

The Limitation to the Consent to Marriage under Iranian Civil Code

Leila Alikarami

Introduction

The right to enter into a marriage freely and to choose a spouse is an important aspect of equality. Iranian law, to an extent, secures this right. According to Article 1070 of Iran's civil code, consent of the marrying parties is a required condition upon which depends the enforcement of the marriage contract.¹ Marriage is a civil contract and takes place orally through *ijab* (offer) and *qabul* (acceptance), which explicitly convey the intention of marriage.² Therefore, without the full and free consent of both parties, the marriage contract is not considered to be valid. Despite this equal treatment of men and women in the marriage contract, there is some discrimination against women. To examine equal rights in marriage under Iranian Civil Code, this paper will analyze the age of marriage and the "condition of a father's consent" that enables a virgin girl to marry. The purpose of this analysis is to demonstrate that the normative structure of Iranian law has failed to accommodate the realities of women's lives, and represents ambiguous and complex legislatures that discriminate against women. This paper will first elaborate on the Islamic conception of the State, including its principles and goals, to highlight the extent to which the Iranian political and legal system is based on the principles of *shari'a*. The interpretation of Islam that is used by the Iranian government to justify its legislation is one of the main obstacles preventing reform in the legal system and its applications.

The Islamic Definition of the State: Principles, Goals, and Tasks

In 1979, the Iranian Revolution changed the country's political system from a monarchy to an Islamic Republic, a change enshrined in Article 1 of the Constitution.³ The Twelver Ja'fari school of Shia was adopted as the official religion of the state.⁴ The Islamic Republic is based on Islamic principles that are mainly presented in Article 2 of the Constitution, as follows:

1. There is only one God [...] who has exclusive sovereignty and right to legislate, and man must submit to His commands.
2. Divine revelation and its fundamental role in the promulgation of laws.
3. The essential role of the resurrection in the course of man's ascent towards God.

4. God's justice in his creation and his legislation.
5. The Imamate's leadership and its essential role in the progress of the Islamic revolution.
6. The exalted dignity and value of man. His freedom entails responsibility before God.

Both the preamble and the main articles of the constitution define the Islamic character of the state and Article 3 numbers its goals. Among them is the foundation of "an exemplary society" based on "Islamic principles".⁵ According to the Islamic Constitution (introduced after 1979), all laws should be compatible with Islamic law. Some Islamic jurists argue that the principle of equality violates Islam, because, according to Islamic law, women and men should not be treated equally as there are different roles and responsibilities for each sex. Ayatollah Fazel Lankarani, addressing theology students, stated:

Being students of theology, you must not get the impression that intellectualism necessitates violating certain Islamic principles. Who said there is no difference between men and women? There are many differences [...] We don't want to say that women are intellectually and socially inferior, but God has set aside some exclusive advantages for men, and vice versa.⁶

Iranian law largely follows this school of thought. Iran's Constitution does not identify any rights for women as independent entities, although it has recognized some rights for married and pregnant women. One should bear in mind that the Iranian government stresses that "in most parts of the world, particularly in Western countries, women are merely objects of collective materialistic values."⁷ It is believed that family values have changed in the West, and that promises to make changes in favor of women have resulted in exploitation, injustice, oppression, aggression, harassment, neurosis, and indignity.⁸ Iran's government is of the opinion that the West aims to lure (and then control) women from developing countries by turning them into "Western dolls" (Tabari & Yeganeh, 1982). It is also claimed that the concept of "equality" is confused with "similarity" in the West. Therefore, it is argued that Western women are struggling to gain similar – not equal – rights to men. This attempt, it is claimed, runs counter to Islamic law, which aims at improving the situation of each human being taking into consideration their nature. The West's attempt to provide equal rights for women is "reducing women to a mere means of promoting consumer goods and perpetual sexual slavery" (Tabari & Yeganeh, 1982).

In Iran, legislative power is bound by *shari'a* and Article 4 of Iran's Constitution declares that all laws should be based on *shari'a*. The legislature is made up of two powerful institutions: the first is the Islamic Consultative Assembly (ICA), and the second is the Guardian Council (GC). The latter is responsible for judging whether laws are compatible with *shari'a*.⁹ In other words, the ICA is barred from enacting laws that are contrary to the principles of *shari'a*.¹⁰ The Expediency Discernment Council of the System (*majma-e- tashkhis-e- maslahat-e nezam*) was created in 1988 by the late Supreme Leader Ayatollah Khomeini to overcome the differences of views between the ICA and the GC. The Expediency Council acts as an arbitrator, and can use the concept of "expediency" to vote in favor of either the ICA or the GC when there is a conflict between them. Taking into consideration that the permanent and temporary

members of the GC are appointed by the leader, one can begin to understand how complicated the shape of the legislative system in Iran is. This complication has led to contradictions in Iran's Constitution, which states that all laws should first be approved by the ICA, and only later may be ratified by the GC.

Although Iran's Constitution includes provisions for the principles of non-discrimination/non-privilege¹¹ and equality before the law,¹² these rights are regulated by "Islamic criteria".¹³ However, there is no definition of "Islamic criteria" in the Constitution. Therefore, different interpretations of these criteria may be used to prevent criticism of the laws and, by implication, of the government. For the purpose of this paper, it is important to give an example of the non-discrimination provisions of Iran's Constitution regarding women's rights. The preamble of the Constitution, which contains a section entitled "Women and the Constitution" states:

Through the creation of Islamic social infrastructures, all the elements of humanity that served the multifaceted foreign exploitation shall regain their true identity and human rights. As a part of this process, it is only natural that women should benefit from a particularly large augmentation of their rights, because of the greater oppression that they suffered under the old regime.

It is also worth considering Article 21 of the Constitution, which contains a substantive provision on women's rights:

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

- 1) create a favorable environment for the growth of 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, aged women, and women without support;
- 5) the awarding of guardianship of children to worthy mothers, in order to protect the interests of the children, in the absence of a legal guardian

The Iranian Constitution also considers the separation of powers. Nevertheless, this is contradicted by Article 57, which states that all three powers (i.e. executive, legislative and judiciary) should be under the supervision of the absolute Supreme Leader.¹⁴

Gender-based discrimination is justified by the principle of *shari'a*. Ironically, some religious scholars, such as Grand Ayatollah Sanei, believe that the extent of discrimination is in fact incompatible with the true and objective interpretation of *shari'a*.¹⁵

Age of Marriage

According to Article 1041 of the Iranian Civil Code, which was amended in the summer of 2002, marriage for girls younger than 13 full solar years and for boys younger than 15 full solar years requires a guardian's permission, except in cases of expediency,

which would be determined by a competent court. This article has been reviewed several times to become more compatible with women in contemporary Iran and to provide a greater amount of support for the parties to the marriage contract.

Before the amendment in 2002, Article 1041 of the civil code, which was ratified in 1935, had forbidden the marriage of a girl before the age of 15 and a boy before the age of 18. However, the prosecutor may ask the court to grant an exemption from the age requirement. In this case, such permission would not be given to a girl under 13 years of age and a boy under 15 years. According to the Family Protection Act passed in 1975, the age of marriage increased for both parties. Article 23 of this law banned the marriage of a girl before the age of 18 years and a boy before the age of 20 years. The prosecutor may still ask the court to permit the union, if it is necessary for a girl to marry and provided she is mentally and physically ready for marriage and not below the age of 15 years. A man who marries a girl who still has not reached the legal age for marriage will be punished according to the law.¹⁶

The Family Protection Act was abrogated after the Revolution of 1979 and replaced three years later, in 1982, with Article 1041:

Marriage before the age of majority is prohibited.

Note - Marriage before puberty with the permission of the Guardian and on condition of taking into consideration the ward's interest is valid.

The note to Article 1041 made permissible a situation that was originally banned by the article itself (i.e. marriage before puberty). It is also important to note that the term "permit" is used when the contract is finalized. This means that the provision in the note to the article refers to a case where a boy and a girl marry before reaching puberty, and the guardian approves of their marriage afterwards upon his acknowledgment of the marriage. The contradiction between the provisions of Article 1041 and the note to the article is clearly demonstrated here. The article itself rightly prohibits marriage before puberty. It is noteworthy to mention that one of the essential elements for a contract to be valid is the competence of the parties. In this regard, Article 210 of Iran's civil code states: "Both parties should be competent to transact the business." According to Article 211, "In order for a contract to be valid, both parties to it must have the required minimum age, be in their proper senses and must have reached puberty." Moreover, a transaction between people who are not of age, not in their proper senses, or not mature is invalid because of their incompetence.¹⁷

Therefore, according to the above-mentioned provisions of Iran's civil code, pre-pubescent boys or girls cannot be a party to the marriage contract, and if they enter it, the union would be considered null and void. In addition, the meaning of the word *nikah* is intercourse, and according to jurists intercourse with a girl who is not mature is forbidden and holds the person who marries a non-mature girl criminally and legally responsible. So it seems that the term 'marriage' according to Article 1041 means intercourse, and in the note to the article, the legislator means consummation of marriage. Therefore, the word 'marriage' is accompanied by the term 'contract' to eradicate any doubt.

Although marriage before puberty is prohibited, the guardian is permitted to arrange

marriage for his ward before the latter reaches puberty. Accordingly, the age of marriage could be even lower than the age of puberty. Further, because no authority had the right to monitor such marriages - and only the father could grant permission - there is the possibility of abuse of this legal authority. As is evident from the aforementioned article, girls are more at risk of early marriage than boys as the law envisages a lower age of marriage for them.

The significant issue in Article 1041 mentioned above is that the age of puberty was the one stated in Article 1210 of the civil code.¹⁸ As a result, the legislator has forbidden marriage below the age of nine for girls and 15 for boys. Naturally, one cannot imagine a girl's marriage below the age of nine. For this reason, this clause was highly criticized by many in Iranian society.

In 2000, ICA passed legislation that raised the age limit of marriage for both sexes to 18 solar years. However, girls who were at least 15 years old could petition the ICA for permission to marry sooner. The GC¹⁹ rejected this legislation and sent it back to the ICA. But since the ICA refused to change it, the legislation was forwarded to the State Expediency Council (SEC). On June 22, 2002, the SEC issued the following opinion: "Marriage for girls younger than 13 full solar years and for boys younger than 15 full solar years requires the guardian's permission, but on the condition of expediency, as determined by a competent court."

With the passage of this law, the age of marriage was raised to 13 for girls and 15 for boys (solar years). The provision of the amended article might be considered a positive step, as the supervision of a higher legal authority is required. Perhaps it might be understood that the age of maturity for marriage is 13 for girls and 15 for boys, and not the age that is stipulated in Article 1210. In other words, the age of maturity for marriage differs from the age of religious puberty. However, this amended article is still not compatible with the situation of Iranian women and needs to be changed in order to increase the age of marriage to 18 for both parties. Recently, some grassroots changes have taken place in Iranian society. Families are more willing to send their daughters to university to become educated and independent. Even in smaller cities, girls now have access to education and, therefore, the average age of marriage has risen in Iran. The One Million Signatures Campaign²⁰ that was launched in Iran in 2006 to raise awareness about discriminatory laws against women and to collect one million signatures to seek reform of these laws has made the minimum age of marriage one of its priorities.

Guardianship in Marriage and a Father's Consent

A girl and a boy who have not reached puberty cannot marry without their guardian's permission. However, the guardian is free to decide on his ward's marriage. In this situation, the guardian can act unilaterally, can be considered one of the parties to the marriage contract and can say, "I wed for my daughter" or "I accept the marriage on behalf of my son." The guardian should take into account the interest of his ward, and should prove before a competent court that it is in the best interest of his child to marry. If he does not do so, the child should approve the marriage after he/she reaches puberty.

Any girl or woman who is marrying for the first time, regardless of her age, needs her

father or paternal grandfather's permission in order to do so. Any time the father or paternal grandfather withholds permission without justifiable reason, his authority can be voided and the girl can marry with the permission of the court.²¹ Therefore, a girl needs the permission of her father or paternal grandfather for her marriage as long as she is a virgin, otherwise she cannot marry. One can imagine how this provision could be complicated in some situations. For instance, imagine an Iranian girl who lives in France and cannot obtain her father's consent. She has married according to French law and now wants to register her marriage in Iran. She cannot register her marriage unless she obtains her father's consent. Therefore, her only option is to ask the court to approve her marriage, which is a drawn-out and complicated process. In the case of *F v M*, the girl married in France without her father's consent. She married according to French law and afterwards presented in a Sunni mosque and obtained a written confirmation of her marriage. She went to the Iranian Embassy to register her marriage in line with Iranian law. The Embassy rejected her file and asked for her father's consent. Due to a very controversial claim she had issued against her father, it was not easy to obtain his consent. She reported that he had raped her since when she was 13, and continued to abuse her until the age of 20. She had filed a case of *zina* against her father in the criminal court of Tehran. Therefore, she did not want to ask him for permission. The only option was approval from the court, and for that she should prove to the court that she was married. She opened a case for the approval of her marriage, presented evidence such as her marriage certificate translated into Farsi, photos of her wedding, the birth certificate of her son, and witness accounts. After seven months, she finally received approval from the court.

It might also be said that it is humiliating for a 40-year-old university professor to ask for her father's permission to marry. If a father does not allow his daughter to marry, two different situations may arise. In the first, the father or paternal grandfather withholds permission without justification. In this case, the girl can apply to the Family Court by giving the full particulars of the man whom she wants to marry, the terms of marriage and the dowry agreed upon. She must notify her father or paternal grandfather, through that court, of her actions. The court can issue permission for marriage 15 days after the date of notification to the guardian, as long as no response has been received from the guardian to satisfy refusal. The second instance occurs when the father or paternal grandfather prevents her from marrying with permissible reasons. For instance, if a girl from an educated and upper class family marries a criminal without familial consent, her marriage is declared null and void. In accordance with Article 1044, if the girl has attained the legal age of marriage but her father or paternal grandfather are not physically available, or obtaining their permission is impossible, she may get married anyway. Registration of such a marriage is contingent upon proving the aforementioned conditions in court.

In relation to Article 1043, it is important to note that the father's consent is necessary for the marriage of a virgin girl. Therefore, if she marries and her marriage becomes null before the couple has sexual intercourse, or if she loses her virginity by accident, her father's consent is still needed for her to remarry. The only thing that removes the need for the father's consent is the loss of virginity through actual intercourse. Therefore, the girl does not need her father's consent to remarry if she

marries a man without her father's consent and loses her virginity. The High Court, in verdict No. 62/62, dated 18.04.1984, declared that intercourse removes the father's consent. This is very controversial, as having sexual relations before marriage is punishable by law, while registration of a marriage without the father's consent is not possible. This raises the question of how it was possible for a girl to marry without her father's consent in the first place.

There is no consensus on the matter of the father's consent. Some believe that a mature girl does not require permission from her guardian and can decide for herself. Others consider the father's consent necessary for a girl's marriage, even after she reaches the age of maturity. Still others support a more moderate approach, and consider both elements necessary for the marriage of a girl, in other words, both the free choice of a girl and her father's consent.

The question that the issue of consent raises is the following: What is the rationale for this regulation in Iran's Civil Code if there is no single verse in the Qur'an that provides for this provision? Some argue that the provision exists out of respect for the father, but one cannot accept this justification because there is no such obligation for boys. Why are boys not supposed to respect their fathers? And why not respect mothers in the same way?

One of the most important impediments to reform in Iran's legal system (and to introducing a new interpretation of *shari'a*) is the discretionary power of the GC over parliament. It is believed that for as long as these contradictions exist, there remains no possibility for reform. However, now that civil society is strong enough to challenge the discriminatory laws and demand their amendment, some clerics have expressly declared that discrimination against women cannot be justified by *shari'a*, and have argued that equality is reachable through an objective interpretation of the law. Ayatollah Boujnourdi, for example, affirmed that existing rights for women in shi'i jurisprudence are not fixed and changes can be made in many of the laws that are considered discriminatory.²² Subsequently, it is possible to seek justice and equality without infringing on Islamic principles.

Conclusion

Considering the aforementioned provisions in relation to marriage, one realizes that the problem lies with the patriarchal system at the root of the legal system in Iran. Gender inequality in Iran is upheld and perpetuated by two interrelated factors: patriarchal values and attitudes based on male supremacy and state-promoted institutional structure(s) based on gender-biased, hard-line interpretations of Islamic principles. Both represent a male-dominant society with male-empowering values, laws, and practices, making it difficult for women to escape public and private violence.

The contradictory nature of Iran's Constitution is an obstacle to applying a modern interpretation of *shari'a*, therefore prohibiting reform within Iran's legal system. The door will be open for applying a new interpretation of *shari'a* in Iran once the contradictions are removed from the Constitution. In order to accommodate the needs of Iranian women and respond to their demands for equality, the Iranian government

should reinterpret its fundamental norms, including Islamic principles, in line with the current needs and societal contributions of women, as well as with universal human rights standards.

Leila Alikarami is an Iranian lawyer, human rights advocate, and academic.
Email: lailakarami@gmail.com

ENDNOTES

1. Article 1070 of Iran's civil code states that: "Consent of the marrying parties is the condition upon which depends the enforcement of the marriage contract, and if a party showing at first reluctance authorises the making of the contract subsequently, the contract will be binding unless the reluctance is so acute that the reluctant person cannot be considered as having been in possession of any intention."
2. Iran's civil code, Article 1062.
3. Iran's constitution, Article 1.
4. Iran's constitution, Article 12.
5. Article 2 of the Iranian Constitution provides that 'In order to attain the objectives specified in Article 2, the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals:
 - 1) the creation of a favorable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption;
 - 2) raising the level of public awareness in all areas, through the proper use of the press, mass media, and other means;
 - 3) free education and physical training for everyone at all levels, and the facilitation and expansion of higher education;
 - 4) strengthening the spirit of inquiry, investigation, and innovation in all areas of science, technology, and culture, as well as Islamic studies, by establishing research centres and encouraging researchers;
 - 5) the complete elimination of imperialism and the prevention of foreign influence;
 - 6) the elimination of all forms of despotism and autocracy and all attempts to monopolize power;
 - 7) ensuring political and social freedoms within the framework of the law;
 - 8) the participation of the entire people in determining their political, economic, social, and cultural destiny;
 - 9) the abolition of all forms of undesirable discrimination and the provision of equitable opportunities for all, in both the material and the intellectual spheres;
 - 10) the creation of a correct administrative system and elimination of superfluous government organizations;
 - 11) all round strengthening of the foundations of national defence to the utmost degree by means of universal military training for the sake of safeguarding the independence, territorial integrity, and the Islamic order of the country;
 - 12) the planning of a correct and just economic system, in accordance with Islamic criteria, in order to create welfare, eliminate poverty, and abolish all forms of deprivation with respect to food, housing, work, health care, and the provision of social insurance for all;
 - 13) the attainment of self-sufficiency in scientific, technological, industrial, agricultural, and military domains, and other similar spheres;
 - 14) securing the multifarious rights of all citizens, both women and men, and providing legal protection for all, as well as the equality of all before the law;
 - 15) the expansion and strengthening of Islamic brotherhood and public cooperation among all the people;
 - 16) framing the foreign policy of the country on the basis of Islamic criteria, fraternal commitment to all Muslims, and unsparing support to the freedom fighters of the world.'
6. "Joining on the Conditions of Discrimination." Available from <http://www.badjens.com/fifthedition/joining.htm>
7. Women's rights in Islam and Iran (2007). Available from <http://www.presstv.ir/Detail.aspx?id=34194§ionid=3510302>
8. Women's rights in Islam and Iran (2007). Available from <http://www.presstv.ir/Detail.aspx?id=34194§ionid=3510302>
9. Iran's Constitution 1979, Article 4.
10. Iran's Constitution 1979, Article 72
11. Iran's Constitution 1979, Article 19.
12. Iran's Constitution 1979, Article 20.
13. Iran's Constitution 1979, Article 4.
14. Iran's Constitution 1979, Article 57 and Article 110 defines this supervisory authority in the following concrete terms:
 1. Delineation of the general policies of the Islamic Republic of Iran after consultation with the Nation's Exigency Council.
 2. Supervision over the proper execution of the general policies of the system.
 3. Issuing decrees for national referenda.
 4. Assuming supreme command of the Armed Forces.
 5. Declaration of war and peace and the mobilization of the Armed Forces.
 6. Appointment, dismissal, and resignation of:

- a. the religious men on the Guardian Council,
 - b. the supreme judicial authority of the country,
 - c. the head of the radio and television network of the Islamic Republic of Iran,
 - d. the chief of the joint staff,
 - e. the chief commander of the Islamic Revolution Guards Corps, and
 - f. the supreme commanders of the Armed Forces.
7. Resolving differences between the three wings of the Armed Forces and regulation of their relations.
 8. Resolving the problems, which cannot be solved by conventional methods, through the Nation's Exigency Council.
 9. Signing the decree formalizing the election of the President of the Republic by the people. The suitability of candidates for the Presidency of the Republic, with respect to the qualifications specified in the constitution, must be confirmed before elections take place by the Guardian Council, and, in the case of the first term of a President, by the Leadership.
 10. Dismissal of the President of the Republic, with due regard for the interests of the country, after the Supreme Court holds him guilty of the violation of his constitutional duties, or after a vote of the Islamic Consultative Assembly testifying to his incompetence on the basis of Article 89.
 11. Pardoning or reducing the sentences of convicts, within the framework of Islamic criteria, on a recommendation from the head of judicial power.
15. For example in case of polygamy, Grand Ayatollah Sanei stated, "If the first wife does not permit her husband to take another wife, the marriage will not be legitimate, even if a man can support both wives financially." Available at <http://www.wluml.org/node/5929>
16. Article 3 of the Marriage Law (1931) states that: "If a man marries a pre-pubescent girl without permission from her father or guardian, his offense is punishable by six months to two years imprisonment." The law is silent toward women marrying pre-pubescent boys.
17. Article 213 of Iran's civil code.
18. Article 1210 states that: "No one, when reaching the age of majority, can be treated as under disability in respect of insanity or immaturity unless his immaturity or insanity is proved. Note 1 - the age of majority for boys is 15 lunar years and for girls, nine lunar years."
19. The GC has examined the compatibility of the ICA's [majles or the parliament] bills with the principle of shari'a has been examined by a constitutional council mentioned in Iran's constitution, and made up of 12 jurists. Six jurists were appointed by the Supreme Leader and the remaining six were elected by the ICA from among the jurists nominated by the Head of the Judiciary. The GC controls ICA's power through two different procedures. First, as already noted, the GC is responsible for approving the qualifications of all the candidates for election in the ICA. This means that, at first, the GC decides who is eligible to be an ICA representative, and only then do people have the right to vote for those approved by the GC. Second, the GC considers ICA's enactments in order to examine their compatibility with Iran's Constitution and shari'a. In other words, its duty is to ensure that the enactments of the ICA are not in contrast to Iran's Constitution or shari'a. Due to the fact that the members of the GC have a very restrictive and narrow interpretation of Islam, they may veto some of ICA's bills, using the excuse of incompatibility with shari'a. For instance, the GC rejected a bill approved by the ICA for acceding to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), on the pretext of being incompatible with shari'a.
20. The campaign's primary goal was to dismantle discriminatory laws against women in Iran, with a wider vision of transforming the societal and cultural norms.
21. Iran's civil code, Article 1043.
22. "Joining on the Conditions of Discrimination." Available from <http://www.badjens.com/fifthedition/joining.htm>

REFERENCES

- Joining on the Condition to Discriminate'. Retrieved from: <http://www.badjens.com/fifthedition/joining.htm>
- 'Women's rights in Islam and Iran' (2007). Retrieved from: <http://www.presstv.ir/Detail.aspx?id=34194§ionid=3510302>
- Tabari, A. & N. Yeganeh. (1982). *In the shadow of Islam: The women's movement in Iran*. London: Zed Press.
- Global Arab Network. (2010). *Iran: Women fight polygamy proposal*. Women Living Under Muslim Laws. Retrieved from <http://www.wluml.org/node/5929>
- "Violence against women in Iran". Available from: <http://www.cedaw-iran.org/impact-of-cedaw-violence-against-women/>