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Interpreting Divorce Laws
in Islam



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The Politics of Divorce Laws in Iran: Ideology versus Practice

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Unequal access to divorce has played a major role in the perpetuation of patriarchal elements in Muslim societies in modern times. In the classical jurisprudential (*fiqh*) texts, the exclusive right of divorce (*talaq*) rests with the husband. Unlike marriage (*nikah*), which is defined as a bilateral legal act that requires the consent of the two contracting parties, *talaq* is defined as a unilateral act that takes legal effect only through the declaration of the husband. Men's exclusive and unilateral right to *talaq* has consequently been the subject of intense debate, and a focus of attention in Muslim family law, for over a century.

This paper explores aspects of this debate in Iran, where, since the 1979 Revolution that led to the creation of an Islamic Republic, the state has been ideologically committed to the enforcement of classical *fiqh* rules. This has not only exposed and exacerbated the tension between Muslim legal theory and social practice but has also made the unequal construction of gender relations in classical *fiqh* a site of contestation. The lawmakers have been forced to dig into legal theory and classical jurisprudential concepts in order to reinterpret and readjust them in response both to the reality on the ground and to women's aspirations for equal treatment in law. Paramount among these concepts is that of *'usr wa haraj* (lit. hardship and suffering), which allows the suspension or removal of a rule (*hukm*) when compliance with it produces

1. An earlier version of this chapter appeared in HAWWA 5/1 (2007:111-126), as "When a Woman's Hurt Becomes an Injury: 'Hardship' as Grounds for Divorce in Iran".

hardship in general (i.e. for all) or for an individual (i.e. one person).² Iranian legislators have used this concept to expand the limited rights that classical Shi'a law gave women to free themselves from unwanted marriages in 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 that, for a woman, staying in a marriage is a kind of obligation, from which she can however 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?³

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 and 2002 amendments of Article 1130, which, by invoking *'usr va haraj* as a ground for divorce, in effect brought back, under a different legal logic, the earlier reforms to the divorce laws that were abandoned in 1979. In conclusion, I consider the ambiguities in the concept of 'hardship' and their potential for rethinking the *fiqh* conception of divorce.

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'*) in accordance with the rules and principles of the Ja'fari school of Shi'a *fiqh*. The apparent aim of the reforms was the creation of a modern and centralised 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 *fiqh* rules and concepts were retained almost intact, codified as part of a Civil Code (CC) and gradually grafted onto a new legal machinery.⁴ In

2. For a discussion of this rule in Shi'a *fiqh*, see Ja'fari (1970: 112-48) and Mohaqqueq-Damad (2003: 131-62).
3. For a discussion of the ambiguities inherent in the concept and its application, see Hajjipoor (2004).
4. Amin (1985: 61); Banani (1961: 71).

1935 parliament debated and approved one by one the 172 articles of the code (1034-1206) that deal with marriage, its dissolution, family relations and children. This amounted to a partial codification of the majority opinion (*mashhur*) within Shi'a *fiqh*.⁵ Reforms were limited to Article 1041, which prohibited the marriage of girls under thirteen, and Articles 1029,⁶ 1129 and 1130, which enabled women to obtain a judicial divorce on the grounds of prolonged absence of their husband, his refusal or inability to provide, his refusal to perform his marital duties, his maltreatment of her, and his affliction with a disease that could endanger her life. In the absence of her husband's consent, until then, the majority of Shi'a jurists held that a woman could be released from her marriage contract only if her husband was impotent or insane, conditions that enabled her to ask for annulment (*faskh*) of the contract and that were duly codified as Articles 1121 and 1122 of the CC.⁷ Likewise, Article 1113 codifies men's unilateral and extrajudicial right to terminate marriage: 'A man can divorce (*talaq*) whenever he wishes'.

While retaining *fiqh* concepts in the area of family law, Reza Shah's reforms substantially curtailed the administrative and judicial functions of the clergy. In 1931, the jurisdiction of Shari'a courts was reduced to dealing with disputes involving the essential validity (*asl*) of marriage and divorce. In the same year, a separate Marriage Law (*Qanun-e Ezdevaj*) required that all marriages and divorces be registered in civil bureaux to be set up in accordance with the regulations of the Ministry of Justice. Failure to do so did not affect the validity of the marriage or divorce, but incurred penalties and the loss of legal recognition by the state, thus creating a dual notion of legality: legal (*qanuni*) or official (*rasmi*), as opposed to religious (*shar'i*).⁸

The major shift in divorce laws came during the reign of the second Pahlavi monarch, Mohammad Reza (1941-79), with the enactment in 1967 of the Family Protection Law (FPL), which curtailed men's arbitrary rights to divorce and polygyny and at the same time enlarged women's access to divorce and child custody. In introducing these reforms, the framers of the FPL were neither able nor inclined to reopen the *fiqh* books. They left the CC articles

5. Three Shi'a legal texts were used as authoritative sources: Najm al-Din Mohaqqueq-Hilli's *Sharayeh-e Islam*, Zayn al-Din Shahid Sani's *Sharh-e Lom'eh* and Shaykh Morteza Ansari's *Makaseb*.
6. This article appears in a section that deals with 'absent persons'.
7. For a discussion of *faskh* in Iran and its legal difference from *talaq* and *khul'*, see Mir-Hosseini (2008: 218-9); for its basis in Shi'a *fiqh*, see Rasti and Isma'ili (2001).
8. For a brief discussion of the evolution of Iranian family law, see Mir-Hosseini (1999a).

unchanged, and achieved their reforms through procedural devices. The FPL changed the rules for registration of marriage and divorce as set by the Marriage Law of 1931, and created new courts to deal with all kinds of familial disputes. It made registration of divorce without a court order, and of an unauthorised polygamous marriage, legal offences subject to a penalty of six months to one year of imprisonment for all parties involved, including the Registrar. All divorcing couples were required to appear in the new courts, which were presided over by civil judges, some of them women. In the absence of mutual consent to divorce, the court would, upon the establishment of certain grounds, issue a certificate referred to as 'Impossibility of Reconciliation' (*'adam-e sazesht*). Grounds available to women were parallel to those available to men.⁹ In 1975, the FPL was amended to expand the reforms further to embrace the principle of gender equality; it increased the minimum age of marriage for both sexes to eighteen and formally repealed any prior laws contrary to its mandate.

To avoid an open clash with the *fiqh* conception of divorce (*talaq*), which defines it as the prerogative of men, FPL resorted to one of its legal devices: mandatory insertion of a stipulation in the marriage contract by which the husband gives the wife the delegated right to *talaq* under certain conditions. Such an option had already been available under classical Shi'a *fiqh*, which was also reflected when family law was codified (Article 4 of the Marriage Law of 1931, repeated in Article 1119 of the CC), but it was left to the woman or her family to negotiate such a right for her at the time of marriage – something that seldom happened, and then mainly among the landed classes. What the FPL did was, first, to make the insertion of the divorce stipulation an integral part of every marriage contract, and secondly, to require that no divorce could be registered without a court order. New marriage contracts were issued in which the conditions upon which each spouse could obtain a court divorce were printed out. This changed the default terms of the marriage contract as defined by classical Muslim jurists, and did away with the inequality inherent in the rules they set up for its termination, which gave the husband the exclusive right to divorce. State involvement here clearly worked in favour of women and took account of their expectations of a more equitable gender balance.

In February 1979, barely two weeks after the collapse of the Pahlavi regime, a directive from Ayatollah Khomeini's office declared the FPL to be 'non-Islamic' and announced a return to the 'Shari'a' provisions of marriage

9. For a discussion of the FPL, see Hinchcliffe (1968).

and divorce as reflected in the Civil Code articles. The FPL courts were suspended. In September 1979, to replace them, the Special Civil Courts law created courts under that name. Presided over by clerical judges (*hakem-e shar'*), these courts were free from the rules of the Civil Procedure Code (*a'in-e dadrasi-ye madani*), hence the term 'special'.¹⁰ Their establishment was seen as a first step towards the 'Islamisation' of the judicial system and also of family and society, a process that has continued since then. In a nutshell, as we shall see, as far as family law is concerned, this Islamisation has meant two parallel and opposing developments: the validation of the patriarchal mandates of *fiqh*, and attempts to protect and compensate women in the face of them.

'Hardship and Suffering' as Grounds for Divorce

It was against the backdrop of these developments that the concept of 'hardship and suffering' (*'usr wa haraj*) was first raised as a ground for divorce. The chaos that followed the abolition of the FPL courts, the reluctance of clerical judges to issue divorces requested by women, and their consequent protests, forced the new regime to take two legal measures to ease the tension. The first was to issue new standard marriage contracts, carrying two stipulations that the marriage registrars must read out to a marrying couple. The first stipulation entitles the wife to claim half the wealth acquired during marriage, provided that the divorce is not initiated by her and is not caused by any fault of hers. In the second, the husband gives the wife the delegated right to divorce herself on his behalf after having recourse to the court and establishing one of the conditions inserted in the marriage contract.¹¹ These conditions, with some minor modifications, are the same as the grounds on which a couple could obtain a divorce under the FPL. But now, the husband is given the option of accepting or rejecting each of these conditions individually, since, for any of these conditions to serve the wife as grounds for divorce, it must carry the husband's signature underneath.

The second measure was to amend Article 1130 of the CC with a view to empowering the court to issue a divorce when requested by a woman. Unlike the first measure, here a new *fiqh* justification was needed. As already mentioned, these two articles, along with Article 1041 (which increased the min-

10. For the formation and working of these courts, see Mir-Hosseini (1993: 54-83).

11. For these stipulations, see Mir-Hosseini (1993: 57).

imum marriage age for girls from nine to thirteen) were the only instance where the CC had departed from the majority opinion in Shi'a *fiqh* when it was ratified in 1935. Article 1130, which is in effect a continuation of Article 1129, introduced reform by adopting a principle from other schools (*ta-khayyur* or *talfiq*) and drew its inspiration from the Maliki school of Sunni law, which granted women wider grounds for divorce. In the absence of the husband's consent, as noted earlier, classical Shi'a law allows a woman to be released from her marriage only if her husband is impotent or insane, conditions that enable her to ask for annulment (*faskh*) of the contract.

In the 1935 CC, these two articles appear under a section entitled "On the Possibility of Annulment (*faskh*) of the Marriage Contract".

Article 1129: Where the husband refuses to pay maintenance (*nafaqa*) to his wife, and enforcement of a court judgment and inducing him to do so prove impossible, the wife can refer to the judge for divorce (*talaq*) and the judge will compel the husband to divorce the wife. The same applies to a case where the husband is unable to provide maintenance.

Article 1130: The ruling (*hukm*) of the preceding Article applies to the following cases:

1. Where the husband does not fulfill other obligatory rights of the wife [i.e. sexual], and compelling him to do so proves impossible.
2. Husband's bad behavior (*su'-e ma'asherat*) to the extent that it makes the continuation of living with him intolerable for the wife.
3. Where because of contagious disease of generally incurable nature the continuation of married life may no longer be safe for the wife.

As evident, the term '*usr wa haraj* or 'hardship' is not explicitly invoked in the text of the article, yet the concept is clearly implied. As we shall see, attempts to use the concept in an explicit way were bound to meet with the resistance of clerical jurists of the Guardian Council, whose task is to ensure that all laws in the Islamic Republic are in conformity with Shi'a *fiqh*. It is interesting to note that these jurists did not object to the inclusion of non-payment of *nafaqa* as a ground for divorce (Article 1129), though it is as much a departure from majority opinion in Shi'a *fiqh* as 'hardship'. In fact, in 1979, the newly created Special Civil Courts were given the power to jail a man if he refuses to maintain his wife, and in practice the non-payment of *nafaqa* has become one of the least troublesome grounds on which a woman can obtain a divorce. Apart from the fact that *nafaqa* is an element in the marriage contract that can easily be enforced, there is also an unspoken assump-

tion: the husband's failure to provide for his wife might force her to earn her living in immoral ways.¹²

The First Amendment of Article 1130

In early 1982, the first post-revolutionary parliament passed a bill to amend Article 1130. The objective then was twofold: First, to contain the damage done by dismantling the FPL, which almost overnight had taken away women's right to judicial divorce; and secondly, to empower the judges in the newly created Special Civil Courts to issue divorces requested by women who were protesting about losing their rights. The bill caused rifts, both between parliament and the Guardian Council, and among the jurists on the Council. While the majority of the jurists rejected it on the grounds that a man's right to *talaq* is absolute and cannot be taken away and given to the judge, a minority argued otherwise.

To resolve the dispute among jurists of the Guardian Council, Ayatollah Sane'i, as its head, wrote to Ayatollah Khomeini and asked for his legal opinion. In his letter, Sane'i summarised the arguments of the two sides in the Council. The majority opposed the bill, arguing that 'hardship' (*haraj*) caused by a husband's refusal to agree to a divorce requested by his wife is a necessary consequence of her need to abide by the contract of marriage, in which the husband has the exclusive right to divorce. Even if the 'hardship' argument is valid here, it can only remove the need to abide by the contract, and create for the woman the right of annulment (*faskh*). But, they went on to argue, given that Shi'a jurists have already defined the conditions under which marriage can be annulled, viz. husband's insanity and impotency, and 'hardship' is not one of them, thus the option of *faskh* is strongly ruled out.

Those jurists on the Council who (like Sane'i) approved the bill argued that what lies at the root of 'hardship' for a woman is 'the husband's control of divorce'. Thus the argument became that – in accordance with the argument of *haraj* – any primary religious rule that entails intolerable hardship is removed by the secondary rule of 'no hardship' (*la zarar*). So the jurists argued that they could remove this control, and by way of caution refer the woman to the court where she can establish that the continuation of marriage

12. This assumption was clear in my discussions with clerics, see Mir-Hosseini 1999b: esp. part II.

entails hardship; the judge can then compel the husband to give a divorce or divorce her on his behalf.

Ayatollah Khomeini took the side of the second opinion, and wrote back:

Caution demands that first, the husband be persuaded, even compelled, to divorce; if this is not possible, [then] with the permission of the religious judge, divorce is effected; there is a simpler way if there was courage [i.e. if I had the courage I would have said it].¹³

With Ayatollah Khomeini's intervention, the opposition of the majority of jurists on the Guardian Council was offset and thus 'hardship' was accepted as grounds for divorce. In December 1982, the bill to amend Article 1130 was ratified for a provisional period, and then, ten years later, with a slight change of wording, it became permanent. The text of Article 1130, as eventually amended, reads:

When the continuation of marriage causes '*usr wa haraj*' for the wife, she may refer to a religious judge (*hakim shar'*) and request divorce; if this hardship is established for the court, the court can compel the husband to divorce (*talaq*) his wife, and if compelling him is not possible, with the permission of the religious judge the wife will be divorced.

But this neither settled the issue nor solved the problem for women, who continued to face difficulty in the courts. What it did was to replace the husband's authority with that of the judge, who now had discretionary power to withhold or issue divorces requested by wives. In the absence of a clear definition, a judge could decide when and under what circumstances a marriage could be tolerable or intolerable for the wife. In practice, this not only exacerbated the problem for women, but also resulted in contradictory court judgments, and added to the workload of the judiciary.

During my own fieldwork in the courts in the 1980s and the 1990s, wives who requested divorce on the grounds of 'hardship' found it difficult to provide evidence that a judge would accept. The judges felt uneasy to use the discretionary power given to them by the amended version of Article 1130, and rarely used it to issue a divorce when the husband remained adamant in his refusal to end the marriage. Instead judges often tried to persuade the husband to agree to a *khul'* divorce.¹⁴

13. For the full text of this letter, see Mir-Hosseini (1999b: 164-5).

14. Mir-Hosseini (1993) and (2002a). For a sample of court cases and the difficulty of proving 'hardship', see Hajjipoor (2004: 176-80).

The Second Amendment to Article 1130

The second time that 'hardship' became a bone of contention was in January 1999, when the Women's Commission of the Fifth Majles proposed another bill to amend Article 1130. This was almost two years after Khatami's reformist government came to office; and there was more room for debate. Women's rights and criticism of the patriarchal mandates of *fiqh* were already being aired in women's journals and the emerging independent press.¹⁵

By then, men's arbitrary right to *talaq* had been curtailed to some extent, and some elements of the FPL reforms reinstated. The 1992 Amendment to Divorce Laws (ADL) once again outlaws the registration of any divorce without a court certificate of 'Impossibility of Reconciliation' (the same name as certificates issued under the FPL). More importantly, it makes divorce costly for men by enabling the wife to claim remuneration for what she has contributed to the marriage, and puts a monetary value on housework by entitling her to claim 'compensation' (*ujrat al-mithl*). The 1992 ADL also requires all divorce cases to be sent to arbitration; if the arbiters, one chosen by each side, fail to reconcile the couple, the court allows the man to effect a divorce only after he has paid his wife's dues: the dower (*mahr*), maintenance for the waiting period (*'idda*), and compensation (*ujrat al-mithl*). Of course, if the wife is the one asking for divorce, she forgoes all these dues.¹⁶ In 1994, a new law brought a restructuring of the courts, and the Special Civil Courts disappeared. Familial disputes, like others, now appeared in General Courts, presided over by a clerical or civil judge who had jurisdiction over all types of cases from penal to familial. Another law, passed in 1997, required that a woman's *mahr*, if in cash, be recalculated to take account of inflation. In the same year, the Majles presented a bill requiring family disputes to be heard in Special Family Courts, presided over by married judges with at least eight years of judicial experience and in the presence of female advisory judges. These new Family Courts started work in 1999.

The Women's Commission's bill to amend Article 1130 was in line with these developments. This time, the intention was to curtail the discretionary power of the courts and to define what constitutes 'hardship' in marriage; in other words, to tackle the conditions under which marriage becomes intolerable to women. The bill provided for the following note to be added to Article 1130:

15. For these debates, see Mir-Hosseini (2002b) and (2002c).

16. For analysis of the 1992 law, see Ansari-Pour (2002) and Mir-Hosseini (1995/96).

'*Ushr wa haraj* (hardship and suffering) that is the subject of this Article is the creation of a situation that makes the continuation of [marital] life for the wife hard and difficult to tolerate. The following, if established in the court, are instances of '*usr wa haraj*.

1. Husband's desertion of marital home for at least six months without reasonable cause
2. His addiction to any type of harmful drugs
3. His affliction by an incurable disease or any other affliction that may endanger the continuation of marriage and the wife's health
4. His refusal to pay maintenance and the impossibility of forcing [him] to do so
5. His infertility to the extent that it prevents the wife from having children
6. Maltreatment to the extent that is intolerable to the wife considering custom, social, ethical and psychological factors as well as those [endorsed] by place and time
7. His taking another wife if not capable of dealing justly [with them both]
8. His not observing the court's order not to engage in an occupation that is against the interest or reputation of the family
9. His definite conviction for a crime that is against the reputation of the family and status of the wife.

All these nine instances, with some slight changes, are among the 14 conditions that have been included in the marriage contract since 1982 as part of the divorce stipulations, which in turn were the grounds upon which the FPL courts issued divorce certificates. So why, after all these years, did the Women's Commission of the Fifth Parliament present a bill to have them included as a Note to Article 1130 of the Civil Code?

There are several reasons, which become evident when one reads the speeches and examines the arguments of those for and against the bill and press coverage of the issue.¹⁷ Here, I limit myself to debates in the Majles. The Women's Commission introduced the bill in January 1999 and despite its initial rejection (in February 1999) by the Majles Legal Commission, it was debated in two public sessions, which both took place in the closing days of the Fifth Majles (Spring 2000). This debate in effect shows a confrontation between two world-views, two ways of conceptualising and relating to marriage and woman's rights and place in family and society.

Those in favour of the bill – all the female deputies, regardless of their political affiliation, and some male deputies from the reformist camp – argued on the basis of the reality on the ground and the difficulty that women have in obtaining a divorce in the courts. They stressed the need to curtail the discre-

17. Since the mid-1990s, numerous articles on the concept of women's suffering in marriage have appeared in newspapers and in women's and law journals. Here I can only refer to a few, written by members of the judiciary: (Asadi, 2004; Ahmadiyeh, 2001; Mowgu'i, 1999; Pur-rangnia, 2000).

tionary power of those judges who were unwilling to take women's suffering in marriage seriously and to honour women's grievances. They pointed out that Islam is based on justice and equity, ensures women's rights, and that women are rational beings who do not take the grave decision to end a marriage unless they are at the end of their tether.

Those who spoke against the bill – all men from the conservative camp – opposed it on the basis that it goes against 'the laws of Islam' that have made divorce difficult (without mentioning that it was difficult only for women), and that easier access to divorce for women would lead to the destruction of family and the creation of an immoral society. They argued that men are less likely than women to divorce at whim, because they are the ones who have to pay for it; they quoted a *hadith* (*al-talaq biyad min akhazah assaq*, literally, 'divorce in the hand of the one who holds the calf'), which is commonly invoked to justify man's prerogative to divorce at will.

The following two quotations give a flavor of the arguments put forward by the two sides. Soheila Jelowdarzadeh, a female reformist deputy, spoke in defence of the bill and framed her argument in terms of social reality:

A lady medical doctor came to see me, she had a big bruise under her eye; she told me she was beaten by her husband. You all witnessed what happened some years ago when a woman and her children, whose husband had repeatedly threatened her, was eventually burned to death by him. How long are we going to evade [dealing with real] issues and repeat our slogans? Women are being oppressed in the family, they are beaten, they are hungry, they are humiliated, they are suffering, and this is being passed on from one generation to another. If the wife of a careless man gets a divorce, at least she will not be beaten when she comes back from work tired to give her earnings to her husband to feed his opium or heroin habit! I beg you! You have the duty to act in society in the direction of justice: our women live in [terrible] conditions – the [terrible] way they are treated in courts. Honorable judges say the instances [of hardship] are not clear to them. Yes, unless one is a woman, unless one has suffered, unless one has been beaten, unless one has had one's child sold, one does not understand what 'hardship' [in marriage] is.¹⁸

Hojjat ol-Islam Faker, a hardliner conservative deputy, opposed the bill and framed his opposition to it with reference to the other world.

The way that the ladies talk is as though each of them is a *marja' taqlid* [highest authority in Shi'a law], Ms Vahid Dastjerdi who is from the right faction becomes united with Ms Rafsanjani when it comes to women's issues ... These [proposals] are against religious principles, I beg you in these last days of the parliament not to ratify something that would cause us problems on the Day of Resurrection, for God's sake, do not pay attention to what

18. *Ruznameh Rasmi* No. 16031: p. 27.

these ladies say about such matters ... [laughter of deputies] ... Let the bill go back to the [Legal] Commission or let that Commission complete it, or let it remain for the Sixth Majles, which wants to do a revolution, let it do this revolution too!¹⁹

In May 2000, in its closing days, the Fifth Majles ratified the bill, but the Guardian Council rejected it. The Sixth Majles, dominated by the Reformists, started work in June and re-ratified the bill and sent it back to the Guardian Council. In July, the Guardian Council rejected the bill on the basis that what constitutes 'hardship' varies from one person to another and also is dependent on time and place, so the existence of one of the instances cited in the bill cannot be taken as constituting 'hardship' for all women at all times. The Council suggested that if the judges require clarification and definition of *'usr wa haraj'*, then the judiciary should prepare a bill in accordance with religious rules and principles and send it for approval to the Majles.

The Sixth Majles did not accept the Council's objection, and ratified the bill unchanged for the third time, and once more sent it to the Guardian Council. The Council once again rejected it and sent it back ten days later. The Majles ratified the bill once again in October 2000 and sent it for arbitration to the Discretionary Council – whose task is to decide on the fate of bills that are rejected by the Guardian Council. In August 2002, after some modifications, the Discretionary Council approved it. The second amended version of Article 1130 now has a note that reads:

... The following, if established in the court, are instances of *'usr wa haraj'*:

1. Husband's desertion of the marital home for at least six successive months or nine months in a year without reasonable excuse;
2. Husband's addiction to drugs or alcohol that is detrimental to marriage and his refusal or the impossibility to force him to quit during a period assessed by a doctor as necessary for him to quit;
3. Husband's final sentencing to imprisonment for five years or more;
4. Husband's beating or any kind of repeated maltreatment that is intolerable to the wife, given custom and her situation;
5. His affliction to an incurable or contagious disease or any other affliction disrupting marital life.

The instances cited in this Article do not prevent the court from issuing a divorce on the basis of other instances where a wife's 'hardship' is established in the court.

The Sixth Majles, in which the Reformists had a majority, ended in June 2004. It had ratified 41 bills that in various ways aimed to modify the inequalities that women face in law. The Guardian Council rejected almost all of

19. *Ruznameh Rasmi* No. 16087: p. 30.

them; 21 eventually became law after the mediation of the Discretionary Council, sometimes with their teeth removed, and emptied of their gender-egalitarian tone and intent. The bill defining instances of 'hardship' in marriage is the only one that was improved when modified by the Discretionary Council. The rest were badly mutilated. For instance, an amendment to Article 1041, to raise the minimum age of marriage to 18 for both girls and boys, was not so lucky: in its final version, it raised the minimum age of marriage for girls to 13 and for boys to 15.²⁰ The remaining 20 bills – significant among them, a proposal to join the United Nations Convention for Elimination of all Forms of Discrimination Against Women – were left for the Seventh Majles, which was controlled once again by the Conservatives.

Women's Campaign for Equal Family Law

With the defeat of the Reformists in the 2004 parliamentary and 2005 presidential elections, conservative hardliners gained total control of legislative and executive powers, and none of these bills stood a chance of being revived. The process of reform of family laws entered a lull. Meanwhile, women's activism became more radical and daring. In September 2006, following attacks on a peaceful women's gathering in a central Tehran square, a group of activists launched the 'One Million Signatures' campaign to change all laws discriminating against women. Patterned after Moroccan women's activism in the 1990s, this campaign is largely conducted by younger women, and through the internet.²¹

In July 2007 the hardliner government of Ahmadinejad presented a bill to Parliament that has not yet become law. Entitled 'Protection of the Family', it aims to do away with not only the pre-revolutionary reforms that have been retained in practice, but also the protective measures introduced in the 1980s and 1990s. The bill was originally prepared by a commission in the Judiciary to set up procedural rules for the Family Courts, but the government altered some of its articles. Four articles in particular alarmed women's groups and became the focus of protest; they make it easier for men to be polygamous and restrict women's ability to gain compensation. Article 22 relaxes the regulations for the registration of temporary marriages. Article 23 allows a man

20. For the gender-related laws passed, see Geramizadegan, (2004); Kula'i, 2004 and Mir-Hosseini, (2004).

21. For the campaign, see <http://www.we-change.org/spip.php?article19> and also <http://www.feministschool.com/english/spip.php?rubrique3>.

to contract a second marriage without the consent of his first wife, if the court decides that he can afford it. Article 25 requires the Ministry of Finance to demand tax payments from women at the time of marriage, if they stipulate a marriage gift (*mahr*) that exceeds a certain limit. Above all, Article 52, by repealing all previous laws and acts, in effect dismantles not only the reforms introduced under the FPL that have continued to ban the registration of polygamous marriages without a court order, but also the 1992 ADL that requires a man to pay his wife compensation for housework during the marriage, before he can exercise his unilateral right to divorce.

Women's rights activists, including some conservative groups, joined forces in opposing the 'Protection of the Family' bill. Calling it 'Destruction of the Family', they succeeded in gaining the support of progressive and reformist clerics. Grand Ayatollah Sane'i declared that taking another wife without the true consent of the first wife was prohibited (*haram*) according to Islamic law, since polygamy in modern contexts entails 'harm and hardship' for the majority of women. In September 2008, a group of women's rights activists went to Parliament to lobby against the bill, as it was about to be debated. They succeeded in persuading members of Parliament to withdraw the bill, and to send it to the Parliament Judicial Commission. It was announced that Article 23, inserted by Ahmadinejad's government, would be removed.

But then, in the heat of the unrest following the disputed June 2009 presidential election, Parliament reintroduced Article 23 in modified form: the court may allow a man to register further marriages, if he can establish certain conditions, which are more or less those specified by the 1975 FPL.²² In January 2010, Parliament ratified the bill, taking advantage of the closure of the reformist press and the arrest of a number of women's rights activists. As of the time of writing (January 2012), however, the fate of the bill remains uncertain, as the Guardian Council has returned it to Parliament for revision. A member of the Parliament Judicial Commission observed in February 2010 that it is unlikely to be debated again soon, as the Council considers restrictions on men's right to polygamy to be in contradiction with Shari'a.²³

22. See Change for Equality (2010), 'Women fight polygamy proposal', <http://www.forequality.info/english/spip.php?article645>, dated 8 February; Feminist School (2009), 'Last change on the Family Protection Bill', <http://www.feministschool.com/english/spip.php?article344>, dated 26 November.

23. See <http://www.feministschool.com/spip.php?article4148>.

Meanwhile, women's rights activists have started a new campaign, 'NO to Anti-Family Bill'.²⁴

The Debate Continues

The struggle for legislative change and an equal family law in Iran is still unfolding. In the aftermath of the disputed 2009 election, this struggle acquired a new dimension. It has become integral to the larger struggle for democratic change and civil rights that came to be known as the 'Green Movement'. I will conclude with three observations.

First, after the 1979 Revolution and the Islamisation of law and the judicial system in Iran, two parallel yet opposing trends emerged: on the one hand, the validation of the patriarchal mandates of *fiqh* (namely through relaxing restrictions on men's divorce and polygyny), and on the other, attempts to protect and compensate women in the face of them (namely through making divorce costly for men and enlarging the grounds upon which women can obtain judicial divorce). The first trend, which began soon after the Revolution and lasted for almost a decade, saw the dismantling of the legal reforms achieved under the previous regime and the suppression of gender debates. The second trend, which can be dated to the early 1990s, saw the reintroduction of a large portion of the abandoned reforms and a critique of the patriarchal mandates of *fiqh* by women's journals and the reformist press. Many *fiqh* concepts and rules underlying family law were questioned, and some positive legal changes, in particular in the area of divorce laws, took place. By 2000, one could say that what remained of men's right to *talaq* was mere lip-service: not only could men no longer divorce their wives extrajudicially, but they also had to pay heavily to exercise their divorce right in courts.

Secondly, the reluctance of the judges (all men) and some clerics, and the absence of political will, combined with the patriarchal culture of Iran, also prevented a radical rethinking of *fiqh* notions of divorce. The potential of the *fiqh* concept of 'hardship' to equalise the right to divorce remained unexploited in other areas of family law. The concept could also be applied to expand women's limited rights to custody of their children after divorce: it can be ar-

24. S. Moqadam (2010), 'No to Anti-Family Bill' (in Persian), <http://www.roozonline.com/persian/news/newsitem/article/2010/february/17//3d95903e6a.html>, dated 26 February [Bahman 1388].

gued that separation from her child causes a mother 'intolerable suffering', which could be used as the basis for removing the right of custody from the father on the grounds of 'hardship'. This potential was intimated in the exchange between Ayatollah Khomeini and Ayatollah Sane'i in 1982, when the issue of 'hardship' was raised for the first time as grounds for divorce. This exchange, and Khomeini's response – 'there is a simpler way' to enable women to have better access to divorce – met with silence. No one then asked what that 'simpler way' was. It was during the war with Iraq and the heyday of Islamic ideology in Iran; the press was highly controlled, and there was little room for a critique of *fiqh* rules, and no scope for raising the issue of women's rights. What is surprising is the continuation of this silence: the letter was not even mentioned two decades later, when the term 'hardship' was being debated again in the Majles, despite the fact that the letter is available in print, both as part of Khomeini's declaration and in the records of the Guardian Council.²⁵

I came to learn about Ayatollah Khomeini's 1982 letter in a meeting with Ayatollah Sane'i in 1995 – that is, after he had given up all government duties and retreated to the Qom seminaries. According to Sane'i, who had been Khomeini's student and had become a *marja'* after his death, the 'simpler way' that Khomeini alluded to was that, if a woman asks for a divorce but her husband refuses to give his consent, such a refusal, on its own, is proof of 'hardship' in marriage. In such a case, according to Sane'i, either the wife can divorce herself, because, according to the *fiqh* principle of alleviating 'hardship', the husband loses his right to control divorce, or, according to another general *fiqh* principle of 'no harm' (*la-zarar*), she can demand that the marriage be dissolved through the option of *faskh*. These are radical views that so far have remained dormant.

Finally, adherence to Islamic laws in Iran, far from creating marital harmony and ensuring the stability of marriage that the Islamists expected, has resulted in increasing divorce petitions to court and soaring divorce rates. The attempt to retain men's privileged rights to divorce and polygyny, and to compensate and protect women in the face of them, has equipped each party in a marital dispute with a legal stick to beat and defeat the other. The increasing frequency of divorce is gradually breaking down the stigma surrounding it. In short, changes in Iranian society and family structure are widening the gap between the *fiqh* concept of divorce and actual social practice. An examination of court cases clearly shows that what lies at the root of

many marital disputes that make their way to the courts is the problem of the unequal construction of gender relations in family law – something the Islamic Republic, for ideological reasons, has so far been unable to redress. The anti-progressive measures implemented or pending under the post-Khatami governments have only made matters worse, while the fate of family law reform, like so much else in Iran, remains hostage to the wider international situation.

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