WHEN A WOMAN’S HURT BECOMES AN INJURY: ‘HARDSHIP’ AS GROUNDS FOR DIVORCE IN IRAN

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‘Usr wa haraj (lit. hardship and suffering) is both a concept and a rule in Islamic jurisprudence (fiqh) that allows the suspension or removal of a rule (hukm) when its compliance produces hardship in general (i.e. for all) or for an individual (i.e. one person).\(^1\) In post-revolutionary Iran, committed to the application of fiqh, this concept has been used to expand the limited rights that classical Shi’a law gave women to free themselves from unwanted marriages in the face of their husband’s refusal. Article 1130 of the Iranian Civil Code was twice amended (in 1982 and 2002) to empower a judge to issue a divorce when a woman establishes in court that the continuation of marriage entails ‘intolerable suffering’. The implicit legal presumption here is: for a woman, staying in a marriage is a kind of obligation from which she can be released when her suffering becomes intolerable. But when and under what circumstances does a woman’s ‘suffering’ in marriage become an ‘injury’, entitling her to ask for a divorce? What constitutes ‘hardship and suffering’ in marriage, and who defines it?\(^2\)

I will explore the ambiguities, as well as the potential, inherent in the concept of ‘hardship’ in Islamic legal discourse, and trace the ways they have been negotiated by the Iranian legislators. I do this by telling the story behind the two post-revolutionary amendments to Article 1130 of the Civil Code. I argue that the enforcement of fiqh rules in Iran since the Revolution has not only exposed and exacerbated the tension between legal theory and social practice in Islamic law, but has also made the unequal construction of gender relations in fiqh a site of contestation. The lawmakers have been

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\(^1\) For a discussion of this rule in Shi’a fiqh, see Ja’fari 1970, pp. 112–48 and Mohaqeq-Damad 2003, pp. 131–62.

\(^2\) For a discussion of the ambiguities inherent in the concept and its application, see Hajipoor 2004.
forced to dig into legal theory and classical jurisprudential concepts in order to reinterpret and readjust them in response to the reality on the ground and to women’s aspirations for equal treatment in law.

I begin with a brief account of the codification of Shi’a family law provisions in the 1930s, their reform in the 1960s under the Family Protection Law, and their dismantling after the Revolution; I then proceed to the debates surrounding the 1982 amendment to Article 1130, and I end with those around the 2002 amendment to the Article, which, as we shall see, was in effect the last stage in bringing back, under a different legal logic, the reforms abandoned in 1979.

DIVORCE LAWS IN PRE-REVOLUTIONARY IRAN

Family law was codified in Iran between 1931 and 1935 as part of the reforms of the judiciary during the reign of Reza Shah (1925–41), the first Pahlavi monarch. Until then, the clergy performed marriages and divorces and dispensed justice in Shari’a courts (mahakem-e shar’i) in accordance with the rules and principles of the Ja’fari school of Shi’a figh. The apparent aim of the reforms was the creation of a modern and centralized judicial system based on a Western model, which was achieved in most areas of law where European legal concepts and codes were adopted. But with respect to family law, Shi’a figh rules and concepts were retained almost intact, codified as part of a Civil Code (CC) and gradually grafted onto a new legal machinery. The 172 articles of the code (1034–1206) that deal with marriage, its dissolution, family relations and children, were debated and approved one by one by parliament in 1935. They amounted to a partial codification of the majority opinion (mashhur) within Shi’a figh. Reforms were limited to Article 1041, which prohibited the marriage of girls under thirteen, and Articles 1029, 1129 and 1130, which enabled women to

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4 Three Shi’a legal texts were used as authoritative sources: Najm al-Din Mohaqeq-Hilli’s Shurayeh-e Islam, Zayn al-Din Shahid Sani’s Sharh-e Lom’eh and Shaykh Morteza Ansari’s Makaseb.
5 This article appears in a section that deals with ‘absent persons’.