LEGAL REFORMS IN THE SHI'I WORLD — RECENT LEGISLATION IN IRAN AND IRAQ

The purpose of this paper is to examine recent reforms in the Shi'i world, especially the Family Protection Act which was recently enacted in Iran — having received the Royal Assent on 24th June, 1967. This statute is one in a series of reforms enacted by the Iranian legislature as part of what the Shah terms his "White Revolution". Examples of other statutes are those concerned with the land reforms, and with the enfranchisement of women.

It may perhaps be worthwhile to compare this statute, as ,far as is possible, with some earlier legislation enacted by Iraq, since Iran and Iraq may be said in some sense to represent the Shi'i, as opposed to the Sunni, world. Iran of course is wholly Shi'i, while Iraq is fairly evenly divided between Shi'is and Sunnis, with the Shi'a, perhaps, numerically superior, but the Sunnis having undoubted political ascendancy. The Iraqi legislation we are concerned with is the Law of Personal Status, which was promulgated in 1959 by the government of 'Abd al-Karim Qasim after the revolution which overthrew the monarchy and made Iraq a Republic. Important amendments were made to this Law in 1963 when, in its turn, the Qasim regime was overthrown by that of Colonel 'Arif. The Law was to apply to Sunnis and Shi'a alike, and thus effect a unification of the Iraqi family law.

It is not possible to make an exact comparison between the Iranian and the Iraqi legislation. The Iranian law is extremely short, consisting of a mere 23 Articles and one Note, and is concerned mainly with procedural matters, divorce, polygamy and the custody of children; while the Iraqi law consists of 88 Articles (which is still quite short when compared with similar Codes enacted by other Middle East countries), and attempts to cover in outline the full scope of the family law. The Iraqi Law of Personal Status was a (radical piece of legislation at the time of its enactment, although not as radical as the Tunisian Law;[1] but it is by no means as revolutionary as the Family Protection Act.

The first five articles of the Iranian Act are concerned with the procedure to be followed in actions for divorce and other family disputes which are defined as civil disputes between husband and wife, children, paternal grandfather, executor and guardian. Perhaps One of its most important provisions is that henceforth jurisdiction in all such matters, including of course divorce, belongs to the civil courts: either the *Shahristan* Courts, which are roughly equivalent to the [English] County

1. Law of Personal Status, 1957. For a full discussion of this Law see J.N.D. Anderson, "A Law of Personal Status for Iraq", (1960) 9 *I.C.L.Q.* pp. 542-563.

Courts, or the *Bakhsh* Courts, equivalent to the [English] Magistrates' Courts. The curtailment of the jurisdiction of the *qadis* courts began in 1927 when the Mullahs were ousted from the Ministry of Justice and replaced by lawyers trained in the West. Then, in 1931, when women were permitted for the first time to initiate divorce proceedings on certain specified grounds, it was provided that such actions were to be brought before the civil courts rather than the Shari'a courts. But if, of course, a husband wished to repudiate his wife he was free to do so, before the passing of the Family Protection Act, without the intervention of any court, civil or Shari'a.

Under this Act, however, the *qadis'* courts have been deprived of all their jurisdiction in family law matters, except possibly in cases where the point at issue is the essential validity of a marriage or a divorce. This means that the inevitably traditionally-minded *qadis* will play no part in the interpretation of the Family Protection Act. This is of great importance because some sections are very loosely drafted and leave tremendous scope for judicial interpretation. In Iraq, by contrast, the *qadis* retain control of the family law courts, and they have been allowed to interpret the Law of Personal Status, some parts of which are also imprecise. Unfortunately experience has shown that the *qadis* have tended to interpret the statute restrictively. This is apparent from a study of reported cases. It is reasonable to expect an interpretation from the Iranian judges, who have been trained in the Civil Law, which will be much more in keeping with the spirit of the legislation. The Family Protection Act, moreover, not only empowers the court to examine the parties and witnesses having knowledge of the dispute, but also to seek the help of social workers in any suitable case. It may also provide legal aid for an indigent party and exempt either party from payment of costs.

Either party to the dispute may apply to the court for arbitrators to be appointed, and the court is bound to grant this request unless satisfied that the application was made only to delay or prolong the hearing unnecessarily. These arbitrators must first attempt to reconcile the parties. If they fail they must submit their findings to the court within a specified period. The parties will then be served with a copy of the arbitral award, which will be put into execution unless they make objection to it within ten days. If an objection is raised the court itself must examine the issues and give judgment.

The most important and outstanding provisions in the Family Protection Act are those which relate to divorce. Prior to the passing of this Act, the traditional Ithna 'Ashari law applied as regards the husband's right to repudiate his wife. The Civil Code granted him the right to divorce his wife at will and however blameless she might have been.[2] Regarding the wife's right to seek a dissolution, reforms were made to the traditional law in 1931 when a married woman in Iran was for the first time allowed to initiate divorce proceedings not only if her husband was impotent[3] or insane,[4] either at the time of the marriage or

2. Civil Code, Article 1133.
3. *Ibid*., Article 1122.
4. *Ibid*., Article 1121.

subsequently (which was always allowed under the traditional law), but also if her husband failed to maintain her,[5] ill-treated her in such a way as to make married life intolerable, or suffered from a disease which caused her danger[6] (when the court would order the husband to divorce her if satisfied that her claim was well-founded). The Civil Code also permitted the insertion into marriage contracts of stipulations that a wife should, in certain events, have the option of repudiating her-helf.[7] Stipulations of this type were widely used among the educated classes but not among the population as a whole. Despite these reforms of Reza Shah, it is obvious that until 1967 there was a great disparity between the rights of men and women in Iran in matters of divorce. The passing of the Family Protection Act, on the other hand, has put Iran into the forefront of the movement for law reform in this matter, for the hitherto unprecedented step has been taken of depriving a husband of his right of unilateral repudiation. Henceforth the sole ground for divorce is that the marriage has broken down irretrievably, and that there seems to be no possibility of reconciliation between the spouses.

There are three distinct stages in the granting of a divorce: the first is concerned with establishing valid grounds; the second with attempting reconciliation; and the third with the formal registration of the divorce. First, an application must be made to the court asking for a certificate of impossibility of reconciliation to be granted.[8] Such an application may be made only on certain specified grounds. The Act in Article 11 states that grounds on which a dissolution or annulment could have been obtained under the Civil Code, prior to this Act, will hence-forth be grounds for such an application. But, in addition, the Article specifies five further grounds upon which an application may be made. These are:

(a) where either spouse is sentenced to imprisonment for five years or more;

(b) where either spouse is suffering from an addiction which in the court's opinion is prejudicial to family life (Such addiction is defined by Article 11 of the regulations for the enforcement of the Family Protection Act as any addiction to drugs, alcohol, gambling, or the like, which is habitual and injurious to the health or welfare, financial or moral, of the person addicted or his or her spouse) ;

(c) where the husband marries a second wife without his first wife's consent;

(d) where either "abandons family life" (The Act makes no attempt to define what is meant by the this phrase and it is for the court to decide if in fact there has been such an abandonement. This

5. *Ibid*., Article 1129.

6. *Ibid*., Article 1130.

7. *Ibid*., Article 1119.

8. Family Protection Act, Article 8.

gives great discretion to the courts and it remains to be seen how this extremely important section will be interpreted) ;

(e) where either spouse is convicted of an offence which in the court's opinion is repugnant to the honour and prestige of the family of the other. In deciding whether an offence is so repugnant the court must take into account the position and social status of the parties as well as custom and "other relevant factors".

The second stage commences once the court has entertained the application, when the court must itself, or through arbitrators, attempt to reconcile the parties. It is at this stage of the proceedings that the assistance of social workers will be of most value. Only if all attempts at reconciliation fail will a certificate be issued. No appeal lies against the court's decision to grant or refuse a certificate.[9] If a certificate is issued it will remain valid for a period of 3 months,[10] during which it may be produced before ,a divorce notary who will then register and effect a final (*ba'in*) divorce, and thus complete the third stage of the procedure.

From the point of view of jurisprudence rather than substantive law, Article 17 is the most interesting Article of the Act. It states that "the provisions of Article 11 shall be inserted in the marriage document in the form of a condition of the contract of marriage and an irrevocable power of attorney for the wife to execute a divorce will be explicitly provided. In accordance with the provisions of the Civil Code such a divorce will be irrevocable".

At first sight the article appears to serve no useful purpose and it may be asked why the legislature felt it necessary to include it. In fact, it is a point of more than ordinary interest, for the article is a legal stratagem by means of which a complete break with the Shari'a has been avoided. Under the traditional law, as we have seen, divorce is a right of the husband to which the wife has no comparable right, but the husband may delegate to her his right of repudiation which she may exercise on the occurrence of certain specified events. By enacting the grounds specified in Article 11 as those on which an application may be made shall be inserted in all marriage contracts, the impression is given that divorce is still a right of the husband (although one which he may now exercise only when granted a certificate of impossibility of reconciliation by the court) and that the wife has a comparable right only when it is delegated to her by her husband (which the law now obliges him to do).

By means of this device lip-service is still paid to the Shari'a, but the fact remains that in Iran the traditional law of divorce has been abandoned since a husband no longer has the power to repudiate his wife at will and without cause.

9. *Ibid*., Article 16.

10. *Ibid*., Note to Article 19.

In emphasising the need for reconciliation to be attempted, on the other hand, the Act is fully in accordance with the spirit of the Shari'a. The Qur'an itself provides that, in the case of disputes between husbands and wives, two arbitrators are to be appointed, one from the family of each spouse, with the duty of attempting to reconcile the parties. But in the traditional Shi'i law the arbitrators have no power to decide that a marriage shall be terminated, and their function is over once they have made their attempt at reconciliation.

As stated above, a certificate will remain valid for three months from the date of issue. Thus the Act has provided, in effect, a period for reconsideration in which the party who has been granted the certificate may decide whether he or she wishes the marriage tie to be finally severed. It must, however, be stressed that it is not mandatory to delay three months, and the certificate may be presented to a divorce notary immediately it is issued and a final divorce thereby effected. This period is not a substitute for the *'idda,* which will commence when the notary registers the divorce, not when the court issues the certificate. However it is possible that, when deciding on the period of three months during which the certificate will remain valid, the legislature was influenced by the traditional law, for according to Ithna 'Ashari doctrine, a repudiation, unless it was a third repudiation, was revocable by a husband during the *'idda,* which in the case of a non-pregnant woman is three menstrual cycles. One of the purposes of the *'idda* was, indeed, to allow a husband time in which to reconsider his decision to repudiate his wife. The Sunnis, on the other hand, recognised several forms of repudiation which were immediately irrevocable and which therefore allowed a husband no opportunity to have second thoughts. Accordingly, it has been the aim of some Sunni reformers to provide a time for reconsideration after the pronouncement of a repudiation in order to alleviate some of the distress caused by irrevocable repudiations pronounced by husbands who in many cases, had no real desire to divorce their wives. In Pakistan, for instance, the Family Laws Ordinance 1961 has provided a time for reconsideration by enacting that no repudiation, even though the husband specifically states that it is final, shall become irrevocable until 90 days have elapsed from the date on which it is reported to a Union Council, during which time attempts must be made by this Council to effect a reconciliation.[11] In Iraq, also, the Law of Personal Status has provided a time for reconsideration by making many previously irrevocable repudiations count only as a single revocable divorce.[12]

The traditional law of both the Sunnis and the Shi'is recognises a divorce by mutual consent, known as *khul'* or *mubara'a.* In accordance with the Family Protection Act[13] a divorce may still be effected by agreement between the spouses although the agreement itself does not dissolve the union but constitutes a ground for the issue of a certificate of impossibility of reconciliation once it is declared to the court. If in

11. Section 7(3). See N.J. Coulson, "Islamic Family Law: Progress in Pakistan", *in* J.N.D. Anderson (ed.) *Changing Law in Developing Countries.* London (1963), pp. 240-257.

12. Law of Personal Status, Article 37(2).

13. Family Protection Act, Article 9.

their declaration the parties have failed to make adequate provision for the custody and maintenance of the children of their marriage, the court is empowered to make such arrangements as it deems fit. A wife who, prior to the Act, was granted a power of attorney to repudiate herself by her husband may exercise it, but only after first obtaining a certificate of impossibility of reconciliation from the court.[14] In addition to the provisions of Article 11 which, as we have seen, are henceforth inserted into all contracts of marriage, the parties may at their discretion insert further conditions in accordance with Article 4 of the Marriage Act and Article 1119 of the Civil Code.

In the matter of divorce the Iraqi law is far less radical than the Family Protection Act, although the reforms effected by it are typical of those promulgated by other Middle-Eastern countries. Since 1959 a repudiation is ineffective if pronounced by a husband who is drunk, acting under duress, or "oblivious of what he is doing by reason of anger, sudden calamity, old age, or illness".[15] This constitutes an abandonment of the traditional Hanafi law. A divorce pronounced by a man in his death sickness is also without legal effect, and a wife in such circumstances is entitled to her share of his inheritance.[16] Under the traditional law of the Sunni and Shi'i schools, a divorce pronounced in death sickness was perfectly valid, although a wife retained her right to inherit in spite of being repudiated — provided that her husband died while she was still in her *'idda* in Hanafi law, or within one year in Shi'i, Maliki and Hanbali law. No repudiation, moreover, may now be postponed until a future date, suspended upon an unfulfilled condition or expressed in the form of an oath.[17] This reform again constitutes an abandonment of the Hanafi law, this time exclusively in favour of the Ja'fari doctrine. A repudiation coupled with a number, moreover will effect only a single repudiation — and this again is an adoption of Ja'fari law.[18] The Law, however, does not state specifically what is the effect of a divorce formula pronounced three times in one session, but the courts have clarified this point by holding that, in such cases, only a single revocable repudiation takes place.

At first sight one of the most radical provisions of the law[19] is the one which enacts that a man who wishes to repudiate his wife must commence proceedings in the Shari'a court to demand that this be effected and to seek a judgment accordingly. Unfortunately a proviso was added that if the husband could not take the matter to court he must register the repudiation during the *'idda* period; and subsequently the Court of Appeal[20] has held that even failure to register the repudiation during the *'idda* does not render it invalid *per se.* This article in the Law is

14. *Ibid.*, Article 10.
15. Law of Personal Status, Article 35(1).
16. *Ibid.*, Article 35(2).
17. *Ibid.*, Article 36.
18. *Ibid.*, Article 37(2).
19. *Ibid.*, Article 39(1).
20. *'Ali* v. *Farida,* Decision 306, 1963. For this information I am indebted to my friend Miss N. al-Naqeb, whose thesis on "Problems of Matrimonial Law in Contemporary Iraq" may be consulted in the University of London Library.

a departure from traditional Sunni practice, for according to the Sunnis divorce is a right of the husband which he is free to exercise free from any formalities. In this it is also a departure from Shi'i law; but it falls short of the Ja'fari requirement that only a repudiation which conforms to a strictly prescribed form in regard to the language, terms used, time and intention will be legally effective.

It must be emphasised that the Iraqi courts need not ask the husband for his reason for insisting upon a repudiation, as repudiation is still considered to be his exclusive and unequivocal right. Thus divorce procedure in the courts appears to be merely a matter of routine, as no attempt is made to reconcile the parties or to discover the reason for the rift between them. The courts have repeatedly stated indeed that the right to repudiate belongs to the husband, and that he may exercise it even in the absence of any fault on the part of the wife. This means that an apparently radical reform has a very restricted meaning.

In addition to this very minor restriction on the husband's power of repudiation, the Law granted wives the right to go to court to ask for a dissolution of their marriage on certain specified grounds. The reforms in this respect approximate to similar reforms in other Arab countries, and are by no means radical in comparison with the Iranian Family Protection Act. The basis of the relevant provisions of the Law are Maliki and Hanbali doctrine.

In accordance with Article 40, if *either* spouse (husband or wife) claims injury and alleges that the other has behaved in such a way as to make the continuance of the union impossible, or to create discord, the Law provides as in other Arab countries, for a judicial dissolution after an investigation has been carried out by two or three arbitrators, who must attempt a reconciliation. If the wife appears to be solely responsible for the discord, the *qadi* is empowered to deprive her of her deferred dower or even make her pay back not more than half her dower when the whole has been handed over.

In practice this provision has not been a great success, because of the vagueness of the question "What constitutes an injury?". In one case[21] the Shari'a court held that to accuse a wife of *zina* did not constitute an injury, despite the fact that even in present-day Iraq a woman is in danger of being killed by her kinsmen if she is found to have been unchaste.

The wife may demand a judicial dissolution on the grounds of injury if her husband has been sentenced to imprisonment for five years or more,[22] or has been absent for two or more years without lawful cause [23] even though he has left property behind for her maintenance. Unfortunately there is a proviso that a petition for divorce may be presented on this ground only if the husband's whereabouts are known. The courts have commented that to allow a wife to petition when it is not known where her

21. Shari'a Court of Cessation (Ja'fari), Decision 63, 1963.

22. Law of Personal Status Article 41.

23. *Ibid*., Article 43.

husband is would prejudice the husband, since a notice of the petition could not be served on him and therefore he would have no chance to defend himself. With all respect, this proviso deprives the article of a great deal of its effect.

The wife may also obtain a judicial dissolution if her husband is suffering from a physical defect which makes married life dangerous for her, or if he is unable to consummate the marriage.[24] Unlike similar, reforms in the Middle-East, no mention is made in the Law of a year's respite for treatment; but in practice, in cases of this type the courts will invariably delay a final decision for a year to see if the husband can be cured. Only if the husband's impotence is proved to be permanent can the wife obtain a divorce. Impotence which supervenes after the marriage has been consummated does not constitute a ground for dissolution.

As in other reforms in the Arab world, a wife may obtain a dissolution for failure of maintenance [25] either because her husband refuses to maintain her, or because she is unable to obtain maintenance because her husband is "absent, missing, in hiding, or imprisonment for more than one year". A dissolution on this ground is counted as a revocable repudiation, since if the husband pays his wife maintenance within sixty days, the decision of the court will be revoked. The husband's inability to maintain because of sickness, unemployment, etc., is not a ground for divorce, unlike certain reforms in other Arab countries.

The Iraqi law conferred on wives what could have been a most important right, by allowing them to obtain an annulment of their marriage if the husband failed to observe any lawful stipulation inserted in the contract.[26] Unfortunately, no examples are given in the Law as to what constitutes a lawful stipulation; unlike similar provisions in the Syrian and Jordanian Laws. Whether the legislation intended that the Hanbali law regarding stipulations should be followed is not clear. The *qadis* therefore have had a free hand in determining which conditions are lawful and which are not, and so far there is no indication that they are following the Hanbali rather than the Hanafi or Ja'fari doctrine.

Neither the Law of Personal Status nor the Family Protection Act make any provision for the payment of alimony to divorced women. In both countries women are entitled to maintenance only during the *'idda* period. Under the Iraqi law of divorce women, even those who are *nashiza* (i.e. have removed themselves from their husbands' control), are entitled to maintenance but the court has held in one case[27] that a woman who failed to observe the traditional custom of remaining in seclusion during the *'idda* period, and had travelled to another town, had forfeited her right to maintenance. In another case the Ja'fari court[28] held that where a woman was repudiated irrevocably she was not entitled to maintenance even during her *'idda.* This decision is in accord-

24. *Ibid*., Article 44.
25. *Ibid*., Article 45.
26. *Ibid*., Article 6(4).
27. Shari'a Court of Cessation (Sunni), Decision 420, 1960.
28. Shari'a Court of Cessation (Ja'fari), Decision 403, 1961.

ance with the traditional Shi'i law, but is clearly contrary to the spirit of the legislation. This traditional law was applied in Iran under the Civil Code which also stipulated that maintenance was payable during the *'idda* following a revocable divorce but not in the *'idda* following a judicial dissolution.[29] However the Family Protection Act specifically provides[30] that the judge may at his discretion decide upon an amount to be paid to the wife during the *'idda,* taking into consideration the "moral and financial standing of the parties". Whether the courts will interpret this to mean that a wife who is the guilty partner will not be entitled to maintenance remains to be seen, but it seems probable that this will at least be taken into account.

Neither the Iranian nor Iraqi legislation has forbidden polygamy, but in both countries restrictions have been placed upon the practice. In Iran a man wishing to marry a second wife, while still married to his first wife, must obtain the permission of the court.[31] Such permission will be granted only if the court is satisfied that he is financially and otherwise capable of treating both wives equally (and the court may examine the first wife before reaching its decision). If a man contracts a second marriage without the permission of the court he may be sentenced to up to two years' imprisonment, but it seems that the marriage itself will be regarded as valid. The permission of the court must be obtained for the second marriage, moreover, even if the first wife consents. It is interesting to note however that, even if the court gives its permission for a polygamous marriage, a wife who has not given her consent may make an application to the court on this ground asking for a certificate of impossibility of reconciliation and subsequent divorce.

Section 4 of the Iraqi Law of Personal Status states that marriage with more than one wife is not permitted without the permission of the the court, and such permission will be given only on the following three conditions: that the husband is financially able to support more than one wife; that there is "some lawful benefit" involved; and that the husband is regarded by the court as capable of according two or more wives equal treatment. Anyone who contracts a second marriage in contravention of the article is liable to imprisonment for not more than one year or a fine not exceeding one hundred dinars, or both.

The statute provides no guidance as to what is meant by "lawful benefit" or how the *qadis* are to determine if unequal treatment is to be feared. Unlike the Family Protection Act the Law does not require that evidence be taken from the existing wife; and in practice in Iraq she is only rarely called upon to appear. This means that the *qadi* is being called upon to exercise the role of prophet rather than judge when he is asked to decide how the husband is likely to behave in the future.

The question of whether a lawful benefit is involved is perhaps easier to answer. A court has granted permission to contract a second marriage in cases of sickness or where the first wife is barren; but it

29. Civil Code, Article 1109.

30. Family Protection Act, Article 12.

31. *Ibid*., Article 14.

seems that a proper investigation is very seldom carried out, for the wife is, as stated earlier, rarely called upon to give evidence, so the testimony of the husband usually goes unchallenged.

The *qadis* themselves have admitted that they are in a difficult position, which perhaps is made worse by the fact that the Court of Appeal has held that it has no jurisdiction to entertain an appeal in cases where a *qadi* has granted or withheld his permission for a second marriage.[32] This is also the position in Iran where the Family Protection Act provides[33] that no appeal shall lie against a court's decision to allow or forbid a polygamous marriage.

What is the position in Iraq if a husband contracts a polygamous marriage without obtaining the prior permission of the court? The 1959 Law took the radical step of declaring such marriages invalid. However the 1963 Amendment[34] expunged the clause "marriage with more than one wife without the permission of the court" from the list of temporary impediments to marriage. The result is that a polygamous marriage without the *qadi's* permission is no longer invalid *per se,* although it gives rise to penal sanctions.

An Iraqi wife may not obtain a divorce should her husband contract a second marriage, even when he has not obtained the permission of the court. Her position is thus worse than that of a Pakistani woman under the Family Law Ordinance,[35] and infinitely worse than that of an Iranian woman who, as stated earlier, may obtain a divorce even when the court has granted permission, provided she herself has refused consent.

Both the Iranian and Iraqi law contain sections dealing with the important question of the custody of children following the dissolution of a marriage. In accordance with the Family Protection Act,[36] when issuing the certificate of impossibility of reconciliation the court must decide upon the question of the custody and maintenance of the children if it does not consider that the parties have made proper arrangements. Payment of the children's maintenance must be made by the husband or the wife, or by both together.

The court may later revise its order for the custody and maintenance of the children upon information being laid by the parents, or any relative of the children, or by the Public Prosecutor.[37] Whichever of the parents is granted custody, the other has a right of access to the child which on his or her death or absence passes to his or her first-class heirs (i.e. grandparents or brothers and sisters of the child). It is interesting to note that even children whose parents have separated from each other

32. Shari'a Court of Cessation (Ja'fari), Decision 606, 1966; and Shari'a Court of Cessation (Sunni), Decision 313, 1966.
33. Family Protection Act, Article 16(5).
34. Article 1.
35. Family Law Ordinance, Article 13.
36. Family Protection Act, Article 12.
37. *Ibid*., Article 13.

before the promulgation of the Act are subject to its provisions provided the court is satisfied that no proper arrangements for their custody or maintenance expenses were made previously. Prior to the Act the traditional law regarding custody of infants applied. So a mother retained the right of custody of her sons only until they reached the age of two, and her daughters until they reached the age of seven. After that age the children in all cases passed into the custody of their father. Now, however, an Iranian judge may award custody to either parent or uphold an arrangement regarding custody which the parents themselves have made, provided he is satisfied that this is in the best interests of the child.

The Iraqi Law is much more traditional. The Law lays down that custody (i.e. *hadana*) shall continue until the child of either sex attains the age of seven years.[38] This accords with the law of the Hanafis regarding boys, and of the Ja'faris regarding girls. However, the seven year limit is not to be applied strictly, and the *qadi* is empowered to extend the period of custody if it appears that the interests of the child so require.

Regarding this right of custody, the Law enacts that the mother shall have the prior right. This is in accordance with traditional law. Failing the mother, the Law does not state who is to have the right of custody, merely requiring that the custodian be free, over the age of puberty, sane, and able to take proper care of the child — and, if a woman, should not be married to a man who is not related to the child within the prohibited degrees. In the absence of any express provision, the *qadis* have solved the matter according to the traditional law: thus in cases involving Hanafis they have granted the right of custody to the maternal grandmother in cases where the mother is dead or disqualified; and in cases involving Ithna 'Asharis to the father.

I should like to end this paper by discussing briefly the law of inheritance in the two countries. The Family Protection Act does not make any changes in the law of succession, which is codified in Part 4 of the Iranian Civil Code, Arts., 825-860 being concerned with testamentary succession, and Arts., 861-946 dealing with intestate succession. But to ascertain the reasons why Iran has not felt the need so far to change the law, it is necessary to examine briefly the traditional Islamic law of inheritance.

In pre-Islamic Arabia only male agnates were allowed to inherit, so daughters and other female relatives were excluded, but Islam introduced some outstanding reforms in this sphere. Certain shares are specified in the Qur'an itself for nine heirs, most of whom are female, but not all these heirs inherit in all circumstances, (e.g. a uterine sister is given a precise share, but she will inherit that share only in the absence of sons, daughters, father, or paternal grandfather). The Sunni jurists regarded the institution of these Qur'anic or quota shares as superimposed on the agnatic system of pre-Islamic times. Accordingly in Sunni law the Qur'anic sharers are given their shares, and then the remainder of the estate, if any, is given to the nearest agnate. Relatives other than

38. *Ibid*., Article 57.

agnates or Qur'anic sharers inherit only in the absence of both of these categories. Thus if a man dies survived by his daughter and the son of a full brother, his daughter will inherit half his estate as a Qur'anic heir and the nephew will take the remaining half as nearest agnate. If however his only heirs are the child of his deceased daughter and a brother's son, the nephew will take the whole estate, excluding the grandchild, as the nephew is an agnate, and the grandchild is of course a cognate relative.

The Shi'i jurists disagreed radically with the Sunni scheme and built up a wholly different system out of the same Qur'anic material — for they regarded the Qur'anic reforms not as a piece of amending legislation to be superimposed upon the pre-existing system, but rather as abrogating legislation, so they took the Qur'anic reforms as a basis on which to build up an entirely new system. Henceforth, agnates were to have no preference over cognates, and each heir was to take his or her Qur'anic share whether specified, or implied (as in the case of sons and brothers), or to take the entitlement of the appropriate Qur'anic sharer or *dhu qaraba* (next of kin) by "representation". The Shi'is divide all heirs, excluding the spouse relict who inherits in all cases, into three classes. Class I comprises parents and lineal descendants, Class II grandparents how high soever and collaterals and their descendants, and Class III paternal uncles and aunts and their descendants and maternal uncles and aunts and their descendants. Any heir in Class I excludes all those in Class II, and any heir in Class II excludes all heirs in Class III, so (e.g.) a daughter will exclude a grandfather and a brother, as will a daughter's son or a daughter's daughter.

It is obvious from this short survey that the Sunni and Shi'i concepts of the family differ fundamentally. It may also be said that the traditional Sunni notion of the family as a unit based on tribal solidarity seems outdated in the twentieth century. The Shi'i concept of the family, on the other hand, as a much smaller unit consisting of parents and their children appears much more consonant with modern life; and indeed several important reforms in the Sunni world have tended to restrict inheritance to just such a unit. I would suggest that it is for this reason that the need to reform has been felt less strongly in the Shi'i world, and the principles of Shi'i law so long regarded as heterodox have been adopted to some extent by certain modern Sunni reformers.

By contrast with Iran, the Iraqi law of succession has had a very chequered history. When 'Abdul Karim Qasim came to power his aim was a unification of the law of the country and the bringing about of equality between the sexes. As we have seen, it is with regard to the law of inheritance that the greatest divergence between the Sunnis and the Shi'a occurs. Thus in Iraq two completely different laws of inheritance were in operation, neither of which could be said to treat women equally with men, since even in Shi'i law the male takes double the female share.

Qasim, therefore, to further his aims, introduced what was certainly the most startling innovation of the law of 1959, namely the complete

abandonment of the Islamic law of intestate succession in favour of the statute law, originally of German origin, which had previously applied only to rights of succession in government land (both in the Ottoman Empire, and subsequently in Iraq). The new law was to apply of course to all Iraqi citizens, whether Sunni or Shi'i. This reform aroused tremendous opposition in traditional and conservative circles and when Qasim was overthrown in 1963 an amendment was added to the Law which once again completely changed the law of succession. The most important section of the amendment[39] states that "those who inherit by reason of relationship and the way in which they inherit are as follows: (i) parents and children how low soever, the male taking twice the female share, (ii) grandparents how high soever, and brothers and sisters, and the children of brothers and sisters, (iii) uncles and aunts whether paternal or maternal, and uterine relatives". This scheme of inheritance by class, each class excluding an inferior class, is traditionally Shi'i, and thus the general principles of Shi'i law are now applied to all Iraqis whether Sunni or Shi'i. To this extent the law of intestate succession has been unified for the whole community. But it is enacted that "the distribution to the heirs by relationship of their entitlement and their shares shall be according to the rules of the Shari'a which were followed before the enactment of the Law of Personal Status". This has been interpreted to mean that the detailed rules of Shi'i law apply only to the Shi'i population, while as far as Hanafis are concerned the traditional Hanafi principles of distribution still apply subject to the statutory order of priorities. Thus if a man dies survived by a daughter, a son's daughter and a germane brother, the brother will be excluded as belonging to Class II in the presence of lineal descendants, Class I heirs. Then if the parties are Shi'i, the daughter will exclude the son's daughter as being nearer in degree. But if they are Hanafis, the daughter and the son's daughter will inherit together, the daughter taking half initially, and the son's daughter one-sixth — then both shares being increased proportionately to exhaust the estate. This is in accordance with the normal Hanafi practice, where a daughter's daughter inherits with a son's daughter.

If the only heirs are Class II heirs — a grandfather and a full brother — the grandfather will inherit as a full brother and they will share equally if the parties are Shi'i. It is only if the parties are Hanafi that a difficulty arises for in traditional Hanafi law there is no known principle of distribution between grandparents and collaterals, since the former exclude the latter.

From this brief survey of the family law of Iran and Iraq. It can be seen that while the law of inheritance of the two countries is substantially the same, there are great divergences in other branches of the law — in particular the law of divorce. Indeed, the recent Iranian legislation is so radical that it cannot be compared with that of any

39. Law of Personal Status, Article 89, as amended by the enactment of 1963. See J.N.D. Anderson, "Changes in the Law of Personal Status in Iraq" (1963) 12 *I.C.L.Q.* pp. 1026-1031.

other Islamic country. It has effected much more fundamental changes in the traditional law than even the Tunisian Law of 1957, and yet has avoided a complete break with the Shari'a by means of a legal stratagem.

It is still too early to say if the Act will be successful in practice. Certainly it is to be hoped that the courts in interpreting the Act will be guided by the same spirit of progress which influenced the legislature when enacting it. It remains to be seen, moreover, to what extent this radical Iranian statute will influence future reforms in other parts of the Muslim world.

DOREEN HINCHCLIFFE*

* LL.B., Dip., Islamic and Comparative Law, Lecturer in Islamic Law in the School of Oriental and African Studies — University of London.