

Beiträge zum Islamischen Recht VII

Leipziger Beiträge zur Orientforschung

Herausgegeben von Hans-Georg Ebert
Begründet von Günter Barthel

Band 26



PETER LANG

Frankfurt am Main · Berlin · Bern · Bruxelles · New York · Oxford · Wien

Hatem Elliesie (Hrsg./ed.)

Beiträge zum Islamischen Recht VII

Islam und Menschenrechte /
Islam and Human Rights /
الإسلام وحقوق الإنسان



PETER LANG

Internationaler Verlag der Wissenschaften

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Gedruckt mit Unterstützung der Gesellschaft
für Arabisches und Islamisches Recht (GAIR e.V.).

Gedruckt auf alterungsbeständigem,
säurefreiem Papier.

ISSN 0942-2323

ISBN 978-3-631-57848-3

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Internationaler Verlag der Wissenschaften

Frankfurt am Main 2010

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ABKÜRZUNGSVERZEICHNIS / LIST OF ABBREVIATIONS

Aufgrund der weltweiten und interdisziplinären Bandbreite an mitwirkenden Autor(inn)en in dieser Publikation bot es sich an, nachstehendes Abkürzungsverzeichnis aufzunehmen. The worldwide and interdisciplinary scope of contributors found in this volume has necessitated the list of abbreviations found below to facilitate better understanding.

A

A.A. / a.A.	andere Auffassung
a.a.O.	am angegebenen Ort
Abs.	Absatz
AC	Constitution of the Islamic Republic of Afghanistan
ACHPR	African Charter on Human and Peoples' Rights
AD / A.D.	Anno Domini
ÄEG	Ägyptische Gesetz Nr. 77 von 1943 über die Erbschaft
AEMR	Allgemeine Erklärung der Menschenrechte
AFP	Agence France Press
AG	Amtsgericht
ägypt.KassGH	ägyptischer Kassationsgerichtshof
ägypt.OVerfG	ägyptischer Oberster Verfassungsgerichtshof
ägypt.ZGB	ägyptisches Zivilgesetzbuch
AH	Anno Hegirae
AHDR	(World Bank's) Arab Human Development Reports
AI	Amnesty International
AIBA	Afghan Independent Bar Association
AIHRC	Afghanistan's Independent Human Rights Commission
AJIL	American Journal of International Law
akad.	akademisch
AL	Arab League / Arabische Liga
a.M.	am Main
APuZ	Aus Politik und Zeitgeschichte
arab.	arabisch / Arabic
Art.	Artikel / Article
AU	African Union / Afrikanische Union

Aufl.	Auflage(n)
AYIHL	African Yearbook on International Humanitarian Law
AYLH	Association of Young Legal Historians
Az.	Aktenzeichen
B	
BAKWATA	Baraza Kuu la Waislam wa Tanzania
Bearb.	Bearbeiter(in)
Bd.	Band / Bände
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
B.I.I.C.L.	British Institute of International and Comparative Law
BRD	Bundesrepublik Deutschland
bspw.	beispielsweise
Bull. Civ.	Bulletin des arrêts des Chambres civiles de la Cour de Cassation
BVferG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
bzgl.	bezüglich
C	
ca.	circa
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Cour de Cassation / (Iranian) Civil Code
CCM	Chama Cha Mapinduzi
CE	Common Era / Christian Era
CEDAW	Committee / Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CIA	Central Intelligence Agency
CIBEDO	Christlich-Islamische Begegnungs- und Dokumentationsstelle
CIHRS	Cairo Institute for Human Rights Studies
CIRI	Cingranelli-Richards Human Rights Index

CMRA	Child Marriage Restraint Act of 1929
CNMS	Centrum für Nah- und Mittelost-Studien
CNN	Cable News Network
COC	tunesisches Gesetzbuch für Obligations- und Vertragsrecht
Cp. / cp.	compare
CPA	Comprehensive Peace Agreement
CRC	Convention on the Rights of the Child
CRIDHO	Cellule de recherche interdisciplinaire en droits de l'homme
CSO	civil society organisation

D

d.	died
D.C.	District of Columbia
DEDAW	Declaration on the Elimination of Discrimination against Women
ders.	derselbe
d.i.	das ist
Dir.	Direktor
d.h.	dass heisst
DMMA	Dissolution of Muslim Marriages Act of 1939
Doc.	Document
Dok.	Dokument
Dr.	Doktor / doctor
Draft Bill	lāyeḥeh-ye ḥemāyat az ḥānevādeh

E

EAMWS	East African Muslims Welfare Society
ECOSOC	(UN) Economic and Social Council
Ed. / ed.	Editor
Eds. / eds.	Editors
e.g.	exempli gratia
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
em.	emeritiert; emeritus
EMHRF	Euro-Mediterranean Foundation of Support to Human Rights Defenders
EMPINX	Empowerment Rights Index
Entsch.	Entscheidung(en)

EOHR	Egyptian Organization for Human Rights
EPLF	Eritrean People's Liberation Front
et al.	et alii
etc.	et cetera
et seq.	et sequens
et seqq.	et sequentes
e.V.	eingetragener Verein
evtl.	eventuell
EU	European Union / Europäische Union
EUGRZ	Europäische Grundrechte-Zeitschrift
EUMC	European Monitoring Centre on Racism and Xenophobia

F

f.	folgend(e)
FamRZ	Zeitschrift für das gesamte Familienrecht
FAZ	Frankfurter Allgemeine Zeitung
FCO	Family Courts Ordinance of 2002
FES	Friedrich Ebert Stiftung
ff.	folgende
FGG	Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit
Fn. / fn.	Fußnote / footnote
FPA	Family Protection Act of 1975
FROLINAT	Front de Libération Nationale du Tchad
FS	Festschrift

G

GA	Georgia [State]
GAIR	Gesellschaft für Arabisches und Islamisches Recht
GDP	Gross Domestic Product
gest.	gestorben
GG	Grundgesetz
ggf.	gegebenenfalls
GoS	Government of Sudan
GURLAC	Group of Latin America and Caribbean Countries
GWA	Guardian and Wards Act of 1890

H

h.	hiğrī (qamarī)
HE	Her Excellency / His Excellency
h.M.	herrschende Meinung
hon./h.c.	honoris causa
HRQ	Human Rights Quarterly
Hrsg.	Herausgeber
HRW	Human Rights Watch
http	hypertext transfer protocol
https	hypertext transfer protocol secure

I

i.a.	inter alia
ICC	International Coordination Committee / International Criminal Court
ICCC	Interim Criminal Code for Courts
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant for Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ICLQ	The International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICYFDC	Islamic Conference Youth Forum for Dialogue and Cooperation
IDP	Internally Displaced People
i.e.	id est
ILM	International Law Materials
ILO	International Labour Organization
IMF	International Monetary Fund / international military forces
INC	Interim National Constitution of the Republic of Sudan
insb.	insbesondere
IPR	Internationales Privatrecht
IPrax	Praxis des Internationalen Privat- und Verfahrensrechts
i.R.	im Ruhestand

irak.	irakisch
IRNA	Iran's official news agency
ISAF	International Security Assistance Force
ISESCO	Islamic Educational, Scientific and Cultural Organization

J

JEM	(Sudan) Justice and Equality Movement
JICJ	Journal of International Criminal Justice
JORT	Journal Officiel de la République Tunisienne
JSSP	Justice Sector Support Program
JURA	Juristische Ausbildung
JZ	Juristen Zeitung

K

KAAD	Katholischer Akademischer Ausländer-Dienst
KAS-AI	Konrad Adenauer Stiftung - Auslandsinformationen
KCA	Kadhi's Court Act
kg	Kilogramm / kilogramme

L

LE	livre égyptienne
Lfg.	Lieferung
LL.M.	Legum Magister; Master of Laws
LOJC	Law on the Organization and Jurisdiction of Courts

M

M.A.	Magister Artium; Master of Arts
MAoZ	Mufti Act of Zanzibar of 2001
m.E.	meines Erachtens
MENA	Middle East and North Africa
MERIP	Middle East Research and Information Project
MFLC	Marriage and Family Law Commission of 1955
MFLO	The Muslim Family Laws Ordinance of 1961
Mich. JIL	Michigan Journal of International Law
MNLF	Moro National Liberation Front
MP	Member of Parliament

MPIL	Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht
MPR	Majelis Permusyawaratan Rakyat
MPU	Majelis Permusyawaratan Ulama
MRR	VN-Menschenrechtsrat / UN Human Rights Council
MSA	Haager Abkommen über die Zuständigkeit der Behörden und das anzuwendende Recht auf dem Gebiet des Schutzes der Minderjährigen vom 5.10.1961 (Minderjährigenschutzabkommen)
m.w.N.	mit weiteren Nachweisen

N

N.B.	Nota bene
NC	Constitution of the Federal Republic of Nigeria
NCW	National Council for Women
NDS	National Directorate of Security
NGO	Non-governmental Organisation
NHRI	National Human Rights Institution
NHRIs	National Human Rights Institutions
NJW	Neue Juristische Wochenschrift
NNPC	Northern Nigeria Penal Code of 1960
No. / no.	Number / number
n.p.	unpaginated
NPA	National Plan Of Action
Nr.	Nummer
NZZ	Neue Zürcher Zeitung

O

OAU	Organisation of African Unity
OIC	Organization of the Islamic Conference
o.g.	oben genannt(e/n)
o.J.	ohne Jahresangabe(n)
OP	Optional Protocol
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OUA	Organisation de l'Unité Africaine

P

p.	page
PAN	Partai Amanat Nasional
para.	paragraph
PAS	Partai Islam Se-Malaysia
PCr.L.J	Pakistan Criminal Law Journal
PDF	Popular Defence Force
PerDa	Peraturan Daerah
pers.	persisch / Persian
PhD	philosophiae doctor
PHYSINT	Physical Integrity Rights Index
PKB	Partai Kebangkitan Bangsa
Pl.	Plural
PLD	Pakistan Legal Decisions
PNCSW	Pakistan National Commission on the Status of Women
pp.	pages
PPP	Partai Persatuan Pembangunan
Prof.	Professor
PRT	Provincial Reconstruction Team
PUOICM	Parliamentary Union of the OIC member states

R

RANHAM	National Action Plan for Indonesian Human Rights
rer. pol.	rerum politicarum
Res.	Resolution
RevICJ	Review of the International Commission of Jurists
Rez.	Rezension
RG	Reichsgericht / Reichsgesetz
RGZ	Revolutionary Government of Zanzibar
RiA	Recht in Afrika
Rn.	Randnote
Rp	Rupiah
RSF	Reporters Sans Frontieres
Rz.	Randziffer

S

S.	Seite(n)
S. / s.	siehe / see
SAA	Shari'at Application Act of 1937
SFDA	Sudan Federalist Democratic Alliance
SJEM	Sudan Justice and Equality Movement
SLM	Sudan Liberation Movement
S.M.Z.	Serikali ya Mapinduzi ya Zanzibar
s.o.	siehe oben
sog.	sogenannt(e/n)
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SSP	Justice Sector Support Program
SSPC	Sokoto Shari'a Penal Code
St.	Sankt / Saint
StAZ	Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands
s.u.	siehe unten

T

T.	tome
TOP	Tagesordnungspunkt
TPI	Tribunal de Première Instance
TPersG	tunesisches Gesetzbuches zum Personalstatut
TPLF	Tigray People's Liberation Front

U

u.	und
u.a.	unter anderem
UDHR	Universal Declaration of Human Rights
u.g.	unten genannt(en)
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan

UNAMA LSOP	United Nations Assistance Mission in Afghanistan, Legal System Observation Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
U.N.T.S.	United Nations Treaty Series
UNYB	Max Planck Yearbook of United Nations Law
u.ö.	und öfters
UPR	Universal Periodic Review
ursp.	ursprünglich
US	United States of America
USA	United States of America
USD	United States Dollar
usw.	und so weiter

V

v.	verse(s) / versus
VASA	Vereinigung Arabischer Studenten und Wissenschaftler
VCLT	Vienna Convention on the Law of Treaties
vgl.	vergleiche
Virg. JIL	Virginia Journal of International Law
VN	Vereinte Nationen
vol.	volume
VRÜ	Verfassung und Recht in Übersee

W

WEOG	Western European and Others Group
WLUML	Women Living Under Muslim Laws
WOCMES	World Congress of Middle Eastern Studies
WPFCA	West Pakistan Family Courts Act of 1964
www.	World Wide Web

Z

ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
Z.B. / z.B.	zum Beispiel

Ziff.	Ziffer(n)
ZGB	Zivilgesetzbuch
ZPO	Zivilprozessordnung
z.T.	zum Teil
ZVglRWiss.	Zeitschrift für Vergleichende Rechtswissenschaft
z.Z.	zur Zeit

Civil Society and Legislation: Development of the Human Rights Situation in Iran 2008

Irene Schneider, Göttingen

A. Introduction

On 22 July 2007 the Draft Bill for the protection of the family, which had been proposed by the judiciary and approved by the Council of Ministers, was submitted to the Iranian parliament (the *Mağles*).¹ When the text of this “Draft Bill for the protection of the family” (*lāyeḡeh-ye ḡemāyat az ḡānevādeh*, henceforth: the Draft Bill) was made public, a storm of protest broke out. This protest focused on two provisions. The first was Article 23, which allowed a husband to take a second wife only after the court had given permission, but ignoring the first wife’s permission, which was necessary according to the Family Protection Act of 1975 (FPA) from the Shah’s time.² The second was taxation of the dower (*mahrīyeh*) according to Article 25. This would have meant, that women would have to pay tax on dower, which usually is considered a means of security for women after divorce. Both articles were not drawn up by the judiciary when drafting the Bill, but were inserted in the course of the discussions by the Council of Ministers. A “Women’s Movement” (*ḡonbeš-e zanān*), as it was called in the press, emerged from different organisations and actors with different political and ideological backgrounds. Representatives of this “Women’s Movement” went to the parliament and in the end succeeded in having these two articles deleted.³

In what follows, I will sketch out some legal developments in the Islamic Republic, focusing on the interaction between civil society (especially as composed of different women’s organisations) and the state, in particular with regard to the Draft Bill.

The questions I will try to answer are: How can the human rights situation in connection with the Draft Bill be described, especially with regard to gender equality? What roles do the international human rights covenants, on the one hand, and the activities of civil society in the process of legislation, on the other

¹ The Farsi text of the *lāyeḡeh-ye ḡemāyat az ḡānevādeh* can be found at <http://meydaan.org/ShowArticle.aspx?arid=330> (accessed on 12 December 2008). An English translation can be found at <http://www.meydaan.org/English/showarticle.aspx?arid=375> (accessed on 19 January 2009).

² See the Family Protection Act (*Qānūn-e ḡemāyat-e ḡānevādeh*)1975, Art.16 (1): *režāyat-e hamsar-e avval*.

³ See, e.g., an interview with *Maržīyeh Langerūdī* at http://www.roozonline.com/archives/2008/09/post_8966.php (accessed on 22 January 2009).

hand, play in the public discussions of these human rights issues? The focus in this context is on Article 23 of the Draft Bill. After a description of the human rights situation in the Islamic Republic between 1979 and 2008 (B.), the rulings of the Draft Bill will be presented (C.). Furthermore, it will be asked whether there is a civil society in Iran and how it acted (D.), and what arguments were offered by the several participants of the public discourse (E.). A conclusion (F.) is given at the end.

Methodologically, I will focus on a reconstruction of the political and social process and its context (B., C., D.) and on discourse analysis, analysing the arguments put forward by the different sides (E.).

B. The Human Rights Situation in the Islamic Republic between 1979 and 2008

According to the FPA of 1975, divorce had to be decided by the court. This statute eliminated the right of the husband to extra-judicial divorce and broadened the grounds on which women could seek divorce. Custody was based on the best interests of the child, decided by Family Courts, and no longer accorded the absolute right of the father to custody of boys over two years and girls over seven years. Women were granted the possibility of custody. A married man had to obtain the permission of the court and the first wife before marrying a second wife. Nevertheless, polygamy and temporary marriage continued and women did not have equal rights for divorce, or custody and guardianship of children. Neither did the FPA ensure women's rights after divorce, to maintenance or to work outside the home. It was, however, an improved version of Islamic Law with regard to more gender equality.⁴

In her article, "Rights of Women and Children in Iran", Shirin Ebadi (Šīrīn 'Ebādī) points to the fact that after the Islamic Revolution the rights of women and children were curtailed. She argues that there is a great discrepancy between Human Rights according to the standard of the Universal Declaration of Human Rights (UDHR) and the Iranian legislation, especially with regard to the rights of women and children.⁵ The FPA was suspended by Khomeini in 1979, but

⁴ Shirin Ebadi / Henriette Sinding Aasen, "Rights of Women and Children in Iran", in: Uichol Kim / Henriette Sinding Aasen / Shirin Ebadi (Eds.), *Democracy, Human Rights and Islam in Modern Iran. Psychological, Social, and Cultural Perspectives*, Bergen 2003, pp. 221-257 (on p. 240); see also Parvin Paidar, *Women and the Political Process in twentieth-century Iran*, Cambridge, 1997, pp. 271-276.

⁵ Shirin Ebadi / Henriette Sinding Aasen, *Rights of Women...*, supra, footnote 4, pp. 221-228.

parts of it remained in force.⁶ After the Revolution, the state policy on marriage focused on the construction of marriage as the only legitimate site of sexual pleasure and reproduction, and its universalisation. To achieve this, the state adopted a number of strategies. The lawful age of marriage was lowered, obstacles to polygamy were removed, financial assistance was offered to newly-wed couples, and a campaign was launched to promote the virtues of marriage and Islamic matrimonial rights.⁷ In 1986 a new marriage contract was introduced which spelled out the infringements of women's rights which could give them the right to initiate divorce. These included, among others, the husband's marriage to another woman without her consent.⁸ In 1985 the policy changed towards greater restriction on polygamy.⁹

The main discrepancies in Iranian family law with regard to international human rights instruments and gender differences are:

- The age of marriage, which was lowered to 9 (lunar) years for girls after the Revolution, is still low after the reform of 2002: 13 for girls and 15 for boys (Art. 1041 Civil Code [CC]).¹⁰
- A woman marrying for the first time always needs the permission of her father or grandfather (Art. 1043 CC) but this is not true for a man. If the father/grandfather does not consent, the woman has to obtain the permission of a court.¹¹
- The marriage of an Iranian woman to a non-Iranian man has to be permitted by the Iranian state (Art.1060 CC).¹² A Muslim woman cannot marry a non-Muslim man (Art. 1059 CC).
- A woman cannot contract a second marriage while she is married, but a man can be married to up to four women at the same time (Art. 16 FPA 1975).¹³
- Temporary marriage, a speciality of Shiite law, still exists (Art. 1075-1077 CC).
- The husband is the head of the family (Art. 1105 CC). He chooses the place to live (but husband and wife can stipulate something else according to Art. 1114 CC) and is

⁶ Parvin Paidar, *Women and the Political Process...*, supra, footnote 4, pp. 273-274. That parts were still in force can be seen from the fact that the new Draft Bill explicitly declares the FPA of 1975 as abrogated. In most works published on Family Law until 2008, the FPA was recited, see, e.g., *Ġahāngīr Manṣūr*, *Qavānīn va muqarrarāt-e marbūṭ beh ezdevāḡ va ṭalāq*, 8th edition, Tehran 1386/1998.

⁷ Parvin Paidar, *Women and the Political Process*, supra, footnote 4, on p. 277.

⁸ Ibidem, on p. 284.

⁹ Ibidem, on p. 285.

¹⁰ Hossein Safa'i, "Le mariage et le divorce en droit Iranien", in: Jürgen Basedow / Nadjma Yassari (Eds.), *Iranian Family and Succession Laws and their Application in German Courts*, Tübingen 2004, pp. 69-80 (on p. 71).

¹¹ Ibidem.

¹² Ibidem.

¹³ Ibidem, on p. 72.

allowed to prevent his wife from working outside the home (Art. 1117 CC) in case the work is against the interests of the family.

- The wife, however, has also the right in certain situations to prevent her husband from working, but with an important restriction because the husband's work ensures the financial basis of the family (Art. 18 FPA).
- A reasonable amount of living expenses (*nafaqeh*) (Art. 1107 CC, and amendment of 1381/2003) and also the dower (*mahrīyeh*) has to be given by the husband (Art. 1078-1101 CC).
- Divorce has to be ordered by a court, and the court tries to reconcile the partners. If this is not possible, the husband obtains divorce (*talāq*) (Art. 1133 CC, modified by the law of 10 November 2002). The wife has to give certain reasons for her wish for divorce (*fash-e nekāh*), such as the husband's non-payment of living expenses (Art. 1129 CC), or that cohabiting is no longer bearable for her (hardship and distress/*osr va harag*) (Art. 1130 CC). There is, furthermore, divorce by mutual consent (*talāq-e ḥol'*) (Art. 1146-1147 CC)¹⁴ and the woman can have a divorce, with the consent of the husband, by paying him a sum, more often the dower.
- According to Article 1169 CC, in case of divorce, a woman will be given custody (*hezānat*) over her sons to the age of two years and seven years for daughters. After this, the custody devolves to the father. The parliament agreed on 28 July 2002 to a law raising the age of custody for children of both genders to seven years, effectively only raising the age of custody for the boys. This was finally accepted and came into force on 31 December 2003. If the woman remarries, then she will lose her right to custody over her children. However, if the father dies, then the custody will go to the mother, after a change in the law in 1992.¹⁵
- In 1997 women were given the right to partial custody, but not to guardianship (*velāyat*) (Art. 1180 CC). This is the case, if, for example the husband is dead. Guardianship is the non-negotiable right of the father, or the paternal grandfather in case of the father's death.
- In inheritance law, the woman's portion is half of the man's portion (Arts. 921, 923, 931, 933 CC).¹⁶
- Women still do not have the chance to become judges in the Iranian judicial system, they can only act as legal consultants, and only in family matters.¹⁷

To summarize: The main fields of divergence from international human rights standards in family law are; polygamy, divorce, custody and women's representation in the public space.

¹⁴ Ibidem, pp. 76-78.

¹⁵ Shirin Ebadi / Henriette Sinding Aasen, *Rights of Women...*, supra, footnote 4, on p. 242.

¹⁶ Hossein Mehrpour, "An overview of inheritance in the legal system of Iran", in: Jürgen Basedow / Nadjma Yassari (Eds.), *Iranian Family...*, supra, footnote 10, pp. 103-109 (on p. 107).

¹⁷ Martin Haars, "Summary", in: Jürgen Basedow / Nadma Yassari (Eds.), *ibidem*, pp. 97-99 (on p. 98).

Since 1993, Iranian women have also increased their political participation considerably. Still, in 2008 there were only eight women in the parliament out of 290 members of the parliament. In 1997, however, the Council of Guardians disqualified female candidates from running for the presidency.¹⁸

On the international level, human rights and rights of women and children are protected by several international covenants, e.g., the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention of the Rights of the Child (CRC). These covenants, which are legally binding upon the ratifying states, represent the main international legal standards and instruments concerning Human Rights. Iran ratified the UDHR in 1948,¹⁹ the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the CRC in the time of the Islamic Republic, but not CEDAW. The goal of the CRC is to protect children and their fundamental human rights and dignity. It recognises that “childhood is entitled to special care and assistance” and that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection” (Preamble of CRC). However, the Iranian government made a general reservation upon ratification. It stated that

“the Government of the Islamic Republic of Iran reserves the right not to apply any provision or articles of the Convention that are incompatible with Islamic Laws”.²⁰

Despite the ratification of CRC, thus discrepancies between the Convention and the Iranian legislation still exist.²¹ CEDAW was discussed but not ratified by Iran. The Parliament agreed to accede to the Convention, but the Council of Guardians (*Šūrā-ye negahbān*) rejected its proposal of 12 August 2003 to ratify CEDAW.²² CEDAW was then submitted to the Assessment Council and is still there (December 2008).

Furthermore, the Islamic Republic has approved Article 6 (A) of the Cairo Declaration on Human Rights in Islam. This declaration is not a legally binding con-

¹⁸ Shirin Ebadi / Henriette Sinding Aasen, Rights of Women..., supra, footnote 4, on p. 239.

¹⁹ See: <http://www.unhchr.ch/udhr/miscinfo/carta.htm> (accessed on 16 January 2009).

²⁰ Shirin Ebadi / Henriette Sinding Aasen, Rights of Women..., supra, footnote 4, on p. 224 et seq.

²¹ Nadjma Yassari, “Who is a child?”, in: Susan Rutten, (Ed.) *Recht van de Islam* 22, Maastricht 2005, pp. 17-30.

²² Shirin Ebadi / Henriette Sinding Aasen, Rights of Women..., supra, footnote 4, pp. 223-224.

tract, but it is a common declaration from the Muslim world on the concept and content of Human Rights.²³ It states that:

“ Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform.”

Ebadi states:

“ Article 6 (A) may be interpreted to mean that women and men, despite equality in human dignity, enjoy different human rights: Women enjoy special rights due to their sex rather than equal rights like men.”²⁴

C. The Provisions of the Draft Bill

Being the object of a public discussion of high political implication, the developments around the Draft Bill have been reported meticulously.²⁵ The public criticism started in July 2007 and focused on Articles 23 and 25. The Draft Bill's introduction refers to the special role and status of the institution of the family in the legal and pedagogical system of Islam,

“ considering that certain parts of the laws concerning rights of the family have been found incompatible with the Sharia.[...]”.

The Bill is divided into chapters: Chapter 1 concerns the family court, Chapter 2 family counselling centres, Chapter 3 marriage, Chapter 4 divorce, Chapter 5 custody and maintenance of children, Chapter 6 penal provisions. In Article 53 it is stated: “As of the date of enactment of this law, the following laws and all regulations to the contrary shall be superseded”. Several laws are named, among them the FPA of 1975.

As Article 23 on polygamy is the focus of this article, the text of the article is given here:

Marriage to a subsequent permanent wife shall depend on court authorization upon ascertainment of the man's financial capability and undertaking to uphold justice among his wives.

Note: In the event of plurality of marriages and should the marriage portion mature and the wife demands it, the authorization to register the new marriage shall depend on payment of the marriage portion to the first wife.

Whereas the public protest focused on Articles 23 and 25, jurists have had more concise criticism of other articles, too. In her article, “Women: one step ahead does not make the whole way”,²⁶ Šahīndoḡt Mawlāverdi, a jurist specialising in international law, draws attention to other points of the Draft Bill:

²³ Ibidem, on p. 222.

²⁴ Ibidem, on p. 224.

²⁵ <http://meydaan.org/showArticle.aspx?arid=660> (accessed on 15 January 2009).

²⁶ Šahīndoḡt Mawlāverdi, “Zanān: yek gām beh piš-e rāh-e nā-tamām”, in: Šahravand-e emrūz 31, Šahrivar 2008/September 2008, on p. 81.

- **Article 2:** Whereas the judiciary had made the presence of female judges in the family courts obligatory, the state changed this to “where possible” (*ḥattā l-maḥdūr* instead of *bāyad*). Instead of “one of the members of the court must be from among women having a judicial basis (*dārāndeh-ye pāyeh-ye qazā’ī*)” the text was changed to “one of the counsellors (*mostašārān*) of the court must be a woman [...]”. This means that a woman now cannot be an alternating judge or the head of the court, and it is in contradiction with what the judiciary wanted the counsellors to be, i.e., to be responsible just for problematic cases.
- **Article 4, para. 8:** The following affairs and claims shall be investigated by the Family Court: “Unilateral obedience and deference of the two parties (*nošūz va tamkīn-e zawḡayn*)”. This is new insofar as *nošūz* (evasion) here refers to both sexes, husband and wife. Mawlāverdī justifies this by pointing to Qur’ān Verse 4 (النساء): 128²⁷. It must be stated, that *nošūz* still is normally used based on Qur’ān 4 (النساء): 34²⁸, for women only. She clearly approves that this categorization now concerns both sexes.
- **Article 5:** the government inserted: “The Family Court shall also investigate offences the subject of Chapter 6 of this law”. This was inserted instead of the judiciary’s text: “Minor crimes and disputes in the family between the spouses” are to be dealt with by the Family Court. So the Family Court is now bound to deal with the problems named in Article 4 and chapter 6. This would mean that not all violence in the family will be penalized and Mawlāverdī suggests the formulation, “hitting and wounding and violence in the family” should be added to Article 4.
- **Article 11,** concerning the Family Court, the text is as follows: “The court may adjourn the hearing, no more than twice, at the request of the couple or one of the partners to provide opportunity for reconciliation and rapprochement.” This text was left unaltered by the government, but Mawlāverdī suggests here that the hearing should be postponed only once to shorten the process.
- **Article 21,** note 1, provides: “Members of the Family Counselling Centres shall be chosen from among experts [...]. Note 1: Counselling sessions shall be held necessarily in the presence of trustees of the two parties and preferably their relatives.” Mawlāverdī suggests either removing this note, or that the counsellor should decide if it is necessary to invite the relatives, because, according to her, many differences arise from the participation of the relatives.
- Another note has been added by the state to **Article 2** (note 2): “All the family disputes and differences may be raised with Arbitration Councils (*Marākez-e mošāvareh*). If petitioned by the two parties, the said councils shall be established with relevant experts participating and their judgments, with the exception of divorce, shall be binding. If they decide upon a divorce judgment, the case shall be referred to court.” Mawlāverdī suggests removing this because it undermines the authority of the court.

²⁷ *Sura 4 (النساء), Verse 128:*
 وَإِنْ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ
 الْأَنْفُسَ الشُّحَّ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا.

²⁸ *Sura 4 (النساء), Verse 34:*
 الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَانِتَاتٌ
 حَافِظَاتٌ لَلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي خِفَافُونَ لِشُؤْرَهُنَّ مُعِظَوْنَ لَهُنَّ وَأَمْحَرُونَ فِي الْمَضَاجِعِ وَاتْرِبُونَ فَإِنَّ
 أَلْطَمَتَكُمْ فَلَا تُجْلَوْنَ عَلَيْهِنَّ سَبِيلًا إِنْ اللَّهُ كَانَ عَلِيمًا كَبِيرًا.

- **Article 22**, the note was changed by the state: “Registration of temporary marriage shall be subject to Rules of Procedure to be approved by the Minister of Justice.” Mawlāverdi argues for the original text of the judiciary, according to which the registration of the temporary marriage was made clear and, in case of pregnancy, obligatory, in other cases, dependent on the will of the partners. Her aim is to give women in this kind of marriage more security and especially the children resulting from such relationships. She suggests taking the text of the judiciary and adding that, in case of registration, two documents are to be given to each party with possible stipulations.
- With regard to the Counselling Centres, the problem of a person not present in Iran has to be solved. Mawlāverdi suggests referring to a legal representative (*vakīl*).
- **Article 32**²⁹: the proposed fair remuneration (*oğrat al-meʿl*) for the wife after divorce was taken out by the state. Mawlāverdi suggests it should be restored.
- Chapter 5, from **Article 39** on, deals with “custody and maintenance” (*hezānat va negahdāri-ye atfāl*) of children and with special maintenance (*nafaqeh*). Mawlāverdi suggests dealing with the two topics – custody and maintenance – in an extra article and to avoid *negahdāri* being a synonym of *hezānat*.
- **Article 44**: “In the event that a man takes action regarding permanent marriage, divorce, revocation and reunion, without having them registered with authorized offices, he shall be forced to register the event and be sentenced to pay a fine ranging from 20 million to 100 million Riyals and eventually be deprived of an appropriate social right.” Mawlāverdi considers the fine far too lenient and would prefer a combination of fine and imprisonment.
- Mawlāverdi proposes that the original note to **Article 42**, according to which non-registration of a temporary marriage in case of pregnancy was to be punished, should be restored.
- **Article 45**: a doctor issuing a false medical certificate for the marriage (see Article 24)³⁰ is punished with imprisonment from 1 to 5 years, whereas the judiciary had proposed 3–5 years.
- According to **Article 46**: “Any foreign national who marries an Iranian woman without obtaining the permit mentioned under Article 1060 of the CC, shall be sentenced to from ninety-one days to one year imprisonment. In that case, the woman, if she has married of her free will, the girl’s father, if the marriage has taken place with his permission, and the marriage solemniser, shall be sentenced as accomplices of the offence.” Mawlāverdi suggests canceling this article because it was not in the judiciary’s Draft Bill.
- According to **Article 48**: “The person charged with custody of child shall be sentenced to pay a fine from 500,000 to 5 million Riyals in the event he refuses to perform the du-

²⁹ I think Šahīndoḡht Mawlāverdi erroneously wrote 31 instead of 32, but as I do not have the judiciary’s text, I cannot justify this.

³⁰ According to Article 24, the Ministry of Health, Remedy and Medical Education (*Vezāret-e behdāšt, darmān va āmūzeš-e pezeškī*) is required to determine and announce the diseases against which the two parties shall be immunised prior to marriage, as well as the contagious diseases dangerous to married couples and the children resulting from marriage, within one month of the passage of this law. Before registration of marriage, Marriage Offices are obliged to demand and file certificates issued by medical doctors.

ties concerning custody or prevents visitation to the child by the beneficiaries.” She points to the Law with regard to custody ratified on 22 Mehr 1365 /13 August 1987, according to which default in custody is punished with imprisonment, and she argues that the fine is not enough of a deterrent.

- Mawlāverdi suggests that, according to Article 19 of the FPA of 1975, there should be distinction between fixed rules (*ahkām-e qaṭʿī*) and rules which can be changed (*ahkām-e qābel-e eʿterāz*), so it could not be said that with the elimination of Article 23 and Article 25 of this Draft Bill the work would be done.

Many points Mawlāverdi raises concern amendments by the government which were not the original Draft Bill of the judiciary. This is true for Article 2, where the presence of women in the courts had been changed from an obligation into a recommendation, and women can only be counsellors. It is true for Article 5, in which the offences the Family Court (*Dādgāh-e ḥānevādeh*) can deal with are restricted to the offences named in Article 4 and chapter 6. It is also true for Article 22, according to which the registration of temporary marriage was made obligatory in the judiciary’s Draft Bill in case of pregnancy, and the fines and punishments are not hard enough in Mawlāverdi’s opinion (see her suggestion with regard to Article 48). In most cases, it can be stated that the changes the government inserted were, from Mawlāverdi’s point of view, negative for women or made the text less precise. Human rights standards are not mentioned by Mawlāverdi. However, the discrepancies between the regulations in the Draft Bill and, e.g., CEDAW are obvious with regard to the position of women in the judiciary (Art. 2), temporary marriage (Art. 22), and the still existing inequality with regard to polygamy and the male prerogative of divorce as well as custody. One positive remark concerns Islamic Law. The Qur’ānic concept of *noḣūz*, which was often applied to women who did not behave appropriately, is used in Article 4 for both sexes.

D. Iranian Civil Society and its Reaction to the Draft Bill

Civil society as a concept has emerged in the context of western political culture. It has been defined in many different ways, but is normally understood as the third sphere, besides the state and the economy. Whereas the state is seen in relation with the political administration and administrative power, and the economy is seen in relation with money and the economic system of action, civil society is seen in connection with the public communication structure (networks) and its resource is solidarity. All three fields interact and thus display a certain kind of dynamism and development in the social and political context.³¹

³¹ Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a.M. 1992, p. 448. Habermas states that civil so-

This third sphere, “civil society”, will be analysed here in its relation to the state, not the economy. Obviously civil society does not rule, but the question arises whether it can influence the political regime through its power in a certain direction.³² Ruling is thus understood as bound to institutional structures, whereas power functions also in other – not so organised – contexts. Several questions arise: Is there a civil society in Iran, not being a democratic state? If this question is answered in the affirmative: What power does the civil society in Iran exert?

According to Foucault, power is influenced by discourses and discourses create power. Discourse, according to Foucault, can be understood as an institutionalised way of thinking that can be manifested through language, a social boundary defining what can be said about a specific topic but also what cannot be said and is excluded from discourse.³³ Foucault speaks of the taboo of the topic, the ritual of the circumstances and the right of the speaking subject in this context.³⁴ Power according to him is not based on a restrictive top-down perspective. He seeks to provide the tools necessary for analysing power relations at different points in a state and society.³⁵ Power is thus ubiquitous and diffuse.³⁶ As discourses define reality, they exert power in a mutual process. The discourses thus produce power and shift power relations.³⁷ But can discourses shift the state authority?

I will focus on the social and political discourse on the question of the first wife’s permission for polygamy and analyse on that basis, first of all, the political and social situation in Iran, and second, on the basis of the arguments used in this public discourse, how this discourse influenced the political decision making and why, i.e., on the basis of which arguments. This methodological approach seems to be fruitful in order to highlight the processes of legislation in an Islamic authoritarian state by focusing not only on the course of events but on the discursive mechanisms that shaped this course.³⁸

ciety (“eine vitale Bürgergesellschaft”) can only come into existence in a liberal political culture and its actors can only gain influence, not political power, *ibidem*, p. 449.

³² *Ibidem*, pp. 448-449; *Walter Reese-Schäfer*, *Politisches Denken heute*, 2nd edition, Oldenburg 2007, pp. 10-11.

³³ *Michel Foucault*, *The Archaeology of Knowledge*, New York 1972, p. 98.

³⁴ *Michel Foucault*, *Die Ordnung des Diskurses*, Frankfurt a.M. 1994, p. 11.

³⁵ For the development of Foucault’s concept of power, see *Barry Hindess*, *Discourses of Power*, Cambridge 1996, pp. 96-136.

³⁶ *Michel Foucault*, *The Archaeology Knowledge*, *supra*, footnote 33, p. 98.

³⁷ *Michel Foucault*, *Der Wille zum Wissen, Sexualität und Wahrheit 1*, Frankfurt a.M. 1983, p. 122.

³⁸ For the political system, see the analysis of the constitution by *Silvia Tellenbach*, *Untersuchungen zur Verfassung der Iranischen Republik Iran vom 15.November 1979*, Berlin

Albrecht discusses this concept in the research for the Islamic states and concludes that civil society is a historically rooted concept as well as a phenomenon which can be described on the basis of social-political structures. The minimum conditions which have to be fulfilled by civil society organisations and actors as understood in this context are; that civil society organisations or actors have to represent individual interests in opposition to the formal state structures, that membership is voluntary, and that the civil society organisations are autonomous from state influence, that those organisations have to have a certain potential of organisation to be differentiated from purely individual relations (as structures of lobbying, clientelism, familiar structures etc.), and single actors have to have a certain public voice.³⁹ According to Croissant, Lauth and Merkel, the tasks of civil society institutions or actors are; the protection of individuals against the state, mediation between the political and non-political sphere, a function of socialisation, the building of a social community and a communication function.⁴⁰

Albrecht correctly points to the fact that civil society is an analytical concept for the explanation of social organisation and which has to be seen, instead of the alleged division between the social and the political spheres, very much in connection with or in dependence on the state. The state creates the legal and institutional frame and gives the rules thus deciding the radius of action civil society actors actually have.⁴¹ According to Albrecht, democracy cannot exist without civil society and civil society is a constituent of the system, whereas in an authoritarian system it is an opposition force.⁴²

At the same time, I will argue that persons having a prominent public position in Iranian society, like the Nobel prize winner Shirin Ebadi, can be regarded as representatives of civil society and as important actors in the public discourse, who have a voice in the public discourse, of course also internationally.⁴³

1985. Separation of powers exists in Iran, but all three powers are dominated by the prominent figure of the religious leader (*rahbar*).

³⁹ Holger Albrecht, "Zivilgesellschaft und der vorderer Orient: Das Prinzip Hoffnung und die Grenzen eines sozialwissenschaftlichen Konzepts", in: Joachim Betz / Wolfgang Hein, *Zivilgesellschaft*, Wiesbaden 2005, pp. 118-119.

⁴⁰ Aurel Croissant / Hans-Joachim Lauth / Wolfgang Merkel, "Zivilgesellschaft und Transformation: ein internationaler Vergleich", in: Wolfgang Merkel (Ed.), *Systemwechsel 5*, Opladen 2000, pp. 9-49 (on pp. 9-14).

⁴¹ Holger Albrecht, *Zivilgesellschaft...*, supra, footnote 37, p. 120.

⁴² *Ibidem*, p. 120 et seq.

⁴³ Sonja Hegasy, *Staat, Öffentlichkeit und Zivilgesellschaft in Marokko*, Hamburg 1997, takes as examples the sociologist Fatima Mernissi and the philosopher Muhammad Abed al-Jabiri; *ibidem*, on p. 37, pp. 95-112, pp. 131-139).

In 2006 Iranian women's rights activists and different organisations, mostly women's organisations, initiated a nationwide campaign demanding an end to discrimination against women in Iranian law. The campaign, "One Million Signatures Demanding Changes to Discriminatory Laws,"⁴⁴ aims, as the name says, first of all to effect change in discriminatory laws by collecting one million signatures. It was a follow-up effort to the peaceful protest of the same aim, which took place on 12 June 2006 in Haft-eTir Square in Tehran. The aims of this campaign are, according to their self-presentation, the promotion of collaboration and cooperation for social change, and the promotion of cooperation between a wide spectrum of social activists thus forming a kind of superstructure. The intention is to increase knowledge in the population about the legal situation of women and promote democratic actions, to carry out bottom-up reform and to create change through grassroots and civil society initiatives, to strengthen public action and empower women. The campaign strives to demonstrate that women have consistently employed a variety of means and venues to voice their objections to the laws, such as the writing of books, articles, production of films and other forms of artistic expression, and through social activism. In an effort to silence the voices of women calling for change, critics claim that these demands for legal change are expressed by a particular group of women who are out of touch with the realities of ordinary Iranian women. In response, the women campaigners argue that their organisation comprises not only elite and socially and economically advantaged women but many women from all strata of society. The state reacted with strength and suppression against the women participating in the campaign and the organisations, which are mostly illegal, i.e. not accepted officially as non-governmental organisations.⁴⁵ According to a non-governmental organisation's report, between March 2007 and March 2008, 63 women's rights activists were arrested, 38 women's rights activists were summoned to appear in court, and 114 female students were sentenced to exclusion from education. Two female prisoners were killed under suspicious circumstances, and 37 women were sentenced to execution and stoning. The most important feminist magazine (*Zanān*, edited by Šahlā Šerkat⁴⁶) was forced to close in January 2008 and many women's websites and web logs are filtered.⁴⁷

⁴⁴ *Aḥmadi Ḥorāsāni*, 'Ġonbeš-e yek millyūn emzā', Tehran 1386/2008, pp. 70 et seqq.; www.feministschool.com/campaign/ (accessed on 17 December 2008).

⁴⁵ <http://www.forequality.info/english/spip.php?article346>; <http://www.feministschool.org/english/spip.php?rubrique5> (both accessed on 16 January 2009); <http://www.feministschool.org/english/spip.php?article162> from 23 October 2008 (accessed on 17 December 2008).

⁴⁶ Cp. *Margot Badran*, "Gleichberechtigung auf Halbmast", in: Qantara, http://de.qantara.de/webcom/show_article.php/_c-469/_nr-833/i.html, (accessed on 22 January 2009).

⁴⁷ Cp. <http://www.meydaan.org/English/showarticle.aspx?arid=555> (accessed on 19 January 2009).

The campaign must be seen as opposed to the state, and organisations of civil society as defined above are independent from the state. On the level of organisation, the nationwide campaign and the revolt against the Draft Bill reveal an impressive structure of organisation. All the other functions mentioned above such as the protection of individuals against the state – in this case the women against discriminatory laws – the mediation between a political and non-political sphere, the function of socialisation and communication as well as the building of a social community are surely true for these groups. Thus, according to the definition given above, it can be stated that these groups initiating the campaign can be called civil-society organisations. An important aspect of this campaign is the composition of different women's movements with different approaches (feminist, religious, socialist).⁴⁸

Building on this structure, the movement against the Draft Bill came into existence. In the press, they are mostly called the "Women's Movement (*Ġonbeš-e zanān*)"⁴⁹ or the coalition of women's groups against the "Draft Bill against the Family" (*E'telāf-e grūhhā-ye zanān-e 'alayhe lāyeḡeh-ye zedd-e ḡānevādeh*).⁵⁰

On 24 June 2007⁵¹ the Draft Bill was dealt with by the cabinet, on 23 July 2007 it was sent to the parliament (*Maḡles*), it was published and the public criticism started. On 24 August 2007 the campaign entitled, "No to the Bill for the protection of men in the family", started officially. Shirin Ebadi, being one of the most active persons engaged in the campaign against the Draft Bill, threatened that if the bill was not withdrawn, women would take their protest to the parliament. On 7 December 2007 a *fatwā* by Āyatollāh Šāne'ī was published which declared polygamy without the permission of the first wife to be forbidden. On 11 December 2007 severe criticism was launched by the Parliament of the European Union against the Draft Bill. In July and August 2008 more than 2,200 persons joined the Women's Movement, carrying out activities such as public speeches and distributing information-leaflets and stickers.⁵² On 23 August 2008 a media campaign started against the Women's Movement. On the afternoon of 31 August 2008 more than 100 women from different organisations went to the parliament and talked with members of parliament. Consequently, the Draft Bill

⁴⁸ *Aḡmadī Ḥorāsānī*, *Ġonbeš-e Yek Millyūn Emzā*, supra, footnote 42, on p. 70; see also <http://www.we-change.org/english/spip.php?rubrique5> (accessed on 17 December 2008), for further links.

⁴⁹ http://www.roozonline.com/archives/2008/09/post_8966.php (accessed on 1 September 2008).

⁵⁰ <http://www.Feministschool.com> (accessed on 17 December 2008); <http://www.for-equality.info/english/spip.php?article324> (accessed on 16 January 2008).

⁵¹ <http://meydaan.org/showArticle.aspx?arid=660> (accessed on 17 December 2008).

⁵² <http://meydaan.org/ShowArticle.aspx?arid=641> (accessed on 17 December 2008).

was withdrawn and sent back to the Legal Commission.⁵³ On 3 September 2008 Fāṭīma Āliyā, a member of the parliament, spoke out against withdrawal of the Draft Bill. She called the women who had gone to the parliament “a small number of secular mud throwers”. Others wrote a letter to the religious leader, Khamenei, to stop the legal proceedings of the Draft Bill.⁵⁴ On 5 September 2008 Ayatollah Amīnī, in the Friday prayer in Qom, demanded that the *Mağles* reconsider Articles 23 and 25 of the Draft Bill. On 8 September 2008, Articles 23 and 25 and also paragraph 24 of Article 53 were eliminated from the Draft Bill in a session of the Judicial Legal Commission of the *Mağles* (*Komīsyūn-e qazāʾi va ḥoqūqī-ye Mağles*) and its chief, ‘Alī Šāhrūdī, stated that the articles would have led to the destruction of families.⁵⁵ On 9 September 2008 the whole Draft Bill, without the two articles, was approved in the parliament.⁵⁶

E. Which Arguments were put forward? By whom and in what Contexts?

Analysis of a discourse is demanding from the perspective of methodology and sources and deserves a multilayered approach. First of all, the different parties taking part in this discourse must be identified, their arguments collected, classified and analysed. In a second step, an analysis of arguments put forward (and those that could have been advanced but were not) by the discussants as well as their contexts will be made. As public discourses are based on a broad range of actors and participants, there has to be a thematic focus as well as a selection of the “voices”. The thematic focus in what follows will be on Article 23 of the Draft Bill and the issue of the necessity of the permission of the first wife for polygamy. The most important groups engaged in the discourse were (a) the civil society groups including prominent individuals, (b) the Shiite scholars, (c) the state, which in this case comprised the judiciary, members of the Ministry of Justice and members of the parliament and its different committees. The time for the analysis begins with the publication of the Draft Bill in July 2007 and the start of the broad public criticism. It ends, for this article, in December 2008. After the elimination of the two offending articles on 31 August 2008, the discussion became less intensive in the media. Sources that I have used are published articles in journals and the web, a letter to the parliament, the *fatwās*,

⁵³ <http://meydaan.org/ShowArticle.aspx?arid=652> (accessed on 17 December 2008).

⁵⁴ <http://meydaan.org/news.aspx?nid=2377> (accessed on 16 January 2009).

⁵⁵ <http://www.vol.at/news/CO:austria:politik/artikel/iranisches-parlament-kippt-gesetzentwurf-zur-polygamie/cn/news-20080909-02494174>, of 9 September 2008 (accessed on 15 January 2009). See also Behrouz Khosrozadeh, www.heise.de/tp/r4/artikel/28/28804/1.html (accessed on 16 January 2009).

⁵⁶ <http://meydaan.org/showArticle.aspx?arid=660> (accessed on 12 January 2009).

news reports on the internet and interviews conducted by me between October and December 2008.⁵⁷

The arguments comprise legal arguments (I), meaning arguments concerning statutory law, international law and the Iranian judicial system, arguments of the Shiite *fiqh* (II), and social/psychological and cultural arguments (III).

I. The Legal Arguments

With regard to the national level, some of the civil society groups, in an open letter in November 2007, pointed to the CC and argued that no right for men to practise polygamy could be found in this text.⁵⁸ Fāṭimeh Āliyā, a member of parliament from Tehran and responsible for the parliamentary committee of women and the family (*Komīteh-ye zanān va ḥānevādeh-ye Mağles*),⁵⁹ pointed to the positive points and achievements in the Draft Bill, such as female counsellors in the family courts (Art. 2), the right given to mothers to file a suit against their husbands for not paying maintenance for their children (Art. 7), the possibility

⁵⁷ A starting point for the events in the discourse was the following website, which contains the most important events: <http://meydaan.org/showArticle.aspx?arid=660>, with the title *Rūzšomāreh-ye vaqāye'-e ettefāqiyeh-ye layehēh-ye ḥemāyat-e ḥānevādeh*. Interviews were used as an additional source to articles and internet presentations. I selected some representatives of the groups taking part in the discourse (civil society, *fuqahā'* and state representatives) and asked them about the process of legislation with regard to the Draft Bill, about their personal opinion of the Draft Bill and their opinion with regard to the influence of international law, more specifically: CEDAW, on the national legislation. I want to express my gratitude to all of my interview partners for accepting to be interviewed, for answering my questions and discussing with me the different aspects of the process of legislation in the Islamic Republic of Iran. I have benefited greatly from these discussions.

⁵⁸ The letter dates from 12 November 2007 and is to be found in: <http://www.aftabnews.ir/vdcepq2b1qee.html> (accessed on 19 December 2008). It was sent in the name of several women's groups: *Mağma'-e zanān-e ešlāḥtālāb* being supporters of the former president Khatemi; *Ġam'iyat-e zanān-e mosalmān-e nawāndīs* (Intellectual Muslim Women's Association, also supporters of Khatemi); *Anğoman-e rūznāmeḥ-negārān-e zan-e Īrān* (group of women journalists); *Komīsyūn-e zanān-e ḡabbeh-ye mošāarakat-e Īrān-e eslāmī* (Women Organisation of Islamic Iran Participation Front, a party headed by the supporters of the former President Khatemi) and *Ġāme'eh-ye zanān-e enqelāb-e eslāmī*, founded in 1994, being originally supporters of Khomeini at the beginning of the Islamic revolution, now fighting for Reform and Democracy in an Islamic Framework. This letter deals critically with all articles of the Draft Bill. See also the report from 4 September 2007: "Bar-rasīy-e layehēh-ye ḥemāyat-e ḥānevādeh az manzar-e ḥoqūqī, ḡāme'ehšenāsī, ravānšenāsī: kam luṭfī beh zanān beh nām-e layehēh-ye ḥemāyat az ḥānevādeh?"; in: <http://meydaan.org/wwShow.aspx?wwid=495> (accessed on 5 February 2009) in which the position of jurists, sociologists and psychologists are given.

⁵⁹ <http://meydaan.org/wwShow.aspx?wwid=520> (accessed on 22 December 2008).

for women to apply to the court of the city they live in, in case the husband is in another city (Art. 15), and the establishment of counselling centres for families (Art. 17-21).⁶⁰ With regard to Article 23 and the first wife's permission, she argued that there had been no legal regulation of polygamy before this Draft Bill, because Article 16 of the 1975 FPA had been suspended by Khomeini and quashed by the judgment of the Council of Guardians in 1985, which decided that punishment of a man not having the permission of his first wife was not lawful. In practice many men had married without permission or even without official registration. According to the Draft Bill this was now made illegal. The court furthermore has to invite the first wife and hear her.⁶¹ Āliyā is convinced that the first wife's permission is implicitly meant in Article 23, but she argues that the text should be made explicit in order to reassure families and public opinion.

With regard to the judicial system, Āliyā expressed her trust in the courts and stressed the courts' competence.⁶² The courts have to deal with justice on the level of finances ('*adālat-e mālī*) and on a subjective level ('*adālat-e āṭefi*), which, she admits, is difficult for the judges. This subjective justice, Āliyā states, as implied in Qur'ān, Sura 4 (النساء): Verse 3⁶³, is difficult for men to bring about, so that it becomes evident that God himself restricted polygamy. Here Āliyā switches to an argument from Islamic *fiqh*.⁶⁴ The question of the independence of the judiciary and the courts is seen more critically by others. The judges are thought not to have an objective understanding of women's position in the legal system,⁶⁵ which, after all, is a strong criticism of the judiciary of the Islamic Republic.

⁶⁰ For these positive arguments, see also the Interview with Ḥasan Ḥamīdiyān, Deputy Head of Justice Administration of Tehran Province and Director of the Family Judicial Complex, on 12 October 2008.

⁶¹ This, however, is just her interpretation. In Article 23 only the court's permission is mentioned, nothing is stated about the conditions under which the court has to decide upon the second marriage.

⁶² Others argue the same, e.g., Zaynab Raṅḡbar in my interview with her on 15 October 2008. Being a judge herself (or rather a counsellor because women cannot be judges on their own) she argues that the court can act with justice with regard to the finances, and, on the other hand, has to act on the basis of a kind of extrinsic justice ('*adālat-e zāher*). For this the man's behaviour in the family as well as in society is examined.

⁶³ Sura 4 (النساء), Verse 3:

وَإِنْ حِفْظُهُمْ أَلَا تُنْسَطُوا فِيهِ الْبَتَّاءِ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَنِّي وَتَلَاتِ
وَرَبَائِعَ فَإِنْ حِفْظُهُمْ أَلَا تُغْدِلُوا فَرَاجِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا.

⁶⁴ <http://meydaan.org/wwShow.aspx?wwid=520> (accessed on 22 December 2008).

⁶⁵ <http://meydaan.org/wwShow.aspx?wwid=520> (accessed on 22 December 2008), and <http://www.aftabnews.ir/vdccepq2b1qee.html> (accessed on 19 December 2008).

Whereas these arguments concern the statutory law (CC) and the judiciary, Zaynab Raṅḡbar,⁶⁶ judge and head of the department of public education of the judiciary (*Ra'īs-e āmūzešhā-ye mardomī-ye mo'āvanat-e āmūzešhā-ye quvveh-ye qazā'īyeh*) refers to the FPA of 1975 in which the first wife's permission is already explicit as well as the *ordre public* of the Islamic Republic of Iran. She summarizes the discussions in the judiciary stating that at the moment the protest against the Draft Bill came up it was decided by the judiciary to give in, because the Draft Bill was thought to be a Draft Bill for the protection of the family. As it was not accepted by the families, and especially by women, the two articles had to be dropped. Raṅḡbar stated that in a situation like this, and with such heavy protest, public welfare (*maṣlaḡat*) was at stake and taken as a reason for skipping the articles.

With regard to international law, Shirin Ebadi argued in her article,⁶⁷ that Iran's legislation is not in accordance with human rights standards. Elāheh Kūlā'ī, professor at the Faculty of Law and Political Science of the University of Tehran,⁶⁸ described CEDAW as the frame of human rights discussion and argued that Muslims have a different understanding of human identity (*huvīyat-e ensān*) from western cultures. She connected the process of democratisation to the development of the status of women, seeing, however, sufficient potential in Iranian women for development (towards more democracy?). According to her opinion, the sensibility against CEDAW is based on the fear that with this convention the "Islamic identity" would be given up. Shahīndoḡt Mawlāverdī, a jurist trained in international law,⁶⁹ pointed in her article especially to the important meaning of public national welfare (*maṣlaḡat-e mellī*) for the Iranian state, not on the level of national legislation, but with regard to the international reputation of the Islamic Republic. She referred to Khomeini, who gave the government of the Islamic Republic the right to suspend the religious duty of pilgrimage in case the public welfare is in danger.⁷⁰ *Maṣlaḡat* is for her a strategy to solve the problems of the Islamic Republic of Iran.⁷¹ Like Kūlā'ī, she is convinced that cultural differences cannot be an obstacle for admitting at least international standards of human rights. The equality of gender (*ḡensīyat*) belongs to

⁶⁶ Interview on 15 October 2008.

⁶⁷ Shirin Ebadi / Henriette Sindig Aasen, *Rights of Women...*, supra, footnote 4.

⁶⁸ Elāheh Kūlā'ī, *Čālešhā-ye farāyand-e ta'mīn-e ḡoqūq-e zanān dar kešvarhā-ye eslāmī va češmandāz-e eḡrā'ī-ye paymānāmeḡ-ye Sīdā dar Īrān*, UNICEF Office, Tehran, November 2007.

⁶⁹ Šahīndoḡt Mawlāverdī, "Goftemān-e maṣlaḡatgerā va Konvensiyūn-e raf'-e kollīyeh-ye aškāl-e tab'īz 'alayhe zanān", in: Rayḡāneh 6.1383, pp. 203-217.

⁷⁰ Ibidem, pp. 203-204.

⁷¹ Ibidem, p. 205.

these standards,⁷² because it belongs to the nature of human beings. Islam and Human Rights have many points in common and there is no single interpretation to the Islamic texts, just as there are different possible understandings of the Human Rights.⁷³ Mawlāverdi sees Iran in danger of isolation on an international level because the state has not yet ratified CEDAW.⁷⁴

Whereas Khomeini's concept of *maṣlaḥat* implied the Iranian government's right to restrict even basic religious rules in case this was deemed necessary for the welfare of the state,⁷⁵ Raṅḡbar's statement quoted above reflects a concept of *maṣlaḥat* as an *ordre public* that can be influenced by public discourse. Civil society arguments thus changed the legislation because the public welfare and thus the social peace had to be preserved.

All three articles on CEDAW and Human Rights in Iran by Ebadi, Kūlāī and Mawlāverdi argue on the basis of international human rights and maintain that there are rulings in the Qur'ān and the Muslim tradition which can be seen as parallel to the western understanding of human dignity. None of them deals with the difficult verses of the Qur'ān which seem to contradict human rights standards⁷⁶ and cause hermeneutical problems.⁷⁷ The perspective and basis of the argument underlying all the articles is thus the hierarchy of laws (with international law on the top) and the role of the international community in acting as an instance of control over the national legislation.

Whereas Kūlāī's article is from 2007 and thus from the high point of the protest against the Draft Bill, the other articles are older. However, Kūlāī, who also participated actively in the Women's Movement and gave interviews, did not mention the Draft Bill in her article. The other two authors, Mawlāverdi and

⁷² Ibidem, p. 213.

⁷³ Ibidem pp. 213-215.

⁷⁴ Ibid., 215

⁷⁵ Said Amir Arjomand, "Authority in Shiism and constitutional developments in the Islamic Republic of Iran", in: Werner Ende / Rainer Brunner (Eds.), *The Twelver Shia in Modern Times*, Leiden 2001, pp. 305-336 (on p. 314).

⁷⁶ Cp. Sura 4 (النساء), Verse 34:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ لِيُظَاهِرْنَ وَأَهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنِ أَطَعْتِكُمْ فَلَا تُغْوُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا.

For the difficult interpretation of Sura 4 (النساء), Verse 34, "Men are above women...", see, for example, Kecia Ali, *Sexual Ethics and Islam*, Oxford 2006, pp. 112-134.

⁷⁷ See Ann Elizabeth Mayer, "Die Konvention über die Beseitigung jeder Form von Diskriminierung der Frau und der politische Charakter 'religiöser' Vorbehalte", in: Mechthild Rumpf / Ute Gerhard / Mechthild Jansen (Eds.), *Facetten islamischer Welten*, Bielefeld 2003, pp. 103-122.

Ebadi, took an active part in the Women's Movement, too, but in their published statements and interviews they did not hint at international law either. When asked in interviews, Mawlāverdi and Ebadi⁷⁸ supported the idea of Iran signing CEDAW⁷⁹, arguing that it would mean an improvement for the national legislation with regard to women's rights. Ebadi, however, conceded that the signature of an international convention did not automatically mean an improvement in the legislative activity of Iran, as seen, e.g., with regard to CRC (which Iran has signed). She confirmed that, in political contexts, she used religious, i.e. "mazhabī", arguments.⁸⁰

Asked why Iran did not sign CEDAW, Zaynab Raṅḡbar, a representative of the judiciary, pointed to differing gender concepts in the west and Iran. According to the latter, the biological difference causes differences in the social and family life which is reflected in the legal regulations of the Islamic Law.⁸¹ Since the rejection of CEDAW by the Council of Guardians in 2003, CEDAW is stranded in the Assessment Council and – according to the opinion of Ašraf Gerāmīzādegān, a lawyer and member of the legal committee of the Office of Women's Affairs of the Ministry of the Interior (*Komīte-ye hoqūqī-ye daftar-e omūr-e bā-nuvān-e Vezārat-e kešvar*), it will not be discussed in the near future.⁸² Whereas Raṅḡbar⁸³ explained the reasons for the non-ratification of CEDAW in terms of gender roles, and Sāne'ī⁸⁴ saw the main points of divergence from international human rights standards in the Iranian law of inheritance and divorce, the opinion was often expressed that ratification of CEDAW would have a positive influence on the legislation process in Iran towards more gender equality.⁸⁵

Legal arguments are used by lawyers and persons trained in law as well as by participants of the Women's Movement, but, perhaps not surprisingly, not by scholars of *fiqh*. Legal arguments are used by jurists who are part of the civil

⁷⁸ I did not conduct an interview with Kūlā'ī.

⁷⁹ Interviews with Mawlāverdi, 29 October 2008; and with Ebadi, 1 November 2008.

⁸⁰ Ebadi, interview on 1 November 2008

⁸¹ Raṅḡbar, interview on 15 October 2008. This Islamic-justified concept of gender relations is common in Iran. See also the interviews with Alusvand on 11 November 2008. *Shahen Sardar Ali*, *Gender and Human Rights in Islam and International Law. Equal Before Allah, Unequal Before Man?* The Hague, 2000, p. 61, calls this kind of right "protective" rights and makes a clear distinction between this and gender equality.

⁸² Gerāmīzādegān, interview on 10 November 2008.

⁸³ Raṅḡbar, interview on 15 October 2008.

⁸⁴ Āyatollāh Sāne'ī, interview on 12 November 2008.

⁸⁵ Ebadi, interview on 1 November 2008; Mawlāverdi, interview on 29 October 2008; Gerāmīzādegān, interview on 10 November 2008. All three women are jurists trained in law (not *fiqh*).

society such as Ebadi and Mawlāverdi, but also by jurists and persons who are connected to the state such as Raṅḡbar and Āliyā.

II. The *fiqh* Arguments

An unnamed member of the judicial commission of the parliament stated that the omitted Article 23 was “absolutely Islamic” (*‘ayn-e ḥwāsteh-ye Eslām*) and that the parliament originally wanted “to solve some of the actual women’s problems and the problems of society with the application of the opinion of Islam”. He criticised the elimination of the article and argued that the parliament should have made the aim of the article clearer. Furthermore, Salmān Zāker, a member of the judicial and legal commission of the parliament (*Komīsiyūn-e qaṣā’ī va ḥoqūqī-ye Maḡles*) stated: “Many women have no problem with the polygamous marriage of their husband, polygamy is based on (Islamic) law (*šar’*) and with the first wife’s permission it is nothing wrong. When eliminating this Article 23 the Parliament has blocked the way for the solution of women’s problems”, whereas Farīdeh Gayrat, a lawyer, answered that the actual problem for women in Iran is their difficulty to get a divorce. No woman in the world would accept a second marriage of her husband.⁸⁶

Āyatollāh-e ‘ozmā Šāne’ī,⁸⁷ who, according to the Middle Eastern newspaper *Al-Šarq al-Awsaṭ*, is the “women’s Muftī”⁸⁸ and who resides in Qom, found clear words: the polygamous marriage of a man without consent of his first wife is forbidden and a sin (*ḥarām va-gonāh*) and from the viewpoint of law it is a crime (*ḡorm*). It is against justice (*ḥelāf-e ‘adālat*)⁸⁹ and he expresses his hope that this injustice (*ḡolm*) will not become law.⁹⁰ He is not generally opposed to polygamy, but he wants to limit the injuries women may suffer from it, whereas Vasmaqī argues that polygamy is disapproved (*makrūh*).⁹¹ According to the open letter of November 2007, Article 23 is to be considered a step backwards (*‘aqabmāndeh*) in the exegesis (of the holy texts). The state is accused of con-

⁸⁶ <http://www.irwomen.info/spip.php?article6288> (accessed on 17 January 2008).

⁸⁷ Cp. <http://www.saanei.org/page.php?pg=showzanan&id=128&lang=fa>: *ḥoqūq-e zanān; ezdevāḡ-e muḡaddad* (accessed on 17 January 2009).

⁸⁸ <http://www.asharqalawsat.com/details.asp?section=4&issue=10336&article=411000> of 17 March 2007, No. 10336 (accessed on 17 January 2009).

⁸⁹ See also *Šadīqeh Vasmaqī*, *Zan, fiq, Eslām*, Tehran 1387/2008, 44; Fāṭima Āliyā: <http://meydaan.org/wwShow.aspx?wwid=520> (accessed on 22 December 2008).

⁹⁰ Husband and wife should live peacefully together and the rights the husband has towards his wife are the same the wife has towards her husband. If one has a right which is forbidden (*ḥarām*) for the other, this is against justice, see www.saanei.org/page.php?pg=showzanan&id=128&lang=fa (accessed on 22 January 2009).

⁹¹ *Šadīqeh Vasmaqī*, *Zan, fiq, Eslām*, supra, footnote 86, pp. 45-46.

sidering polygamy from a conservative point of view (*dādgāh-e sonnati*),⁹² and of seeing polygamy (in the Draft Bill) as a fixed religious rule (*ḥokm-e dā'emī-ye dīnī*) and not a rule which can be interpreted according to the conditions of the time (*movaqqatī*), whereas in the Qur'ān the condition of justice is given (Sura 4 [النساء]: Verse 3, Sura 4 [النساء]: Verse 129).⁹³ It is from this point of view that it is argued in the letter, that the principle (*aṣl*) in the law is monogamy, polygamy is only allowed (*mobāḥ*).⁹⁴ It should not be seen as a fixed rule (*ḥokm-e dā'emī*) in the sense of an unchangeable interpretation of the Qur'ān.⁹⁵

Polygamy, it is furthermore argued, might have been a habit in tribal times in the beginning of the Islam, but is not fit for the conditions of today's society.⁹⁶ Another argument focuses on the first wife's permission being a legal condition. Āyatollāh Moḥaqqueq-e Dāmād,⁹⁷ pointing to Khomeini's (d. 1989) prohibition of such a condition and Kho'ī's (d. 1992) acceptance of it, argues for accepting this condition. This is because it is a condition of the contract (*shart-e demn-e 'aqd-e nekāh*) and as such it is a *šart-e 'orfī*, i.e., a customary condition usually stipulated in the marriage-contract and widely accepted in society. In consequence, he states, '*orf* – here in the understanding of a condition usually used by the people (*šart-e 'orfī*) – can be changed into *fiqh-e šrī*. This is an important statement with regard to the process of development of Islamic Law as accepted by the Shiite clergy.⁹⁸

Several chapters of Ṣadīqeh Vasmaqī's book *Zan, fiqh, Eslām*, which was published in December 2008 and much awaited by the Women's Movement, concern the problem of polygamy and the first wife's permission for a further marriage as a stipulation in the marriage contract.⁹⁹ Vasmaqī argues, using the clas-

⁹² Cp. <http://www.aftabnews.ir/vdcecpq2b1qee.html>, supra, footnote 56.

⁹³ Ibidem.

⁹⁴ Ṣadīqeh Vasmaqī comes to a different evaluation and calls it *makrūh*, see *Ṣadīqeh Vasmaqī, Zan, fiq, Eslām*, supra, footnote 86, p. 44.

⁹⁵ Cp. <http://www.aftabnews.ir/vdcecpq2b1qee.html>, supra, footnote 56.

⁹⁶ See Sanei www.saanei.org/page.php?pg=showzanan&id=128&lang=fa, ḥoqūq-e zanān; ezdevāḡ-e muḡaddad (accessed on 17 January) 2009; *Ṣadīqeh Vasmaqī, Zan, fiqh, Eslām*, supra, footnote 86, p. 49.

⁹⁷ Interview with Moḥaqqueq-e Dāmād on 16 October 2008.

⁹⁸ I was not, however, able to obtain Moḥaqqueq-e Dāmād's officially published article or fatwā on the topic. I used the information he gave me in the interview.

⁹⁹ *Ṣadīqeh Vasmaqī, Zan, fiqh, Eslām*, supra, footnote 86, pp. 43-92: The chapters on polygamy and the stipulation of the first wife's permission in the contract and an empirical study on polygamous families. These eight chapters were published earlier in 2008 as a booklet under the title *Ṣadīqeh Vasmaqī, Čandhamsarī va Eslām*, Tehran 2008, and distributed free of charge by the Maḡmū'e-ye entešārāt-e aḡoman-e zanān-e pažūhešgar-e tārtī.

sical Islamic Law categorisation, that polygamy is disapproved (*makrūh*), because according to the Qurʾān justice might not be possible. After dealing with social and psychological arguments against polygamy as the impossibility of men to manage a polygamous family in today's Iranian society, she returns to judicial arguments and discusses the role of stipulations in contracts, arguing, with reference to Šayḥ Murtaẓā Anšārī (d. 1864) that conditions are to be kept. Making illegal (*tahrīm*) rulings that are acceptable (*mobāḥāt*) is allowed (*ǧāʿez*).¹⁰⁰ Some jurists thought this condition in the contract is not void (*bāṭel*), but that the wife should have the right to divorce.¹⁰¹ She argues, however,¹⁰² that the condition of “not-taking another wife” has to be fulfilled,¹⁰³ because it is an inherent part of the contract (*ǧozʾi az rokn-e ʿaqd*).¹⁰⁴ Thus, she concludes, legal measures have to be taken to anchor this condition in legislation and ignorance has to be punished.¹⁰⁵

The hermeneutical discussion in Iran does not go so far as it does, for instance, in Tunisia, where polygamy was completely forbidden in the middle of the twentieth century on the basis of a new interpretation of Sura 4 (النساء): Verse 3.¹⁰⁶ In the text of the Draft Bill, it is stated, that certain laws have been found incompatible with the *šarʿa* and nothing is said about different interpretations. State representatives point to the permission of polygamy. Different interpretations are used as an argument, mainly in the open letter to the parliament and by jurists and lawyers like Mawlāverdi and Vasmaqī but also by the Shiite clergy. In the letter, the state's interpretation of Islamic Law is called “backward”, the Draft is seen to be against the *šarʿ*.¹⁰⁷ The Shiite *fuqahāʾ* like Moḥaqqueq-e Dāmād, Sāneʿī and Vasmaqī, being professors of *fiqh*, on the other hand, go into more detail and try to argue on the basis of new hermeneutical approaches.

¹⁰⁰ Šadīqeh Vasmaqī, Zan, fiqh, Eslām, supra, footnote 86, p. 77.

¹⁰¹ Ibidem, on p. 81.

¹⁰² Ibidem, on p. 83.

¹⁰³ Ibidem on pp. 86-87.

¹⁰⁴ Ibidem on p. 88.

¹⁰⁵ Ibidem, on p. 89.

¹⁰⁶ Alusvand, interview on 11 November 2008, based her argument on the different gender roles which imply not equality but different roles in society and thus also different legal regulations for the sexes. See also Raṅǧbar, interview on 15 October 2008, with a similar gender concept. She also did not accept the Tunisian approach, whereas more modern oriented women like Maryam Moḥaqqueq, daughter of the Āyatollāh Moḥaqqueq-e Dāmād, (interview on 1 December 2008) see in the Tunisian approach a point of orientation.

¹⁰⁷ This is a contradiction: on the one hand, the rule is called a backward interpretation, on the other hand, it is seen to be against *šarʿ*. However, the letter requires an analysis for itself, because its arguments are not well structured but give the impression they had been collected quite by chance from different actors.

Fiqh arguments are used by all sides taking part in the discourse; the Shiite clergy, the state and civil society. It is evident that every side is anxious to show that the argument it uses is compatible with Islam.

III. Social, psychological and cultural Arguments.

Besides legal and *fiqh* arguments, arguments which concern society and the individuals as well as the whole of Iranian culture are put forward.

1. Society

The main argument is that the changing conditions of society have to be taken into consideration, that women's position in society has changed, that more women are educated and have more and more important positions in society. Ḥasan Ḥamīdiyān from the judiciary gave these changing conditions as a reason for the new family law represented by the Draft Bill.¹⁰⁸ This argument is often used in connection with the argument that institutions which were accepted at the Prophet's time cannot be accepted in Iranian society of the twenty-first century.¹⁰⁹ It is argued that fathers in polygamous marriages cannot perform their family duties correctly and thus cannot be just;¹¹⁰ that the rights of the first wife have preference and the children have to be taken into consideration; that polygamy causes trouble and chaos in families; that divorce and single-parent families are the consequences;¹¹¹ and that polygamy actually concerns only 5% of men in the Iranian society, who can afford to have a second wife, and ignores the interests of 50% of Iranian society, i.e. women.¹¹²

¹⁰⁸ Interview on 12 October 2008.

¹⁰⁹ *Ṣadiqeh Vasmaqī*, Zan, fiqh, Eslām, supra, footnote 86, p. 22, p. 41, p. 47, p. 48, p. 56.

¹¹⁰ Ibidem, pp. 56-58. This is without any references.

¹¹¹ Ibidem, pp. 47, pp. 56-60; see <http://www.aftabnews.ir/vdcepq2b1qee.html> (accessed on 19 December 2008).

¹¹² Cp. <http://www.aftabnews.ir/vdcepq2b1qee.html>, supra, footnote 56. During the events it was revealed that more than 60 members of the Parliament have more than one wife, see <http://meydaan.org/showArticle.aspx?arid=660> dated 24 Mordād 1387/14 August 2008 (accessed on 12 January 2009). There is no critical historical or empirical research on the traditional role of polygamy, the main social strata in which polygamy is practised or the economic or social circumstances of polygamy in Iranian history and present society. Polygamy is simply seen in many discussions as a cultural relict not fitting into the modern Iranian society, but mostly the definition of "modernity" is not given. See, however, http://sociologyofiran.com/index.php?option=com_content&task=view&id=770&Itemid=65 (accessed on 17 January 2009). According to an empirical study quoted in this report, the number of polygamous men rose between 1977 and 1987. In 67% of cases where women kill their husband it is because of another sexual relation the man had (or another wife) or at least because this was suspected by the women. Women are four times more likely to commit suicide than men.

Under the FPA of 1975 (Art. 16), polygamy was lawful, for instance, in the case of infertility or illness of the first wife. That is not always the case, however. Vasmaqī cites a sample of 23 polygamous marriages, where most men who wanted a second wife already had children (in 20 out of 23 marriages), and that they wanted a second wife after 15 years and more of marriage. Some married without informing the first wife, some even in spite of the first wife's protests. In the course of events, nine divorces occurred, two wives were sent away without being financially compensated, in three cases children were separated from their mothers, and all children were unhappy with the second marriage. One second marriage even remained undiscovered for 16 years.¹¹³

Generally, polygamy is said to endanger the structure of the family. The metaphor used here is "earthquake" (*zelzele*). The scenario is depicted according to which women will be divorced and Iran will face the problem, which is typical for western countries, i.e., many single-parent families with women and their children living alone, children growing up without a father. This argument, in the open letter to the parliament, is chosen with deliberation, because it supports the government's arguments against the moral decay in the West on the basis of a society based on individualism and materialism against the Islamic concept of the family as the heart of society.¹¹⁴ Interestingly the "earthquake" argument was used by Maḥmūd Hāšemī Šāhrūdī when he declared the elimination of the two articles from the Draft Bill.¹¹⁵

2. Psychological Aspects

Polygamy damages society and puts women and children under pressure, because no woman can feel safe that her husband will not take a second wife, and this feeling of insecurity is also passed onto the children. Hostility, malevolence, loss of loyalty and aggression as well as violence in the family will grow. How can a woman be loyal to a polygamous husband? This is the question the women ask the women in their letter to the parliament. Men will marry young women and children will grow up with a bad example of the male sexuality.¹¹⁶

The category of "social" and "psychological" refers to an alleged disapproval of polygamy in modern Iranian society – where "modern" is nowhere defined – and plays with the government's ideological position on the Islamic family as

¹¹³ *Šadīqeh Vasmaqī*, Zan, fiqh, Eslām, supra, footnote 86, pp. 91-92: these examples cannot be called an empirical study, there is no thorough analysis of the cases and no methodology referred to.

¹¹⁴ Cp. <http://www.aftabnews.ir/vdccepq2b1qee.html>, supra, footnote 56.

¹¹⁵ Cp. <http://www.vol.at/news/CO:austria:politik/artikel/iranisches-parlament-kipt-gesetze-ntwurf-zur-polygamie/cn/news-20080909-02494174> from 9 September 2008 (accessed on 15 January 2009).

¹¹⁶ Cp. <http://www.aftabnews.ir/vdccepq2b1qee.html>, supra, footnote 56.

opposed to the individualistic Western society, in which divorce and one-parent families are signs of the breakdown of society. And these arguments express the fear that the situation created by the Draft Bill will lead to a psychological strain for women and children.¹¹⁷

These arguments are, in the overwhelming number of cases, used by actors of the civil society and its activists. But the social context of legislation is also reflected in the judiciary, as Ḥamīdiyān and Šāhrūdī's statements show. The Islamic aspect of this argument stresses the legality and custom of polygamy in the Prophet's time, which, however, is no longer suitable for the society of today.

F. Conclusion

The elimination of Articles 23 and 25 from the Draft Bill surely can be considered as an important step in the dynamic process of negotiation between civil society and the state. A superstructure of civil society organisations emerged and succeeded in revising state legislation. Obviously the topic was important enough to bring together organisations with completely different social, political and ideological or religious backgrounds. The civil society's success caused international sensation. This was reached on the basis of non-violent means, with arguments, with discursive power. It turned out that public discourse brought forward by oppositional groups can exert a certain pressure on the government and state policy and thus lead to a revision of policy. In Islamic concepts this process was connected to the concept of *maṣlaḥat*, the public welfare.

Civil society in Iran is not only well structured – as the actions in the “One Million Signatures” and the visit to the parliament show – but also completely independent of the state. It is thus a civil society mostly composed of non-governmental organisations and many individual actors, which is in opposition to the political system. Being in an authoritarian system, the civil society actors' aim is (sometimes uttered expressly) to press for more democracy. The state hit back, accusing the civil society actors of being influenced by the west and being anti-Islam. This argument brings into discredit their request: being an Islamic Republic the state does not accept western value systems and explicitly rejects arguments based on the western discourse. As the process is still ongoing, the chances that this pressure and common activity will lead to more democracy in Iran are open. As stated above, the state gave in with regard to the elimination of the two articles, but started to harass the participants of the Campaign of “One

¹¹⁷ See: <http://meydaan.org/wwShow.aspx?wwid=495> from 13 Šahrīvar 1386/ 4 September 2007 (accessed on 6 January 2008).

Million Signatures” as well as all participants of the discourse on the Draft Bill who were critical of the state. In this context, it is worth considering another draft Bill, which is being discussed at the time of writing in the parliament: the Draft Bill on the Penal Code. It is not possible to go into details here, but it has to be stated that this draft Bill aroused much international attention for inserting the death penalty for apostasy into the Iranian Penal Code.¹¹⁸ The *hadd*-penalties are still given in this draft, which contradict international human rights norms. Gender inequality can be found, for instance, in the different amounts of blood-money (*diyeh*) for males and females, the blood-money for females being half the amount due for males. There is much criticism expressed by civil society, especially human rights organisations, to this draft Bill.¹¹⁹ The question arises whether this criticism as in the case of the Draft Bill on Family Law will lead to substantial changes in the proposed legislation.

With regard to the Draft Bill on Family Law the question remains, why only two issues out of the many criticised provisions dominated the discourse: the permission of the first wife for the husband taking a second wife and the taxation of the dowry.

The answer with regard to the first wife’s permission can be seen, I think, in the history and development of this ruling in the Iranian legal system as well as in society. Despite the lack of attention in the classical *fiqh*, the ruling concerning the first wife’s permission was made law in the FPA of 1975. Obviously, in the course of time, it became a custom (*’urf*) in Iranian society, inserted into many marriage contracts¹²⁰ and thus widely accepted as a right of women in society. The legal situation was ambivalent, because Khomeini suspended the FPA of 1975 without obviously eliminating it.¹²¹ In spite of the decision of the Council of Guardians the first wife’s permission seems to have had public prestige as

¹¹⁸ Often the juvenile criminals are kept in prison until they are 18 and are then hanged, see: <http://www.stopchildexecutions.com/> (accessed on 17 January 2009).

¹¹⁹ The text of the Draft Bill on the Penal Code can be found on the internet: http://www.dadkhahi.net/law/Ghavanin/Ghavanin_Jazae/layeh_gh_mojazat_eslami.htm, (accessed on 17 January 2008); for a critique from a feminist point of view see: <http://meydaan.org/ShowArticle.aspx?arid=527> (accessed on 17 January 2008).

¹²⁰ At this point a quantitative empirical study of the use of this stipulation in marriage contracts would be of use.

¹²¹ It is especially disappointing that no statistics and no empirical research exist on polygamy in Iranian society. It is simply not possible, whatever the human rights activists state, that polygamy does not play any role in Iran as there are polygamous marriages and as, as stated above, some 60 members of the parliament seem to live in polygamous marriages. But the topic of polygamy is, according to my impression, a taboo for modern sociological research in the country.

well as social acceptance. It was, after all, obviously politically not enforceable to override the need for this permission and restrict the permission of the second marriage to the court.

This is why this Article 23 can be seen as a good example of how legal rulings gain customary acceptance (*‘orf*) and this can lead to an alteration of Islamic Law. Surely the social situation in Iran has to be taken into consideration. As stated above the number of educated women has increased since the Revolution and many women today have a good education. Having a good education will often lead to more critical assessment of traditional norms that are often disadvantageous for women: but the whole interaction of public discourse, education, civil society action and political pressure is still poorly understood for the lack of solid research.

The events and discussions about Articles 23 and 25 can be seen as an example of the development of law in a state that considers itself strictly Islamic, basing its legislation exclusively on Islamic principles. This framework influences the discussion: The arguments used in the political context, such as the public media and the open letter to the parliament, are first of all based on Islamic Law, which is used as an argument by all participants in this discourse. Furthermore, arguments from the Iranian legal system and social arguments play an important role, but not arguments based on international human rights standards. Even if CEDAW is dealt with in academic articles, it seems never to be used as an argument in the political context. The same persons who use Human Rights as an argument in their published books and articles do not use them as an argument in the direct confrontation with the domestic political system. There is, as Foucault would call it, a clear “taboo of the topic” concerning human rights according to the UN standard in the Iranian political discourse.

The human rights situation in Iran clearly still shows many discrepancies between the international standards and the domestic legislation. Many laws contradict gender equality and there is no official statement of the government of the Islamic Republic to change this. The discrepancy is even justified by jurists in state service, as well as scholars, as based on a distinctive, Islamic gender model (Ranġbar, Alusvand). Arguments based on international human rights, which were used in Khatemi’s time from 1997 to 2005¹²², are not acceptable under President Aĥmadineġad (2005-). Thus international human rights instruments cannot have any direct influence on the Iranian legislation, even if many human rights activists would still welcome Iran’s signature of CEDAW. What

¹²² *Said Amir Arjomand*, “Civil society and the rule of law in the constitutional politics of Iran under Khatami”, *Social Research*, volume 76, issue 2, New York 2000, pp. 283-301.

seems possible is the approach of civil society, which makes itself heard, redefines *maṣlaḥat* and, on the basis of an Islamic discourse, rebuilds a – social and political, but also legal – process of development in Iranian society. So that “custom” can become “law” – even against classical *fiqh* and the government’s interpretation of Islamic Law.