CHAPTER VII

TUNISIA

I

REFORM OF THE CLASSICAL FAMILY LAW

Formerly an autonomous province of the Ottoman Empire, Tunisia became a French Protectorate after the La Marsa Convention of 1883. In 1956, she attained the status of an independent nation and later, in 1957, became a Republic. Under the present Constitution of Tunisia Islam is the state religion. The school of Islamic law followed by a predominant majority of Tunisian Muslims is that of Imam Malik.

The background in which Islamic family law was codified and reformed in Tunisia was not much different from that in Egypt and other Middle Eastern countries. An overwhelming majority of Muslims in Tunisia followed the Malikī school before the Turkish domination in the country. The Hanafī School of Islamic law which was officially adopted by the Empire later had its influence in Tunisia as well. The Hanafī law did not, however, wholly replace the Malikī legal system in Tunisia. Consequently, a particular case had to be decided according to the law of that school to which the parties belonged. Since these two legal systems had divergent principles, there remained no uniformity in Tunisia in respect of family law.

After the separation of Tunisia from the Ottoman Empire, some lawyers in the country began thinking of a uniform family code based generally on the Malikī law. At the same time, they were inspired by the codification and reform of family law in Egypt, the Sudan, Jordan and Syria. Some jurist-theologians of Tunisia, therefore, unofficially prepared a monograph setting in parallel columns the corresponding provisions of the Malikī and the Hanafī schools, relating to various legal matters including family law. This monograph was called the Lāihāt al-Majallat al-Ahkām al-Sharī'yya (draft code of the laws of Shari'a). Subsequently, another draft code was officially prepared on similar lines by the Shaykh al-Islāmi of Tunisia,

Muhammad Ju'ayt, with the assistance of a committee of some leading lawyers of the country. In 1956, the Tunisian legislature enacted, and mainly on the basis of the said two works, a new uniform code of personal status called the Majallat al-Ahwal al-Shakhsiyya. It was enforced throughout the country on the first day of January 1957. It was modified and supplemented several times between 1959 and 1964. As amended up-to-date, the Code deals, in twelve bulky Books, with marriage, divorce, maintenance, 'idda, custody of children, paternity, filiation, intestate and testamentary succession, etc. Although based generally on the Mālikī law, the new Code includes a few principles derived from some other schools of Islamic law as well. Further, a few reforms introduced into family law by the Tunisian Code are of a revolutionary nature and distinguish it from its counterparts in other Arab countries.

II

SALIENT FEATURES OF THE TUNISIAN CODE

Following is a summary of the major provisions of the Tunisian Code of Personal Status, 1956.

A—LAW RELATING TO MARRIAGE, ETC.

MARRIAGE-AGE

Men and women in Tunisia can freely marry on the completion of twenty years of age. A girl who has completed her seventeenth year can, however, validly marry with the permission of her guardian, and if such a girl wishes to marry but her guardian does not permit her to do so, the case shall be decided by the Court. The Court may also authorise the marriage of a boy below the age of twenty or a girl below the age of seventeen years, if there are ‘grave reasons’ for that.

MENTAL CAPACITY

Consent of the guardian is essential for the marriage of an insane; if the marriage of such a person is solemnized without the guardian’s consent, the latter can apply for its cancellation by the Court before it is consummated.

4. See infra. 107 n.
5. Article 5 as amended by Law No. 1 of 1964.
6. Article 6.
7. Article 5.
8. Article 7.
STIPULATIONS IN A MARRIAGE-CONTRACT

Parties to an intended marriage may agree to incorporate any stipulations in their marriage-contract; violation of such a stipulation shall be a ground for the dissolution of marriage and if it occurs after the consummation of marriage it shall also entitle the aggrieved party to an indemnity to be paid by the party who is guilty of violation.9

POLYGAMY

Article 18 of the Tunisian Code says that "plurality of wives is prohibited". It also provides a penalty for persons marrying again during the subsistence of a valid marriage. Till 1964 there had been a controversy in Tunisia over the correct interpretation of the provisions of article 18. It was doubtful if a bigamous marriage would be invalid 

per se or would only make the husband liable to the prescribed penalty. The Amendment Law of 1964 settled the controversy by including bigamous marriages in the list of invalid (fāsid) marriages.10

INVALID MARRIAGES

Besides a bigamous marriage, the following marriages shall also be invalid (fāsid) under the Tunisian law:11

(a) a marriage with a condition which is contrary to the essence of the marriage,12
(b) a marriage without the consent of either spouse,13
(c) a marriage contracted before attaining puberty or to which there is any other legal impediment,14
(d) a marriage within any of the prohibited degrees,15 and
(e) a marriage with a woman observing ‘idda.16

An invalid marriage shall be compulsorily annulled. If such a marriage takes place and is consummated, it will give rise to the wife's right to dower and obligation of ‘idda, and also to legitimacy of children and bar affinity, but not to mutual rights of inheritance between the spouses.17

DIVORCE

A unilateral pronunciation of divorce is no more possible in Tunisia. A divorce can now be effected only by a Court. The Court can grant a divorce

9. Article 11.
10. Article 21 as amended by Law No. 1 of 1964.
11. Article 21.
12. Ibid.
13. Article 3.
15. Articles 15 to 17.
17. Article 22.
when demanded by the wife on the ground of husband's failure to provide maintenance, or when the spouses mutually agree about it. The Court may also grant a divorce when either spouse unilaterally insists on divorce, in which case such spouse shall have to pay an indemnity to the other. A decree of divorce shall, under all circumstances, be given only after the failure of all possible efforts to effect a reconciliation between the spouses.

**TRIPLE DIVORCE**

Under the law of Islam, a husband can divorce his wife thrice. With a view to putting a check on the pre-Islamic practice of innumerable divorces followed by revocation or remarriage leaving the wives in a pitiable condition of uncertainty, Islamic law had introduced the concept of *baynūnāt al-kubra*, literally a ‘big interval’. When a husband divorces his wife for the third time, a *baynūnāt al-kubra* is established between the divorced couple and the man cannot remarry the divorcee. The law, however, recognises a device which would remove the obstacle. It is the marriage of the woman with a third person, its consummation and dissolution followed by *'idda*. This device is sometimes misused by Muslims. A husband desiring to remarry his triply-divorced wife would contract her into marriage with one of his close relatives with an understanding that the intervening marriage will never be consummated and that a divorce would follow after which the first husband would again marry her. No school of Islamic law recognises this law-evasive measure. Various laws recently enacted in Muslim countries have dealt with the problem and, generally, have expressly provided that the intervening marriage in such cases should not have been contracted with a planned dissolution (*qasāl al-tahlil*). In Tunisia, article 19 of the Code of 1956 says that a man is forbidden to marry his triply-divorced wife, and article 14 describes ‘triple-divorce’ as a ‘permanent impediment’ to marriage. There has been a controversy over the interpretation of these provisions of the Tunisian Code and it is not yet certain whether a triply-divorced wife cannot marry her former husband even if the resulting bar has been removed in accordance with the procedure prescribed by law.

18. Article 31(a) read with article 40.
19. Article 31(b).
20. Article 31(c).
21. Article 32.
22. Anderson 'Tunisian Law of Personal Status', *op. cit.*, note 2, at 277. The learned critic is of the opinion that a Tunisian husband can never remarry a wife whom he has divorced thrice. He, however, also refers to the opinion of Shaykh Fādil ibn 'Āshur, a Tunisian scholar, who disagreed with him and expressed the view that remarriage with a triply-divorced wife was forbidden only so long as she remained a “divorced wife” and that as her status changed with her second marriage, the first husband could marry her after the dissolution of the second marriage. Some Tunisian lawyers in London expressed to the author of the present book their full agreement with Shaykh Fādil's view.
MAINTENANCE OF WIFE

The Tunisian Code enforces the principles of Mālikī law relating to the wife's right to get maintenance from her husband. Article 41 provides that it is permissible for a wife to spend her own money on her maintenance with an intention to seek reimbursement by the husband. While fixing the amount of maintenance regard shall be had to the capacity of the payer and the status of the payee and also the cost of living at a particular time.23

CUSTODY OF CHILDREN

Articles 54 to 67 of the Code provide in detail the legal rules relating to rights and obligations of parents and other guardians relating to custody of children (hadāna). These provisions are generally based on the traditional Mālikī law. The Code, however, authorises the Court to extend the normal period of custody in the interest of a child.24

LINEAGE AND GESTATION

Acknowledgement and repudiation of filiation form the subject of Book VI of the Tunisian Code. The maximum period of gestation has been fixed at one year, and a child born to a woman later than one year from the date of her separation from the husband on account of his death, divorce, or otherwise, shall not be presumed to be legitimate.25 Ordinarily, six months shall constitute the minimum period of gestation, unless a valid acknowledgement of paternity is made.26 The law also provides that an acknowledgement of filiation shall have no effect in a case where there is positive evidence negativing it.27 The traditional procedure of ‘Mutual Imprecation (li'ān),28 to be followed in a case of repudiation of paternity by the father, has been replaced by a perpetual separation between the spouses to be effected by the Court.29

B—LAW OF SUCCESSION

(a) LAW RELATING TO INHERITANCE

Book IX of the Tunisian Code of Personal Status (articles 85 to 152) deals with intestate succession. Generally the provisions of this part of the Code represent a mere codification of the traditional Mālikī law of inheritance which has always been followed in Tunisia. Anderson has said:

23. Article 52.
25. Article 69.
26. Article 71.
27. Article 70.
28. See Fyzee, Outlines, 158-59.
29. Articles 75-76.
The Mālikī law of intestate succession has been followed virtually exclusively in Tunisia even among those families which otherwise observe Hanafi principles—and this is faithfully reflected in the codified law.30

A few provisions in Book IX of the Code are, however, different from the corresponding principles of the Mālikī school. These have been based on or derived from the opinions of jurists belonging to some other schools of Islamic law. The following are more important among these provisions.

EXCLUSION OF A KILLER-HEIR

Article 88 of the Tunisian Code provides that an heir who has intentionally caused the death of the propositus, whether as a principal or as an accessory, or as a witness giving false testimony in a case leading to his death, shall have no right to inherit from the deceased.

RIGHTS OF THE SURVIVING SPOUSE

The scope of the Doctrine of Return as laid down in Article 143A of the Code31 is different from how it is applied under the traditional Mālikī law. Unlike the latter, the surviving spouse of the deceased shall not be excluded, under the present Tunisian law, from the benefit of the doctrine. Consequently, if in a case the Qur'ānic heirs do not exhaust the estate and there are no agnatic heirs to take the residue, the former (including the surviving spouse) shall take it in proportion to their fractional shares.32

DAUGHTERS AND SONS' DAUGHTERS

Similarly, in respect of a daughter or son's daughter inheriting as a Qur'ānic heir, the Code provides that she shall take the residue of the estate even in the presence of an agnatic heir like a brother or an uncle.33 This principle places daughters and sons' daughters in a better position in the scheme of inheritance than that given to them by the traditional Mālikī law.31

THE MĀLIKĪ PRINCIPLES

The provisions of Book IX of the Code dealing with general principles of inheritance,35 capacity of heirs,36 entitlement of the Qur'ānic and

31. Added by Law No. 77 of 1959.
32. Article 143A (a).
33. Article 143A(b).
34. A brief discussion of the effect of the incorporation of this principle into the Mālikī law of inheritance and its similarity to the Shi'ia law will be found in Anderson, 'Recent Reforms in the Islamic Law of Inheritance', 14 I.C.L.Q. (1965), 362.
35. Articles 85 to 88.
36. Articles 89-90.
agnatic heirs,\textsuperscript{37} exclusion,\textsuperscript{28} and some extraordinary cases of inheritance,\textsuperscript{29} are all based almost exclusively on the traditional \textit{Mālikī} law of intestate succession.\textsuperscript{40}

(b) LAW RELATING TO BEQUESTS

\textit{Book XI} of the Tunisian Code\textsuperscript{41} deals with testamentary succession and execution of bequests. Some of its outstanding provisions are summarised below.

\textbf{DIFFERENCE OF RELIGION AND NATIONALITY}

A bequest is valid under the Code irrespective of the fact that the legator and the legatee profess different religions.\textsuperscript{42} Where, however, the legatee is a foreigner, a reciprocal transaction shall be essential.\textsuperscript{43}

\textbf{PROOF OF LEGACIES}

A bequest can be proved only by a written document signed and dated by the testator; oral evidence will not be enough to prove it.\textsuperscript{45}

\textbf{BEQUEST IN FAVOUR OF AN HEIR}

In accordance with the traditional \textit{Mālikī} law, article 179 of the Tunisian Code provides that a bequest in favour of an heir shall be invalid. This provision distinguishes the Tunisian law from the corresponding Egyptian and Sudanese laws.\textsuperscript{48}

\textbf{OBLIGATORY BEQUEST}

The principle of obligatory bequest was introduced by the \textit{Egyptian Law of Bequests}, 1946 with a view to making a provision for orphaned grandchildren of propositus.\textsuperscript{47} It was later adopted in Syria and has been enforced also in Tunisia. Under the Tunisian Code, the benefit of obligatory bequest is available only to the first generation of grandchildren, male or female.\textsuperscript{49} Articles 191 and 192 of the Code provide the detailed rules in

\begin{itemize}
\item \textsuperscript{37} Articles 91 to 121.
\item \textsuperscript{38} Articles 122 to 143.
\item \textsuperscript{39} Articles 144 to 152.
\item \textsuperscript{40} The \textit{Mālikī} principles of inheritance will be found in Ruxton, \textit{Mālikī Law} (London, 1927), Chapter IX.
\item \textsuperscript{41} Added to the Code by \textit{Law No. 77} of 1959.
\item \textsuperscript{42} Article 174.
\item \textsuperscript{43} Article 175.
\item \textsuperscript{44} Article 176.
\item \textsuperscript{45} Article 177.
\item \textsuperscript{46} The \textit{Egyptian Law No. 77} of 1946, article 37 and the \textit{Sudanese Circular No. 53} of 1945, article 1.
\item \textsuperscript{47} Articles 76 to 79. see supra, chapter III, 57-58
\item \textsuperscript{48} cf. the \textit{Law of Personal Status}, 1953, article 257.
\item \textsuperscript{49} Article 192.
\end{itemize}
accordance with which the amount of an obligatory bequest in favour of the children of a predeceased child of the propositus is to be worked out. These are identical with the corresponding provisions under the Egyptian law. 50

**Killer-Legatee**

If a legatee is intentionally involved in the circumstances leading to the death of the legator, whether as a principal, an accessory, or a witness whose false evidence leads to punishment of death inflicted upon the legator, he shall not get the benefit of either an optional bequest left by the legator or an obligatory bequest imposed by law. An optional bequest shall, under the Tunisian Code, become ineffective and the law of obligatory bequest will not be applied, in such a case. 51

51. *Article* 198.
APPENDIX TO CHAPTER VII

TEXT OF THE TUNISIAN CODE OF PERSONAL STATUS, 1958*

ENGAGEMENT

1. A promise or an exchange of promises shall not constitute a marriage and shall not be actionable.

2. A person betrothed may recover the gifts which he might have given to the fiancee, save where the break took place on his initiative, or where there exists a condition to the contrary.

CONTRACT OF MARRIAGE

3. No marriage shall be concluded without the consent of both spouses. It is essential for the validity of a marriage that two eligible witnesses be present and the dower be specified.

4. No marriage shall be proved except by a formal deed as prescribed by law. A marriage concluded in a foreign country shall be proved in accordance with the law of that country.

5. Both spouses should have attained the age of puberty and should be free of all legal impediments. A woman shall attain the age of puberty on the completion of seventeen years and a man on that of twenty years. Marriage of a person below such age will depend on the special permission of the Court, which shall be granted only for grave reasons.

6. Marriage of a person who has not attained the legal age of majority shall be subject to the consent of the guardian. If the guardian refuses to give consent to a marriage which a person persistently desires, the matter shall be referred to the Court.

7. Marriage of a person interdicted due to prodigality shall not be valid unless consented to by the guardian; the guardian may demand, before consummation, cancellation of such a marriage by the Court.

8. The guardian shall be an agnatic relative, sane, of the male sex, and major. The father or his executor is the primary guardian of a minor child, male or female; in the absence of a guardian, the Court shall act as guardian.

9. A marriage may be concluded by the spouses themselves or by their agents; the guardian may also delegate his authority.

* This English translation of the Tunisian Code of personal status, 1956 (as amended up to 1964) was prepared by the author of the present study on the basis of its Arabic text found in al-Qada Ba’d Ashar Sanawat (Tunis, 1966).

Whereas Book VII (Foundlings) and Book X (Gifts) of the Code are out of the scope of the present study, Book IX (Inheritance) is virtually based on the Mālikī law of inheritance representing codification and not reform of the said law. These have not, therefore, been included in the translation.
10. No special qualifications are necessary for an agent; he shall not delegate his authority without the principal's consent. Delegation of authority must be made by an express deed mentioning the identity of both spouses, lest it should be void.

OPTION OF STIPULATION

11. 'Choice of stipulation' (khiyár al-shart') in marriage is permissible; if any stipulation is violated, the aggrieved party may apply for dissolution of marriage. Such a dissolution shall not give rise to a right of indemnity, if it occurs before the consummation of marriage.

DOWER

12. Any thing which is lawful and has a monetary value may form the dower. It cannot be a valueless thing, nor is its maximum limited. Dower is wife's property which she may dispose of as she wishes.

13. The husband cannot, unless he pays the dower, force the wife to consummate the marriage. After a marriage is consummated, dower shall constitute an unsecured debt of which only the wife can claim payment.

IMPEDIMENTS TO MARRIAGE

14. There are two kinds of impediments to marriage: permanent and temporary. Permanent impediments are: blood relationship, affinity, fosterage, and triple-divorce. Temporary impediments are: marriage of the woman with another person and 'idda.

15. Women prohibited because of blood relationship are the man's ascendants and descendants, issues of parents and first offspring of every ascendant howsoever remote.

16. Women prohibited because of affinity are wife's ascendants, irrespective of consummation of marriage with her, her descendants, if the marriage with her has been consummated, and wives of one's ascendants and descendants howsoever remote, irrespective of the consummation of the marriage concerned.

17. Relations prohibited by fosterage are the same as under the preceding two articles. The foster-child shall, in particular, to the exclusion of his collaterals, be considered the child of the foster-mother and her husband. Fosterage occurring after the age of two years shall not constitute any impediment to marriage.

18. Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240,000 francs, or to both, even if the second marriage is in violation of any requirements of this law.

19. Marriage of a man with a triply-divorced wife is forbidden.

20. Marriage with a woman married to another person or observing 'idda for him is prohibited.

INVALID MARRIAGES AND THEIR EFFECTS

21. An invalid marriage is one which involves a condition contrary to the essence of a marriage-contract, or which is in contravention of articles 3, 5, 15, 16, 17, 18, 19 and 20 of this Code.

22. An invalid (jäsid) marriage shall be compulsorily annulled without a divorce. The marriage-contract in itself shall have no legal effect. If such a marriage is consummated, the following effects only will follow:

(a) the right of woman to the specified dower,
(b) legitimacy of children,
MUTUAL OBLIGATIONS OF SPOUSES

23. The husband must treat his wife with benevolence, live with her on good terms, refrain from causing any injury to her, and provide maintenance to her and her children in accordance with his and her circumstances. The wife shall, if she has got any property of her own, contribute to the support of the family. She shall submit to the husband as the head of the family and, within the limits, obey him in whatever he orders her. She shall perform her marital duties according to custom and usage.

24. The husband is not the guardian of his wife's property.

DISPUTES BETWEEN SPOUSES

25. If either spouse alleges that the other has caused injury but cannot prove it, the Court, where he is not sure as to who is responsible for injury, shall appoint two arbitrators to look into the matter and, if possible, to effect a reconciliation. In all cases, the arbitrators shall report the case to the Court.

26. Where there is a dispute between the spouses over the ownership of the household goods, and there is no evidence, the husband's words on oath shall be accepted as to those items which customarily belong to men, and that of the wife as to those items which so belong to women; where commercial items are disputed, the word of that spouse shall be accepted who is acquainted with such matters. Items which customarily belong to both men and women shall, upon oath of each spouse, be divided between them.

27. Where either spouse dies and there is a dispute relating to household goods between the heirs of such spouse and the surviving spouse, the rules specified under article 16 shall apply.

28. The husband can, in case of dissolution of marriage, recover from his wife whatever remains with her out of any presents he made to her after the marriage, where the dissolution takes place before consummation for reasons attributable to her. If the dissolution has taken place after consummation, nothing can be recovered.

DIVORCE

29. Divorce means termination of the marital union.

30. No divorce shall take place except before the Court.

31. A decree of divorce shall be given:
   (a) on the demand of the husband or the wife on the grounds specified in this Code.
   (b) when agreed upon by both spouses, and
   (c) when either spouse insists on divorce, in which case the Court shall specify the indemnity which that spouse shall have to pay to the other.

32. No divorce shall be decreed except after the Court has made an overall inquiry into the causes of rift and failed to effect a reconciliation.

Where no reconciliation is possible, the Court shall provide, even if not asked for, for all important matters relating to the residence of the spouses, maintenance, and custody of children.
The Court shall fix the maintenance on the basis of all those facts which it comes to know while attempting a reconciliation.

33. Where divorce occurs before consummation, the wife shall get half of the specified dower (mahr al-musamma).

'IDAD

34. Any woman separated from her husband after consummation of marriage, by divorce, or before or after consummation by his death, must observe the period of 'idda hereinafter specified.

35. The duration of 'idda for a divorcee who is not pregnant is three months, and that for such a widow, four months and ten days. If she is pregnant, 'idda shall last till delivery, the maximum period of pregnancy being one year from the date of divorce or the husband's death, as the case may be.

36. The wife of a missing person (al-mufqid) shall, after a decree of his death is passed, observe the 'idda of death.

MAINTENANCE OF WIFE

37. The causes of maintenance-rights are marriage, blood relationship and contractual obligation.

38. On the husband is binding the maintenance of his wife after consummation of marriage and also after dissolution of marriage during 'idda.

39. Maintenance is not binding on the husband when he is destitute. In such a case, the Court shall give to the husband a period of two months and if he fails to provide maintenance thereafter, shall dissolve the marriage. Where the wife was, at the time of marriage, aware of her husband’s financial difficulties, she shall have no right to claim dissolution of marriage.

40. Where the husband absents himself leaving back his wife, and neither has left property for her maintenance, nor appointed any person to provide maintenance to her during his absence, the Court shall give him one month’s time and if he does not come back within that period, shall dissolve the marriage after the wife proves the allegation by swearing on oath.

41. Where the wife spends on her own maintenance with a mind to seek reimbursement from her husband, she shall have a right to do so.

42. The right of maintenance shall not be lost by the wife by passage of time.

MAINTENANCE OF RELATIVES

43. Two categories of blood relations are entitled to maintenance, parents and grandparents how highsoever, and descendants how lowsoever.

44. Maintenance of parents and grandparents is binding on well-to-do children and grandchildren.

45. In the case of plurality of children, such maintenance shall be binding in accordance with their financial condition, and not according to age or rights of inheritance.

46. Maintenance of minor descendants, how lowsoever, is binding on the ascendants. A girl is entitled to such maintenance till the responsibility is taken over by her husband, and a boy till the age of sixteen years or till he becomes capable to earn.

47. The mother shall, in the event of the father's poverty, precede the grandfather in providing maintenance to her child.
48. Where the mother is unable to 'suckle the child, the father is liable to arrange for fosterage in accordance with custom.

MAINTENANCE BY CONTRACT

49. Whoever undertakes, for a specified duration, the support of another shall discharge the obligation he has undertaken. If the period of the obligation has not been specified, his word shall be accepted.

GENERAL PRINCIPLES (MAINTENANCE)

50. Maintenance includes food, clothing, lodging, education and whatever is regarded as necessary by custom and usage.

51. Maintenance-right lapses when its basis disappears, and he who provides it without a basis can reclaim it.

52. The amount of maintenance shall be determined according to the capacity of the person paying it and the status of the person getting it, and with regard to the conditions of time and costs.

53. Where there are several persons entitled to maintenance and the person responsible for it is unable to maintain all of them, the wife shall have precedence over the children and minor children shall be preferred to ascendants.

CUSTODY OF CHILDREN

54. Hadanā means care of the child in regard to its custody and arrangements for its up-bringing.

55. A woman who refuses to have the custody of a child shall not be compelled to do so unless there is nobody else to do that.

56. If the child owns any property, the expenses of custody shall be paid from it. If it has no property, it shall be paid from its father's property. If the woman has no residence of her own, she shall live in the child's home.

57. During the continuance of a marriage, the parents are entitled to the custody of their children. In the event of dissolution of marriage by death or divorce, the right of custody shall devolve, in order, upon mother, mother's mother, maternal aunt, mother's paternal aunt, mother's maternal aunt, father's mother, father, sister, paternal aunt, father's paternal aunt, his maternal aunt, brother's daughter, father's ancestress, mother's ancestress, brother's son, uncle and uncle's son.

58. A person entitled to the custody of a child must be major, reliable, and capable of undertaking the duties of custody; such person must also be free from all infectious diseases. If the person so entitled is a man, the child, if a female, must be within prohibited degrees of marriage.

59. Where the woman who is entitled to the custody of a child is follower of a religion different from that of the child's father, she can have the custody of the child only up to five years of its age provided there is no risk that it shall become inclined towards her religion, unless she is the guardian of the child.

60. The father and other guardians of the child shall look after the child and its education. The child shall spend nights only with the person having its custody unless the Court otherwise directs in the child's interest.

61. If the woman in custody of a child takes it to a far off place so that its guardian cannot perform his duties, she loses her right to custody.

62. The father shall not send a child out of its mother's home town unless she consents to it or unless the child's interest demands so.
63. The person on whom the right to custody has devolved for any reason other than the physical incapacity of the person primarily entitled thereto shall not live with the child in the residence of the former custodian except with the consent of the Court and in the child's interest.

64. A person entitled to the child's custody may renounce the right in which case it shall pass on to the person next in order. If no other person is available, the person primarily entitled to custody cannot renounce the right.

65. The person having custody of a child shall be entitled to remuneration only in regard to services rendered to the child, e.g., cooking, laundry etc., in accordance with custom and usage.

66. If the child is in the custody of either parent, the other shall not be denied the right to visit and look after it. Any expenses that such a right involves shall be paid by the other parent.

67. A male child shall remain with the custodian up to the age of seven years and a female child up to that of nine years, after which the father shall take over, unless the Court decides, in the child's interest, that it should remain with the person having custody.

LINEAGE

68. Lineage shall be established by valid cohabitation, father's acknowledgement or testimony of one or more eligible witnesses.

69. Paternity of the child of a wife whose non-cohabitation with her husband is proved shall not be established; same will be the case of a child born to a woman one year after separation from or death of or divorce by her husband.

70. Where there is positive proof to the contrary, an acknowledgement shall have no effect. A child of unknown parentage may establish its parentage by acknowledgement provided the person claimed by it to be its parents has children resembling it and it can be believed to be telling the truth. In such a case the child and the acknowledged parent shall have mutual rights.

71. Paternity of a child born to a woman six months after the date of marriage, whether valid or irregular, shall be attributed to the husband.

72. Disproof of a child's lineage shall exclude it from consanguine relationship and from the rights to maintenance and inheritance.

73. An acknowledgement by a person which affects the rights of a third party shall not be recognised. Such acknowledgement shall be valid as regards the person making it provided the third party so affected concurs and the acknowledger has no other heirs. In determining whether other heirs exist or not, the date of the acknowledger's death and not that of acknowledgement shall be taken into consideration.

74. If a child is repudiated by a man after having been acknowledged by him, it shall inherit to the acknowledger where he predeceases it; but if the child does before the acknowledger, the latter shall not inherit to it. In the latter case the property of the child shall be held in trust to be given to the father's heirs after his death.

75. No repudiation of an unborn child or a child shall be effective except by the judgement of a Court all legal means of proof shall be admissible in such cases.

76. Where a repudiation is proved, the Court shall decree a break in the child's lineage and a perpetual separation between the spouses.

MISSING PERSON

81. Every person who has not been heard of and who cannot be located alive shall be considered a missing person (mafsād).
82. If a person disappears in war time, or in exceptional circumstances where the risk of death is greater, the Court shall, after a search not exceeding two years, decree that he be considered a missing person. In all other cases, the period after which such a decree shall be made is left to the discretion of the court.

83. If a person disappears without leaving a legal representative, the Court shall take an inventory of his property and appoint an executor to administer it under Court's supervision till it is decided whether the missing person is alive or dead or could be considered dead in the eyes of law.

84. Any executor appointed by a missing person before his disappearance shall not be discharged after a decree of his death is passed.

BEQUESTS

GENERAL PRINCIPLES

171. Bequest means transfer of property postponed till after death by way of donation, whether of the corpus or the usufruct.

172. Where a bequest is coupled by an invalid condition the bequest shall be valid and the condition inoperative.

173. A bequest is valid in favour of religious institutions and lawfully formed corporations.

174. Difference of religion between the legator and legatee will not invalidate a bequest.

175. Where the legatee is a foreigner reciprocity is essential for the validity of a bequest.

176. No bequest can be proved except by a document or a deed written, dated and signed by the legator.

177. The legator may be consulted about the bequest but this will not be a proof within the meaning of article 176.

178. A bequest made by a person interdicted by insanity or by a person who has completed eighteen years of age is valid if confirmed by the Court.

179. There is no bequest for an heir; nor that of more than a third, except by consent of the heirs given after the testator's death.

180. Specification by the testator, during his life, of the items of his property, or of some of them, if balanced by substitutes, is permissible and shall be binding after his death. What exceeds the substitutes shall be governed by the rules applicable to bequests in favour of heirs.

181. The legatee is entitled to the object of legacy along with any increase therein since the date of the legator's death.

182. A bequest of usufruct is not valid except in favour of a single class and after its expiry the corpus shall revert to the property left by the legator.

183. A bequest in favour of two or more persons, if in excess of a third of the estate, shall be reduced first to a third, and the division shall be made with regard to the intentions of the testator as to preference, etc.

184. A bequest in favour of an unborn child is valid provided it is alive on the date of execution of bequest and is delivered within the period mentioned in article 35 of this Law.

185. Where the object of bequest is destroyed or disappears, the legatee shall get nothing, and where a part of it is destroyed, he shall get the remainder.

186. The object of bequest must be in existence and in possession of the legator at the time of bequest and must be of a definite identity.
187. A bequest in favour of non-heirs shall be executed from a third of the estate without the consent of the heirs.

188. Where there are no creditors and no heirs, a bequest shall be executed even if of the whole property, in preference to escheat to State treasury.

189. Bequest of the usufruct of a definite thing shall be executed during the period fixed therefor and where no such period is fixed, the legatee's right to usufruct shall last during his lifetime, unless the will has some other relevant stipulation in it.

190. A loan of a known amount given from the property by way of bequest shall not be paid from more than a third of the estate without the heirs' consent.

191. If a person dies leaving grandchildren, male or female, whose parent died before him or with him, a bequest shall be binding on such person in favour of such grandchildren of an amount equivalent to the share which the link-parent concerned would have received had he or she died right after such person's death, provided that such a bequest shall not exceed a third of the whole estate of such person.

The grandchildren shall not be entitled to such a bequest:
(a) when they inherit to their father's ascendant—grandfather or grandmother,
(b) where the grandfather or the grandmother, as the case may be, has left a bequest for them or a gift inter vivos equivalent to the amount of the obligatory bequest; if the grandparent has bequeathed to them property less than that, the deficiency shall be made up, whereas if the optional bequest is in excess of the amount of obligatory bequest the excess shall be governed by the general law of bequest.

192. Obligatory bequests shall not be effected except in favour of the first generation of grandchildren, male or female, and shall be divided between them, the male taking double the share of a female.

193. A bequest shall lapse when refused by the legatee or his agent.

194. Renunciation of bequest shall be valid, if made, after the legator's death, within a period of two months from the date of legatee's knowledge of the bequest. Silence of the legatee shall amount to acceptance. If he dies without lawfully renouncing the bequest, his heirs shall represent him from the date of their knowledge of the bequest.

195. Where the legator accepts a part of the bequest and rejects the remainder, the bequest shall become void to the extent of the remainder. In case of several legatees, some of whom renounce the bequest, it shall lapse in relation to them only.

196. Acceptance is not valid if made after renunciation, nor is valid a renunciation after acceptance—unless it is made before the distribution of the property.

197. A bequest shall become void:
(a) where the legator becomes mad and continues to be so till his death,
(b) where the legatee dies before the legator,
(c) where the object of bequest is destroyed before the legator's death, and
(d) where the legatee renounces it after the legator's death.

198. Optional bequests as well as obligatory bequests shall become ineffective if the legatee kills the legator intentionally or is the reason of his death whether as principal, accessory or a false witness whose testimony leads to his execution—provided, in all cases, the killing is without legal excuse and the killer is sane and has completed thirteen years of age.

199. When a bequest lapses, wholly or in part, the whole or the part of it as the case may be shall revert to the legator's property.