

# Marriage on Trial

Islamic Family Law in  
Iran and Morocco

ZIBA MIR-HOSSEINI

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## Preface to the Second Edition

Since the publication of the first edition of this book, various elements of family law in both Iran and Morocco have changed, as have my own perspectives. The book, not surprisingly, was a product of its time. It was written in 1990–91 in the context of discussions then current concerning Islam's resurgence as a social and political force and its adverse impact on women's status in society. I was concerned and often dismayed by a dominant approach in the literature of the 1980s on women in Muslim societies, mostly produced by women from Muslim backgrounds writing in English or French. These writers seemed to share – and thus helped to reproduce – the essentialist and Orientalist assumptions purveyed by many of their Islamist antagonists about gender in Islam, as divinely ordained and immutable, rather than (as I had experienced it) as changing and thus open to negotiation and modification. Like the Islamists, it seemed to me, these writers were selective in their arguments, had an ahistorical understanding of Islam and gender, resorted to the same kinds of sophistry and resisted readings of Islamic law which treated it like any other system of law, disguising their resistance by obfuscation and misrepresentation. Both, in other words, had a strongly ideological approach; and in the final analysis they read what they wanted into Islam, though in pursuit of different agendas, the one Islamist and the other feminist.

In *Marriage on Trial*, I tried to shift the debate on the relation between Islamic law and women to a different level. Instead of condemning the Shari'a as responsible for all women's problems, I sought to understand how it operates and in what ways it is relevant to today's Muslim societies; how individuals, both men and women, make sense of the religious precepts that underlie every piece of legislation regulating their marriages. I also tried to shift the focus away from the ways in which Islamic rules oppress women to the ways in which women can find the contradictions embedded in these rules empowering. In the court cases I had witnessed in Iran and Morocco, I noticed how many women were

aware of these contradictions and manipulated them in order to renegotiate, and at times to rewrite, the terms of their marriages. In so doing, they sometimes turned the most patriarchal elements of Shari'a law to their advantage in order to achieve their personal and marital aims. I was sensitive to this in part because it was exactly what I had managed to do myself some years earlier when my own marriage broke down.

*Marriage on Trial* was also my initiation into the politics of gender in Islam. I wrote it when I was still feeling my way in terms of my own academic and personal engagement with both feminist discourses and Islam. When I started field research in Tehran family courts in 1985, I sought to retain the impartiality of the 'objective' academic observer, as firmly instilled in me by my 1970s social science training. My fieldwork in Moroccan family courts in 1989 – the first research I had done outside Iran – helped me to come to terms with my own Muslim background, and to re-examine my own relationship with the faith into which I was born, yet I still found it difficult to reconcile my growing personal involvement in feminist discourses and Islam with my academic aim of 'objectivity'. By the time I finished research in Morocco, I had realised that this aim was impossible, but I still hesitated to acknowledge it, let alone to participate actively in what I was studying; I still carried a heavy baggage of conflicting identities and politics, too painful to unpack in the aftermath of the 1979 revolution in my own country, Iran. So, while writing up my field material from Iran and Morocco, I tried as far as possible to keep my distance and not to insert my own voice into the text.

In the 1990s, discussions of gender and Islam, and of women in Iran in particular, have changed in focus and tone. More recent literature is less ideological and is willing to explore on-the-ground complexities. It is no longer taken for granted that secularization of the law and legal process necessarily enhances women's position and that a return to the Shari'a necessarily limits women's choices. This can be seen, for example, in reviews by Janet Afary (*Iranian Studies* 29, 1996, pp. 363–67) and Shahla Haeri (*International Journal of Middle Eastern Studies* 27, 1995, pp. 350–52) and my subsequent exchange with Haeri (*International Journal of Middle Eastern Studies* 30, 1998, pp. 469–75). While Haeri questioned the book's account of divorce in Iran, Afary rejected its interpretation of the data. What neither could accept was the book's finding that in post-revolutionary Iran, where the legal system had been Islamized and most courts were presided over by religious judges, women have more rights in marriage and better access to courts than in Morocco, where the courts were secular. At the same time, my own academic approach has changed. In 1995–97, I undertook research on how the custodians of the Shari'a in Iran – Shi'a clerics – attempt variously to perpetuate, to modify, to deconstruct and to reconstruct the notions of gender that lie at the root of Islamic family law. In writing about this, I

abandoned the impossible ideal of 'academic' detachment, and described my own engagements with a series of texts and their authors as a personal search for understanding (*Islam and Gender: The Religious Debate in Contemporary Iran* (Princeton, Princeton University Press, 1999; London, I.B.Tauris, 2000)).

Then in 1997–98, I sought to reach a wider public through a film inspired by the Iranian cases in *Marriage on Trial*. The 80-minute documentary *Divorce Iranian Style*, directed for Channel 4 TV by independent British filmmaker Kim Longinotto and myself, went on to win twelve awards at international film festivals, and has been widely shown around the world on television and in cinemas; it has also become part of the debate about women's rights in Iran, in which I am now very much involved personally. Reactions to the film among academic colleagues and among Iranian audiences abroad have also been instructive. For example, even those who questioned the data and analysis presented in *Marriage on Trial* have reacted positively to the film. This, I believe, has more to do with changing attitudes and positions concerning women's rights and understandings of Islamic law, than to differences in content and format between the film and the book, which take very similar positions in the debate.

In both countries there have been some changes in family law since I did the research for *Marriage on Trial*; here I outline them and comment on their impact on court cases. In Iran, with the enactment of the Law of Formation of General Courts in 1994, the Special Civil Courts where I had done fieldwork disappeared. Familial disputes, like others, appeared in General Courts, housed in sixteen Judicial Complexes *mofatameh qazq'i* in Tehran. Presided over by either a religious or a civil judge, General Courts have jurisdiction over all types of cases, from penal to familial. This restructuring caused such chaos that soon afterwards one or two courts in each complex were allocated to deal with familial disputes. In March 1997, the Parliamentary Women's Commission presented a bill to parliament aimed at rectifying the situation by demanding the formation of Family Courts on the basis of Article 21 of the Constitution. The bill was ratified, and in August 1998 the Family Judicial Complex in Tehran was opened, consisting of 22 courts of which 19 were housed in the same building where the Special Civil Courts had operated. The Family Courts Law specifies that judgments should, as far as possible, be passed in consultation with female legal advisors. When the Family Judicial Complex opened, however, only one court had a female legal advisor.

The most important piece of family law legislation since the first edition of this book was written is the 'Amendments to Divorce Regulations.' Enacted in December 1992, this measure once again outlawed the registration of all divorces without a court certificate. In so doing, it reinstated some of the rejected elements of the pre-revolutionary

reforms. A single-article law with seven Notes, the Amendments require all divorcing couples, even those who have reached an agreement, to go through a process of arbitration. If the arbiters, one chosen by each side, fail to reconcile them, the court allows the man to effect and register a divorce only after he has paid his wife all her dues, i.e. her *mahr* (dower) and her maintenance for the *'idda* (the waiting period after marriage during which a woman cannot remarry), unless he convinces the court of his inability to pay (Notes 1, 2 and 3). If the divorce is *ruj'i* (irrevocable) the divorced wife is required to stay in the marital home during this period (Note 4). Note 5 allows the appointment of women as advisory judges to work in co-operation with the main judge. Note 6 enables the court to place a monetary value on women's housework, and to force the husband to pay her 'wages in kind' (*ujrat al-mithl*) for the work she has done during marriage, provided that divorce is not initiated by her or is not caused by any fault of hers. If this is not possible, then the husband has to make a 'gift' to the wife, the amount to be decided by the court on the basis of his financial circumstances, the duration of marriage and the tasks she has performed. Another law, passed in 1997, requires the *mahr* to be revalued in line with inflation, thus increasing the obstacles for men wishing to exercise their right to divorce.

In Morocco, similar obstacles were created for men in 1993 through legislation which amended articles of the Code of Personal Status. No longer can a man exercise his right to divorce extra-judicially, or take another wife without a court certificate. The amended versions of Articles 41 and 48 now require men to produce court certificates prior to registering polygamous marriages or divorces. At the same time, Article 52 *bis* enables the judge to force the husband to provide his wife with a consolation gift (*mut'a*), if it is established that he divorced her 'without valid reason'. The amount is to be decided on the basis of the situation of the divorced wife.

In both countries, there have been slight modifications to custody rules. In Morocco, the amended version of Article 99 of the Code of Personal Status, while retaining a woman's right to custody of her children after divorce, now lists the father – instead of the maternal grandmother – as the next in line on whom the custody falls. In Iran, a single-article Act passed by Parliament in 1997 modified Article 1173 of the Civil Code: it enables the court to decide on custody, if it is proved that the child suffers because the parent who has custody is uncaring and/or morally corrupt.

It remains to be seen how the courts are interpreting and implementing these amendments, and whether women can use them to gain more security in marriage and a better bargaining position when it breaks down. It is safe to assume that, in both countries, the dynamics of marital disputes that reach the court remain very much the same as described in

this study. This is so because the juristic logic – and spirit – of these amendments is not to put men and women on a more equal footing in marriage, rather it is to protect and reward women who present no overt challenge to the patriarchal ethos of the Shari'a model of marriage, by penalizing men who abuse it, in short to give legal force to the moral sanctions of Shari'a marriage. The logic of the amendments tends to ignore that it can do this only when the law is prepared to address the core issue of disparity between men's and women's access to divorce, which is itself at the root of marital abuse and the court's inability to protect women.

Since the time of the fieldwork on which this book is based, women's bargaining positions have improved in both countries, though the limits within which they can negotiate have not altered. They are now better able to use the law as a means of exerting pressure on their husbands either to concede their demands or to incur punishment for not fulfilling their Shari'a obligations in marriage. By confronting the courts with their own experiences, which in many cases contradict the Shari'a model of marriage and belie its ideals, Muslim women will continue to expose the anachronistic nature of this Shari'a model. They are pioneers caught between religious tradition and changing social realities.