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Torkashvand, Erfaneh

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ANALYSIS OF WOMEN’S FREEDOM OF MOVEMENT AND EMPLOYMENT RIGHTS, PRE- AND POST-MARRIAGE IN IRAN

Erfaneh Torkashvand

ABSTRACT

According to Iranian family law, marriage restricts women’s rights to employment and freedom of movement. Under specific circumstances, the exercise of these rights is subject to the spouse’s consent. This unbalanced power relation between spouses can be rectified in three ways: reforming existing laws, judicial intervention, and contracts. This article illustrates that the first two solutions are not feasible in Iran’s legal regime. At the same time, marriage contracts allow the parties to lift legal discrimination and agree on equal rights by mutual consent. Case law, jurisprudential and legal principles show that contracts’ potential can reform the status quo more effectively. The conventional Islamic family forms different rights and duties for spouses. These are unbalanced levers that lubricate family law controversies. Accordingly, this article argues that marriage contracts can balance these forces and create both equality and equilibrium in the family.

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I. INTRODUCTION

Under the Iranian legal system, family law heavily relies on the Islamic Shia ordinance as the state’s official religion. In this context, marriage (*Nikah*) is a contract that brings about various duties and obligations, shaping a unique relationship between men and women. An egalitarian perspective can illuminate several issues raised by such a union. Divorce, children’s custody, inheritance, restrictions on Muslim women marrying non-Muslims, and Iranian women marrying other nationalities are all contentious issues. These are all constraints that apply to women either before or after marriage. However, there are certain rights that unmarried women enjoy that *Nikah* deprives them of. “Freedom of movement” and the “freedom of employment” are rights that are partially taken away when a woman marries.

Religion has had a salient role in forming socio-legal institutions pre- and post-revolution. However, reducing the analysis to religion oversimplifies the complexity of historical and cultural factors and the impact of economics on contemporary developments.¹ The issue of women’s employment or mobility does not arise solely from the laws and the Islamic creeds.

Iran has undergone extensive social transformations in recent decades, which have altered its understanding of religious principles. Aside from diverse readings of Islamic canons, women’s lived experiences also vary. Iran has diverse ethnic, linguistic, religious, and geographical identities. Indisputably, these aspects can be remarkably influential in the analysis’s outcome. Also, it is impossible to generalize the heterogeneous experiences of women in urban areas to rural parts or to underestimate the differences among classes.

1. For example, a study conducted in 2012 on women’s employment promotes the hypothesis, based on empirical data, that the low rate of female participation in the labor market is a non-ideological problem, such as the lack of proper childcare centers. In the statistical population, about two percent of the participants cited religious restrictions, 35 percent cited difficulties in coordinating childcare, and 18 percent cited their spouses’ opposition as their unemployment reason. (Narjes Mehdizadeh, *Beyond Cultural Stereotypes: Educated Mothers’ Experiences of Work and Welfare in Iran*, 33 *Critical Social Policy* 251, (2013). <https://doi-org.ezp-prod1.hul.harvard.edu/10.1177%2F0261018312449809>).

Understanding that this is a multi-faceted subject, this article limits the scope of the analysis to the role of law and Islamic tenets on women's status without entering the details of nuanced jurisprudential interpretations. It will also concentrate on women's cases in the urban middle-class community. The middle class plays a central role in the development of democracy, arguably more so than any other social group. This study aims to highlight the significance of engaging the middle class and utilizing contractual instruments in the pursuit of gender equality.²

Sections II and III of this paper explain the jurisprudential origin and the doctrinal foundations of the restrictions of women's movement and employment. Section IV discusses the potential solutions for rectifying the status quo to emphasize the contract's importance and demonstrate the alternatives' inefficiency. Section V focuses on contract law and descriptively illustrates marriage contracts' characteristics to show how the general rules may apply to *Nikah*. Finally, section VI normatively argues why contracts are the most compatible solution with the egalitarian ideas in family law and the most feasible solution in the current system.

II. JURISPRUDENTIAL BACKGROUND

The roots of the debate about freedom of movement and employment can be traced back to a broader belief regarding the headship of the husband in the family. Having a pyramidal image of the family, Islamic precepts entrust the headship of this hierarchy to the husband. Jurists have discussed that a husband's authority means that a woman is obliged to obey and follow her husband. Specifically, she cannot leave the house unless she obtains his permission. Therefore, women's employment in the Islamic context is not a separate issue but an example of this overall constraint against freedom of movement.

Nevertheless, there is no consensus about the scope and rationale behind this limitation. Some jurists argue that this is an absolute right for the husband.³ They believe women are prohibited from leaving the house unless their husbands permit them. Others think this right only applies if it contradicts the husband's right to conjugal intercourse.⁴

This rule has no correspondence under Iran's statutes and laws, and in general, women's freedom of movement to leave the house is not conditional on their husbands' permission. However, the concept of the husband's headship,

2. Chunlong Lu, *Middle Class and Democracy: Structural Linkage*, 31 Int'l Rev. of Mod. Socio. 157–178, (2005).

3. Seyed Ruhollah Musavi Khomeni, *TAHRIR-AL-WASILA* (2013) (Iran).

4. Seyyed Mostafa Mohaqeq Damad, *JURISPRUDENTIAL STUDY OF FAMILY LAW: MARRIAGE AND ITS DISSOLUTION* 264 (2021) (Iran).

inspired by Quranic verses,⁵ is directly reflected in the Civil Code. Article 1105 of this statute indicates that the husband is the head of the family.⁶

Influenced by the gender segregation of roles in the Islamic creed, in addition to the joint duties of cooperation, loyalty, and child-rearing, laws assign multiple discrete responsibilities and rights to husbands and wives. Although the implications of the husband's authority are not explicitly explained in statutes, the obligation to financially provide for the family, the right to determine the place of residence in cohabitation, and supervision over the women's employment are considered indications of his precedence.⁷

It is noteworthy that in neither jurisprudence nor law does the husband's headship mean the guardianship of women (in a way that incapacitated people are under guardianship). Adult women have absolute autonomy over their political and economic rights before or after marriage. Overall, this jurisprudential background is decisive in the drafting and interpretation of several legal articles, including Article 1117 of the Civil Code and 18 Passport Law.

III. DOCTRINAL REVIEW OF THE RESPECTIVE LAWS

A. Article 1117 of the Civil Code

Article 1117 of Iran's Civil Code (hereafter article 1117) reads as follows:

"The husband can prevent his wife from professions or jobs incompatible with the family's interests or the dignity of himself or his wife." From the legal point of view, there is no difference between men and women regarding economic rights and the capacity to acquire sources of wealth. Adult women have the same right and absolute capacity to obtain property, enter contracts, and manage their assets, regardless of their marital status. However, numerous gender-based restrictions on women's employment have been established by law. Some restrictions, such as the ban on employment as a judge or in the armed forces, are imposed on all women, while the second group of limitations applies merely to married women.

Article 1117 enables the husband to prevent his wife from any occupation that conflicts with the family's interests or the parties' dignity. The provision does not explicitly define who should bear the burden of proof; still, to the extent that textual interpretation is concerned, it is within the husband's discretion to determine what occupation is contrary to the family's interests. This is not to imply that the husband decides based on his sole discretion. In fact, with the

5. "Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other, and because they support them from their means. . . ." Quran, (4:34), Abdullah Yusuf Ali, *THE MEANING OF THE HOLY QUR'AN: EXPLANATORY ENGLISH TRANSLATION, COMMENTARY AND COMPREHENSIVE INDEX* (1st ed. 2016).

6. Qanun-e Madani [Civil Code], art. 1105 (Iran).

7. Mohaqeq Damad, *supra* note 4, at 257.

passage of the Family Protection Act (FPA) in 1975, Article 1117 of the Civil Code was amended. Article 18 of this act indicates that the husband can, with the “court’s approval,” prohibit his wife from engaging in any occupation that is contrary to the family’s interests or the dignity of himself or the wife.⁸ It has also enabled women to make such a request so that the court can forbid the man from taking up the job under exceptional circumstances. In other words, the amendment establishes more equal rights and posits that courts have the ultimate authority to determine whether the wife’s occupation conflicts with the family’s interests.

“Family interest” and people’s “dignity” are not defined in the law. Judges must determine these elements according to the parties’ social status, custom, time, and place. Some writers have interpreted family interests in relation to other articles of the Civil Code and the duties specified for couples in these articles. In their view, if the situations are such that they interfere with cohabitation and child-rearing, these conditions are probably considered against the interests of the family.⁹ In a 2020 case, the court interpreted Article 1117 similarly. It rejected the husband’s request to prohibit his wife’s employment because he could not provide satisfactory evidence that the wife’s occupation was destructive to their cohabitation and raising children.¹⁰

Broad construction of Article 1105 in a way that (as the jurists argue) restricts freedom of movement *per se* and impedes women’s employment thoroughly is not credible. Such an interpretation obviously invalidates Article 1117, which limits the husband’s discretion to oppose the spouse’s occupation only if it is incompatible with familial interests.¹¹

B. Article 18 of the Passport Law and the Emergency Permission

Section 3 of Article 18 of Iran’s passport law (hereafter article 18) states that: “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 and in case of emergency the permission of the local prosecutor . . .”. And according to article 19, husbands are not bound by their initial consent, and they can request the government to stop their wives from leaving the country at any time after a passport is issued.

Prosecutor’s intervention is allowed only in the case of emergencies and is not a conventional alternative to the husband’s consent. “Emergency” in Iran’s legal system is a specific concept, different from other circumstances that affect the will, such as reluctance, threat, or coercion. It refers to situations in which an

8. Qanun-e Hedayat Az Khanevadeh [Family Protection Act], art. 18 (Iran).

9. Qanun-e Madani [Civil Code], art. 1104.

10. Dadga-e Tajdid-e Nazar-e Ostan-e Mazandaran [Mazandaran Provincial Court of Appeal] 981327–02/18/1399 [5/7/2020] (Iran).

11. Qanun-e Madani [Civil Code], art. 1117.

individual's life or property is at stake; therefore, to avoid grave damages, they commit crimes or make decisions that a reasonable person would not usually make. A state of emergency, for example, is when a person is inclined to sell a property for one-fifth of its price because of an urgent need to pay for the medical treatment of a family member. These agreements are valid because they are entered at will, even if external factors pressure that will. An emergency is also an affirmative defense and justification in criminal law. Although this concept is not precisely defined in the Penal Code, the dangers that create an emergency must be severe, actual, or imminent. Also, the behavior in response to the threat must be necessary and proportionate, and the creation of the danger ought to be beyond the will of the acting individual.¹²

However, the concept of emergency in transactions and criminal law do not correspond with the same term in Article 18 and the issue of obtaining a passport. This notion is neither defined in Passport law nor similar statutes, and in practice, its examples are unlike those of criminal law or contracts. However, the overall implications of the emergency concept in the legal system demonstrate that it is an exceptional situation, and the courts are not willing to affirm a situation as such easily.

In recognizing emergencies, the judge must make decisions based on the individual's social, occupational, and family circumstances. As the words of the article imply, the general rule prohibits the issuance of passports without the husband's permission, and emergencies are mentioned as an exception to this rule. Under Iran's legal system, exceptions must be construed narrowly. In many cases, the legislature has deviated from the original rule in dealing with an emergency and provided a secondary rule. Consequently, judges try to exert discretion to ensure the issues remain within the ambit of the main rule.

Moreover, the reluctance to interfere in private contracts, especially family affairs, makes it even more challenging to accept emergencies broadly. For this reason, in 2017, after Zahra Nemati was barred from participating in international competitions due to her husband's opposition, a bill of amendments was submitted to parliament to clarify the definition and domain of the emergency.

Zahra Nemati was an Iranian taekwondo athlete injured in a paralyzing accident in 2003. Three years after this incident, she participated as an archer in national and international archery competitions alongside non-disabled archers and has won medals in all the competitions she has participated in ever since. Nemati competed in both Olympic and Paralympic competitions and was the flag bearer for Iran in the 2016 Olympics. She is also the first Iranian woman to win

12. Hossein Mir Mohammad Sadeqi, *CRIMINAL LAW, CRIMES AGAINST PERSONS* 343–345 (16th ed. 2014) (Iran).

a gold medal in the Olympics or Paralympics.¹³ However, when her name made headlines in 2017, it was not because of her success record.

Nemati's husband, an archery athlete, banned her from leaving the country.¹⁴ After the wave of public dissatisfaction, she was finally granted a special "sports" visa, which was a sporadic intervention by authorities. Following this, the bill of amendment went to the parliament requesting that participation in Hajj, sports championships, and scientific, cultural, and economic competitions on behalf of the Islamic Republic of Iran should be considered an "emergency."¹⁵

This was not the first time an Iranian athlete woman was forbidden from traveling abroad to participate in international competitions for the same reason. In 2015 Niloufar Ardalan, captain of the Iran national women's soccer team, missed the Asian Football Federation (AFC) Women's Futsal Championship for the same reason. Ardalan's husband, a TV presenter and sports journalist, reportedly denied the permission because he did not want her to miss their 7-year-old only child's first day of school. This led to an outrage on online social platforms. Thanks to the media coverage, she eventually participated in the next tournament under the Tehran prosecutor's single exit permit. The tournament she missed was a final match, an inaugural competition of the Asian championship, which was extremely important in her career.¹⁶

Article 18, unlike article 1117, does not bind the husband's discretion with certain conditions and gives absolute authority to him. In practice, this right is exercised not in court but through an administrative process by refusing to sign the application form for the issuance or renewal of a passport.

Lastly, the requirement of obtaining the husband's consent for getting a passport has no equivalent for unmarried women. Unmarried women, after reaching the age of 18, like men of the same age, can freely travel without acquiring anyone's approval.

IV. A STEP TOWARD A MORE EGALITARIAN SITUATION

Solutions to the problem of women's right to employment and freedom to leave the country on a broader scale of gender-based legal inequalities could entail law reformation, judicial intervention, and using contractual agreements.

13. *Zahra Nemati*, INT'L PARALYMPIC COMM. <https://perma.cc/EGY3-U44Z> (last visited May 1st, 2022).

14. *This Iranian Soccer Player's Husband Refused to Let Her Travel to a Tournament*, WOMEN'S HEALTH (Sep. 18, 2015), <https://perma.cc/E8GW-XQMP>.

Zahra Nemati is banned from going out by her husband, IRANIAN STUDENT'S NEWS AGENCY (ISNA) (May 8, 2017), <https://perma.cc/5FTX-L2KZ> (Iran).

15. Amendment Bill of Paragraph 3 of Article 18 of the Passport Law of 29 July 2017 (Iran).

16. *Iran women's soccer team captain to miss tournament after husband refuses to let her travel*, THE WASHINGTON POST (Sep. 16, 2015), <https://perma.cc/8CRU-5WNA>.

To the extent that it helps clarify this article's hypothesis, that contracts play an important role in achieving gender equality, alternative solutions are examined.

A. Reforming the Existing Law

The Islamic Republic of Iran's sovereignty is based on a divine-popular dichotomy. Article 20 of the Constitution states, "All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria." Evidently, even the very foundation of equality before the law is conditional on compliance with religious requirements. This dual sovereignty is reflected in the structure and content of legislation, and perhaps the most outstanding example of it is the "Guardian Council." The Guardian Council, which consists of six lawyers and six clerics (all non-elected), is responsible for Constitutional interpretation, monitoring elections, approving the election's candidates, as well as ensuring that the enactments passed by the parliament conform to "Islamic" and "constitutional" standards.

Within this system, women's rights and family law have been subject to conservative readings perhaps more than any other legal topic. Despite the fundamental social advancements and the constant movement towards modernity over the past four decades, the study of family laws and women's rights shows inconsistent changes over the decades of modern Iranian legislation. Examining the changes that have taken place in these fields in recent decades indicates no consistent progress or definite improvement.

A quintessential example here is the issue of women's employment as judges. Even though no woman had been appointed as a judge until 1970, 47 years after the first judges' employment laws in 1923 and 1927, there had been no gender requisite; female judges entered the Iranian judiciary and remained in that position until the revolution.¹⁷ In the aftermath of the revolution of 1979, the cabinet of the Interim Government of Iran barred women from holding judicial positions, and all sitting female judges were demoted and forced to work in the administrative sector or retire. According to Article 163 of the Constitution, judges' qualifications must be determined by the law and in accordance with Islamic jurisprudence. Consequently, in 1982, a law was ratified on the employment of judges, which explicitly introduced being a man as a prerequisite for a judge.¹⁸

In later years, pressures from women's rights activists led to amendments that allowed women to serve as advisers in certain courts, including the supreme administrative court. They were also permitted to work in certain positions, like

17. Hosein Mehrpoor, *ISSUES OF WOMEN'S RIGHTS FROM THE PERSPECTIVE OF: DOMESTIC LAW, JURISPRUDENTIAL PRINCIPLES, AND INTERNATIONAL STANDARDS* 314–315 (5th ed.2016) (Iran).

18. *Qanun-e Sharayet-e Entekhab-e Ghozat-e Dadgostari* [The Law on the Conditions of Appointment of Judiciary Judges], (Iran).

investigative judges. However, 88 years after the enactment of the first law on the employment of judges, which allowed women to work equally as judges, women are still unable to issue a final verdict in the courts.¹⁹

Another example of these fluctuations can be seen in the FPA, passed in 1967. This Act limited the existing laws on polygamy and introduced several requirements for a second marriage. According to this law, polygamy is allowed only with the court's permission and only if it is proven that a man can financially afford two families and treat both fairly. The law also criminalized the failure to comply with these requirements. The FPA of 1975 reinforced this position and generally banned polygamy unless the man met several conditions.²⁰ It also added the first wife's consent as a requirement unless she was unable to have sex or bear children. Meanwhile, it authorized the first wife to file for divorce if her husband remarried. However, after the revolution, the Guardian Council decriminalized any second marriage which took place without the court's permission and the first wife's consent, and removed the imprisonment punishment.

Briefly, two main movements in post-revolution Iran have been officially active in the political arena: Conservatives and reformists. With two divergent opinions on Islam, modernity, and democracy, they differ significantly on various political and social issues, particularly women's rights. Throughout the 43-year Islamic Revolution history, conservatives have dominated all three areas of the legislature, the executive, and the judiciary. On the other hand, reformists came to power for a short time, both in parliament and the presidency.²¹ In this short term, much progress took place on a large scale. President Mohammad Khatami, with the majority of women and youth votes and the slogan of tolerance, the rule of law, freedom, and dialogue, sought to strengthen civil society by promoting free media, transparency, and NGOs.²² Under his reformist administration, the presence of women in managerial positions increased, and numerous plans for women's empowerment were put on the agenda.²³ Women's activities grew unprecedentedly, and significant budgets were allocated to strengthen them. For example, the number of women's rights NGOs increased from 69 in 1997 to 339 in 2005,²⁴ and NGOs expanded from 20 in 1997 to more than 650 in 2005.²⁵ In

19. Jamileh Kadivar, *Women Working as Judges and Making Judicial Decisions*, In *WOMEN, POWER AND POLITICS IN 21ST CENTURY IRAN*, 109–110 (Tara Povey and Elaheh Rostami-Povey eds., 2012).

20. "A married man cannot marry a second wife unless . . .".

21. The reform era lasted for two terms of the presidency between 1997–2005 and 2000–2004 in parliament.

22. Massoumeh Ebtekar, *Women and the Environment*, In *WOMEN, POWER AND POLITICS IN 21ST CENTURY IRAN*, *supra* note 19, at 156.

23. Elaheh Koolae, *Women in Parliament*, In *WOMEN, POWER, AND POLITICS IN 21ST CENTURY IRAN*, *supra* note 19, at 139.

24. Koolae, *supra* note 23, at 140.

25. Ebtekar, *supra* note 22, at 161.

this era, Iran acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁶ In the sixth parliament (2004–2004), the reformists also held a majority of seats. During this period, the women’s faction was formed. Despite the small number of women MPs, they actively sought to amend laws related to women, including several articles of the Civil Code on inheritance, divorce, and custody of children.

The Guardian Council later rejected many of the proposals on women’s coalition amendment bill, as well as the accession to CEDAW.²⁷ With the end of the reform period in the parliament and the government, the efforts to amend the laws to achieve more equal rights were suspended and, in some cases, overturned. The women’s faction was dissolved in the seventh parliament, which was dominated by a conservative majority. In the eighth parliament, the number of female MPs decreased, and the elected female representatives, along with their male colleagues, sought to pass a bill to encourage polygamy.²⁸ Likewise, many NGOs in various fields were shut down, and numerous bills were put on the agenda in subsequent parliaments that disadvantaged women.²⁹

These forward and backward movements are not limited to the above instances. Most of these fluctuations occurred with the outbreak of the 1979 Islamic Revolution. At this time, both religious and secular women’s rights movements were suppressed, and some of their progress was reversed. Indeed, despite significant successful efforts, the reform process has been highly reliant on the political party which holds power. In addition, the activist struggle for reform has always been hindered by the Guardian Council as one of the most potent and conservative institutions in Iran’s legal structure. Over the years, the Council’s radical viewpoints on various laws, including those on women, have been controversial.

B. Judicial Intervention

Iran’s legal regime is founded on a civil law system. The two-tier structure of the judiciary system consists of trial and appellate courts. According to

26. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, <https://perma.cc/2VPV-NQ2U>, [hereinafter CEDAW]. Article 11 of this convention particularly states that: “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;”

27. Koolae, *supra* note 23, at 142.

28. Koolae, *supra* note 23, at 148, 149.

29. *Id.*, at 146.

Article 167 of the Constitution, “the judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he must deliver his judgment based on authoritative Islamic sources and authentic *fatwahs*”³⁰

The codified statutes are the primary source for judges in resolving a dispute. Unlike the common law system, the previous judgments do not form a precedent in a civil law legal regime, and the judges are not obliged to refer to the case law in deciding subsequent lawsuits. Except for the rulings of the general assembly of the supreme court (the highest judicial body of the legal system), the verdicts issued are not enforceable in future cases and can only be cited for persuasive authority. Since the concept of *stare decisis* has no place in this system, past rulings and arguments are rarely mentioned by judges in their decisions.

From a practical point of view, relying on the judicial intervention of courts and prosecutors as a systematic solution is unfeasible. The case study manifests that judicial decisions are unlikely to pioneer women’s rights development. In what follows, even where judgment is issued in accordance with human rights standards and egalitarian principles, the legal structure does not allow the expansion of the liberal interpretations needed for extensive reforms.

In a fascinating case in 2020, the Mazandaran Court of Appeal addressed the issue of banning the wife from working as a hairdresser. In this case, the plaintiff asserted that he opposed his wife’s job as a hairdresser and her employment in any other profession. The Court of Appeal initially argued that the right to employment, the choice of occupation, and the enjoyment of equal rights for both men and women are fundamental human rights. Contrary to the common practice in the Iranian judicial system, the court cited numerous international documents. It mentioned Article 22 of the Universal Declaration of Human Rights (1948), Article 13 of the Cairo Declaration of Human Rights in Islam (1990), the Declaration on Human Rights defenders (1998), and Article 6 of the International Covenant on Economic, Social and Cultural Rights (1966).

The appeal court took an innovative step and emphasized “non-discrimination” and the prohibition of “any restrictions,” citing Human Rights Committee General Comment No. 18 (1989). It further reasoned that not only a woman’s employment as a hairdresser is not contrary to the customs, interests of the family, and society’s norms, but more importantly, women, like men, are “entitled to all equal human rights.”³¹

Furthermore, referring to the International Covenant on Economic, Social, and Cultural Rights, the court mentioned the role of governments in creating

30. Fatwa is the formal opinion or interpretation issued by a qualified Islamic jurist on a specific religious ruling. Moustafa Kassem, *FATWA IN THE ERA OF GLOBALIZATION*, IN *IFTA’ AND FATWA IN THE MUSLIM WORLD AND THE WEST* 90 (Zulfiqar Ali Shah ed., 2006).

31. Dadga-e Tajdid-e Nazar-e Ostan-e Mazandaran [Mazandaran Provincial Court of Appeal] 981327–02/18/1399 [5/7/2020] (Iran).

positive discrimination for vulnerable groups, specifically women.³² Based on article 21 Constitution, the government is responsible for creating a favorable environment for developing women's personalities and restoring their rights. The court also quoted the Declaration on the Right to Development adopted by the UN General Assembly in 1986 and stressed that human beings are the main subject of development and that women, as half of society, play a pivotal role in this process. Thus, it is the government's responsibility to empower women by guaranteeing the right to choose a job.³³

Although the ruling was in line with human rights standards and supported women's rights, it could not influence judicial practice even in the same jurisdiction due to various reasons. Firstly, the Guardian Council is the official authority to interpret the Constitution, and the courts' mission is merely the application of law to the cases. In the aforementioned judgment, the court interpreted the notion of equal rights liberally under international documents. Strikingly, Iran's Constitution does not endorse formal equality and non-discrimination. As was indicated, article 20 of the Constitution guarantees equal rights in compliance with the Islamic precepts. This very condition enormously affects women's rights. Many discriminatory laws are rooted in Islamic texts when read and interpreted dogmatically. The lack of authority to interpret the Constitution's article, while the central ambiguity lies there, renders these judgments groundless.

Secondly, although equalitarian, the ruling deviated from the conventional interpretation of article 1117 and advocated for the prohibition of any restriction, while the article obviously sets limits on women's employment. *De novo* interpretation, which is not bound by precedents, facilitates this progressive interpretation of text and deviation from dominant readings of articles. However, this potential is not always deployed to advance women's rights. In the above case, the court was given the opportunity to sanction the liberal construction of equal rights. Simultaneously, it is also foreseeable that a court will interpret the articles dogmatically by turning away from the precedents.

For instance, in a 2018 case, a plaintiff filed a case to ban his wife from working in a real estate firm. The judge ruled that the wife's job was against the husband's dignity because the plaintiff had a government job. He also found it to be against the family's interests because the wife's workplace was a male-dominated environment, where male brokers often frequented. The court added that since the defendant had been working there without being paid and only to spend her free time, this activity fell within article 1117's scope; thus, the verdict was issued in favor of the plaintiff.³⁴

32. International Covenant on Economic, Social and Cultural Rights, General comment no. 20, article 2, July 2nd, 2009, E/C.12/GC/20, <https://perma.cc/F3GK-8FNL>.

33. Dadga-e Tajdid-e Nazar-e Ostan-e Mazandaran [Mazandaran Provincial Court of Appeal] 981327-02/18/1399 [5/7/2020] (Iran).

34. Dadgah-e Khanevadeh Karaj Shobe 2 [Karaj Family Court Branch 2]

In another strictly interpreted judgment from the same court, since the husband worked in the municipal council, his wife's occupation in confectionery was considered contrary to the husband's social status.³⁵ Likewise, in a case where the wife was working as a secretary in a dermatologist's office and advertising and modeling for beauty salons, the court ruled for the husband. There, the court decided that the wife's activity as a model and her eyebrows pictures released on Instagram were contrary to the family's etiquette and interests.³⁶ In the court's view, the type of occupation (eyebrow modeling), regardless of working hours or even the husband's social status or position, was inappropriate. This judgment rigidly found that a type of licit career could inherently be detrimental to a family's interest.

In another case, the court similarly interpreted the article in favor of the husbands. It removed the plaintiff's burden of proof to prove article 1117's criteria that a specific job is destructive to family life. According to Article 1117, the husband can forbid his wife from a certain "job" that is against the family's interests. This article is in no way a permit to prohibit employment as a fundamental constitutional right in general. In this case, the wife was asked by her husband to stop working in the "Tehran" hair transplant clinic. The court argued that since the husband was only opposed to his wife's employment in this particular clinic and not her employment in general, his claim is granted without bearing the burden to prove that this specific job is contrary to their dignity or family interests.³⁷ Here, the court's interpretation regarding procedural law and changing the burden of proof was ultimately detrimental to woman's rights.

The contradiction between the first progressive judgment with the later dogmatic ones plainly shows how the application of laws varies among courts without creating a predominant judicial practice. Even judgments within the same jurisdiction or different branches of a single court are not necessarily harmonious.

More seriously, exceptional judicial interventions negatively affect long-term solutions. Especially regarding the Passport Law, the cases that have attracted the most public attention and rendered into a collective petition to amend the law have been resolved with the scattered intervention of the prosecutor. By virtue of the popularity of the athlete plaintiffs, these cases were followed by widespread demands and significant social pressure to change inefficient laws. The deprivation of the national team captain from participating in the World

97099726115012690-09/14/1397 [12/5/2018] (Iran).

35. Dadgah-e Khanevadeh Karaj Shobe 2 [Karaj Family Court Branch 2] 9909972611500167-02/21/1399 [5/10/2020] (Iran).

36. Dadgah-e Khanevadeh Karaj Shobe 2 [Karaj Family Court Branch 2] 9809972612701829-12/13/1398 [3/3/2020] (Iran).

37. Dadgah-e Khanevadeh Karaj Shobe 2 [Karaj Family Court Branch 2] 9909972613201029-08/20/1399 [11/10/2020] (Iran).

Cup highlighted a latent problem that had plagued the lives of many women for years. With the publicization of these cases, the troubling law, which was always actively present in women's life but was forgotten in public awareness, became the core of public demand for reformation. The pressures created by civil society actors on social media forced high-ranking political officials to react, increased the public consciousness, and could have been a step toward reform. Nevertheless, in each case, the authority's intervention resolved the dispute, removing the underlying issues in the laws from public attention.³⁸ In fact, exceptional interventions serve as a safety valve that postpones and prevents considerable reformation.

In all, the case law on the interpretation of these articles over the years illustrates neither visible progress nor converging viewpoints, even in a single jurisdiction. A progressive judgment does not directly become a part of the general law. Structurally, judicial decisions in Iran's civil legal system are not the source of law, and in future like circumstances, judges are not obliged to follow the same result. They are bound to construe the statutes *de novo* in every case before them. That is why neither judges nor attorneys cite previously decided cases in their arguments.³⁹ Consequently, judicial exceptionalism, particularly in family law, is unlikely to result in a meaningful, comprehensive alteration in the status quo.

On the other hand, the law reform is not only a complex and long-term solution but also highly political. Family law has remained almost intact in the past few decades despite the dramatic changes in social life. The dominating conservative party in legislative bodies has challenged women's activism for reforming the law. Despite efforts, the judicial or legislative records shows that there has not been a coherent will aiming to promote women's status.

V. CAN CONTRACT MAKE UP FOR DISCRIMINATORY LAW?

A. Marriage as a Status or Contract?

Examining the various facets of the family, including the forms it takes and the effects it creates, one could identify marriage as a contract or a status. The status-contract dichotomy is more analogous to a spectrum than two opposing poles.⁴⁰ Family over time or in different societies may be status with

38. In Niloofar Ardalan case, the Vice-President for Women and Family Affairs, intervened and stated that until the law was revised, her office would seek exemptions for female athletes and scientists until the law is revised. *The Vice-Chancellor of Women is seeking to amend the law on "wife's permission to leave,"* IRANIAN STUDENT'S NEWS AGENCY (ISNA) (Sep. 30, 2015), <https://perma.cc/6TXR-EU7P> (Iran).

39. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. Comp. L. 424-426, (1966-1967).

40. Cf. Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 Unbound 3, (2010) (promoting a critical view of the contract-status

some contractual dimensions or a contract containing some aspects of status. Spectral understanding depicts that the family simultaneously has status and contract parameters.

The concept of status is more associated with stagnation, the institutionalization of the family, and rigid conservative discourse. Aspects of marriage governed by sovereignty's will are values or traditions that are so important to society that the legislature stabilizes them beyond the will of the parties and regardless of variations that marriage may find.⁴¹ The closer the marriage is to the status, the more forms are imposed by the legislature and the less power individuals have to adjust their rights and duties by agreement.

B. Marriage in Islam

Marriage in Islam is a combination of sacraments, status, and contract. The Quran calls marriage a solemn covenant⁴² and one of God's signs.⁴³ Prophet Mohammad also said that whoever marries has preserved and completed their religion.⁴⁴ In Islam, family is a relationship between two people of the opposite sex, but at the same time it is a devotional act bringing humans closer to God. This institution is presumed as the only accepted and legitimate form of sexual relations, saving people from sin, adultery, and fornication.

As the sole institution which legalizes intimate relationships, the legislature has regulated many aspects of marriage contracts beyond the parties' wishes. From the formation of marriage and identification of its valid types, prohibition of same-sex marriage, imperative laws of inheritance, the impossibility of termination of the contract at the will of parties, along with dozens of legal implications, all bring the institution of marriage closer to the status paradigm. Meanwhile, the parties face obligations and duties that mutual consent cannot change. For example, the husband is responsible for financially supporting the family and paying his wife the dowry, which includes all reasonable living expenses. The head of the household is also assigned to the man by law, whereas the wife is obliged to obey her husband and cohabit with him.

Legislations impose many personal and social restriction on the marital relationship and manage its continuity and dissolution. Because it leads to the formation of the social institution of the family, in the preservation of which society also has vital interests, the active and vast role of the mutual agreement

distinction and an analysis transcending this dichotomy).

41. *Id.* at 3.

42. Quran, 4:21.

43. "And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy. Surely in this are signs for people who reflect." Quran 30:21.?[^]\$

44. Sheiki Mahmud Ghansey AlShababi A; 'Ameli, ALMOSTADRAK OL-SANI LEVASAELE AL-SHIA 186 (1st ed. 2017) (Arabic).

in other contracts does not exist here.⁴⁵ Hence, Islamic marriage is a mixture of the contractual and status paradigm and does not fit perfectly under either of these poles.

Nonetheless, aside from status dimensions, Islamic marriage is principally a civil contract. Like any other contract, marriage “takes place by offer and acceptance in words that explicitly convey the intention of marriage,”⁴⁶ and it does not require any special rituals or formalities from the religious point of view. Like all contracts, parties’ mutual consent is the essential bedrock, without which marriage is void. In Islam, marriage is completed by the agreement of two people (without needing a third person to officiate it). Their free consent (or that of someone else on their behalf) is the core of the contract, and no one’s will can substitute a competent adult’s consent.⁴⁷

1. Spousal Rights and Obligations

A properly concluded marriage establishes the marital relationship between parties and imposes numerous legal consequences. Some of these legal rights and obligations are financial, and some are non-financial. According to the law, the reciprocal non-financial duties of couples include cooperation and loyalty. In terms of exclusive responsibilities, wives are required to obey their husbands (*tamkin*), whereas husbands bear the burden of the financial duties of dowry (*mahr*) and alimony (*nafaqa*).

2. *Tamkin*

In a marital relationship, the wife is obliged to obey (*tamkin*) her husband. In a broad sense, *Tamkin* means the general obedience of the wife to the husband and the acceptance of his dominion over the family and residing in the matrimonial home chosen by him.⁴⁸ In a narrow definition, *tamkin* means obedience of the wife to her husband in marital intercourse and admitting his requests for sexual relationships at reasonable times and places. Disobedience, as the opposite of *tamkin*, is called *noshuz*, which means defiance. This term also applies to husbands when they refuse to perform their duties.⁴⁹

In cases of disobedience, the husband can demand the court to enforce this obligation; Nonetheless, implementing judicial decisions in *tamkin* cases does not involve affirmative actions. Thus, even if a verdict is issued in favor of the husband and convicts the wife, there is no practical legal procedure to enforce the judgment. Forcing a person to submit to an intimate relationship like living in

45. Halley, *supra* note 40, at 25.

46. Qanun-e Madani [Civil Code], art. 1106.

47. Tanzeem Fatima, MARRIAGE CONTRACT IN ISLAM 47 (2007).

48. If the parties agree that the wife has the right to determine the cohabitation place, the husband is obliged to live in the house that his wife chooses.

49. Seyed Hossein Safaei and Asadullah Emami, A BRIEF ON FAMILY LAW 140 (2016) (Iran).

the same residence is impossible and against public morality and human dignity. However, the arrangement of this relationship proves that men are active agents with the right to access coitus at their will, and a strong emphasis is given to this right in the Islamic family system.

3. *Nafaqa*

The husband's dominion over the family does not create any rights or authority over the wife's property. Under Islam and Iranian law, spouses do not share property after marriage. Besides, the financial duties of the family are the sole responsibility of the man, and the woman has no obligation for the family's expenditures. Alimony and dowry are the two most important financial commitments a man takes on with the marriage.

In return for the wife's obedience (*tamkin*), the husband is obliged to provide for her alimony (*nafaqa*). Alimony contains all living expenses and reasonable needs of a woman, including but not limited to housing, clothing, medical and health expenses, food, household items, and maids if the wife's lifestyle demands.⁵⁰ Regardless of his financial state, it is the responsibility of the man to pay for everything that a woman typically needs. Therefore, in determining the type and amount of alimony, the needs of women are the criteria, not the men's status or wealth.⁵¹

Family law has remarkably stressed the husband's duty to pay alimony. If the husband does not comply with this commitment, the wife can sue him in civil and criminal lawsuits. Also, *nafaqa* is not a supplementary law, which means that parties cannot remove or change this duty by mutual agreement. Therefore, even if the woman is employed or affluent, she is still entitled to alimony and can claim it. The husband's duty to pay alimony is conditional and dependent on the wife's obedience. Accordingly, when the wife's disobedience (*noshuz*) is proven, she loses her right to alimony. Indeed, losing the right over *nafaqa* is the practical guarantee for *tamkin*.

4. *Mahr*

Another financial duty of husbands is paying dowry. *Mahr* is a payment that a husband has to make to his wife at the time of marriage. It can be money or something of monetary value, which becomes the wife's property. The *mahr* is not specified in religion or law and is up to the parties' agreement.⁵² The wife is legally entitled to receive the *mahr* at the time of marriage, called prompt *mahr*. If parties do not explicitly determine a time for payment in the future, the dowry is considered prompt and should be paid at the time of marriage. If the husband

50. Qanun-e Madani [Civil Code], art. 1107.

51. Safaei and Emami, *supra* note 49, at 145,144.

52. Syed Sahid Ahammad, *A Critical Analysis of Dower (Mahr) in Islam*, 21 J. Humans. Soc. Sci. 86, (2016).

does not make that payment at the time of marriage, he is committed to delivering that upon the wife's request. However, in practice, wives rarely ask for and receive their *mahr* during their marital life but usually upon the termination of the marriage. This issue generally comes up during the divorce process, and the type of divorce (mutual, initiated by the husband solely or by the wife) defines to what extent parties can use this tool in their bargaining.⁵³

Aside from the fact that, in some cases, *mahr* is an effectual deterrence for husbands to use their unilateral right of initiating the divorce, it is also a powerful bargaining tool during marital life. Supporting the view that Islamic marriage is analogous to other transactions (specifically sale agreements), there are numerous common rules between them. For example, in sale agreements, there are two correlated commitments: the seller must deliver the good, and the buyer must pay the price. At the same time, the seller has the right to lien, and the buyer likewise has the right to stoppage of paying the price before the other party fulfills their obligation. This context similarly establishes a right for a woman to refuse to have intercourse unless she is paid the prompt dowry.

In contrast, the husband does not have a similar right to abstain from paying the dowry.⁵⁴ However, if sexual intercourse happens even once, the wife no longer has the right to refrain from cohabitation and conjugal relation. Accepting a sexual relationship even for once signifies that the woman has abandoned her right of lien. Nevertheless, even after losing the right of lien, *mahr* remains a husband's financial commitment.

C. Contract Law in Iran

Article 10 of the Civil Code recognizes freedom of contract. It states that private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit provisions of the law.⁵⁵ Individuals can freely form contracts and determine their obligations, effects, and results. However, it is hard to imagine that there is such a thing as a pure contract in any modern legal system. Unlike supplementary laws, imperative laws cannot be changed by private agreements. The rules related to the validity of contracts, the legal competence of the parties, the legal age for concluding the contract, the effects of coercion on agreements, and so on are all imposed by the legislator, and they are not changeable by mutual consent. Additionally, numerous restrictions, including public order and morality, limit agreements' scope.

53. Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 Int'l J.L. Pol'y Fam. (2010).

54. Qanun-e Madani [Civil Code], art. 1085.

55. Qanun-e Madani [Civil Code], art. 10.

1. Conditions

A condition is an agreement within another contract. The status of these sub-contracts is dependent on the original one and is binding as such. Therefore, neither party can terminate these sub-agreements unilaterally. On the other hand, the dissolution or invalidity of the original contract causes the dissolution and invalidity of the conditions contained in that contract.⁵⁶

The parties' agreements in the form of conditions are legally enforceable as long as they are valid. Invalidity under Iran's Civil Code is divided into two categories: merely invalid conditions (such as impossible, useless, and illegitimate conditions) and conditions that are invalid and invalidate the original contract (like conditions contrary to the nature of the contract.) Of all these invalid forms, this article focuses on the illegitimate conditions and those contrary to the nature of the contract, which helps clarify the right to freedom of movement and employment for married women.

a. Illegitimate Conditions

Conditions against imperative laws or public order are illegitimate and invalid. Contrarily, supplementary laws are binding if the parties do not agree differently precisely. In the absence of mutually agreed-upon terms, the supplementary laws complete the provisions of the contracts, but the parties can always change or agree otherwise. For instance, the husband's discretion to determine the place of residence is a supplementary law that parties can change.⁵⁷

Some scholars assert that article 1107 and the husband's duty of paying alimony in the family is an example of imperative law and related to public order. They believe the legislature has established this rule to regulate the family, which private contracts cannot disrupt.⁵⁸ Similarly, article 1105, i.e., the headship of husbands, contains a mandatory rule, and the parties' agreement against it is not credible. Therefore, if the wife has obtained his consent at the time of marriage, the husband can still prevent her from employment by invoking this article. They conclude that the husband's authority is not an individual right to waive in a private contract; a condition to the contrary should be deemed illegitimate and invalid.⁵⁹

b. Conditions Contrary to the Essence of Contracts

Each contract has legal effects and characteristics that distinguish it from other contracts. Some of these features go to the essence of the contract such that, by removing them, there would be no contract. It is not always easy to determine which rules of contracts are associated with their nature and which

56. Nasser Katouzian, *INTRODUCTORY COURSE IN CIVIL LAW* 282 (2013) (Iran).

57. *Id.* at 288.

58. Nasser Katouzian, *CIVIL LAW OF FAMILY* 170 (2021) (Iran).

59. *Id.* at 209.

rules have less correlation and can be removed or modified. In general, the essence of any contract is the main issue for which it is made, and the judge must determine it using customs and law.

2. Conditions in Marriage Contract

Including conditions in the marriage contract is not only possible but also very common. Conditions in a marriage contract are one of the most valuable ways to respect autonomy. Adding conditions allows the parties to customize their rights and obligations. Accordingly, all terms agreed upon by the parties before or after marriage are valid and enforceable as long as they do not contravene imperative rules, public order, or morality.

The conventional marriage document encompasses twelve predetermined conditions that have already been predicted, and the parties are free to accept any or all of these terms. Besides them, adding any other condition that is not contrary to the essence of the contract and the laws is also valid and binding on the parties. Among the conditions that can be included in the marriage contract are the wife's right to work and to leave the country. For example, the parties agree that the wife can, at her discretion, take up any job she wishes and apply for a passport or renew it independently.

In principle, "permission" does not create an obligation, and a person can withdraw his permission at any time. However, if someone signs a contract to permit something, it will become a legal obligation that not only cannot be violated arbitrarily but is enforceable by law. Therefore, the husband's consent in the marriage contract makes it irrevocable.

As mentioned, even though some scholars believe that parties cannot sign away the husband's supervision over women's occupation, courts rule that contractual terms granting freedom to mobility and employment are binding. These two conditions are not illegitimate, contrary to public order or the nature of the contract. Moreover, courts do not consider them contrary to imperative law which means parties can legitimately add them to the marriage contract.

VI. WHY CONTRACTS ARE IMPORTANT AND EFFECTIVE

Under Shia jurisprudence and Iran's contract law, there is a contractual capacity to rebalance rights and obligations in marriage. Accordingly, the following section will normatively argue why contractual tools are crucial. The first part will shed light on the discourse and theoretical framework that generate legal discrimination and could be influenced by contracts to sanction the more liberal approach toward gender roles. In the second section, a cost-effectiveness analysis shows that the current legal arrangements between parties' rights and obligations have failed to create an equilibrium in family law and how the contract can rectify this situation.

A. Changing the Discourse and Underlying Ideas

The divine-popular dichotomy of sovereignty is probably the most important characteristic that can explain Iran's legal system. This dual approach is spread throughout the legal structure and the legislation's contents. Most conspicuously, article 20 of the Constitution recognizes equality before the law, provided that it conforms with Islamic ordinance. This language is repeated in many other constitutional articles; for instance, article 21 obliges the government to secure women's rights in all respects according to Islamic norms and create favorable conditions for the growth of their personalities and the restoration of their rights. Article 28 states that everyone has the right to choose any job if it is not against Islam and the public interest. The effects of this dichotomy are more complex than what these articles show. The contradictions and inconsistencies created by this issue are ubiquitous. Notably, although Islamic teachings accommodate a wide range of interpretations, as observed earlier, policymakers and legislators have generally supported the conservative reading of divine pillar in the past decades.

In the post-revolution system, the role and position of women were ideologically redefined in the shadow of this dichotomy. On the one hand, formal ideology regards women's participation in society's political and economic spheres as indispensable for development. At least, in theory, women's engagement in the public sphere has always been accentuated as part of policy-making programs. On the other hand, it strengthens Victorian ideas about women. Those programs chiefly identified women with their role in the family as spouses and mothers and prioritized their private roles over social ones. Consequently, ambivalent policies generate inconsistencies on different levels.⁶⁰ For example, although the Constitution guarantees "freedom to choose an occupation," many ordinary laws restrict it.

More noticeably, the Islamic Republic vigorously and successfully pursued combating illiteracy and expanding public education. In aid of that goal, the government dedicated a broad public infrastructure and encouraged education for children and adults. As a result, the budget devoted to education almost doubled between 1976 and 2000.⁶¹ With the revolution's inception, the emphasis on education in Islamic beliefs entered the government's ideology. Many traditional and religious families, who may had been concerned about modern education and its conflict with their values, agreed, even in the rural areas, to send their girls away from home to pursue education with confidence in the

60. "Considering the sanctity of motherhood and nurturing the next generation, home management, and the importance of women's role in cultural growth and economic development, the spiritual and economic value of women's role in the family and their work at home should be considered." *Siasatha-ye Eshteghal-e Zanan dar Jomhoory-e Eslami-e Iran* [Women's Employment Policies in the Islamic Republic of Iran] (August 11, 1992) (Iran).

61. Mehdizadeh, *supra* note 1, at 245.

government's Islamic ideology. This trend continued so that, over several decades, the literacy rates increased significantly to 88.8 percent for girls and 94.5 percent for boys by 2006. By 2009, women outnumbered their male counterparts in higher education.⁶² Human rights council reported in 2013 that literacy and elementary school attendance for women is around 99 percent, and there is almost no gender disparity at secondary and high school levels.⁶³

Paradoxically this advancement has not resulted in meaningful participation of women in the job markets. Aside from other economic and cultural factors, there has never been an emphasis on women's employment compared to their education, and, as some argue, the government even curtailed women's work.⁶⁴ Although women's social activism in the public arena has always been a part of the government's official agenda, the emphasis on women's role in the family hinders the realization of that purpose.

Aside from policies, inconsistencies are also apparent in the laws. Interestingly, the case law shows how the lack of harmony in the overarching principles becomes challenging in family law. The subsequent dispute concerns women's right to employment, where the court faces a dilemma in upholding the orthodox design of family and simultaneously respecting individual rights.

In this case, the husband petitioned the court to forbid her wife from her job, and the verdict was issued in favor of the defendant. Here, the defendant had worked as a bank employee for years. The trial court rejected the plaintiff's claim because the wife was working in the same job at the time of her marriage, and the distance to her workplace was so close that it could not be deemed against the family's interests. Upon the plaintiff's appeal, the court asserted that the husband could bar his wife from a profession if that were unsuitable to the family's interests or the parties' dignity. However, a woman's job as a bank employee did not oppose them. The court continued:

Nevertheless, "the continuation of the wife's employment in this situation requires leaving the house without the husband's consent, the legal result of which is *noshuz* and the fact that she will not be entitled to alimony." In another case between the same parties regarding the subject of obedience, the court . . . obliged the wife to *tamkin*, including general obedience (wives need the husband's consent to leave home). Since the obedience verdict's issuance, every time the wife left the house for work was considered disobedience. Therefore, in the current situation where the wife is not entitled to alimony, banning her from employment causes financial difficulties for her. Article 40 of the Constitution posits that no one can exercise his rights in a way injurious to others or

62. Shahla Haeri, *No End in Sight: Politics, Paradox, and Gender Policies in Iran*, 93 B.U. L. Rev. 1054, (2013).

63. U.N. Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, U.N. Doc. A/HRC/22/56 (Oct. 4, 2013).

64. Haeri, *supra* note 62, at 1055.

detrimental to public interests. Banning the wife from employment in the current situation causes harm to her, which is unjustified.⁶⁵

In this ruling, the court was confined by *tamkin*, *nafaqa*, and *noshuz* as non-egalitarian institutions. Evidently, it could not interpret these rules in a way that gives the woman the latitude to defend her rights. What happened here was playing the game with the same rules. The court ironically confirmed that the women need their husbands' permission to leave the house, and defying them will lead to disobedience, making them not entitled to alimony. However, as this result is vividly unjust, the court resorted to a fundamental principle to resolve the dispute in favor of the defendant.

In short, due to the unique combination of religious thought and urges of modern life, the status of women in the family and particularly their employment and mobility are still controversial in the legal system. The controversy is not at the level of contradictory laws but goes deeper into the core principles shaping family law. In the conventional image of family, the dominant discourse about women is necessity-oriented as opposed to right-oriented. In an ideological framework where women's main role is motherhood, their personal development, like their employment, is given a second priority. For example, in a case on employment, the plaintiff objected to his wife's job because her working hours were from 6 am to 8 pm, and sometimes she was on the night shift to 8 am. Here, the court ruled in favor of the husband since the amount and hours of the wife's job were such that it interfered with their cohabitation and the duty to care for their children.⁶⁶

Likewise, it is argued that women's employment is supported if justified by financial necessity. Consequently, in some cases where women are wealthy or their husbands provide for their financial needs, women's professions are seen as less needed. In another case where the wife worked as a school service driver, the court ruled against the defendant because the husband claimed he could pay her living expenses.⁶⁷ In a similar case, the judge banned the wife from her job because, in the court's opinion, the wife's job is not one of the "necessary and sensitive jobs that society inevitably needs." The court further reasoned that because the husband is a well-off person who can meet the cost of living and the only child in the family needs maternal care, the defendant should be barred from continuing her job.⁶⁸

65. Dadgah-e Tajdid-e Nazar-e Ostan-e Alborz Branch 3 [Alborz Provincial Court of Appeal] 90737012720–10/06/1400 [12/27/2021] (Iran).

66. Dadgah-e Khanevadeh Karaj Shobe 8 [Karaj Family Court Branch 8] 9909972612701464–12/13/1399 [3/3/2021] (Iran).

67. Dadgah-e Khanevadeh Karaj Shobe 8 [Karaj Family Court Branch 8] 990997261200075–02/06/1399 [4/25/2020] (Iran).

68. Dadgah-e Khanevadeh Tehran Shobe 267 [Tehran Family Court Branch 267] 9209972130500017–01/21/1392 [4/10/2013] (Iran).

In an interesting decision from the same court, the judge endorsed the importance of women's role as mothers, where it banned the wife from any full-time job outside the home. The court opined that the defendant's full-time job had shaken the family's foundation since she had no children after ten years of marital life. Thus, given that the wife was an affluent person and for the family's interests, the plaintiff's claim was upheld.⁶⁹

Comparably, despite the acceptance of freedom of movement in the Constitution, the ordinary laws make the restriction of movement the initial status and subject the removal of this restriction to "emergency" circumstances. The contradiction here is not a discrepancy between ordinary law and the Constitution. Rather, it is an issue concerning the foundations and the theoretical framework. Necessity-oriented reflections are ideas that obliterate the creative expressions of the will. The view that underlies the respective ideas about women's freedom of movement and occupation is restrictive beyond and more serious than these articles. This theory generally considers women's employment and activities ancillary, which do not deserve support unless an objective external cause justifies it.

In brief, when the primary idea does not buttress the inherent value of women's independence and individualism, their rights are the first thing that is forsaken when the slightest conflicts with other values or interests arise. A school of thought that recognizes freedoms widely and restricts them in some instances is fundamentally different from the idea that acknowledges restriction as a principle and excludes occasional cases from the constraint.

The marriage contract allows the convergence of all these controversies in favor of liberal concepts, i.e., individualism and free will. In general, free will in contracts provides the ground for individuals to execute their agency and manage their social and private relations. Contracts are opportunities in the existing system that can respond to inconsistencies. The dichotomy of tradition and modernism, which seems unsolvable at the level of the law, can congregate in contracts. In other words, although the path of amending laws is long and complicated, the same unequal laws can be adjusted by mutual agreement.

B. Balancing the Leverages

A non-customized marriage presupposes various rights and obligations for the parties. In such a marriage, the authority to divorce is unilaterally in the husband's hands, and he has the duty to pay alimony and dowry to his wife. On the other hand, the wife is obliged to live in a joint residence chosen by her husband and obey him. These asymmetric rights promote male dominance and female subordination in the family.

69. Qanun-e Madani [Civil Code], art. 1062.

Family is regarded as a sacred union of man and woman, which is “beyond justice.” Gender-based relations are not debated through the lens of justice theories simply because family is and ought to be governed by morality and sentiments between the members.⁷⁰ Culturally and traditionally, family is thought of as a holy institution, merely a space for devotion and self-sacrifice. Firstly, this approach diminishes the need for awareness of rights before and after marriage. Secondly, it makes contractual negotiations unnecessary or, in some cases, taboo.

The credibility of this theory in confronting the large volume of family lawsuits has become questionable. The most recent official report of the Statistics Center of Iran in 2020 announced that the divorce rate was 34 percent.⁷¹ In family litigations, unequal rights are the levers that parties use to force the other party to submit to their demands. In many cases, frivolous lawsuits are brought up to obtain the desired result in the main case. For example, in an employment case, the defendant stated in her defense that she had worked in a hospital for three years as a receptionist. During these years, she dedicated all her income to buying the family house and car, and the husband had no objections to the wife’s job. Only after they had a quarrel, the husband used this leverage to pressure her by making a frivolous lawsuit. The husband described the job as destructive to their cohabitation, while they had been living apart for several months due to a different problem.⁷² In other words, the husband, using the authority provided in Article 1017, sought to force the wife to give up her financial rights to pursue his primary purpose: divorce.

In many other family law litigations, the husband’s financial obligation to pay the *mahr* is a complex problem. Legally, there is no cap on the dowry, and in practice, very high amounts of money (customarily gold coins) are set for the *mahr*. Given the husband’s job and income, *mahr* may be impossible to pay in many cases. There are many cultural, social, and economic reasons for accepting a financial commitment that one cannot fulfill (in some cases, even taking into account one’s life-long income). Unequal gender relations between the parties can largely account for the nature and function of the *mahr*. It is the fifth most frequent lawsuit after divorce and has become a serious issue after the gold coin price increased dramatically.⁷³ Under Iranian law, if the debtor is unable to pay his debt, his property is confiscated in lieu of debt, and in some cases, it will lead to imprisonment. Determining a *mahr* which both parties know the husband cannot afford to pay, is relatively a compensation for the unequal power relations. This

70. Susan Moller Okin, *JUSTICE, GENDER, AND THE FAMILY* 25 (1989).

71. *National Record of Marriage and Divorce*, STATISTICAL CENTER OF IRAN, <https://perma.cc/7DAC-4YBZ> (last visited May 15, 2022) (Iran).

72. *Dadgah-e Tajdid-e Nazar-e Ostan-e Zanzan Shobe 9* [Zanzan provincial Court of Appeal-branch 9] 140011390001404895–07/11/1400 [10/3/2021] (Iran) (appellee’s brief).

73. *Dowry demand: The fifth judicial demand in Iran*, HAMSHAHRIONLINE (Sep. 12, 2018) <https://perma.cc/LZN8-MB52> (Iran).

legal obligation has become a powerful tool in the hands of the wife, who can pressure the husband in times of conflict. In fact, *mahr* is seen as an opportunity to offset legal discrimination and unequal socio-economic relations. However, increasing the amount of dowry is not only inadequate to compensate for egalitarian rights and lead to gender justice, it is also problematic in many other ways. The long duration of incarceration sentences due to dowry debt and increased prison populations has led to multiple amendments attempt. Numerous bills and proposals to create dowry insurance, set a cap for dowry, or to eliminate imprisonment penalties have been discussed over the years, but none has been effective in practice. Many dowry cases still result in severe financial penalties and imprisonment; in some cases, men even seek to leave the country to get rid of their debt.⁷⁴ The problem becomes more apparent if we notice that women usually claim this right not at the time of marriage but in the divorce process.

The high number of *mahr* and *tamkin* cases signifies that legislative interventions have failed to create an equilibrium between the parties' legal leverages. At the same time, contractual negotiations can effectively correct some structural gender imbalances. One of the modes of compromise that can be reached at the time of marriage is the abandonment of dowry in exchange for the right to employment, freedom of movement, divorce, and so on.

The imbalanced bargaining power does not only impact the divorce process. The effects of gender inequality also manipulate relationships throughout marital life. Couples' relationships are formed in the shadow of these laws, and the logic of their relationship is defined by differences in employment rights, divorce, child custody, and financial obligations.⁷⁵

Some interpretations of religion have made it challenging for family law to be modernized. Nevertheless, equally vigorously, religion has supported other institutions, including the contract and the role of agreement between individuals. In the following case, the power and importance of contracts are highlighted by enforcing tacit agreements and implied contracts.

In this case, the wife worked as a hairdresser, and the plaintiff claimed that this occupation had led to the moral corruption of his wife and her disobedience. The court argued that the defendant was engaged in this job before marriage and that the plaintiff had knowledge of this issue. The marriage contract was based on the implied consent to the wife's profession. Noticeably, the court did not even focus on the explicit provisions of the agreement but on the importance of the circumstances that implicitly shaped the decision and understanding between the parties. In a similar case, the court stated that mentioning the wife's job in the marriage certificate meant the husband's tacit consent to her job.⁷⁶

74. *Women's "dowry,"* HAMSHAHRIONLINE (Sep. 15, 2018), <https://perma.cc/LHN2-J57D> (Iran).

75. Halley, *supra* note 40, at 48–49.

76. Dadgah-e Hoghoughi-e Khoramdarreh Shobe 1 [Khoramdarreh Civil Court Branch

Needless to say, explicit conditions can also eliminate the husband's consent requirement. In another instance, the case was filed to remove the effect of the husband's disapproval of leaving the country. The trial court ruled that because the husband had accepted the condition for the wife to leave the country at the time of marriage, he had no authority in this regard anymore. This judgment was upheld in the appeal court, where the judge stated that the contractual permission to leave the country eliminates the possibility of revoking his permission, and the wife can travel abroad frequently.⁷⁷

Based on the abovementioned, the terms and conditions of a marriage contract open an opportunity for the parties to modify the form of their relationship. Unequal legal rights in marriage are tools that parties use during disputes to advance their goals. Nonetheless, discriminatory laws will not create equality by intensifying the power of either party. Women's and men's asymmetric status will not be symmetrical by emphasizing the same rights that fabricate such conditions. The costs that lawsuits directly or indirectly impose on the judicial system and the parties to enforce or prevent these rights can be removed by initial agreements. The parties' will can cost-effectively replace discriminatory laws in private relations and define family roles more equally. Unequal rights such as the right to choose the location of joint residence, the right to initiate divorce, custody of children, employment, and obtaining a passport are all conditions that can be negotiated in marriage contracts.

VII. CONCLUSION

Women's rights to employment and freedom of movement become restricted after marriage under Iranian law. Unless women agree otherwise, the existing law requires one to obtain their husbands' permission to get or renew the passports. Furthermore, husbands can ban their wives from a certain job if it contradicts the family's interest or dignity.

Law reformation in this legal system has been hindered by the conservative readings of Islam and constitutional provisions in parliament and the Guardian Council. The study of women's rights in the past decades does not reflect consistent progress. Rather, it reveals a back-and-forth in the legislation to develop women's rights. Meanwhile, judicial practice in Iran's civil law system does not create precedents. As a result, even liberal constructions of laws in the courts' rulings cannot culminate in an extensive reformation. Moreover, the sporadic intervention of prosecutors in support of more equal rights under "emergencies" solely erases the question without giving a proper answer.

1] 9609972430701164-11/02/1395 [1/21/2018] (Iran).

77. Dadgah-e Tajdid-e Nazar-e Ostan-e Tehran Shobe 30 [Tehran provincial Court of Appeal Branch 30] 555-04/13/1400 [7/4/2012] (Iran).

On the other hand, contract law respects mutual agreements if it does not contradict imperative laws. Women and men can modify their rights and obligations via the terms of the marriage contract. Therefore, a marriage contract is a potent tool for altering gender-based power relations. Firstly, it can modify existing theoretical frameworks. Contractual freedom inherently entails the ideas of autonomy and individualism. Emphasizing this legal capacity as an effective strategy to challenge patriarchy creates synergy between the needs and the responses. The contractual solution, which strengthens women's agency, is effective in the short term and can lead to structural changes in the long run.