end result the reforms still did not change the inherent inequality between the husband and wife in respect to the right of divorce.

The Family Protection Laws of 1967 and 1975 set up new mandatory court procedures for divorce and outlawed private divorces. Since then, divorcing couples were required to appear in court and apply for a certificate that would be necessary for divorce. If the court, or the

arbitrators, were unsuccessful in bringing peace between the parties, or if both parties agreed to a divorce, the court could issue a “certificate of impossibility of reconciliation”. But before issuing the certificate, issues such as the wife’s rights (e.g. *nafaqa*), and also the custody of children, if any, should be decided. The applicant, then, could bring the certificate to a Divorce Registry Office and finalize the divorce.

In fact, under the new regime of family laws in Iran, the unilateral right to divorce that had been the monopoly of the husband was restricted and could only be applied under specific conditions and through the court. In addition, both the husband and wife could apply to the courts for divorce under similar conditions. Although the above mentioned laws retained some Islamic principles, they also included many favorable provisions for women’s rights and added new grounds for divorce for both parties. The conditions on which either spouse could apply for divorce included: mistreatment by either parties; a husband’s failure to provide “maintenance” to the wife or his failure to satisfy other needs of the wife; the wife’s refusal to provide *tamkin* (sexual submission) to her husband, the incurable disease of either party; addiction of either party that makes the continuation of marital life impossible; an imprisonment of more than five years of either party; the infertility of either party, among other factors.

Not surprisingly, these changes were opposed by many clergy, who viewed these laws as going against the Islamic Shari’a and the Islamic family framework. Although clerics did not succeed in preventing the adoption of these laws in that era, the 1979 Revolution gave them the opportunity. Only two weeks after the revolution, in the chaotic and inflamed situation of the country, Ayatollah Khomeini ordered the then Minister of Justice to review the Family Protection Law and remove the “anti-Islamic” rules therein.⁷⁹ Although the Family Protection Law was never expressly repealed by any other law, its validity was questioned and in a huge step backwards, the family law reverted to the Civil Code (1928) and Shari’a rules.⁸⁰

⁷⁹ Sanasarian Eliz, *The Women’s Rights Movement in Iran*, Chapter 7, translated to Farsi by Pouya, available at <http://www.ketabfarsi.org/ketabkhaneh/ketabkhani_1/ketab1554/ketab1554.pdf> accessed 28 Sept 2012.

⁸⁰ According to Article 2(2) of the Legal Bill of Special Civil Court adopted by the Revolutionary Council (23 Sept 1979): “The conditions of divorce are the same as prescribed in the Civil Code and Shari’a rules; however, in cases where a husband applies for divorce under Article 1133 of the Civil Code, the Court ... shall refer the case to the arbitrators and if they cannot reconcile the spouses, the court shall issue the permission for divorce. When there is an agreement between the parties about divorce, there is no need to apply to the court...”.

During the following years, some articles of the Civil Code, especially in respect to marriage and divorce, were amended. First, in 1982, Article 1130 of Civil Code was amended to give the court more power to grant a judicial divorce requested by a woman in cases of *osr-va-haraj* (intolerable difficulty and hardship) that made the continuation of marital life impossible for the wife. In such cases, even if the husband did not give his consent or cooperate, the court would divorce his wife on his behalf. In 2002, a note was added to the same article, according to which more grounds and details were added to the cases of *osr-va-haraj* in which the wife could request a judicial divorce.

Article 1130 (amended on 29/12/1982)- “In the following circumstances, the wife can refer to the court and request a divorce. If it is proved to the court that the continuation of the marriage will cause osr-va-haraj (intolerable difficulty and hardship), for the sake of avoiding harm and difficulty, the judge can compel the husband to divorce his wife. If it is not possible to compel the husband, then, [the wife] shall be divorced by permission of the judge.

Note (added on 20/7/2002)- The osr-va-haraj (intolerable difficulty and hardship) mentioned in this article refers to the conditions that make the continuation of [marital] life intolerable and difficult for the wife; the following circumstances, if proved in the relevant court, shall be considered as a case of osr-va-haraj:

- 1- The husband’s leaving of marital life for, at least, six consecutive months, or, nine alternative months in a one year period, without any acceptable reason.*
- 2- The husband’s addiction to any kind of drugs or alcohol that, damages the marital life, and his refusal, or impossibility of compelling him, to quit the addiction in a period prescribed by the doctor. If the husband does not fulfill his promise [to quit], or, again begins his abuse, the divorce shall be granted by the request of the wife.*
- 3- Final conviction of the husband to five years, or more, imprisonment.*
- 4- Wife battery or any kind of mistreatment of the wife that is intolerable in the wife’s condition.*
- 5- Husband’s affliction to incurable mental illnesses or contagious disease or any kind of incurable diseases that disrupts the marital life.*

The circumstances mentioned in this article are not exhaustive and the court may grant the divorce in other cases that osr-va-haraj is proved in the court.”

On November 19, 1992, the law of “Correction of Divorce Rules” was adopted by the Expediency Council according to which the requirement of the intervention of the Special Civil Court and the certificate of impossibility of reconciliation was stressed. Moreover, it was provided that divorce should only be granted if all the wife’s rights including *nafaqa*, *mahriyeh*, etc. were either paid or the wife is content. The law also extended the divorced wife’s financial rights to the right to sue for payment for household services during the marriage.

Article 1133 of the Civil Code was another article that was amended in 2002. While the old article provided that a man could divorce his wife whenever he wishes without any judicial procedure, the amended article provides:

“A man can divorce his wife under the conditions of the current law and by applying to the court.

Note- A woman, too, and according to articles 1119, 1129 and 1130 of the current law can request a divorce from the court.”

However, as it is clear that the current legal framework of family law in Iran is not favorable to and protective of women and does not offer equality to them, the minor and rare reforms introduced from time to time, although favorable, cannot end the inequality of spouses. Rather, an institutional overhaul is needed. In the absence of those deep reforms, women have reverted to alternative solutions, namely to rely on contractual conditions of marriage which allows them to enter some provisions of the Family Protection Law, or any other favorable conditions, into their marriage contracts. In fact, marriage contracts are often registered in pre-printed booklets that deal at first with the main part of the contract and details of the parties, and then, in its second half, with complementary conditions. The parties are then able to sign or avoid each condition and even add their own conditions. Usually the following conditions are printed and by signing each one the husband gives his wife the right to request a divorce in the relevant circumstances: husband’s disappearance or non-maintenance for six months; husband’s mistreatment; husband’s affliction with incurable disease(s); insanity of husband; non-

compliance with a court order to refrain from an occupation which contrary to the wife's dignity; husband's remarriage without his first wife's consent; amongst other factors.

Another important condition that is printed and can be signed by the parties is that, in the case of divorce, the wife is entitled to half of her husband's assets if the court finds the divorce is initiated by the husband and is not caused by any fault on the wife's part. In addition, there is a separate condition that gives the wife the opportunity to obtain power of attorney for divorce. This condition, although it cannot give the wife the right to divorce, will help her to speed up the case of divorce when the husband does not cooperate.

Moreover, as discussed earlier, *mahriyeh* is seen by some women as another tool that can play a crucial role to alleviate this inequality between the wife and husband. In fact, *mahriyeh* has been used by some women as a bargaining chip to put pressure on their husband to consent to a divorce if initiated by the wife. The more they can determine their *mahrs* in the contract of marriage, the more secure they feel. On the other hand, inability of the husband to pay the *mahriyeh* of his wife is a deterrent factor that prevents him from initiating the divorce application. Although this creates its own problems and cannot guarantee the divorce for the wife when she applies for such relief, it cannot be denied that a relatively heavy *mahriyeh* lowers the risks for wives.

According to one study, more than 70 percent of all divorces registered in any given year in Tehran are by mutual consent, that is, the wife's waiver of her claim to *mahriyeh* in exchange for the husband's consent to divorce.⁸¹ This has led to a significant increase in average *mahr* levels in Iran which has prompted the IRI government to try to find a way to reduce the *mahr* amounts. In the most recent measure, on March 6, 2012, The IRI Parliament passed an article of the new Bill of Family Protection Law which sets a limit of 110 gold coins for the *mahr*, above which the husband, if unable to pay, will not be jailed.⁸² However, due to extreme financial inflation in Iran, 110 gold coins still amount to a huge amount of money for men with middle-class income in Iran. Therefore, this will not considerably lower the rate of "*mahriyeh* prisoners"; and, while women are not granted the equal right to divorce, will make women even more vulnerable.

⁸¹ Ziba Mir-Hosseini, Tamkin: Stories from a Family Court in Iran, in Donna Lee Brown and Evelyn A. Early (eds), *Everyday Life In The Muslim Middle East*, (Indiana Press, 2002), 149.

⁸² The new Bill of Family Protection Bill is still under discussion and has not been finalized. For more details see section 2.3.4.

2.3. Custody and guardianship of children

Under Islamic Shari'a and Iranian law, the custody and guardianship of children are determined separately. While guardianship mainly deals with legal and financial issues and primarily belongs to the natural guardian (*vali-ye-qahri*), i.e. the father and/or paternal grandfather, the physical custody of children and raising them is the right and duty of both parents (Article 1168 of the Civil Code). However, in the case of divorce, only one parent can have this right and perform the duty. According to the Family Protection Law of 1967 and of 1975, the court should determine the method of custody of the children, after taking into consideration the moral and financial position of the parents, as well as the interest of the children (Article 12).

In addition, due to the special needs of children, the law has given priority to the mother for the custody of children up to a certain age, after which custody devolves upon the father. The Civil Code (1928) gave the mother the right to the custody of her daughter until the age of seven and to the custody of her son only until the age of two (former Article 1169). In the minor reforms of the Civil Code in 2002, despite the disagreement of the Guardian Council, the difference in the age of custody of boys and girls was removed and the age of priority of the mother in obtaining custody of the child was raised to seven:

Article 1169- "For the custody of children whose parents are separated, the mother has priority until the age of seven; and then, custody will devolve upon the father.

Note- After reaching seven years of age, in the case of dispute, considering the best interest of the child, the court will decide who receives custody of the child."

However, even during the priority age (before the child reaches seven years of age), custody will devolve upon the father if the mother remarries. In other words, if a mother wants to keep the custody of her child after divorce, she must refrain from re-marriage; otherwise, she will lose custody. Article 1170 of Civil Code provides:

"If the mother becomes insane or marries another man during her period of custody, the custody shall devolve upon the father."

There is no such restriction for the father. When a father obtains the custody of his child, even if he marries, he will keep the custody and the child's mother cannot claim the custody back on this ground. After the murder of Aryan Golshani in 1997, this rule came under serious criticism from women's rights activists and triggered the amendment of Article 1169 five years later. In 1997, Aryan Golshani was a nine year old girl whose parents had separated several years prior. Custody was granted to her mother until Aryan reached the age of seven. Then the court, without any further investigation, granted custody of Aryan to her father, despite the fact that he had remarried and had children with his new wife. Her mother was unsuccessful in convincing the court that the father was not mentally balanced and had a history of child battery and violence. Two years later, the father, together with his son and Aryan's step-mother, brutally tortured and murdered Aryan. Shirin Ebadi, a prominent Iranian criminal defense lawyer, represented Aryan's mother in court and publically asked for a change in the custody rules in Iran.⁸³

More often than not, under the IRI's current legal system which considers the father to be the natural guardian (*vali*) of the child when the mother's period of custody terminates, custody will devolve upon the father and "the interest of the child" plays almost no role. This procedure can easily be subverted for purposes of revenge and the father, even if he is not ready nor eager to care for his child, can easily use the system to inflict pain and suffering on his ex-wife by separating her from her child. The only way the mother can regain custody is by proving that the father is unfit to care for the child—which is not an easy task at all. However, this possibility is not exclusive to the mother—the father can also sue the mother on the basis that she is unfit and obtain custody. Article 1173, which was amended in 1998 with more detail, provides:

"If the physical health or moral education of the child is endangered as a result of carelessness or moral degradation of the father or mother who are in charge of custody the court can make any decision appropriate for the custody of the child on the request of [the child's] relatives or [his/her] guardian or the Chief of the Judicial District. The following are instances of carelessness or moral degradation of each parent:

- 1- Harmful addiction to alcohol, drugs, and gambling.*
- 2- To be notorious for moral degeneration and prostitution.*

⁸³ See: <<http://www.hamshahrionline.ir/hamnews/1376/760822/shahr66.htm>> accessed 29 Sept 2012.

- 3- *Affliction with mental diseases according to Forensic Medicine.*
- 4- *Child abuse or forcing him/her to enter into immoral occupations such as prostitution, beggary, and smuggling.*
- 5- *Repeated unusual battery of the child.”*

In addition, in the case of the husband's death, a woman naturally acquires custody of her children (Article 1171), but, as discussed earlier, loses the custody if she remarries (Article 1170). Moreover, even when the child's father dies, the mother cannot become the child's natural guardian (*vali*). Rather, in that case, the child's paternal grandfather will be his/her natural guardian. In fact, a woman is not entitled to natural guardianship (*velayah*) of her children under Islamic and current Iranian laws. Article 1180 states that “a minor child is under the natural guardianship (*velayat-e-qahri*) of his/her father or paternal grandfather...”. This means that even when the woman has custody of the children, the natural guardian maintains decision-making control over crucial matters where the consent of the guardian is required, including the permission to obtain a passport and leave the country, undergo a surgery, the permission for marriage of virgin girls, decisions regarding financial issues such as ownership and disposal of the children's property, and other issues.

In a progressive effort, Article 15 of the Family Protection Law of 1975 delicately tried to establish the mother's right to be her child's natural guardian (*vali*) and equal to the paternal grandfather. Moreover, considering that under Islamic law the natural guardianship of the father is inherent and inviolable, the abovementioned article, for the first time, prescribed the possibility of the deposition of the father from guardianship in cases where his dishonesty and lack of competence is proved.

Article 15- “A minor child is under the guardianship of his/her father. However, if the father's lack of competence or dishonesty or inability in disposal of the child's property is proved, or in the case of his death, on request of the Public Prosecutor and approval of the district Court, the right to guardianship shall be devolved upon either the paternal grandfather or mother...”.

Although in the amendment of Article 1184 (21/5/2000), the possibility of the deposition of the father from natural guardianship was accepted in the Civil Code, the mother's equal right to

become the natural guardian (*vali*) of the child was not accepted. But, yet, in a contest with other “competent individuals”, she may have the chance to be selected by the court as the legal guardian (*qayyem*):

Article 1184 – “If the natural guardian of the child does not act in the best interest of the child and cause him/her a loss, on request of the relatives of the child or the Chief of the Judicial District, and after the issue is proved in the court, the court shall deposit the natural guardian (vali) and forbid him from any interference with the child’s property. Also, appoints a competent individual as the guardian (qayyem)...”.

2.4. Bill of Family Protection Law

First introduced in August 2007, the new 50-article Bill of Family Protection Law was passed by the Judicial and Legal Commission of the IRI Parliament on July 9, 2008. Intense opposition by numerous women’s rights groups has prevented the Bill’s ratification so far. Moreover, the Guardian Council, in several stages, and most recently on June 6, 2012, has opposed some articles and returned the Bill to Parliament for further revision. Although the whole Bill, and the spirit with which it has been drafted, has been criticized by women’s rights groups, some specific articles have attracted more attention and criticism. A detailed analysis of this Bill would require a separate paper on the subject, so only its major discriminatory rules will be highlighted here. Among the most controversial provisions of the latest version of the Bill (April 2, 2012)⁸⁴ are the following:

Article 21- “The IRI’s legal regime, aiming at [supporting] the stability of family, supports permanent marriage as the basis of the formation of a family. Temporary marriage is also subject to Shari’a rules and the Civil Code; and its registration is mandatory in the following conditions:

1- Pregnancy of the wife.

⁸⁴ Available at <http://rc.majlis.ir/fa/legal_draft/state/807902?fk_legal_draft_oid=720519> accessed 29 Sept 2012.

2- *Mutual agreement of the parties.*

3- *Contractual condition [that mandates the registration]”*

There is no single view about this article among experts and activists. From a legal point of view, it is said that this article is not new. Temporary marriage has had a basis in the Civil Code since 1928, and if the temporary marriage results in pregnancy and a child is born, the temporary marriage should be registered to ensure the protection of the child's rights including identification documents, *nafaqa* (maintenance) and inheritance. Moreover, if the parties to a temporary marriage agreed, they could register their contract. Therefore there is nothing innovative in this article and it is in the interest of the wife and, if any, the child.⁸⁵ Even, when the earlier version of this article (former Article 22) had not stipulated the mandatory registration of temporary marriages, it was criticized for removing the requirement of registration of temporary marriages.⁸⁶

On the other hand, however, it was criticized by some women's rights activists for spreading and popularizing the concept of temporary marriage which is a practice that can result in increased instability of families. Women's rights activists believe that issues arising out of temporary marriage are not currently a frequent problem in society and therefore do not need to be addressed under the laws. In their view temporary marriage is unacceptable and not frequently practiced in Iranian society and therefore it would be better to not unnecessarily elevate the issue as it is an infrequent occurrence.⁸⁷

Former Article 23 authorized polygamous marriages contingent upon the financial capacity of the man. But unlike, for example, Article 16 of the Family Protection Law⁸⁸, it did not set specific parameters for adequate financial resources to support multiple wives, or define overall concepts of justice or equal treatment of multiple wives. Notably absent from the Bill in

⁸⁵ See the interview with Bahman Keshavarz at <<http://www.mellatonline.net/index.php/society/42-gozaresh/18634-1391-02-13-05-00-32>> accessed 29 Sept 2012.

⁸⁶ For example it is said that “Article 22 effectively removes any requirement to register temporary marriages (*sighah*), which are viewed in Iran as a form of legalized prostitution. The removal of the registration requirement eliminates any financial or legal protections for women in these unions, and for children who are born into temporary marriages.” See <<http://fis-iran.org/en/women/laws/07fpb>> accessed 29 Sept 2012.

⁸⁷ See for example <http://www.bbc.co.uk/persian/iran/2010/08/100821_135_family_protection_law.shtml> accessed 29 Sept 2012.

⁸⁸ See section 2.1.3.

particular was any effective requirement of consent of the first wife for her husband to enter into a second marriage.⁸⁹ This article is removed in the newest version dated April 2, 2012.

Former Article 25 intended to impose a tax on the heavy '*mahr*'s. In the newest version of the Bill (April 2, 2012), this idea is replaced by setting a limit (110 gold coins) beyond which the husband may not be enforced to pay or sent to jail, unless it is proved that he has the financial ability.

Apart from these criticisms, which targeted specific articles and undoubtedly succeeded in removing some controversial articles, the spirit of the Bill and its reactionary nature was criticized by some activists. It would be true to say that this Bill is a reproduction of a patriarchal regime, in which the man, unquestionably, is the head of the family and the woman does not enjoy the equal right to divorce. In addition, this Bill ignores and degrades the historical aims of women that they have struggled with for a hundred years. This Bill not only has ignored women's aims in this regard but also has taken steps backward. It was also described as a part of a bigger project of "neo-fundamentalism" that aims to put women's minds and bodies under control.⁹⁰

3. Inheritance and ownership

Although the equal right to ownership is recognized for women under Islamic Shari'a and Iranian law, in some instances their financial and ownership rights are restricted. The first and most important instances of inequality are in the law of inheritance. It is worth noting that, inheritance has a close relationship with family law. Determining which one of the family members is entitled to inherit depends mainly on the family system. According to pre-Islamic Bedouin Arabs, only men who were capable of fighting and engaging in combat had the right to inherit. This had its basis in the patriarchal system, which remains a feature of Islamic Shari'a. In fact, inheritance is one of the areas in which patriarchal traditions have survived and been

⁸⁹ See n 72.

⁹⁰ See: Shadi Sadr in a press conference for the Human Rights Defenders Center, available at <www.feministschool.com/spip.php?page=print&id_article=1099> accessed 12 Sept 2012.

transferred from generation to generation. Discriminatory inheritance rules against women that were employed to secure the patriarchal structures of tribal societies play an old role in Iranian law.

First of all, the discriminatory tradition that views a woman as half the worth of a man or a “half human”, which impacts on the rules of *diya* (blood money) and the weight of the testimony of women as discussed in earlier sections of this commentary⁹¹, dominates the inheritance law as well. However, in addition to this, financial issues and the special structure of tribal societies and their efforts to keep the wealth inside the tribe, play a great part as well. Quranic verse 4:11 stipulates: “[t]he share of the male shall be twice that of a female”. Accordingly, under Article 907 of Civil Code, when a father dies his son(s) are entitled to twice as much as his daughter(s):

Article 907 – “If the deceased leaves no parents, but has one or more children, ...If there are several children, some being boy(s) and some girl(s), each son takes twice as much as each daughter.”

Second, the woman’s share as a wife—in addition to being half that of a man as a husband—is very small and limited.

- (a) When a husband dies, if he has at least one child, his wife may only inherit one-eighth of the assets; otherwise she is only entitled to a quarter:

Article 913 – “In all the cases mentioned in this subsection, whichever of the spouses that survives takes his or her share which shall be half of the assets for the surviving husband and one-quarter for the surviving wife, provided that the deceased left no children or grandchildren; and it shall be one-quarter of the estate for the husband and one-eighth for the wife if the deceased left children or grand children. And the remainder of the estate is to be divided among the other inheritors in accordance with the preceding articles.”

- (b) This small share of a wife may become even smaller if her husband has more than one permanent wife. According to Article 942:

⁹¹ See sections 1.2. and 1.5. above.

“If there is more than one wife, one-fourth or one-eighth part of the assets, which belongs to the wife, will be divided equally among them.”

- (c) Furthermore, a wife may never inherit more than a quarter of the assets of her deceased husband, even when there is no child or other inheritors. In fact, if there is no other inheritor, while a husband inherits all the assets of his deceased wife, a surviving wife may only inherit a quarter of the assets and the rest belongs to the State.

Article 949 – “If a husband or wife is the sole inheritor, the husband takes the whole of the assets of his deceased wife; but the wife takes only her share [half], and the rest of the assets of the husband shall be considered as the estate of a heirless, and will be dealt with in accordance with Article 866.”

- (d) Another limitation on the wife’s share of her deceased husband’s assets relates to real estates. Under traditional *fiqh*, while a husband inherits all kinds of properties from his deceased wife, a wife may only inherit chattels, including the trees and buildings but not the land beneath them. In fact, if there is real estate among the assets, she does not inherit a share from the land. This rule was reflected in Articles 946 to 948 of the Civil Code which were amended on January 25, 2009. According to the amended articles, the wife may inherit from “the value” of her share from the land. In such cases the current value of the land shall be assessed and paid to the wife. But the main rule remained unchanged and women still may not inherit a share from a land, but from its value. In other words, she may not share the land with other heirs and they can pay the value and evict her. It is said that, in tribal traditions, this rule would help them to keep their territory when a woman of one tribe married a man of a rival tribe. Clearly, it is discriminatory and unacceptable in the modern world.

The main problem which prevents these rules to be modernized and amended fundamentally to accord with gender equality is that, the Islamic Shari’a rules for the inheritance of women is considered eternal. In fact, because the shares of the inheritors are dealt with in the Quran (mainly in *Sura al-Nisa* 4:11-12) it is taken as unchangeable by Islamic jurists; and even shifts and developments in the modern world cannot make them change their minds. Therefore, they stick to outdated justifications for these discriminatory rules. For example, they allege that “the

fact that men bear the family's financial burden, in turn, justifies Shari'a prescriptions for women's inheritance or remedies in cases of assault or murder being half the amount paid to men."⁹²

In 2011, a similar stance was taken by the Ministry of Housing and City Planning. According to its Directive, the government-funded houses (the project of Maskan-e-Mehr) may not be assigned to a married woman.⁹³ Instead, the title deed shall be assigned to her husband. This was while that, at the beginning of the application, married women could apply for housing under their own names. Moreover, there were some women who paid the installments out of their own salaries and had been given this chance on the basis of their own jobs. But they were informed that the houses could only be assigned to their husbands.⁹⁴ Quite similarly, when the government introduced its plan to pay a monthly subsidy to Iranian citizens, the father of the family was the one who could receive the funds.⁹⁵ All these measures were justified by the allegedly unchangeable superior position of the man in the family.

4. Employment and right to work

A woman's right to work in Iran has been inconsistent over the past decades. After the 1979 Revolution, the Islamist government displaced most female workers, insisting that the physical and mental weakness of women makes them incapable of working in certain jobs.⁹⁶ As a result, under the Islamic Republic, the proportion of employed women drastically declined. Within a decade, it fell from twelve percent in 1976 to six percent in 1986, resulting in hundreds of

⁹² Shadi Mokhtari, "The Search for Human Rights within an Islamic Framework in Iran", 94 *Muslim World* (Oct 2004) 473-4.

⁹³ The Maskan-e-Mehr project is intended to provide government-funded houses and was initiated by President Ahmadinejad to provide housing for all citizens in Iran. More information: <http://www.bonyadmaskan.ir/en/SitePages/MaskanMehr.aspx>

⁹⁴ *Ebtekar Daily*, September 8, 2011, available at <<http://www.ebtekarnews.com/Ebtekar/News.aspx?NID=86817>> accessed 6 Oct 2012.

⁹⁵ The mother could receive the funds only if the father died or was disabled.

⁹⁶ Maryam Javaherian, "Women's Human Rights in Iran: What can the International Human Rights System Do?", 40 *Santa Clara Law Review* (2000), 846.

thousands of unemployed women.⁹⁷ Although in recent years the percentage of employed women has increased, it is still less than women's employment immediately before the Revolution.⁹⁸

Furthermore, women are denied from equal rights in specific areas of work under the laws. Under the influence of Islamic Shari'a, ascending to high decision making positions in government is contingent on meeting religious requirements, which, normally, and sometimes exclusively, belong to men. For instance, according to the IRI Constitution, many high ranking positions in the IRI are exclusively tailored for Shi'ite *fuqaha* (jurists) and *mujtahids* (Islamic jurists who are capable of an independent derivation of Islamic rules from the primary sources). These include: the Supreme Leader (Article 109), the Head of the Judiciary (Article 157), the six members of the Guardian Council (Article 91), the General Attorney and the Head of the Supreme Court (Article 162). Although there is no requirement of male gender stipulated in the Constitution, this level of religious status has been under the domination of men. No woman has been ever appointed, nor even nominated, for these positions during the 33 years after the Revolution.

4.1. Women as President

While the incompetence of women for taking up the abovementioned positions is somehow taken for granted, the election of women as the President of the State has been always a controversial issue. According to Article 115 of the Constitution, "The President must be elected from among religious and political *rejaal* ...". The word *rejaal* (Arabic word; singular: *rajol* i.e. man) has raised some serious legal debates. Some (the majority) believe that it means "men" while others believe the term can include both men and women. The IRI delegation, after it was questioned by the UN Human Rights Committee during the consideration of its Third Periodic

⁹⁷ Darvishpour, Mehrdad, "Islamic feminism: compromise or challenge to feminism?", Iran bulletin- Middle East Forum, Summer 2003, 55; available at <<http://www2.sociology.su.se/home/Darvishpour/Islamicfeminism.pdf>> accessed September 25, 2012.

⁹⁸ Only 11 percent of women were employed in 2011. See: Khorasan Daily, 13/02/2012 <<http://www.khorasannews.com/News.aspx?id=3821134&type=1&year=1390&month=11&day=24>> accessed October 6, 2012.

Report,⁹⁹ asserted that Article 115 includes both men and women, and there is no obstacle to the presidency of women. The delegation asserted in its written response that “the Guardian Council has not made any interpretation on the 115th principle of the Constitution.” However, on the contrary, the Spokesperson of the Guardian Council in 2004 declared that “the Council has not changed its interpretation of Article 115 and women still may not be elected as President.”¹⁰⁰

It should be observed that, by virtue of Article 98 of the Constitution, the interpretation of the Constitution is vested with the Guardian Council. Again, it is the Guardian Council that has the authority to confirm the competence of candidates for Presidency (Article 110(9) of the Constitution). In addition, the detailed records of discussions of the Experts of the Constitution, who drafted the Constitution in 1979, leave no doubt about the interpretation of the word “*rejaal*” in Article 115. They (the majority) were explicitly opposed to women ascending to the Presidency and excluded women by using the word “*rejaal*” and, in order to decrease the sensitivity surrounding the issue, used an Arabic word to make it vague. Until now, the Guardian Council has not confirmed any woman as a candidate for Presidency.¹⁰¹

4.2. Women in the Cabinet

Appointment of women in the government has always been controversial in Iran. Even before the 1979 Revolution, when in 1968 the first ever woman Minister, Farrokhru Parsa¹⁰² was elected as the Minister of Education, the appointment of women in government ignited some opposition. Mahnaz Afkhami was the second woman appointed as the Minister of Women’s Affairs in 1975. It took an additional 20 years until women were appointed again in the Cabinet. In 1995, reformist president Mohammad Khatami appointed Masumeh Ebtekar as the IRI’s first female Vice-President and the Chairperson of the Organization of Environmental Protection. Khatami also established the Center for Women’s Participation in 1997 and appointed Ms. Zahra

⁹⁹ Replies from the Government of the Islamic Republic of Iran to the list of issues, para 7 (n 56).

¹⁰⁰ See: <<http://www.jamejamonline.ir/newstext.aspx?newsnum=100004167229>> accessed September 24, 2012.

¹⁰¹ Mohammad Hossein Nayyeri, *An Analysis of the Responses Given by the Iranian Delegation to the Human Rights Committee*, (n 30).

¹⁰² Farrokhru Parsa (1922–1980) was executed by firing squad on 8 May 1980 by the Revolutionary Regime.

Shojaei as its Chairperson and the President's Advisor. Although there were a total of 36 advisors, Khatami used his authority and made her Advisor in Women Affairs a new member of the Cabinet.¹⁰³

Despite these relatively progressive moves, Khatami was still reluctant to appoint the first female Minister in the IRI. In an interview, he declared that he did not want to take any risk by appointing a female minister.¹⁰⁴ His Advisor, Zahra Shojaei, later revealed that some hardliner clerics threatened Khatami by claiming that if he appointed a female minister they would issue a *fatwa* declaring his government as anti-Islamic and make a public call for non-cooperation with the government, including calling on the public to refuse to pay tax.¹⁰⁵

Surprisingly, in 2009, conservative president Mahmoud Ahmadinejad appointed the first female Minister in the IRI in 2009. Ignoring the opposition of the clergy, Ahmadinejad made a proposal to Parliament that three women, all with conservative backgrounds, take positions in the Ministries of Welfare, Education, and Health. Marzieh Vahid Dastjerdi was the only one who acquired enough votes and was appointed as the Minister of Health. However, this appointment was deemed to be a mere political gesture. In fact, despite the attractive veneer of the gesture of appointing the first female Minister, the number of women in lower levels of managerial and key positions, such as local government positions has dramatically decreased during Ahmadinejad's tenure. Moreover, government-proposed plans such as women working remotely, which was designed to keep women at home, and gender segregation, as well as decreasing the budget of the Center for Women's Participation to one-third and renaming it the Center for Women and Family Affairs, clearly are in contrast with the asserted commitment to improve the social participation of women.

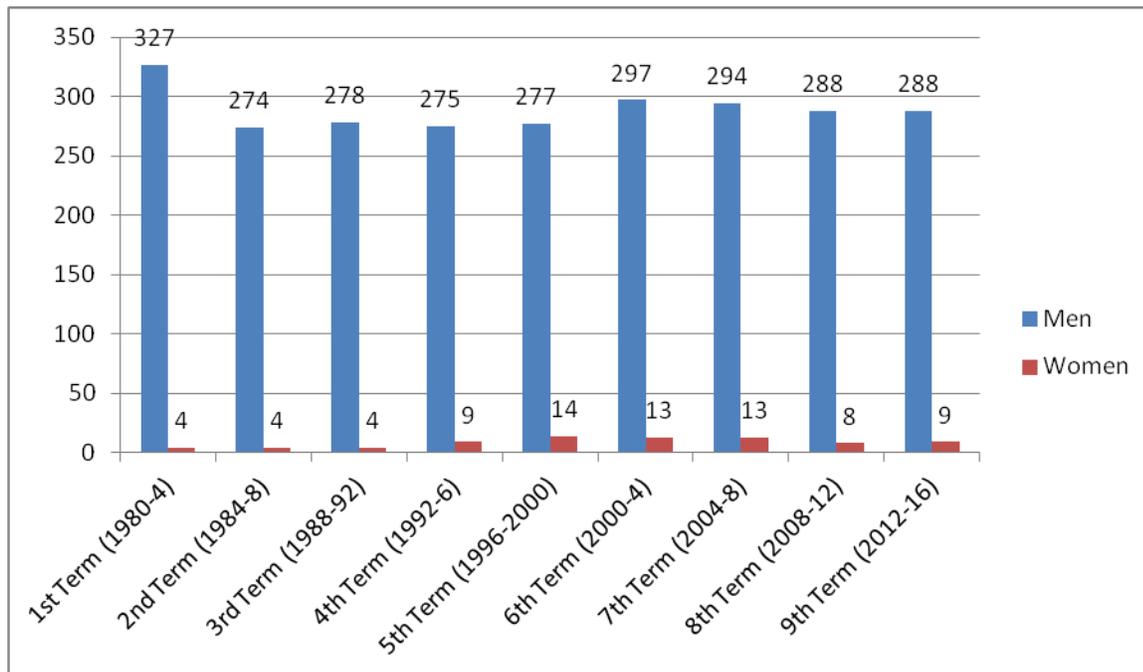
¹⁰³ Interview with Zahra Shojaei, available at <http://www.iran-zanan.ir/social/cat_12/001295.php> accessed October 9, 2012.

¹⁰⁴ See Zhila Bani-Yaqub, "Situation of Women during the Presidency of Mohammad Khatami", BBC Persian, <http://www.bbc.co.uk/persian/iran/story/2005/07/050731_a_women_khatami_baniyaqob.shtml> accessed October 8 2012.

¹⁰⁵ Ibid.

4.3. Women Members of Parliament

There is also no legal obstacle for women to be elected as Members of Parliament (MP) in Iran. However, only 73 women out of 2700 MPs in the course of nine terms of the Parliament have been elected as MPs. In addition, a comparison between the terms of the IRI Parliament clearly shows that, while the number of women MPs shows signs of improvement in a limited period, it has significantly decreased since 2004. More notably, the number of women that ran for the ninth term of Parliament in 2012 decreased by 33 percent in comparison to the previous term.¹⁰⁶ The table below shows the proportion of women MPs in all terms of Parliament since the 1979 Revolution.¹⁰⁷



4.4. Women judges

Prior to the 1979 Revolution, women who studied law could apply and, eventually, become judges. In 1969, some women were admitted in judicial positions and several women including

¹⁰⁶ Source: <<http://ipe9.com/majles90/?pageID=1638>> accessed October 7, 2012.

¹⁰⁷ Source: <<http://hamshahronline.ir/details/169329>> accessed October 7, 2012.

Shirin Ebadi, the Noble Peace Prize laureate, officially became judges.¹⁰⁸ After the Islamic Revolution and following the *fatwas* issued by hardliner clergy, women were banned from practicing as judges, and, as a result, women, including Shirin Ebadi, were removed from their positions as judges.

After the new Constitution was adopted, in order to comply with its Article 162—according to which Shari’a rules should be considered in the appointment of the judges—judgeship became an exclusive right of men. This was supported by the Process of Appointment of Judges Act (1982) which stipulated that judges—i.e. a sitting judge who issues verdicts—should be chosen amongst qualified men. In 1995, the Act was amended so that women could be appointed in some judicial positions such as counselors and investigators.

The ban on women serving as judges can be attributed to the view of the vast majority of Islamic jurists that women, due to their alleged lack of ability and flaws, are not fit to sit in the position of a judge. The basis for this reasoning, which needs to be explored in-depth and cannot be satisfactorily addressed within the bounds of this current commentary, reflects the roots of traditional discrimination against women in Islamic jurisprudence. In sum, it is believed that women are possessed by their emotions and are unable to make reasonable decisions. Moreover, there are doubts about their mental ability and therefore they are deemed incapable of objective judgment. Unfortunately, this view is so well-implanted in the minds of the public that sometimes the resulting effect is beyond belief. For example, in 2010, the wife of the IRI’s Ambassador to France, in an interview with Radio France Culture asserted that “...there is a gland in women’s head which makes us emotional and, no matter how powerful we are, this prevents us in critical situations from making the right decisions.”¹⁰⁹

During the third periodic review of the situation of human rights in Iran in 2010, the IRI’s response¹¹⁰ included a table of so-called “women judges.” In fact, the IRI had been questioned by the Committee about discrimination against women in the public sector, including judicial

¹⁰⁸ In 1975, Shirin Ebadi was appointed as the Judge of the Branch 24 of the District Court. See <www.roozonline.com/persian/news/newsitem/archive/2007/october/29/article/-cc0573ad97.html> accessed September 29, 2012.

¹⁰⁹ The full interview (in French) is available at <<http://www.franceculture.fr/emission-les-pieds-sur-terre-la-femme-de-l-ambassadeur-2010-09-30.html>> accessed October 8, 2012.

¹¹⁰ Replies from the Government of the Islamic Republic of Iran to the list of issues, CCPR/C/IRN/Q/3/Add.1, paras 9-10, (n 56).

positions. The IRI, in its response, asserted that there is no discrimination against women in judicial positions. The table provided by the IRI, referred to 614 “women judges,” but despite its title, shows no woman in a position of “judge”:

Organizational Position	Number
Assistant Public and Revolutionary Prosecutor	497
Judicial Counseling	82
Deputy Head	18
Counselor	10
Deputy Prosecutor	7
Total	614

The so-called women “judges” are not permitted to make substantial decisions in any case. As evident from the above table, there is no woman in decision-making judicial positions such as the presiding judge of a court. They just function as counselors (e.g. counselor in family courts) or assistant prosecutors or in administrative positions. Even female Deputies of the Judicial Complexes (usually Deputies of Reference) only distribute and refer cases amongst the court branches and make no substantial judicial decisions. There are more than 1000 branches of General and Revolutionary Courts only in Tehran; but none of the branches is presided over by a woman.¹¹¹

4.5. Teaching and Medicine

When discussing the rate of employment of women in Iran, it is known that women have more opportunities, sometimes even more than men, in certain professions, such as teaching and medicine. While this fact is undeniable, it should not mislead us. In other words, this does not

¹¹¹ Mohammad Hossein Nayyeri, *An Analysis of the Responses Given by the Iranian Delegation to the Human Rights Committee*, (n 30).

reflect the IRI's commitment to the financial independence of women or their progress in all areas of work. Women are given more opportunities in these areas, because training of female professionals is needed to establish long-term plans of gender segregation which naturally will require separate, gender-appropriate professionals to serve each sex in a separate capacity.

Throughout the years, IRI officials have consistently tried to demonstrate that not only is there no discrimination against women in Iran, but that in fact there are cases of "positive discrimination" in their favor. To prove this assertion, officials usually refer to the establishment of separate hospitals and universities only for women, and a ban on men from studying in some fields such as gynecology at university.¹¹² It is also worth mentioning that all schools are gender segregated from the first grade and there is no mixed gender school allowed in the IRI. In addition, male teachers are banned from teaching schoolgirls over the age of ten. Similarly, the ideal situation in the view of Islamist officials which, has not been achieved yet, is that only female doctors may treat female patients.

However, rather than based on the idea of positive discrimination in favor of women, these plans are the intended results of the fundamentalist policy of gender segregation that views citizens as sexual objects even in education and medical treatment. It is exactly this policy that created exclusive positions in girls' schools and women hospitals, as well as managerial positions for women in the Ministries of Education and Health, yet not in other governmental bodies or the private sector where a supply of female professionals to advance gender segregation policies is not needed. The state policy to segregate male and female students even in graduate and postgraduate programs of universities, as well as gender segregation of patients and doctors, instead of a positive discrimination in favor of women, is based on the idea of Islamization of all aspects of social life. It also shows the tendency to see women from a sexual point of view and reinforces traditional prejudices which the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is intended to eliminate.¹¹³

¹¹² Ibid.

¹¹³ Ibid.

5. International human rights law

As discussed above, many laws and practices in the Iranian legal framework are contradictory to internationally accepted human rights standards. Specifically, the examples of inequality of women under Iran's laws—including: the concept of half *diya* (blood money) for women and their lesser age of criminal responsibility; discriminatory Islamic family laws that put men in a position superior to women and allow for men to engage in polygamy; laws that prescribe less rights for women in divorce and in respect to the custody of children; and discriminatory inheritance laws and employment restrictions for women—are all against the principle of “equality without distinction of sex” and violates the IRI's obligation under international human rights law.

Article 2 of the UDHR and Article 2 of the ICCPR protect every person's human rights “without distinction of sex.” While Iran is a signatory to the ICCPR, it refuses to replace its laws with rules that are not biased for gender. The IRI's primary justification for its refusal of universal human rights standards is Islam. The IRI draws upon Islam as an ideology and program for action in legal, political and other fields. In one instance, when a U.N. investigator reported alleged Iranian human rights abuses, the government first called the report false but later called on the U.N. representative to study the issue further. Iran's Foreign Ministry spokesman Mohammad Mohammadi stated that if the U.N. representative studied the issue of inequality between men and women thoroughly, “he would admit that the moral and material rights of women in Iran are being much better respected according to the Islamic law than that of the West.”¹¹⁴

Since early 2002, serious debates took place in Iran over the ratification of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The Center for Women's Participation and some reformist figures advocated the ratification of the Convention even without any reservations. However, once it became apparent that conservative opposition to the ratification was substantial, the government proposed the ratification with the general reservation that Iran would commit to only those provisions that did not contravene Islamic Shari'a. Despite

¹¹⁴ Iran Denies Indirect Talks With Israel, Xinhua News agency, 22/2/1995 (in Miller, Kristin J, Human Rights of Women in Iran: The Universalist Approach and the Relativist Response, 10 Emory International law Review (1996), 801)

this concession, conservatives found the ratification of the Convention against traditional Islamic values and opposed the government.¹¹⁵

The approach of the CEDAW, in comparison with the traditional treatment of women in Islamic countries, is highly “revolutionary”.¹¹⁶ It aims to achieve full equality between men and women by changing the traditional role of men as well as the role of women in society and in the family. Most Islamic countries that have ratified the Convention—including even those considered to be relatively liberal, such as Tunisia—have entered declarations and/or reservations to the Convention, mostly on grounds of Islamic laws.¹¹⁷

Although Iran’s Parliament passed the Bill of Ratification of the CEDAW in August 2003, the hard-line clerics in the Guardian Council refused to sign the treaty, stating that it went against Islamic law and was unconstitutional.¹¹⁸ They refused to confirm it, even subject to a general reservation of compatibility with Islamic rules. Ultimately, according to Article 112 of the Constitution, the issue was referred to the Regime’s Expediency Council. The Expediency Council could solve the impasse in favor of Parliament or the Guardian Council. But it seems that after roughly nine years, and a corresponding fundamental regression in principles of democracy in Iran’s governance, neither the Expediency Council nor the current conservative majority Parliament feel the necessity to finalize the issue.

Conclusion

It is not deniable that, in stark contrast to Saudi Arabia and countries with similar gender oppression, Iranian women have the equal right to drive, vote, do not need to be accompanied by a male member of their families in public places, and have surpassed men in university entrance

¹¹⁵ Shadi Mokhtari, “The Search for Human Rights within an Islamic Framework in Iran”, 94 *Muslim World* (Oct 2004) 476-7.

¹¹⁶ Mashood A Baderin, ‘Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?’ (2001) 1 *Human Rights Law Review* 272.

¹¹⁷ *Ibid.*

¹¹⁸ Nazila Fathi, “Iran’s Hard-Liners Reject Reform Bills Approved by Parliament”, *New York Times*, Section A11, (August 14, 2003).

exams unlike any other country in the region. However, despite these relative strides, the IRI legal system recognizes women as dependent upon men and incomplete human beings who need to be supervised and controlled by men and the State. While the IRI Constitution claims to guarantee equality for both genders, women are still treated as second class citizens under the IRI legal system. For instance, as discussed above, under the Islamic Penal Code, the value of a woman's worth is only half that of a man's. That is, blood money paid for murder or bodily injuries of a female victim is half that of a male victim; or, a woman's testimony in court is given half the weight of a man's testimony.

The same view towards women is rooted in the IRI Civil Code and family law which provide that women may inherit half of what men do. Similarly, it gives far greater rights in marriage and divorce to men than to women. Most notably, only a man can contract more than one marriage at a time (up to four permanent marriages and an unlimited number of temporary marriages are allowed for men), and only men have unilateral and unconditional divorce rights, while a woman cannot terminate the marriage contract without her husband's agreement, or in specific circumstances by permission of the judge.

These gender inequalities have often been rationalized and justified by arguments based on assumptions about innate, natural differences between the sexes, such as asserting that women are weaker and more emotional by nature, which makes them unfit for hard work or decision-making positions. It is also claimed that women are created solely for the purpose of giving pleasure to men and child-bearing—functions that confine them to the home—which means that men must protect and provide for them.

This construction of gender roles and the patriarchal control of women have produced a framework that demands women's obedience to their husbands and has its roots in the idea of male superiority and female inferiority. It clearly insists on roles and expectations based on gender stereotypes, and results in the economic, social and political predominance of men and dependency of women. The IRI legal system still retains this traditional patriarchal bias that can be described as nothing but the systemic subordination of women, which is undoubtedly a human rights violation. In addition, the IRI is not meeting its obligations of equal treatment of both genders required by international human rights instruments including the UDHR and the ICCPR. Therefore, it would be true to say that due to its resistance to social changes and the demands of

women's rights groups to guarantee the equality of genders and to put the control of women's minds and bodies in women's hands, as well as its violation of obligations under international human rights instruments, the IRI State is responsible for significant violations of women's rights in Iran.

It should be noted however, that these legal inequalities do not solely originate from deficiencies in laws, but also from social customs and traditions that retain the bias of pre-modern and patriarchal social systems. In other words, even if legal changes are planned they need to be accompanied by plans for changes in the socio-cultural context to effectively improve the status of women. Therefore, it is again the State's responsibility to protect women's human rights and make every effort through education, media, and other mediums to stop abusive and violent traditions and plan to replace traditional discriminatory patterns with gender equality norms free from domination and violence. It is also crucial to provide necessary grounds for the financial independence of women through the creation and promotion of equal job opportunities and access to education.