Khul' in Imāmī Law: Women's Prerogative in Divorce and the Moral Order of the Jurists

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Abstract

Khulʿ in Imāmī Law: Women's Prerogative in Divorce and the Moral Order of the Jurists.

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This thesis explores obligatory *khulʿ* divorce (*al-khulʿ al-wājib*) in Imāmī Shīʿīsm. By "obligatory divorce" is meant an offer by a wife of negotiated payment in return for divorce which cannot be refused by the husband; it is more usual that *khulʿ* divorce cannot go forward without the husband's consent. The method employed in this work is an overview of the main texts of explanatory law (*al-fiqh al-istidlālī*) in Imāmīsm. The work first gives a general account of marital dissolution in Islamic law, along with a detailed outline of the basic elements of *khulʿ*. Possible parallels with Jewish notions of divorce that appear to be similar to *khulʿ* and in particular its obligatory form are also noted. The work then outlines the opinions of the minority of Imāmī jurists, both classical and modern, who allowed women to receive *khulʿ* divorces without the consent of their husbands. Finally, the significance of this data is discussed in light of the patriarchal moral order of the jurists who compose and control the law. I argue that the controversial nature of obligatory *khulʿ* is not (primarily) due to ambiguities in the Imāmī legal texts, but is rather the result of negotiations between male jurists on 1) how to maintain male authority and power over matters of family law and 2) how to deal with a wife's extreme discontent and even adultery as possible results of the non-availability of divorce and potential threats to male authority and control over women's sexuality. The work concludes by providing an account of obligatory *khulʿ* by a prominent modern clerical reformist, Ayatullah Yūsuf Ṣāniʿī of Iran. Although his legal opinion and method may seem novel, this work demonstrates that they are, on the contrary, in line with classical Imāmī legal thought.

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To My Wife Haleh
For Everything

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Introduction

The present work is a study of *khul'* in Islamic law, with specific reference to Imāmī law. *Khul'* technically refers to a type of marriage dissolution in which the wife compensates her husband, for instance, by forgoing all or part of her dower and her husband's maintenance obligations, in return for having the marriage dissolved by him. The details, however, differ according to each legal school of thought in Islam.

Women have generally had much less power to divorce than men. Although *khul'* may be thought to imply this right and there is a voice in the tradition that seems to portray *khul'* as conferring it, this has not been realized in Islamic law or fully realized in modern legislation. It is true that around ten years ago, Egypt reformed its divorce laws and thus made it obligatory for husbands to accept a *khul'* divorce.[1] However, it seems that this type of divorce reform has been cosmetic. At best, the reform is (mostly) on a governmental level and not accompanied by a significant religious-legal shift.

The case of Iran, however, is different and even unique. Unlike Egypt, the laws of which are defined by a heavily secularized form of Sunnī Islam and approved by a secular ruling elite, Iran's government is essentially ruled by the producers of religious law themselves, namely the Imāmī jurists. At the same time, as Iran's Islamic state is part of an international community, it has to deal with the pressures of current, Western-defined notions of ethics and human rights. This, of course, is in addition to the serious challenge posed to the government's religious legislative body by a significant portion of its own population, including women's rights groups,

[1] Amira Mashhour, "Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" in *Human Rights Quarterly*, vol. 27 #2 (2005): 583. For more recent updates on divorce in Egypt, see for example BBC World News "Inside the radio station helping Egyptian divorcees". BBC News. http://news.bbc.co.uk/2/hi/world/middle_east/10165530.stm (accessed May 30th, 2010).

reformist clergy and a number of laypersons who, although do not belong to any specific organization or movement, are nevertheless dissatisfied with the legal status quo.

In sum, the ruling elite of the state are the jurists themselves and they cannot isolate themselves within their local domains as many of them did before the Islamic Revolution. They have no choice but to address women's lack of power to divorce and other controversial 'traditional' stances. These engagements have inevitably caused some clashes, and as well as inspiring, in some cases, gradual change.

No legal issue has been as controversial as it has in the case of divorce, since divorce represents the ultimate clash of authority between men and women, while the right to divorce (unrestricted for men, significantly restricted for women) is one of the important defining factors of patriarchy in Islam. It is no wonder that proponents of reform in Islamic law have focused much on this subject.

Scholars who have attempted to study these reforms include Ziba Mir-Hosseini[2], Arzoo Osanloo[3] and Janet Afary.[4] These authors have contributed significantly to the history of debates on gender reform during the last hundred years and the current Islamic government in particular. What has been lacking in Western accounts, however, is a detailed study of the textual legal sources that inform the decisions of the jurists and hence current legislation. There is little engagement with the sources and debates of Imāmī law, namely the classical and modern texts that are studied in the Shī'ī seminaries, even though controversy and reform in the Islamic Republic of Iran is based on and emerges from precisely this tradition. At most, Western authors have briefly dealt with the modern *tawḍīḥ al-masā'il* (clarification of legal problems) genre of

[2] Mir-Hosseini's two main works that deals with the subject are: *Islam and Gender: The Religious Debate in Contemporary Iran* (New Jersey: Princeton University Press, 1999) and *Marriage on Trial: A Study of Islamic Family Law*. Revised Edition. (New York: I.B Tauris, 2000).
[3] *The Politics of Women's Rights in Iran* (New Jersey: Princeton University Press, 2009).
[4] *Sexual Politics in Modern Iran* (Cambridge: Cambridge University Press, 2009).

literature, which are brief summations of the law meant as quick reference guides for lay followers. And even this kind of material often does not reflect the true opinions of the high ranking clerics, as the texts are mere formalities produced by the clerics' offices and not themselves.[5] Even when the "clarification" summations do reflect the opinions of legal authorities on certain issues, the exposition of any given issue is too brief to support any kind of significant study, let alone conclusion.

Clearer, more expansive expressions of the legal views of clerics are found in their commentaries on the classical works of Imāmī law belonging to *fiqh istidlālī* (explanatory law) genre of works, which sometimes run into dozens of volumes. The bulk and most important of these commentaries were produced during and before the nineteenth century. The twentieth century seems to have produced a smaller number of treatises and extensive commentaries of this kind. I would suggest two possible reasons for this relative paucity:

1) The twentieth century saw the rising popularity of the *baḥth al-khārij* genre of study, which laid overwhelming emphasis on oral over written scholarship. *Baḥth al-khārij* or 'study outside [the text]' is the final level of juristic learning, in which scholars aspire to receive their 'degree' in *ijtihād* by studying advanced law and developing an ability to engage in sophisticated legal reasoning. What is distinctive about this procedure is that learning is oral, conducted under the guidance of a leading *mujtahid* and focused on debate and developing the independent mind outside prescribed written texts (although reference to texts are made during the sessions). One important consequence of this practice is that the leading *mujtahids* themselves have come to focus their energy on this

[5] This is done in order for the clerics in question to be recognized as legal sources of emulation (*taqlīd*).

kind of activity and founded their scholarly reputations upon it.[6] As a result, the production of significant written legal material has declined since the beginning of the twentieth century. It is true that transcripts of some of these seminars have been edited in book format. However, many of these works are limited in their scope, lack depth, and above all, offer only incomplete discusson of any given subject. It seems that such transcripts are only intended to be reminders for students, rather than actual research publications.

2) When one reads the transcripts of *baḥth al-khārij* seminars, one cannot help but notice that there is a constant and overwhelming emphasis on classical works of law and their pre-twentieth century commentaries. There is much less reference to the views of contemporary scholars. A possible explanation for this attitude is that the works of previous centuries have largely defined and set the standard for legal debate[7], whereas contemporary scholarship is often a regurgitation and reformulation of previous views (although this practice is to some extent changing with the emergence of reformist jurists).

Thus, this thesis will largely focus on older juristic scholarship, as it is these views that have continued to shape and inform gender laws in the current Islamic Republic. Moreover, even when modern legal sources are cited, older sources will also often be included.[8]

Imāmī *khul*ʿ, the subject of this thesis, will also be compared and contrasted with female-initiated forms of divorce in Sunnī and Jewish law. These cases can be suggestive as both the

[6] I would even go so far as to say that the main source of prestige for jurists, in Qum at least, is the number of students they have in their advanced classes.
[7] There also seems to be a tradition that leading *mujtahid*s do not mention the views of other, rival *mujtahid*s (at least directly). One likely reason is that the jurists like to preserve the respect of their peers and not offend their followers.
[8] In addition to the reason above, I include older sources when citing modern ones in order to illustrate an overall consistency in Imāmī law on most of the major issues. The significance and implications of this will be discussed in the Conclusion of this thesis.

Islamic and Jewish legal tradition relies on strong legal systems featuring a gender asymmetry that is highlighted in divorce procedures. This suggestive comparison is also important because the thesis considers how the tradition can deal with imbalance in the power to divorce. It is also important as certain similarities between the three traditions throw light on how patriarchal, law-oriented religions deal with male power and some of the moral issues involved in this quest for control. At the same time, it should be noted that the comparison with Jewish divorce offered here is merely suggestive and based on secondary sources, and more research is needed. Additionally, the work only offers the general authoritative positions of the four Sunnī schools. It must be noted that none of these schools carry a unified body of laws and as result, the study on Sunnī law will be far from exhaustive and there might be some important, non-authoritative opinions that might not be noted.

What this work primarily intends to do is contribute to filling the gap in Western scholarship on *khul'* in Imāmī law by examining its expression in the textual sources. The aim is to better understand the tradition through which Imāmī law is interpreted and developed under the current Islamic government, as well as suggesting how reform is developed within the scope of these sources.

A focus on reform is important, as with the rise of a Sharīʿah-based form of rule in Iran, novel ideas of religious political governance have been developed and incorporated into the state. However, a more traditional and restrictive outlook on the law has taken precedence in matters pertaining to family law.[9] Naturally, this has caused some tensions, which have also on occasion become the subject of domestic and international controversy in today's gender-focused global

[9] This is not to say that the way family law is administered in Iran is traditional. To the contrary, it is formulated and administred by a modern state which is itself a novelty. It is only the substance of the law that seems to be traditional.

society. As a consequence, domestic reactions - under the guise of a reform movement mainly led by women and equity-oriented jurists - to these controversial rulings have become impossible to ignore. Thus, my two largest chapters (Three and Four) will examine how some pre-modern jurists made *khul‘* obligatory and how current reform oriented jurists such as Ayatullah Yūsuf Ṣāni‘ī have attempted to utilize that tradition in order to suggest reform. As this thesis is specifically focused on Iranian reform, I refer exclusively to historical examples from that country.

Chapter One: Marital Dissolution in Islamic Law

Introduction

> Derivatively, as our language (in this particular case, obviously, 21st-century English) is the common but structured repository of ever-changing modern conceptions, modern categories, and, primarily, of the nominal representation of the modern condition, we stand before the wide expanse of the Sharī'a and its history nearly helpless. Our language fails us in our endeavour to produce a representation of that history, which not only spoke different languages none of which was English (not even in British India), but also articulated itself conceptually, epistemically, morally, socially, culturally, and institutionally in manners and ways utterly different from those material and non-material cultures that produced modernity and its Western linguistic cultures.[10]

In Western legal systems, as exemplified in Canadian law, 'divorce' is the prerogative of the state. Although it is a process which can equally be initiated by either man or woman, it nevertheless

> cannot be dealt with by way of domestic contract or private agreement. A divorce cannot be arbitrated. While all issues attached to the termination of a relationship can be so dealt with, *divorce is the state's acknowledgement that a marriage is terminated* (emphasis added).[11]

By contrast, until the rise of the modern state in the Muslim world, the dissolution of marriage governed by the Sharī'ah or classical Islamic law has largely been a private matter between the

[10] Wael Hallaq, "What is Sharia?" *Yearbook of Islamic and Middle Eastern Law*, 2005–2006, vol. 12 (Leiden: Brill Academic Publishers, 2007): 151.
[11] L. Clarke & P. Cross, *Muslim & Canadian Family Laws: A Comparative Primer* (Toronto: Canadian Council of Muslim Women, 2006), 115.

disintegrating couple and their families, their immediate arbitrating locality and God. The dissolution of marriage, in other words, has been the affair of a private circle of individuals without the need, or at least the obligation, to be processed and acknowledged by an intrusive outside entity.

To translate the Muslim marriage dissolution simply as 'divorce' implies a theoretically and practically singular procedure similar to the current Western construction, by which either party initiates the divorce and subjects it to the state's legal control and validation. The socio-legal construction of marital dissolution as defined in the Sharī'ah (as well as Jewish law) however, is different. This is not to say that there are no overlapping parameters between modern Western and Sharī'ah understandings of marital dissolution; but it is essential to understand them on their own terms, as they have developed and been articulated in quite different epistemic and socio-cultural contexts. As such, I have generally avoided use of the word divorce in this work.

To begin, the general Sharī'ah formulation of marital dissolution is fundamentally a patriarchal construct, in which a husband, alone holds the natural right to unilateral dissolution of the marriage. In addition, Sharī'ah 'divorce' is characterized by various and different legal methods of marital dissolution. Each of these methods or categories has its own laws and regulations, which again vary between Islamic legal schools, which themselves have their own dissenting views.

In this chapter, I will attempt to outline the general modes of marital dissolution in Islamic law according to the Shi'ī Imāmī school of law, as well as the four Sunnī schools of law, the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools. These *ṭalāq*, *faskh* and *ṭalāq al-qāḍī* modes will be examined. For the sake of brevity, modes of martial dissolution that do not have a direct or

important weight on understanding *khul',* such as the *ẓīhār*,[12] *'īlā*[13] and the more important *wikālah*[14] forms of marital dissolution will not be included in this study. A thorough analysis of *ṭalāq*, *faskh* and *ṭalāq al-qāḍī* would necessitate a whole volume for each by itself. Therefore, I will only give the more general, authoritative position of the schools to provide a background for my study of *khul'*.

It must finally be added that translations of Arabic legal terms can often be misleading, as noted earlier. I have adopted Ziba Mir-Hosseini's translations of the terms in her works[15], as I find that they are the closest to their original meaning.

Modes of Marital Dissolution in Islamic Law

Repudiation in General

Ṭalāq is the most common word associated with marital dissolution in Islam and in the Muslim world. It is also commonly associated with the word 'divorce' in the English language. However, 'repudiation' is closer to its actual meaning. Its root in Arabic is Ṭ-L-Q, the first form of which indicates a state of being 'repudiated' or a state in which one gets a repudiation (incidentally, the word can also mean to be 'happy' or 'joyful'). Its second form Ṭ-LL-Q means to 'set free', 'forsake' or 'release'. Its active verbal form *muṭalliq* (repudiator) in Islamic law is always masculine; whereas its passive form, *muṭallaqah* (the one being repudiated), is always feminine. Thus, even the terminology of *ṭalāq* confirms that a wife may never – in theory - actively

[12] *Ẓīhār* is when the husband says to the wife "you are to me like the backside of my mother". One of the legal consequences of this phrase is marital dissolution.
[13] *'Īlā* is when the husband vows to cease sexual intercourse with his wife for the rest of his life, or for a period exceeding four months, which also entails consequences that can lead to marital dissolution.
[14] *Wikālah* (agency) or *tafwīḍ* (delegation) is where the right of marital dissolution, usually in the form of repudiation (*ṭalāq*) or annulment of the marriage contract (*faskh*), is delegated to the wife, who can then enforce a marital dissolution on her own behalf. This usually takes place under a Muslim judge (*qāḍī*) in modern times.The procedure has traditionally been introduced in marital contracts across the Muslim world.
[15] See Mir-Hosseini, *Marriage on Trial*, 36-41.

repudiate her husband, but only be or seek to be repudiated by him. The same conception of repudiation is present in Persian, where the active form of the verb *ṭalāq dādan* (lit. 'to give a repudiation') is always conceptually masculine, whereas *ṭalāq giriftan* (lit. 'to receive a repudiation') is always feminine.[16] *Ṭalāq* is thus the husband's unilateral right of repudiating his wife – with or without her consent (her consent, of course, is not legally material) in order to bring about the dissolution of the marriage.

In order to initiate a divorce, the Canadian legal system requires one of the following three grounds for divorce as defined in section 8 of the Canadian *Divorce Act*:[17]

1) The spouses having lived separate and apart for at least one year
2) Adultery by either spouse
3) Either spouse having treated the other with "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses"

The Sharī'ah, however, does not require any grounds for the husband to repudiate his wife. Nonetheless, although there are no legal barriers to the husband repudiating, marriage dissolution, and especially a no-fault repudiation, is considered morally reprehensible in Islam.[18]

This attitude is reflected in several well-known ḥadīths. The ḥadīth literature is important as it functions as a repository not only of legal materials, but also of moral attitudes and admonitions. In one tradition, the Prophet Muhammad is reported to have said: "*There is nothing which God (Mighty and Majestic is He!) loves more than a house which erects itself on marriage and there is nothing which God hates more than a house which destroys itself in Islam through*

[16] I say conceptually as opposed to grammatically, as Persian grammar is gender neutral.
[17] The following is quoted from Clarke & Cross, *Muslim & Canadian Family Laws,* 115-116.
[18] There are exceptions, however, in which repudiation becomes obligatory. Examples are when the wife aposticizes or is caught committing adultery.

separation (firqah)*, that is, repudiation* (ṭalāq)."[19] In another tradition, the Prophet is reported to have said: "*Marry and do not repudiate, for surely from repudiation (ṭalāq) the Throne* (ʻarsh) *[of God] is shaken.*"[20] Therefore, although marital dissolution is permitted, it is nevertheless considered a despicable act, as it defies the moral order of society which, as understood by the Sharīʻah, is rooted in the institution of marriage. Why marriage is seen as the foundation of a moral society in the Sharīʻah is noteworthy. There seems to be an understanding across all schools of law that marriage first and foremost is a solution to fornication, a phenomenon which the legal system seems to abhor for the reason that it can result in illegitimate births, an untoward event in a system where social solidarity and welfare are guaranteed by family ties. Second, the Islamic construction of patriarchy rests largely on marriage, as it is in marriage that most of the power relations between men and women are defined (I will expand upon this point further in the coming chapters). Therefore, to defy marriage by definition threatens the patriarchal moral order of Muslim society.

Condemnation of repudiation in Shiʻī ḥadīth is made vivid and personal by portrayals of the Prophet and the Imāms angrily reproaching particular men. In one instance, a tradition relates that the Prophet was approached by a man who had married and repudiated two women one after the other, although neither had committed any evil (*sū'*) (i.e. sexual impropriety). Upon hearing this, the Prophet replied to the man that "*God hates* (yubghiḍ) *and curses* (yalʻan) *all tasters*

[19] Abū Jaʻfar Muḥammad b. Yaʻqub al-Kulaynī, *al-Kāfī*, 8 vols. (Tehran: Dār al-Kutub al-Islamīyah, 1407/1986), V, 328; Muḥammad ibn al-Ḥasan Ḥurr al-ʻĀmilī, *Wasā'il al-Shīʻah ilá Taḥṣīl Masā'il al-Sharīʻah h*, 29 vols., ed. Gurūh-i Pazhūhish-i Mu'assasah-yi Āl al-Bayt (Qum: Mu'assasah-yi Āl al-Bayt, 1409/1988), XXII, 8. Majlīsī comments that this tradition is fully veracious (*ṣaḥīḥ*) according to his grading standards; see Muḥammad Bāqir b. Muḥammad Taqī al-Majlisī, *Mirāt al-'Uqūl fī Sharḥ Akhbār Āl al-Rasūl*, 26 vols., ed. Sayyid Hāshim Rasūlī (Tehran: Dār al-Kutub al-Islāmīyah, 1404/1983), XX,16.

[20] Faḍl b. al-Ḥasan al-Ṭabarsī, *Majma' al-Bayān fī Tafsīr al-Qur'ān*, 10 vols., ed. Muḥammad Javād Balāghī (Tehran: Intishārāt-i Nāṣir-i Khusraw, 1372 H.Sh./1993), X, 457; al-Ṭabarsī, *Makārim al-Akhlāq*, (Qum: Intishārāt-i Sharīf-i Raḍī, 1412/1972), 197; also quoted in Ḥurr al-ʻĀmilī, *Wasā'il al-Shīʻah*, XXII, 9. The tradition has also been narrated by al-Ṭabarānī through Sunnī sources, where the repudiator is warned against 'shaking the throne of the All-Merciful' (*'arsh al-Raḥmān*). It is important to note that this ḥadīth is commonly known amongst the Imāmīs and the Sunnīs and thus reflects a shared concern.

(dhawwāq) *from among men and all tasters* (dhawwāqah) *from among women.*"[21] What is perhaps meant by 'tasters' in this context are those individuals who defy the sacred and permanent objectives of marriage by abusing the permission for divorce. In another tradition, the sixth Imām Ja'far al-Ṣādiq relates from his father Imām Muḥammad al-Bāqir, who was reported to have declared, "*Indeed, God (Mighty and Majestic is He!) hates the intense repudiating tasters* (miṭlāqin dhawwāqin*) [from among men]*"[22]. There are a number of other traditions with the same meaning found in the same sections as above; all traditions, however, are exclusively addressed to males, since it is men that have the power to repudiate.

Not all males, however, can repudiate their wives. All the schools of law - with the exception of one - stipulate adulthood (*bulūgh*) for any valid repudiation. The exception is the Ḥanbalī school, which allows a child (*ṣaghīr*), even if he is under ten years of age, to repudiate his wife as long as he is able to discern what repudiation is.[23]As marital dissolution is a serious matter in Islam and comes with important social costs, there are restrictions on who can undertake it. Marriage, by contrast, is relatively easier to undertake as it is a highly recommended act and 'promotes' the moral order of society.

As intention (*nīyah*) is the cornerstone of all Islamic acts, all the schools of law agree that an insane husband's repudiation is invalid. However, the four Sunnī schools of law have a consensus that if a man utters the statement of repudiation while purposefully and knowingly being in a state of intoxication (*sakrān*), be it from alcohol, hashish, heroin or cocaine, the repudiation is still valid. The only exception is that if he did not know prior to being intoxicated

[21] al-Kulaynī, *al-Kāfī*, VI, 54; Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 8.
[22] al-Kulaynī, *al-Kāfī*, VI, 55.
[23] 'Abd al-Rāḥmān al-Jazīrī and Sayyid Muḥammad Gharawī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah wa Madhhab Ahl al-Bayt*, 5 vols. (Beirut: Dār al-Thaqalayn, 1419/1998), IV, 361.

that he was consuming an intoxicant (*muskir*).[24] On the other hand, the Imāmīs, by consensus, categorically reject the validity of a man's repudiation whilst in a state of intoxication.[25] Furthermore, with the exception of the Ḥanafīs, all the Islamic legal schools agree that repudiation through coercion (*ikrāh*) is invalid.[26]

According to the Imāmīs and Aḥmad b. Hanbal (d. 855), repudiation in jest is invalid. However, Mālik b. Anās (d. 795), Muḥammad b. Idrīs al-Shāfi'ī (d. 939) and Abū Ḥanīfah (d. 767) state that it is valid.[27] Furthermore, Ibn Rushd (Averroes) (d. 1198) quotes al-Shāfi'ī and Abū Ḥanīfah that "*intention* (nīyah) *is not necessary for repudiation*".[28] The Imāmīs, however, have been quite strict in arguing that only a repudiation with actual intent is valid. This is based on the famous position of the Imāms where they were reported to have said: "*No repudiation [is to take place] except by one who wants to repudiate…and there is no repudiation except through intention*".[29]

The Imāmī attitude towards divorce is stricter in general than the Sunnī position; other examples of this stricter attitude will be seen below. This attitude may have social roots; but it may also be due to the fact that most aspects of the law have been explicitly laid out, supposedly by the Imāms in the ḥadīth literature, and thus difficult to circumvent. The Sunnī jurists have not

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[24] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 358.
[25] Ibid; see also Muḥammad Jawād Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, 6 vols. (Qum: Mu'assasah -yi Anṣārīyān, 1421/2000), VI, 3; Bāqir al-Írawānī, *Durūs Tamhīdīyah fī al-Fiqh al-Istidlālī 'alá al-Madhhab al-Ja'farīyah*, 3 vols. (Qum: Mu'assasat al-Fiqh, 1426/2005), II, 392. This consensus goes back to the earliest of Imāmī jurists, see for example 'Alī b. Ḥusayn Sharīf al-Murtaḍa, *al-Intiṣār fī Infirāḍāt al-Imāmīyah*, ed. Gurūh-i Pazhūhish-i Intishārāt- Islāmī (Qum: Daftar-i Intishārāt-i Islāmī, 1415/1994), 304. The consensus is based on the insistence of the Shī'ī Imams. See for example Imām Ja'far al- Ṣādiq's famous position in which he categorically invalidated the repudiation of an intoxicated man; Abū Ja'far Muḥammad b. Ḥasan al-Ṭūsī (Shaykh al-Ṭūṣī), *Tahdhīb al-Aḥkām*, 10 vols. (Tehran: Dār al-Kutub al-Islāmīyah, 1407/1994), VIII, 73.
[26] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 361.
[27] Muḥammad Jawād Mughnīyah, *al-Fiqh 'alá al-Madhāhib al-Khamsah*, 2 vols. (Beirut: Dār al-Tayyār al-Jadīd: 1429/2008), II, 158.
[28] Ibid.
[29] Ibid. This tradition and its other variations have been variously narrated by Imām Ja'far al-Ṣādiq, see for example al-Kulaynī, *al-Kāfī*, VI, 62; Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 30-31; for the Imāmī juristic position, see for example Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, III, 65;

faced the same kinds of restrictions, the content of their ḥadīth literature is more general and leaves more room for flexibility in interpretation. The jurists were thus more easily able to introduce increased prerogative or flexibility in divorce.

Types of Ṭalāq

Ṭalāq or repudiation is divided into two categories, the first of which is a revocable repudiation (*al-ṭalāq al-raj'ī*) and the other an irrevocable repudiation (*al-ṭalāq al-bā'in*).

1) *The Revocable Repudiation*

A revocable repudiation does not immediately bring about marital dissolution, but simply starts the process in which, after the pronouncement of the repudiation formula (*lafẓ al-ṭalāq*), the wife enters a waiting period (*'iddah*) of three menstrual cycles. During this time, the wife is to continue to live with her husband and receive maintenance from him until she enters or finishes (depending on the jurist) her last menstrual cycle. Once the waiting period is over, the marriage is finally dissolved. At this point, the now former wife is to receive any dower (*mahr*) still due to her[30], maintenance for the children she is legally responsible for, and any debt the husband has incurred from her. Theoretically, the process seems simple enough. However, it must be noted that historically, unilateral repudiations of this sort have been rare, as they were quite costly and in many instances led to financial ruin.[31] In other words, although the husband does have the power to effect a no-fault repudiation at will, practical considerations and consequences often limited male power.

[30] Note that the wife is legally allowed to ask for her dower at any point in her marriage. However, a widespread practice in the Muslim world has been to ask for it at the point of marital dissolution, apparently in order to discourage repudiation.
[31] Wael Hallaq, *Sharī'ah: Theory, Practice, Transformations*, (Cambridge: Cambridge University Press, 2009), 190.

The husband reserves the right to go back on his repudiation and resume marital life before the waiting period elapses, with or without the consent of the wife. Additionally, if the couple resumes sexual intercourse, the repudiation is automatically cancelled, even without their intention, and the couple must start the process of repudiation all over again. The Mālikīs, Ḥanbalīs and especially the Ḥanafīs, however, consider acts such as kissing or even seclusion (*khalwah*) with the wife to be on a par with intercourse (*al-khalwah ka-al-waṭ'*).[32]Given that marital dissolution is frowned upon, it is not surprising that a revocable option is included during this process so as to prevent a decisive end to the marriage.

A revocable repudiation can proceed in two fashions: either in accordance with the tradition of the Prophet (*ṭalāq al-sunnah*) or deviating from it (*ṭalāq al-bid'ah*). The former (the *sunnah* repudiation) indicates a repudiation which is in conformity with 'the custom and will of God and the Prophet'. It is a process by which a husband repudiates his wife in a restrictive fashion, in which the repudiation can only take place when the wife is not in her menses (*hayḍ*) but in her cycle of purity (*ṭuhr*), during which no penetration (*dukhūl*) can have taken place. The *bid'ah* repudiation is given during the restricted times mentioned above or in other irregular circumstances.

The four Sunnī schools are in agreement that a *bid'ah* repudiation is prohibited (*ḥarām*); but this does not invalidate the process.[33] The Imāmīs, although they do not deem it prohibited to pronounce divorce during the restricted times, nevertheless see it as completely invalid.[34] The

[32] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 378.
[33] Mughnīyah, *al-Fiqh 'alá al-Madhāhib al-Khamsah*, II, 161.
[34] Ibid; Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, VI, 11-12. The legal consensus that only a *sunnah* repudiation is valid has existed since the earliest of Imāmī jurists; see for example Ḥassan b. 'Ali b. Abī 'Aqīl, *Ḥayāt Ibn Abī 'Aqīl wa Fiqhih*, ed. Gurūh-i Pazhūhish-i Markaz al-Mu'jam al-Fiqhī (Qum: Markaz al-Mu'jam al-Fiqhī, 1413/1992), 477; Muḥammad b. 'Alī b. Bābūyah al-Qummī (Shaykh al-Ṣadūq), *al-Muqni'*, ed. Gurūh-i Pazhūhish-i Mu'assasah-yi Imām-i Hādī (Qum: Mu'assasah-yi Imām-i Hādī, 1415/1994), 343; Muḥammad b. Muḥammad b. Nu'mān al-'Ukbarī (Shaykh al-Mufīd), *Aḥkām al-Nisā'* (Qum: Kungri-yi Jahānī-yi Hizārah-yi Shaykh-i Mufīd, 1413/1992), 43.

Imāmī consensus is based on various traditions in which the Imāms explicitly state that "*there is no [valid] repudiation except for a sunnah repudiation* (lā ṭalāq illā 'alá al-sunnah)."[35] Again, this stricter approach seems to be the result of explicit traditions in Imāmī sources. However, another probable factor is the overwhelming fear in Imāmī law of allowing conjecture and opinion, a fear which has historically been, comparatively speaking, less acute in Sunnī law.[36] In other words, the restriction on the usage of conjecture and opinion has reduced the flexibility of the law (the invalidation of the *bid'ah* repudiation being one of many examples) and has often limited the Imāmīs from going beyond the literal narrative of the Imāms. This limitation, however, has been less acute in Sunnī law.

The Imāmīs add two other categories to the *bid'ah* repudiation. The first is the absence of two male witnesses during repudiation. The other is the triple repudiation (*ṭalāq al-thalāth*), the latter which the Sunnīs are also in agreement with[37] but differ with Imāmīs in substance as it will be seen below. First, according to the Imāmīs, for any repudiation to be valid, it must be done in the presence of two just male witnesses, in accordance with the Qur'ānic injunction: "*When they have completed their term either retain them with honor or take two just men as witnesses from among yourselves and bear testimony for the sake of God…"*[38] The four Sunnī schools interpret the verse as only a recommendation and not an obligation.

The Imāmīs also reject the validity of an instant triple repudiation in one sitting (*ṣīghah wāḥidah*). The four Sunnī schools, however, see it as valid. Under normal circumstances in both the Imāmī and Sunnī schools, a husband can repudiate his wife up to three times in three distinct

[35] al-Kulaynī, *al-Kāfī*, VI, 62.
[36] See for example the abhorrence the Imāms display vis-à-vis analogical reasoning (*qiyās*) – a widely held practice in the Sunnī realm – as they believe it speculates with the divine law: al-Kulaynī, *al-Kāfī*, I, 56.
[37] Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, VI, 11. Again this stance has been standard even in early Imāmī scholarship; see for example; al-Ṣadūq, *al-Muqni'*, 343-344; al-Mufīd, *al-Muqni'ah* (Qum: Kungri-yi Jahānī-yi Hizārah-yi Shaykh-i Mufīd, 1413/1992), 526.
[38] Qur'ān, 65:2.

waiting periods. In this case, the third repudiation becomes a final one and the husband can no longer take back his wife during the third waiting period or re-marry her once the marriage has been dissolved. If he wishes to rejoin his wife a fourth time, she must go through a process called *taḥlīl* in which she must marry another man, have intercourse with him and then seek a repudiation from him through which she will become permissible to her former husband again.[39] The triple repudiation 'statement', however, takes place when a man repudiates his wife three times in one sitting. She then becomes immediately forbidden to him, unless she goes through the process of *taḥlīl*. The Imāmīs count this kind of repudiation as only one, regardless of the number of times it is uttered. However, it is accepted as three distinct repudiations (i.e. legally effective), by the four Sunnī schools of law.[40] The famous Ḥanbalī jurist Ibn Taymīyah (d. 1328), however, seems to have been one of the rare Sunnī jurists to have agreed with the Imāmī position.[41]

2) *The Irrevocable Repudiation*

An irrevocable repudiation establishes the marital dissolution the instant the statement of repudiation is made.[42] Although the wife must still observe a waiting period, this is only to determine the paternity of her child and be allowed to re-marry again once its time has elapsed. Furthermore, contrary to a revocable repudiation, the husband has no longer the right to approach her, be it during or after her waiting period, as the couple is no longer married. Although there are significant disagreements as to what falls under the category of an irrevocable repudiation,

[39] A number of traditions explicitly state that intercourse or "tasting" (*dhāq*) must occur before the *taḥlīl* is considered valid, see for example al-Majlisī, *Biḥār al-Anwār al-Jāmi'ah li-durar Akhbār al-A'immah al-Aṭhār*, 110 vols. (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, 1403/1983), CI, 141-143.
[40] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 381.
[41] Clarke & Cross, *Muslim & Canadian Family Laws*, 51.
[42] Note that the conditions of repudiation, as seen earlier, are still dependent on the stipulations outlined by each of the legal schools.

there are three instances, according to the Lebanese Imāmī jurist Jawād Mughnīyah (d. 1979), that are generally agreed to by all schools, including the Imāmīs[43]:

a) Repudiation that takes place before the marriage has been consummated
b) Repuditaiton when the wife is menopausal
c) Repudiation for the third time. In this case, as opposed to the others, it is not allowed for the divorced couple to contract a new marriage. As described earlier, the wife must go through a process of *taḥlīl* before being allowed to re-marry her former husband. However, if the repudiation reaches the ninth time, the repudiation becomes a permanent repudiation (*ṭalāq al-*‘*iddah*) in which the couple become permanently barred to each other and can never remarry again. The purpose here seems to be to prevent frequent divorces, or to emphasize the seriousness of marriage, despite the unlimited male power of divorce.

Annulment of the Marriage Contract **(Faskh)**

Another mode of marriage dissolution in the Sharī‘ah is the annulment of the marriage contract (*faskh al-nikāḥ*). What fundamentally distinguishes a *faskh* and a *ṭalāq* is that the former does not count in the triple repudiation. Thus, one can theoretically dissolve one’s marriage through annulment an infinite number of times without incurring the risk of having to go through a process of *taḥlīl* or being permanently barred from re-marrying again at the ninth instance of repudiation.

Another essential difference between *ṭalāq* and *faskh* is that *faskh* is not a no-fault marital dissolution. A third difference is that it can equally and unilaterally be initiated by the wife (although judicial intervention at this point is necessary). The right to dissolve the marriage

[43] Mughnīyah, *al-Fiqh ‘alá al-Madhāhib al-Khamsah*, II, 168-169.

through annulment is only allowed in cases where there is: (1) a problem in the marriage contract itself which voids the marriage (e.g. if the couple turns out to be related in the prohibited degrees), (2) violation of a contractual stipulation (e.g the husband taking the wife out of her native city) after this had been forbidden by a clause in the contract, 3) deceit (*tadlīs*) (e.g the wife having lied about her virginity), 4) a defect (*'ayb*) on the part of either spouse that does not need to be stipulated in the contract. These defects can be either mental or physical. They can be general matters pertaining to both spouses such as insanity (*junūn*) and leprosy (*baraṣ*/*judhām*); matters relating specifically to men such as impotence (*'unnah*) and penile (*jabb*) or testicular (*khiṣā'*) castration, or matters relating specifically to women such as vaginal blockage (*ratq* and *'afal*) that makes intercourse difficult or impossible.

Another ground for annulling the marriage according to some schools of law is through *khul'*, where the wife initiates a marital dissolution by offering her husband some form of compensation. This issue will be treated in detail in the following chapters.

All the statements above are subject to the fact that differences between the Islamic schools concerning *faskh*, both in substance and procedure, are quite large and run into the minutest of details in almost every aspect. For example, there is wide disagreement on the maintenance and dowry due in various circumstances. I will not address these legal differences here, as they are not directly relevant to this study.[44]

[44] For a good description of the legal differences concerning *faskh* between the five schools of law, see al-Jazīrī, 241-262; Mughnīyah, *al-Fiqh 'alá al-Madhāhib al-Khamsah*, II, 65-78. For a comprehensive discussion on Imāmī legal differences on *faskh* and defects, see Murtaḍa b. Muḥammad Amīn al-Anṣārī, *Kitāb al-Nikāḥ*, ed. Gurūh-i Pazhūhish dar Kungrih (Qum: Kungrih-yi Jahānī-i Buzurgdāsht-i Shaykh-i A'ẓam-i Anṣārī, 1415/1994), 433-464. For a more contemporary Imāmī study of the subject, see Muḥammad Fāḍil al-Lankarānī, *al-Nikāh: Tafṣīl al-Sharī'ah fī sharḥ Taḥrīr al-Wasīlah*, ed. Ḥusayn Wāthiqī (Qum: Markaz-i Fiqhī-i A'immah-yi Aṭhār, 1421/2000), 394-418.

***Judicial Dissolution* (Ṭalāq al-Qāḍī)**

A judicial dissolution (*ṭalāq al-qāḍī*) of the marriage takes place when a Muslim judge (*qāḍī*) exerts his right to dissolve a couple's marriage (*taṭlīq*) without the consent of the husband. Ziba Mir-Hosseini rightly observes that it is only this mode of marital dissolution that "resembles divorce in the Western sense"[45]. However, this is only true in the modern context, as *taṭlīq* is now exercised by the state's centralized judicial body, as exemplified in Mir-Hosseini's own study of modern Moroccan and Iranian law. The resemblance does not hold for the classical conception of judicial dissolution. As Wael Hallaq has observed, the Muslim court and judicial assembly (in their classical sense) were wholly dependent on the *muftī* or *mujtahid*, [46] whose interpretation of the law was enacted by the *qāḍī*.[47] In other words, it was the *muftī* or *mujtahid* who laid the foundation and parameters in which the *qāḍī*'s court functioned. On this basis, I argue that the background presence of the *mujtahid* replaced the state's centrality to the court system (at least as far as family law was concerned). Therefore, it is important to distingh a judicial dissolution under a premodern state and a modern one as the latter was framed within a singular, codified and standardized legal framework and the former was structured within a more fluid, non-monolithic and arbitrary construct.[48]

The traditional judge's power is thus naturally limited to what is allowed according to the school or *mujtahid* in question. The Ḥanafīs only allow a judicial repudiation without the

[45] Ziba Mir-Hosseini, *Marriage on Trial,* 36.
[46] A *muftī* or *mujtahid* is a Muslim jurist who has reached a level of legal knowledge that permits him to interpret the law and issue verdicts. The word *muftī* is generally used within the Sunnī milieu, whereas the word is less common amongst the Imāmīs, who prefer to use the word *mujtahid*.
[47] Wael Hallaq, *Sharī'ah* , 19.
[48] It was generally the case (rather than the exception) that a *mujtahid* would change his opinion many times throughout his life. It was also the case that various sub-*mujtahids* within a school of law would differ as well, which is why it is not rare to find contradictiory verdicts in any given school. Due to the specific focus of this thesis, I have not been able to dwell too much on contradictory opinions within the schools themselves. I have instead outlined their most prevalent and consistant view.

husband's consent if he is impotent or has gone through penile or testicular castration.[49] Mālik, al-Shāfi'ī, and Ibn Ḥanbal have allowed it on the following general grounds[50]: non-maintenance, harming the wife through words (*qawl*) or some action (*fi'l*), the wife being subject to harm due to her husband's absence, and harm being caused to the wife due to her husband's imprisonment.[51] Here we see a siginificant difference and noticeable fluidity in the allowance of divorce.

The Imāmīs agree that that if the husband is absent[52] or if he fails to provide maintenance for his wife, a judge is to dissolve their marriage.[53] The latter is based on a tradition from the fifth Imām Muḥammad al-Bāqir who is reported to have said: "*If [a man] has a wife and does not clothe what can be seen of her* 'awrah[54] *and does not feed her to the point she can stay strong, then it is the right of the Imām to separate them*".[55] According to Imāmī jurists, in the absence of an Imām, this right is delegated to a jurist (*al-ḥākim al-shar'ī*)[56] and this type of dissolution would be considered an irrevocable repudiation.[57] However, it must be emphasized that many Imāmī jurists have been hesitant in enacting the second ground for judicial dissolution as it is not rare that husbands fail to provide because of their financial inability to do so[58] as

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[49] Mughnīyah, *al-Fiqh 'alá al-Madhāhib al-Khamsah* ,II, 212.
[50] It must be emphasized again that these are general agreements; the details are subject to significant differences. For example, non-maintenance is grounds for an obligatory repudiation for the three schools of law; however, al-Shāfi'ī argues that this does not apply if the husband is unable to provide due to insolvency.
[51] Ibid, 212-214.
[52] Many Imāmī jurists have been quite restrictive of this point and speak of a long period before the judge would be able to grant a marital dissolution. For example, 'Allamah al-Ḥillī (d. 1325) argued that the wife is to wait four years before she could take her case to a judge; see Ḥasan b. Yusuf b. Muṭahhar al-Ḥillī, *Qawā'id al-Aḥkām fī Ma'rifat al-Ḥalāl wa al-Ḥarām*, 3 vols., ed. Gurūh-i Pazhūhish-i Daftar-i Intishārāt-i Islāmī (Qum: Daftar-i Intishārāt-i Islāmī, 1413/1992), III, 144.
[53] Mughnīyah, 214-215.
[54] The *'awrah* refers to the parts which are not allowed to be exposed in front of men whom are not related to the wife. This includes the entire body except for the hands and face according to Imāmī law.
[55] See Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah,* XXI, 509; for an alternative version of the tradition, see al-Kulaynī, *al-Kāfī*, VI, 74.
[56] al-Irawānī, *al-Fiqh al-Istidlālī*, II , 452.
[57] Ibid, 453.
[58] Mughnīyah, *Fiqh al-Imām Ja'far al-Ṣādiq*, VI, 53-54.

opposed to a clear case of a husband's carelessness or spite towards the wife. Both here, nevertheless, illustrate the typical Imāmī reluctance to allow divorce (although here, by the wife). This, of course, is especially true with the problem of absence given the long period required to establish desertion (see footnote 51).

Marital relations in Islamic law are largely informed by the duties and roles of both husband and wife, and both spouses are expected to meet their obligations. As these roles underline the social and moral order of Muslim society, the jurists (from all schools) go as far as undermining the husband's default prerogative to repudiate his wife if he does not meet these expectations. This again is evidence of the overwhelming juristic concern for social and moral order, a point which I will elaborate on in Chapter Three.

Marital Dissolution in Jewish Law

Marital dissolution in Jewish law is also dissimilar to the current Western notion of divorce. It seems to be more similar to the notion of *ṭalāq* in Islamic law. In other words, as in Islamic law, a husband has the right to repudiate his wife, and the wife may play only a passive role. What makes the two dissimilar is the more 'private' nature of divorce in Jewish law. In other words, Islamic law does leave room for a judge under certain circumstances to take it upon himself to dissolve the marriage without the consent of the husband, whereas in Jewish law, although the rabbinical court (Beth Din) seems to play the role of the Muslim judge, their authority cannot bypass the husband's will. Marital dissolution in Jewish law, however, is intrinsically bound to the consent of the husband, or more precisely, his writing a document of release (*get*) to free her from the bond of marriage. Thus, the most a rabbinical court can do is advise a husband or attempt to compel him to release his wife; but if the husband's consent is not obtained, there is

little anyone can do. Furthermore, if a Jewish husband apostacizes from Judaism, the marriage will remain intact and still require the husband's express consent for dissolution. According to the general Jewish understanding of the Halakhah, the only way a marital dissolution can take place without the consent of the husband is if he were to die (which is also another mode of automatic marital dissolution in Islamic law).

I will now provide a brief introduction to the Jewish mode of marital dissolution, as it is a necessary background to Maimonides' conception of a wife-initiated marital dissolution, the final focus of my discussion.[59]

The Get

As in Islam, marriage seems to be the center of Jewish religious life. When the Bible speaks of a husband's marriage to his wife, it says: "*He shall cleave unto his wife and they shall be one flesh*". [60] Marriage is thus a sacred and praiseworthy act, whereas marital dissolution is disapproved of. Furthermore, as marriage was intended to be for life, it is "*forbidden to marry a wife with the intention of divorcing her*".[61] Marriage is a celebrated divine act. The strongest statement against martial dissolution is in the prophecy of Malachi: "*God stood in the testament between you and your wife, and now you have turned treacherously against her…Do not turn against the wife of your youth for the one who sends away [his wife] is hateful…"* (2:14-16).[62] This apparent dislike of marriage dissolution was echoed by the famous Rabbi Eleazar ben

[59] It is worth noting that there is, however, a possibility of having the marriage annulled according to some Jewish movements. But this element of the law is controversial and even ill-defined at times. For these reasons, as well as for the sake of brevity, I have not dwelled into this option.
[60] Genesis 2:24, translation from Adele Berlin and Marc Zvi Brettler, *The Jewish Study Bible*, (Oxford: Oxford University Press, 2004).
[61] Ibid, 221-222.
[62] Translation from Rachel Biale. *Women and Jewish Law*, (New York: Schocken Books, 1995), 71.

Azariah (first century C.E) in his well-known statement, "*whenever a man divorces his first wife, the very altar weeps over him"*.[63]

Marital dissolution is disliked, but nevertheless allowed. The first and fundamental reference to marital dissolution, or more precisely 'release'[64] in Jewish law is found in the Bible:

> A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes a bill of divorcement, hands it to her, and sends her away from his house; she leaves his household and becomes the wife of another man; then this latter man rejects her, writes her a bill of divorcement, hands it to her, and sends her away from his house or the man who married her last dies. Then the first husband who divorced her shall not take her to wife again, since she has been defiled – for that would be abhorrent to the Lord. You must not bring sin upon the land that the Lord your God is giving you as a heritage.[65]

It seems from the above that just as in Islam, marital dissolution in Judaism is the prerogative of the husband. The wife plays a passive role, thus never being allowed to actively divorce her husband. Therefore, marital dissolution is a unilateral repudiation, different from that practiced in many contemporary legal systems.[66]

The Bible states that if the husband finds something obnoxious (*ervat davar*) in his wife, he is to write her a "bill of divorcement" (*sefer k'rituth*) and send her away from his house. One will notice, however, that the word *get* (pl. *gittin*) is not mentioned in the Bible. The Biblical term used for the repudiation bill is *sefer k'rituth* which literally means "a document of cutting

[63] John D. Rayner. "From Unilateralism to Reciprocity: A Short History of Jewish Divorce", in *Journal of Progressive Judaism*, #11 (November 1998): 49-50.
[64] One of the meanings of *ṭalāq* is also release.
[65] Adele Berlin and Marc Zvi Brettler, Deuteronomy 24:1-4.
[66] The creation of the modern state of Israel and the centralization of family laws, however, has done little to ease the traditional restrictions.

off, of complete severance"[67]. It is in the *Mishna* and in the Talmud that the word *get* is used for release. The word *get* is in fact an Aramaic word that means "legal document" - or more fully, *get ishah* (woman's document) - which is rooted in the Sumerian term signifying an "oblong object".[68] The full name for a document of release is *get k'rituth*. Other terms, such as *get ishsha* (document of a woman) and *get pitturin* (document of release) are also used, however, the simple word *get* is employed in most cases.[69]

Despite the multiplicity of terms, the basic idea seems to be of a document, and this document appears to be *the* way (and the only way) of divorce in Jewish law. As a consequence, only men are to give a *get* and women are only to receive it. This is not surprising, as marriage in Jewish law appears to be a unilateral contract where the groom acquires the bride – a point that is alluded to at the beginning of the verse cited above: *a man takes a wife and possesses her*. In other words, "one party is the initiator or executor and the other is the acceptor".[70] Logically, as the husband is the only one who initiates the marriage, he will be the only one allowed to initiate its dissolution.

Unlike in Islamic law, however, a man according to the Halakhah cannot release his wife orally, but must write her a document of release (or divorcement). This is thought to inhibit him from divorcing her in a sudden emotional fit or even in jest, as it can be the case in some understandings of Sunnī law. A second difference between Islamic and Jewish divorce law is that once the wife is divorced in Jewish law, she can never go back to her first husband as if she

[67] Ibid.
[68] Rayner, 50.
[69] Samuel Daiches. "Divorce in Jewish Law" in *Journal of Comparative Legislation and International Law*, vol. 8 #4 (1926): 217.
[70] Heather Lynn Capell. "After the Glass Has Shattered: A Comparative Analysis of Orthodox *Jewish Divorce* in the United States and Israel" in *Texas International Law Journal*, vol. 33 #2 (Spring 1998): 335.

were to marry and divorce another man, she would be "defiled".[71] In Islamic law as we have seen, this would only apply after the ninth divorce. According to some scholars, the purpose of this law "is no doubt tended to restrict" divorce,[72] which also appears to be the case with Islam.

Some Concluding Remarks

The Nature of the Marriage Contract

On the motives of a man's right to a unilateral no-fault repudiation, Wael Hallaq remarks that the

> pre-modern jurists reasoned that obliging men to produce, presumably in a court of law, reasons for repudiating their wives might expose family secrets and affairs to public scrutiny that would ultimately hurt the reputation of the wife far more than that of the husband.[73]

He adds that such divulging of secrets would not be as hurtful to men; this he believes is one reason for men's right to no-fault repudiations. However, Hallaq's view might be true to certain customary sensitivities, it is difficult to assume that this was the usual thinking, especially since the legal textual sources do not attest to it. In fact, marriage is defined by a bride offering herself to the groom (*ījāb*) and the latter's acceptance (*qabūl*). In other words, marriage contracts (permanent and, in Imāmī law, also temporary) are considered to be on the same level of transactions (*manzilat al-mu'āwiḍah*) in which the bride offers the groom authority over her vagina (*taslīṭ 'alá al-buḍ'*) and transference of ownership over its enjoyment (*tamlīk al-intifā' bihi*).[74] It is worth noting that that word used for vagina, "*buḍ'*" is rooted in the same word as "*bidā'ah*" which denotes "goods" or "merchandise", thus further reflecting the transactional

[71] "Defiled" not being in the general sense as she is still allowed to marry another man, see *Jewish Studies Bible* commentary, 420.
[72] Daiches, 216.
[73] Hallaq, *Sharī'ah* , 282.
[74] Muḥsin al-Ṭabāṭabā'ī al-Ḥakīm, *Mustamsak al-'Urwat al-Wuthqá,* 14 vols. (Qum: Mu'assasat Dār al-Tafsīr, 1416/1995), XIV, 108; the Sunnis also utilize the same terminology, see al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 475.

symbolism of marriage. As a result, the groom is the acquirer or buyer of the bride. One receives the same impression from Jewish law; although in this case, the wife does not sell her vagina to the groom, but only her right to choose what man to have intercourse with. A marital dissolution in Islamic law, in any case, would parralell or resemble the right to return bought merchandise, as opposed to the oddity of the seller (the woman) wanting her merchandise back after a valid and accepted transaction. At the same time, however, it must be emphasized that in Islamic law, to be on the "same level" (*manzilah*) only means to share certain similarities, and not to be categorically the same. When actual transactions are involved, as in the case of slaves, words like 'buying' (*ishtirá'*) or sales acquisition (*kasb*) are used; the terminology used in marriage, as we have seen above, is different. Therefore, the transaction is symbolic and not literal according to the jurists.

Here it should be emphasized that such descriptions of marriage are not the result of an inherent misogyny, but simply products of a patriarchal context that viewed men as subjects and women as objects; or more precisely, a context which situated men as *possessors* and women as *possessed*. Oddly enough, this feature of patriarchy has followed us into the modern period in the West as much as the East, and shows little sign of abating.

The Nature of the Textual Sources

When studying the textual sources of religious law, one must be careful not to consider them as the whole of the law. In the case of Islam, the texts only deal with the edges and borders of the law. In other words, the law and texts that lay out the law deals with limits that are not to be transgressed. A larger embodiment and practice of the law is to be found in society, which lives it in accordance to its customs (*'urf*) and molds it in accord to its needs. This partly explains the

elastic and dynamic nature of religious law and why no text is the same. From this point of view, religious ethics are also part of law (although ethics are not extensively dealt with in works of *fiqh* for practical reasons). The ethical legal view of the tradition tends to be more welcoming for female Muslim audiences, as it deals with religious behaviors which are often softer and more egalitarian than their purely legal counterparts. In the subsequent chapters of this thesis, I will give some attention to both context and the ethical voice, even though my study, for reasons explained in the introduction, is essentially textual and legal.

As it was seen earlier, although men possess the unilateral right to no-fault repudiation, they are inhibited from exercising that right, as its costs often lead to financial ruin. Moreover, it is worth considering pre-modern Islamic societies were focused on the extended rather than nuclear family. Repudiation could often not have been effected as swiftly and easily as the textual sources make it seem. Rather, repudiation would have been a serious affair in which the interests of the larger family, clan or even tribe would be at stake. Attempts at reconciliation or arbitration in which the interests of families were represented would have slowed and complicated divorce. This seems to have been the case in Muslim societies even upto the nineteenth century. For example, speaking of Iran, Janet Afary observes that marital dissolution was rare in "rural and urban lower classes" (who were the majority of the population) as they were made difficult by "[s]trong social ties between the two families, and the financial obligations of a man after divorce".[75]

[75] Janet Afary, *Sexual Politics in Modern Iran* (Cambridge:Cambridge University Press, 2009), 7.

The Law as an Interpretive Enterprise

The law was born and molded in the society in which it was situated. As such, it was and still is an interpretive enterprise, ultimately functioning in the interests of the society. Rab Yannai (d. 220 C.E), for example, affirmed that the letter of Jewish law was by no means unchallengeable:

> [i]f the law had been completely given without permission to modify it, men could not exist, for it is only in consequence of discussion of the learned that the law is molded to meet the conditions of life. Moses asked God to teach him the Halacha, and God told him to find it in the voice of the majority[76]

It is thus unlikely that Muslim jurists and Rabbis (or some of them) would have failed to find a legally justified means for forcing dissolution of an unbearable marriage. In Muslim law, the means devised were largely through a process known as *khul'*, the subject of the following chapters.

[76] Jacob Freid. "Introduction" in *Jews and Divorce* edited by Jacob Freid (New York: KTAV Publishing House, 1968), 2.

Chapter Two: The Nature of *Khul'* in Islamic Law

Introduction

The legal traditions of Islam and Judaism have given greater power to men in divorce, as seen in the previous chapter. This does not, however, mean that there were no openings in the scriptures or legal interpretations that attempted to give room to women to initiate marital dissolution. Such an opportunity was found and elaborated in *khul*'. *Khul'* is generally understood as a negotiated form of repudiation in which a woman forgoes her dower or other benefits in exchange for her husband's consent to marital dissolution. The problem with this mechanism, however, has been that *khul'* has largely been interpreted by the jurists as contingent upon the husband's acceptance. One important reason given for this (even though male-initiated dissolutions are clearly unilateral to begin with) is that the process of *khul'* is contractual. The dependence of *khul'* upon the husband's consent, as insisted on by most jurists, has seriously weakened an otherwise promising legal option for women.

Despite the prevailing juristic conception of *khul'* as dependent on the consent of the husband, it must also be emphasized that the juristic formulation of *khul'* has actually been quite elastic, probably more so than any category of marital dissolution. There have been both minority opinions and legal loopholes that have allowed forced marital dissolution, i.e. *khul'*, as an option for a woman without needing the consent of her husband. This conception of *khul'* is now gaining more popularity as jurists try to reconcile modern conceptions of gender equality with traditions that were largely created in patriarchal, non-egalitarian contexts.

This chapter will serve as an introduction to the legal concept of *khul'* and its most important legal formulations in both Imāmī and Sunnī law. The question of *khul'* dependent on the consent of the husband (which I will call consensual *khul'*) and *khul'* at the behest of the wife (which I will call obligatory *khul'*) in Islamic law as well as parallel institutions and problems in Jewish law will be addressed separately in the following chapters.

What is Khul'?

The literal meaning of *khul'* can be seen in its root *KH-L-'* , meaning 'to take off', 'tear out' or 'remove'. The classical lexicographer Ibn Manẓūr (d. 1311) traces its original meaning to an act of removing sandals or clothes.[77] Ibn Manẓūr further explains that according to the jurists and Prophetic traditions, the word carries a technical meaning designating a form of marital dissolution in which the husband releases his wife through *khul'* if she gives him something of her wealth (*māl*) so that he in turn "repudiates her and separates her from himself"' (*fa-ṭallaqahā wa-abānahā min nafsih*). According to Ibn Manẓur, the technical meaning of this term arises from the Qur'ānic conception of husbands and wives being garments (*libās*) for each other.[78] The legal understanding of *khul'* thus signifies an act of separation (*firāq*) akin to removing or tearing away these garments from oneself.

***Contempt* (karāhah)**

The basis of *khul'* is found in the following Qur'ānic verse:

> [Revocable] repudiation can only be done twice. [Thus, in marriage] let there be an honorable retention, or a compassionate release. And it is not lawful for you to take back anything from what you have given them [i.e.

[77] Muḥammad b. Mukarram Ibn Manẓūr, *Lisān al-'Arab*, 15 vols. (Beirut: Dār Ṣādir, 1414/1993), VIII, 76.
[78] Ibid, 76-77. For the verse in question, see Qur'ān; 2:187.

> the dower], unless the married couple fear that they may not maintain God's bounds. So if you fear they would not maintain God's bounds, there is no sin upon them in what she may give to secure her release. These are God's bounds, thus do not transgress them, and whoever transgresses the bounds of God it is they who are the wrongdoers.[79]

This passage serves to establish and legitimize *khul'* in Islamic law. According to the verse, the husband is ordinarily prohibited from usurping or having right over any of the dower that was gifted to his wife upon marriage. However, if it is feared that the wife may become rebellious or recalcitrant (*nāshizah*) (this being how the jurists interpreted "fear that they may not maintain God's bounds"), it becomes permissible for the wife to give back or forgo her dower (or any other benefit) in exchange for marital dissolution.

Here the exceptional view of the Mālikī school should be noted. In regular circumstances, they agree as other schools do that the husband may not take the wife's dower by force unless she commits adultery.[80] However, the Mālikīs add two other circumstances: if the wife ceases to pray or ceases to perform the major ablution[81]; and if he forces her into *khul'* without the intention of wanting her dower. As far as I have seen, the other schools are adamant in prohibiting any kind of extortion and required the wife's consent, which is to be based on her fear of not upholding God's bounds.

The Qur'ānic idea of 'fear' (*khawf*) of not upholding God's bounds (*ḥudūd Allāh*) is related to the legal concept of a wife's contempt (*karāhah*) for her husband.[82] Therefore, the

[79] Qur'ān: 2:229.
[80] Ibid, 473.
[81] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 472.
[82] The classical Imāmī jurist and judge Qāḍī Ibn Barrāj (d. 1088), for example, makes this connection explicit when he says: *"If it is feared that God's bounds might not be observed, that is when the wife has an aversion towards her husband. [This] aversion [can either be] due to his nature* (khulq) *or [his observance] of his religion, or anything of*

wife's own contempt, dislike or aversion (*karāhīyah*) becomes the legal basis for *khul'*. If the aversion is mutual, the dissolution will fall under the category of a *mubāra'āh* dissolution.[83]

Contempt or the 'fear of not upholding God's bounds' in all of the Islamic schools largely revolves around the wife's sexual obligations towards her husband. As seen earlier, marriage in Islamic law is characterized by mutual, contractual obligations. On the one hand, the husband is obligated to provide for and maintain his wife in respect to her primary needs (food, shelter, clothing, and availability for sex). In return, the wife is commanded to obey (*ṭā'ah*) her husband. Although there are differences amongst the schools and jurists as to what 'obedience' consists of, there are two areas where there is general agreement. The first is that the wife must be available to her husband sexually, unless there is a valid reason for her not to be available, which includes times when she is sick, when she is in her menses or when she is fasting a prescribed fast. Her sexual availability is the main component of 'obedience', as it is her primary active responsibility and duty towards her husband. The second point of agreement is that she is not to leave her home without the permission of her husband. When the textual sources discuss *khul'*, however, the focus is on sexual obedience, and obedience in movement (i.e. not going out without permission of the husband) is usually of secondary importance. The notion of *karāhah* thus becomes closely associated with disobedience in *khul'*. It goes without saying that a self-evident, yet important reason for this focus is that sexual disobedience would irritate husbands much more than the wife merely stepping outside the home without his permission. This can

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that sort which is [felt] in herself in regard to her aversion toward him. Thus, if this trait (ṣiffah) *is in her, in reality she is afraid of not upholding God's bounds"*. See 'Abd al-'Azīz b. Naḥrīr b. Ibn Barrāj al-Ṭrābulsī, *al-Muhadhdhab*, 2 vols., ed. Ja'far Subḥānī et al (Qum: Daftar-i Intishārāt-i Islāmī, 1406/1985), II, 267.

[83] *Mubārā'ah* dissolutions are usually discussed under the same category (hence *kitāb al-khul' wa al-mubārāt* i.e. the book of *khul'* and *mubārā'ah*). The differences largely revolve around two areas, the first being that a *khul'* dissolution is where the contempt is exclusively that of the wife, as opposed to *mubārā'ah*, where the contempt is mutual; and the second being in the rate of dower that is to be paid. In other words, traditionally in *khul'*, a husband may ask for a compensation that is more than the dower's worth, where as in *mubārā'ah* the husband's demand cannot exceed the dower or its worth. This has at least been the case for Imāmī law.

possibly be one explanation as to why disobeying by going out without the husband's permission is often of secondary importance.

What aversion or contempt and sexual disobedience consist of is discussed in varying degrees of detail. Speaking of the four Sunnī schools of law, 'Abd al-Raḥmān al-Jazīrī (d. 1941), a former al-Azhar professor, begins by stating that sexual obedience must not be perfunctory but complete (*tāmmah*) in regard to what the husband desires in sexual pleasure (*istimtā'*), except that which would result in harm (*ḍarar*) to the wife. Although al-Jazīrī does not expand on the meaning of harm, it seems that he refers to the standard definition: times in which the wife is sick or has a physical ailment that makes sexual relations burdensome. According to al-Jazīrī, 'complete' sexual obedience means that the wife is lovingly sincere (*ikhlāṣ al-mawaddah*) in her fulfillment of her sexual duties. In other words, it cannot be that she is with him physically while her heart is with someone else, as it would bring about a condition in which she would have to force and "be at war" with herself (*taḥārub nafsihā*)[84] when approaching her husband. In short, according to the Sunnī view as reported by al-Jazīrī, sexual disobedience under the rubric of *karāhah* becomes an ailment which 'destroys family life', thus making it a valid basis for establishing a marriage dissolution through *khul'*.

The Imāmīs approach *karāhah* in the same fashion. In one tradition, Imām al-Ṣādiq relates that:

> It is not permissible to separate from a woman through *khul'* until she says to her husband: "By God, I will not do anything for you and I will not obey you at all and I will not perform the major ablution for you from my state of ritual impurity (*janābah*) and I will not soften the bed for you [i.e. I will not have intercourse with you] and I will do things without your permission.

[84] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 470.

> Indeed the populace [i.e. Sunnis] allow [*khul'*] without this. [Regardless,] if the wife says such to her husband then it is permissible for him to take from her [in accordance with] that utterance (*ḥadīth*).[85]

In his treatise on law, the Akhbārī traditionist Ḥurr al-'Āmilī (d.1692), the compiler of the work in which the tradition above is cited, places all these utterances within the framework of *karāhah*.[86] Additionally, he makes sure to clarify that these words do not need to be said explicitly, they can merely be implicit through the wife's behavior. He quotes another tradition by Imām al-Bāqir, who is reported to have said:

> If a woman says the following sentence to her husband: "I will not obey you" in an explicit (*amran mufassaran*) or implicit (*ghayr mufassar*) fashion it becomes permissible to take whatever from her.[87]

The two traditions make it clear that there is no particular action or even utterance needed to establish contempt. Rather contempt can be indirectly recognized through the wife's scornful behavior, which is also tied to her 'rebelliousness' vis-à-vis her sexual duties. The explicit sentences mentioned by the Imams seem only to be a legal recourse for the wife if the matter is ambiguous. To expect people to utter them in an exact fashion would be impractical, since knowing them would require intricate familiarity with Islamic dissolution laws, generally posessed only by jurists. More importantly, it would make *khul'* out-of-bounds for women who might not have the courage to confront their husbands with such direct words, especially in a pre-modern patriarchal context. On this point, the Safavid-era Akhbārī Imāmī jurist Yūsuf al-Baḥrānī (d. 1773) explained that most women would not utter those sentences present in the Traditions to their husbands or even something similar to them. It would thus be sufficient for

[85] al-Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 280.
[86] al-Ḥurr al-'Āmilī, *Hidāyat al-'Ummah ilá Aḥkām al-A'immah; Muntakhab al-Masā'il*, 8 vols., ed. Bakhsh-i Ḥadīth dar Jāmi'ah-yi Pazhūhish-hā-yi Islāmī (Mashhad: Majma' al-Buḥūth al-Islāmīyah, 1412/1991); VIII, 441.
[87] Ibid.

women do something that would indicate *karāhah* (*dāll al-karāhah*) either through some "words (*lafẓ*), action (*fi'l*) or something of that sort which would be enough to validate *khul'* and put into order the rules (*aḥkām*) that pertain to it".[88] Although this is the general opinion of Imāmī jurists, the classical jurist Shaykh al-Ṣadūq (d. 940) seems to be an exception, deeming that the husband must actually hear those words in order for *khul'* to be valid.[89]

The jurists also emphasize that contempt must be of a serious nature and not merely the result of a brief upset. For this reason, they make sure to emphasize that contempt must be present most of the time (*ghālibī)* although it does not need to be perpetual (*dā'imī*).[90]

There is one key difference between the Sunnī and Imāmī schools in regard to the importance of *karāhah* as a basis for validating *khul'*. One will notice in the last passage by Imām al-Ṣādiq that the absence of *karāhah* does not, according to the Sunnis, invalidate the overall process of *khul'*, despite its overwhelming importance. More precisely, the four Sunnī schools consider *khul'* without contempt by the wife to be a detestable act (*makrūh*); but they still deem it valid and legally effective.[91] Although the Qur'ānic verse in question outwardly prohibits *khul'* in the absence of 'fear of not upholding God's bounds', the Sunnī schools understand the Qur'ānic ruling to indicate legal unadvisability, as opposed to prohibition. The Imāmīs, however, understand the verse as a direct prohibition against *khul'* without *karāhah* and see its absence as grounds for invalidating the process. Even if there is an attempt at establishing *khul'* without *karāhah*, the Imāmīs rule that the dissolution would be counted as a revocable

[88] Yūsuf b. Aḥmad b. Ibrāhīm al-Baḥrānī, *al-Ḥadā'iq al-Nāḍirah fī Aḥkām al-'Itrāh al-Ṭāhirah*, 25 vols., ed. Muḥammad Taqī Irawānī and Sayyid 'Abd al-Razzāq Muqrim (Qum: Daftar-i Intishārāt-i Islāmī, 1405/1984), XXV, 599.
[89] al-Ṣadūq, *al-Muqni'* , 348, quoted in Ja'far Subḥānī, *Niẓām al-Ṭalāq fī al-Sharī'ah h al-Islāmīyah,* ed. Sayf Allāh al-Ya'qūbī al-Iṣfahānī, (Qum: Mu'assasat Dār al-Imām al-Ṣādiq,1414 /1993), 383.
[90] Subḥānī, *Niẓām al-Ṭalāq*, 382.
[91] Mughnīyah, *al-Fiqh 'alá al-Madhāhib al-Khamsah*, II, 174.

repudiation, despite intention for *khul'*.[92] This is opposed to the default effect of *khul',* which is categorized as an irrevocable repudiation by all schools. The stricter stance of the Imāmīs again seems partly due to the availability of direct traditions that pertain to the subject, thus giving less room for flexibility. The result is that, again, divorce in Imāmīsm is less easily available, or at least more frowned upon.

Khul': Ṭalāq *or* Faskh*?*

Khul' is not an independent category of marital dissolution, but a subcategory of either one of two types of dissolution; namely *ṭalāq* or *faskh*, that is either repudiation or annulment of the marriage contract. The question of which category it falls into is one of the most contentious issues of Islamic martial dissolution and as such, there is much disagreement even within the legal schools. The implications of which category it falls into are significant, as it will determine whether or not the dissolution falls within the category of a triple repudiation. In addition, for some Imāmī scholars, the classification determines whether the husband's acceptance of *khul'* can be made obligatory or not, a matter central to this thesis.[93]

There is a consensus amongst the Sunnī jurists that if *khul'* is pronounced along with the explicit pronouncement or formula of repudiation (*lafẓ al-ṭalāq*), it falls into the category of *ṭalāq*. However, there is dispute when the pronouncement of repudiation is absent.[94] In one set of legal works, the four schools consider *khul'* to be a *ṭalāq*; whereas in another set of legal works, Aḥmad b. Ḥanbal and al-Shāfi'ī are reported to have considered it a *faskh*.[95] Additionally, Ibn

[92] Ibid.
[93] See Chapter Three.
[94] Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah, *al-Mawsū'ah al-Fiqhīyah,* (Kuwait: Ṭibā'at Dhāt al-Salāsil, 1410/1990), XIX, 237.
[95] Ibid; the disagreement seems to be the most significant amongst the Shāfi'īs. It is widespread enough for even Ibn Manẓūr to mention it; see Ibn Manẓūr, *Lisān al-'Arab*, VIII, 77. For the Ḥanbalīs, however, the opinion that *khul'* is a *faskh* seems to be more popular. The difference of opinion attributed to al-Shāfi'ī is in regard to his two sets of

Rushd notes that in *khul'*, *ṭalāq* and *faskh* are equivalent according to Abū Ḥanīfah.[96] I suspect that, given the context, this means that *khul'* can be categorized as either, depending on the intention behind the dissolution.

The same disagreement also exists amongst the Imāmīs, although the dissenting voice largely revolves around the Imāmī giant Muḥammad b. Ḥassan al-Ṭūsī (d. 1067), popularly known as Shaykh al-Ṭūsī. Despite the number of Imāmī traditions that explicitly categorize *khul'* as *ṭalāq*[97], al-Ṭūsī has opted to give precedence to his interpretation of the Qur'ānic verses on the subject, so that he deems *khul'* to be *faskh*,[98] regardless of the consensus amongst Imāmī jurists that it is a repudiation. However, it is true that Imāmī jurists have opted to count *khul'* as a *faskh* in some special cases. For example, 'Allāmah al-Ḥillī argues that if the guardian of a child performs *khul'* on his behalf based on *mahr al-mithl* (i.e. a dower that is befitting to the bride's social status), then it will be counted as a *faskh*; otherwise the whole process is invalid.[99] One possible reason behind this uncompromising stance might be that the bride, who is most likely to be a child herself, may not be able to properly determine her dower. Therefore the *mahr al-mithl* is demanded, based on precaution.

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opinions in Iraq and later during his stay in Egypt. His later opinion seems to suggest that he believed *khul'* to be a *ṭalāq*; however there seems to be much uncertainty in the sources.

[96] Ibn Rushd, *The Distinguished Jurist's Primer* (Bidāyat al-Mujtahid), 2 vols. (Reading: Garnet Publishing Ltd, 1996), II, 82.

[97] In one tradition, for example, Imām al-Ṣādiq is reported to have said: *"The waiting period of a woman separated through* khul' *is [the same as] the waiting period of a repudiated woman* (muṭallaqah) *and if he separates from her through* khul' *[then] he has repudiated her*, *and it is divided [so that it does not explicitly] need to be called a repudiation…and there remains two more repudiations* (taṭlīqatayn bāqīyatayn), *as* khul' *is a repudiation …"*; see al-Ṣadūq, *Man Lā Yaḥḍuruhu al-Faqīh*, 4 vols. (Qum: Daftar-i Intishārāt-i Islāmī, 1413/1992), III, 523; al-Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 284: For other traditions expressing the same meaning, see al-Kulaynī, *al-Kāfī*, VI, 140.

[98] Subḥānī, *Niẓām al-Ṭalāq*, 365; for al-Ṭūsī 's full discussion on the matter, see Abū Ja'far Muḥammad b. Ḥassan al-Ṭūsī, *al-Khilāf*, 6 vols., 'Alī Khurāsānī and Sayyid Jawād Shahristānī (Qum: Daftar-i Intishārāt-i Islāmī, 1407/1986), IV, 424. In other works, al-Ṭūsī seems to have indicated that *khul'* could be considered a repudiation if it were followed by the 'repudiation formula'. However, Subḥānī holds that al-Ṭūsī's view that *khul'* by its nature is a *faskh* (as he says in his *al-Khilāf*) is his official position. This is also confirmed by Muḥammad b. 'Alī al-Mūsawī al-'Āmilī (d. 1600); see *Nihāyat al-Marām fī Sharḥ Mukhtaṣar Sharā'i al-Islām*, Mu'assasat al-Nashr al-Islāmī, 2 vols. (Qum: n.p, 1412/1992), II, 131.

[99] Ḥasan b. Yūsuf b. Muṭahhar al-Ḥillī, *Qawā'id al-Aḥkām*, III, 158.

The juristic disagreement (*khilāf*) over whether *khul'* is a repudiation or annulment of the marriage contract is centered on a specific understanding of the Qur'ān[100]:

> **A)** [Revocable] repudiation can only be done twice. **B)** [Thus in marriage] let there be an honorable retention, or a compassionate release. And it is not lawful for you to take back anything from what you have given them [i.e. the dower], unless the married couple fear that they may not maintain God's bounds. So if you fear they would not maintain God's bounds, there is no sin upon them in what she may give to secure her release. These are God's bounds, thus do not transgress them, and whoever transgresses the bounds of God it is they who are the wrongdoers.[101] **C)** And if he repudiates her then she will no longer be lawful for him until she marries a husband other than him. And if the other husband repudiates her then there is no sin upon them if they [want to] get back together as long as they think they can uphold God's bounds. These are God's bounds which he makes clear to for those people who know.[102]

Whether Sunnī or Imāmī, the group of jurists who believe *khul'* to be an annulment argue that it would not be possible to understand this verse in light of *ṭalāq*, as it would be tantamount to allowing four consecutive repudiations. They explain this by stating that in the Qur'ān, **A** already speaks of two repudiations and **C** speaks of the third and last repudiation before *taḥlīl* becomes necessary. Therefore, if **B** was to be considered a repudiation, **C** would be the fourth consecutive

[100] Another important cause of this dispute is the reliance on different narrations. Those who consider *khul'* a *faskh* rely on a tradition narrated by Ibn 'Abbās, whereas the other group rely on several traditions narrated by 'Umar, ʿAlī and Ibn Mas'ūd that explicitly state that *khul'* is to be counted amongst the three repudiations. See *al-Mawsū'ah al-Fiqhīyah,* XIX, 238. Another issue is whether the process is equivalent to ransom or sales transactions (*iqālah*). Those who view the process of *khul'* as a *ṭalāq* see it see as a ransoming act, where the wife ransoms herself in order to be free. According to them, acts of ransom are only applicable to repudiations and not sales. The other side considers the process similar to a sales transaction, thus automatically falling under the category of *faskh,* as annulments are characteristic of sales and not repudiations; see Ibn Rushd, *The Distinguished Jurist's Primer*, II, 83. The Imāmīs also differ on this point. Although they consider *khul'* to be similar to or on the "same level" as sales transactions (*manzilat al-mu'āwiḍah*), they nevertheless categorize it as a repudiation, despite classifying *faskh* in the same fashion.

[101] Qur'ān: 2:229.

[102] Qur'ān: 2:230.

repudiation, which is not possible under Islamic law, as the Sharī'ah leaves no doubt that *taḥlīl* is necessary by the third.

The other group of jurists who understand the above verse as a repudiation argue that **B** is not a separate dissolution, but is characteristic of **A**. In other words, **B** acts only as an expansion and explanation of the two repudiations in **A** and therefore is not a repudiation.

Recourse in discussion of *khul'* to the Quran seems to be more common amongst the Sunnīs, probably because the traditions are more in conflict.[103] Since conflict at the level of the traditions (on this subject at least) is largely absent on the Imāmī side (the traditions on *khul'* are actually quite uniform and explicit),[104] the debate only seems to become Qur'ānic when al-Ṭūsī's opinion is discussed.[105] Nevertheless, al-Ṭūsī's position has been harshly criticized, and as far as I know, it has been unanimously rejected by the Imāmīs. For example, al-Baḥrānī explains that there is absolutely no doubt (*lā shakk*) that al-Ṭūsī's argument is weak, as the vast majority of traditions make it explicit that *khul'* is a repudiation. Thus, according to al-Baḥrānī, al-Ṭūsī's opinion is isolated in the Imāmī school.[106]

Mahr

As seen earlier, marriage in Islamic law can be understood as a transaction by which a woman sells or transfers the ownership of her vagina (*buḍ'*) to the groom in exchange for a dower and maintenance. *Khul'* in one sense can be categorized as a cancellation of that transaction, or as a new transaction in which a woman purchases her vagina back from her husband by giving him some form of compensation. It is in this light that some classical Imāmī jurists, or more

[103] See footnote 84.
[104] See footnote 82.
[105] See for example Jamāl al-Dīn b. Aḥmad b. Muḥammad al-Ḥillī, *al-Muhadhdhab al-Bāri' fī Sharḥ Mukhtaṣar al-Nāfi'*, 5 vols., ed. Mujtaba 'Arāqī (Qum: Daftar-i Intishārāt-i Islāmī, 1407/1986), III, 513.
[106] al-Baḥrānī, *al-Ḥadā'iq al-Nāḍirah,* XXV, 566.

precisely, *mutaqaddim* jurists,[107] went so far as to say that a man should tell his wife during a *khul'* settlement that if "you would go back on what you gave, then I [will] own your vagina [again]" (*fa-anā amlik bi-buḍ'ik*),[108] referring to the retransfer of ownership of organs that the wife would have purchased back.

The wealth exchanged (*badhl)* for the vagina is given different names: *fidyah* (ransom), *hibah* (gift), or *'iwaḍ* (exchange). These various terms really convey the same meaning; the ransom, gift or exchange is the basis on which the transaction (*mu'āwaḍah*) takes place, which allows the wife to free herself from the bonds of marriage (*qayd al-nikāḥ).* Valuation of the ransom/gift/exchange revolves around the wife's dower, which acts as a basic standard; although more or less than the stated dower may be demanded by the husband according to most juristic interpretations, as I will soon explain.

All the Islamic legal schools trace the first instance of *khul'* and the nature of its exchange to a Prophetic practice described by 'Abd Allah b. 'Abbās, who is reported to have said:

> The wife of Thābit b. Qays came to the Prophet (peace and blessings be upon him) and said: "I do not blame Thābit in his religion (*dīn*) nor his character (*khulq*) except that I fear disbelief (*kufr*)". He (peace and blessings upon him) replied: "will you give back to him his garden

[107] The Imāmī jurists are often divided into two periods, the *mutaqaddimūn* or 'preceding jurists' who came before the towering Imāmī jurist, theologian and philosopher 'Allāmah al-Ḥillī (d. 1360) and the *muta'ākkhhirūn* or 'later jurists' are those who came after al-Ḥillī. The importance of al-Ḥillī is due to his role as a fundamental systematizer of Imāmī law, legal theory, *ḥadīth* criticism and theology, such that his work became a basis for the later 16th century emergence of *uṣūlī* law (modern legal rationalism).

[108] Ḥasan b. Abī Ṭālib al-Yūsufī Fāḍil Ābī, *Kashf al-Rumūz fī Sharḥ Mukhtaṣar al-Nāfi'*, 2 vols., ed. 'Alī Panāh Ishtihārdī and Aghā Ḥusayn Yazdī (Qum: Daftar-i Instishārāt-i Islāmī, 1417/1996), II, 235.

(*ḥadīqah*) that he had given you [as a dower]?", she replied: "yes". Then she gave it to Thābit and the Prophet ordered him to separate from her.[109]

Al-Baḥrānī notes that the tradition of Thābit b. Qays's wife and its variants have only come in Sunnī sources and that he did not find the tradition or its variants in Imāmī sources or reports (*akhbār*).[110] However, despite its absence in Imāmī sources of *ḥadīth*, this Sunnī tradition has been widely accepted and utilized by Imāmī exegetes and jurists.[111]

Ibn Rushd states that Mālik and al-Shāfi'ī have allowed compensation in a *khul'* settlement to be more or less than the stated dower.[112] Although he does not mention the opinions of Abū Ḥanīfah and Aḥmad b. Ḥanbal, Mughnīyah confirms that they hold the same opinion as well.[113] The Imāmīs are also in agreement with the four Sunnī schools.[114] Ibn Rushd, however, states that there are a number of jurists (whom he does not name) who have taken up a stricter position by stating that the husband may not take more than the stated dower, as that is what Thābit's tradition points to.[115] Although there are other versions of Thābit's tradition that

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[109] *al-Mawsū'ah al-fiqhīyah*, XIX, 241 quoting from *Ṣaḥīḥ al-Bukhārī.* In other variants of the tradition, Thābit's wife specifies that she finds his height and color problematic and wants her marriage to be dissolved through *khul'* for those reasons.
[110] al-Baḥrānī, *al-Ḥadā'iq al-Nāḍirah,* XXV, 555.
[111] For example, he believes Thābit's tradition was the purpose behind the revelation (*sha'n al-nuzūl*) of 2:229, see al-Ṭūsī, *al-Tibyān fī Tafsīr al-Qur'ān*, 10 vols., ed. Aḥmad Qaṣīr 'Āmilī (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d), II, 242. The tradition has also been widely utilized in works of law; see for example 'Alī b. Ḥusayn al-Mūsawī (al-Sharīf al-Murtaḍa), *Masā'il al-Nāṣirīyāt*, ed. Markaz-i Pazhūhish va Taḥqīqāt-i 'Ilmī (Tehran: Rābiṭat al-Thaqāfah wa-al-'Alāqāt al-Islāmīyah, 1417/1996), 352-354; Jamāl al-Dīn al-Miqdād b. 'Abd Allāh (Faḍil al-Miqdād), *Kanz al-'Irfān fī Fiqh al-Qur'ān*, 2 vols. (Qum: np, nd), II, 284; Jamāl al-Dīn al-Ḥillī, *al-Muhadhdhab al-Bāri' fī Sharḥ Mukhtaṣar al-Bari'*, III, 507-508; Aḥmad b. Muḥammad al-Ardabīlī (Muqaddas al-Ardabīlī), *Zubdat al-Bayān fī Aḥkām al-Qur'ān*, ed. Muḥammad Bāqir Bihbūdī (Tehran: al-Maktabah al-Ja'farīyah li-Iḥyā' al-Āthār al-Ja'farīyah, n.d), 608; al-Baḥrānī, *al-Ḥadā'iq al-Nāḍirah,* XXV, 566; Sayyid 'Abd al-'Alā al-Sabzawārī, *Muhadhdhab al-Aḥkām*, 30 vols., ed. Mu'assasah-yi al-Manār (Qum: Daftar-i Āyat Allāh Sabzawārī, 1413/1993), XXVI, 179; Muḥammad Taqī al-Shushtarī, *al-Naj'ah fī Sharḥ al-Lum'ah*, 11 vols. (Tehran: Kitab Furūshī-i Ṣadūq, 1406/1985), IX, 331. For contemporary sources, see for example Faḍil al-Lankarānī, *al-Ṭalāq*, 242. For instances where the traditions have been incorporated into Imāmī compilations of *ḥadīth* through Sunnī sources; see Mírzā Ḥusayn Nūrī, *Mustadrak al-Wasā'il wa Mustanbaṭ al-Masā'il*, 18 vols., ed. Gurūh-i Pazhūhish-i Mu'assasah-yi Āl al-Bayt (Beirut: Mu'assasat Āl al-Bayt, 1408/1987), XV, 385-386.
[112] Ibn Rushd, *The Distinguished Jurist's Primer*, II, 80.
[113] Mughnīyah , *al-Fiqh 'alá al-Madhāhib al-Khamsah*, II, 174.
[114] Ibid; Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, VI, 19.
[115] Ibn Rushd, *The Distinguished Jurist's Primer*, II, 80.

allow one to take more than the stated dower,[116] the majority point toward the Prophet's adherence to the dower only. This is also supported by the Qur'ānic verse which sets the object of exchange as the dower: *it is not lawful for you to take back anything from what you have given them unless you fear you may not uphold God's bounds*…where *what you have given them* (*ataytumūhunna shayan*) refers to the wife's dower (*mahr*).[117] Nevertheless, the majority of jurists view the Prophetic practice and Qur'ānic injunction as setting the dower as the standard, from which the couple may, however, agree to deviate. The Imāmīs, however, state that it is only in a *mubāra'ah* dissolution that one may not ask for more than the stated dower.[118]

Some Concluding Remarks

Why is the Mahr *Important?*

The dower is one of the important components of marriage and symbolizes the transaction through which the marriage contract is effected. The dower must be something that is pure and legally permissible to own (for example, the dower cannot be swine). It can consist either of property, some form of currency such as gold and silver, or profits derived from a legally acceptable source. The payment may take place before the consummation of the marriage or after the marriage has been dissolved, depending on the wife's own discretion. In ninetheenth century Iran, Afary notes that the groom's family "*paid the wife a small amount of* mahriyeh [i.e. mahr] *in advance, and the remainder was paid at the termination of the marriage, whether through divorce or death*".[119] This is consistent with what was seen in the previous chapter, where many women deferred their claim to their dowers (or at least the larger part of their

[116] See for example Mirzā Ḥusayn Nūrī, *Mustadrak al-Wasā'il*, XV, 385.
[117] See for example Muḥammad Ḥusayn al-Ṭabāṭabāī, *al-Mīzān fī Tafsīr al-Qur'ān*, 20 vols. (Qum: Daftar-i Intishārāt-i Islāmī, 1417/1996), II, 236.
[118] Mughnīya, *Fiqh al-Imām al-Ṣādiq*, VI, 24.
[119] Afary, 41.

dowers) in order to use it as a deterrent against hasty repudiations, or even as a bargaining tool to secure certain interests. For example, for urban middle class women in Iran, the dower as a deterrent against divorce seems to have been the norm[120] and the threat of demanding the full amount during marriage was used in case the husband contemplated taking a second wife. However, the latter practice seems to have been largely restricted to upper-class families.[121] The dower thus plays an important social role. In the case of Iran, Willem Floor observes that:

> It represents the social standing of both families in the community and the value (or esteem) given to the bride. Today, some modern women consider the bride demeaning, but tradition as well as Koranic injunction (4:4) makes it impossible to do away with the custom. In fact, bride prices in general seem to have risen and are often expressed in an ever increasing number of gold coins to provide security against inflation.[122]

Despite the legal approach, which is much preoccupied with proper valuation of the dower, Islamic ethics has generally recommended that women ask for low dowers, as marriage should not be based on materialistic concerns. This ethical guideline has often been followed by observant Muslims. However, practical concerns have sometimes pushed them to demand higher dowers as a safety net; for example, in the modern world, the emergence of the nuclear family has meant loss of support of the extended family for repudiated women, leading wives to seek security in substantial dowers. Thus, whereas high dowers were generally the practice of upper class women, today they have become the norm, in Iran at least, for all social levels.

Furthermore, although the dower is used as a deterrent against hasty repudiations, it has also been used as a bargaining chip for child custody, *khul'* or other kinds of concessions during marital dissolution.

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[120] Ibid.
[121] Ibid, 42-43.
[122] Willem Floor, *A Social History of Sexual Relations in Iran* (Washington: Mage Publishers, 2008), 27.

The *mahr* plays quite an important role in *khul'*. Mir-Hosseini, for example, notes that over fifty percent of all marital dissolutions in Tehran are *khul'* "in which by definition the wife forfeited her *mahr*".[123] In other words, *khul'* accounts for the largest number of marital dissolutions in Iran, and the *mahr* is the foundation of this important process. It is also noteworthy that although husbands are allowed to ask for more than the stated dower, such a practice does not seem to be customary. Nor is asking for more acceptable in the view of Muslim judges, as allowing such would render the mechanism futile, since husbands could ask for an amount that would either bankrupt the wife or make it impossible for her to pay. The cases in which husbands are allowed to ask for more than the dower are when the agreed upon dower is of little worth. For example, it is not a rare practice amongst religious Iranian women to state flowers or candy sticks (*shākh-i nabāt*) as a dower; in this case, adding to its worth is seen as more realistic.

One important question remains: is *khul'* a unilateral process like the male initiated *ṭalāq,* or is it bilateral, such that the process cannot go forward without the express consent of the other party? This is perhaps the most important question concerning *khul'*, as it determines whether it is just another, perhaps more advantageous, mechanism for men within the larger patriarchal context of marital dissolution[124] or a mechanism which vests women with authority and autonomy similar to those of men.

[123] Mir-Hosseini, *Marriage on Trial*, 82.
[124] More advantageous, of course, because men can end their marriages without having to pay the *mahr* and possibly other compensation.

Chapter Three: Is *Khul'* Obligatory or Consensual ?

Introduction

Perhaps the most controversial aspect *khul'*, from a modern point of view, is the nature of a (symbolic) vaginal transaction. In a male-initiated dissolution (*ṭalāq*), the husband *cancels* a previous transaction by returning a product to its original owner, in return for the amount he initially paid. The cancellation is a unilateral act and does not require the consent of the other party, as it is not setting up a new contract but merely cancelling an already existing one. As one of the few outlets for female-initiated dissolution, *khul'* in the view of most jurists is not a cancellation in the same sense as male-initiated divorce is. It must be a new transaction and contract whereby a previously sold product (the vagina) must be purchased back. By definition, such a transaction (as opposed to cancellation) necessarily requires the consent of both parties. In other words, without the express consent of the husband or intervention of a judge (who must also be a male), the wife has little recourse but to continue to be legally bound to her husband and forbidden from re-marrying. The predicament of a Muslim woman whose husband has refused to agree to her request for *khul'* is similar to that of the *agunah* or 'chained wife' in Jewish law who must either refrain from remarrying and bear her status as a 'married divorcee'. Because *khul'* came to be widely seen as consensual (i.e. requiring the consent of the husband), what might have been a promising legal avenue for women became an advantageous option for men instead, since they could through *khul'* dissolve the marriage without the costs, such as *mahr*, that normally accompany repudiations.

However, a minority of important jurists set about finding legal means to effectively obligate and compel a husband to repudiate his wife in exchange for returning the dower and in

some cases, her maintenance during her waiting period as well.[125] This chapter describes the legal construction of obligatory *khul'* and speculates on the reasons jurists in a patriarchal society might undertake such a project.

Though *khul'* is an Arabic and Islamic legal term, a similar legal concept is present in Jewish law. This is known as the *get moredet* (rebellious woman's repudiation), primarily explicated in the legal thought of the Arabic-speaking Jewish Rabbi Moses Maimonides. Examination of the Jewish version of "obligatory *khul'*" and the largely negative reaction of the Rabbis to it will serve to highlight a shared religio-legal and patriarchal response and indeed fear of independent female divorce. This fear of women's power to divorce, I will argue, is largely defined by the concern for maintaining and perpetuating the patriarchal moral order of society. That order is founded upon gender power relations that seek to control female sexuality.

Ṭalāq as a Male Prerogative

As seen earlier, one of the characteristics of *ṭalāq* in Islamic law is that it is a male prerogative. For that reason, men are the only repudiators, whereas women can only be repudiated. One famous Prophetic tradition that confirms this exclusive right states that "*repudiation is for the one who took the [wife's] leg* (al-ṭalāq li-man akhadha bi-al-sāq),"[126] meaning that repudiation is

[125] One of the consequences of *khul'* according to the Imāmīs is that maintenance is no longer binding on the husband unless a supervising judge imposes it. The Ḥanafīs make maintenance obligatory, as it is part of the new contract and not the previous one. However, as in the other schools, the previous debts (such as those incurred from suckling of the child) are annulled.

[126] Ibn Mājah; *Sunan ibn Mājah*, 2 vols. (Beirut: Dār al-Fikr, n.d), I, 672. Although the tradition is a Sunnī one, the tradition, as well as its variant, *repudiation is in the hand (yad) of him who took the [wife's] leg* is widely utilized in Imāmī sources, including in chapters on *ṭalāq* and *'itq* (manumission). See for example: Mughnīyah, *Fiqh al-Imām al-Ṣādiq*, V, 103, VI, 50-51, Subḥānī, *Niẓām al-Ṭalāq*, 381; Muḥammad b. Ḥasan b. Yūsuf al-Ḥillī (Fakhr al-Muḥaqiqqīn), *Īḍāḥ al-Fawā'id fī Sharḥ Mushkilāt al-Qawā'id*, 4 vols., ed. Sayyid Ḥusayn Mūsavī Kirmānī and 'Alī Panāh Ishtihārī (Qum: Mu'assasah-yi Ismā'īlīān, 1387/1967), III, 145; Muḥammad b. Makkī al-'Āmilī (al-Shahīd al-Awwal), *Ghāyat al-Murād fī Sharḥ Nukat al-Irshād*, 4 vols., ed. Riḍā Mukhtārī (Qum: Daftar-i Tablīghāt-i Islāmī-yi Ḥawzah-yi 'Ilmīyah-yi, 1414/1993), II, 283; Fāḍil al-Miqdād, *Tanqīḥ al-Rā'ī li-Mukhtaṣar al-Sharā'i* , 4 vols., ed. Sayyid 'Abd al-Laṭīf Kūhkamarī (Qum: Kitābkhānah-yi Āyat Āllāh Mar'ashī Najafī, 1404/1983), II, 287; 'Alī b. Ḥusayn al-'Āmilī al-Karakī, *Jāmi' al-Maqāṣid fī Sharḥ al-Qawā'id*, 13 vols., ed. Gurūh-i Pazhūhish-i

for him who married the woman and took her home to the exclusion of anyone else. The Imāmī jurists understand this tradition as meaning that initiating a repudiation (*ījād al-ṭalāq*) is the exclusive right of the husband (*min ḥuqūq al-zawj al-khāṣṣah*).[127] However, this right can be delegated to a Muslim judge (*al-ḥākim al-shar'ī*) against the husband's will if the 'principle of no harm' (*qā'idat lā ḍarār*) is invoked.[128] The circumstances that can cause this principle to be invoked include cases in which the wife risks serious harm, whether physical or mental, or if the husband fails to respect her rights[129] such as maintenance, sexual intercourse (at least once every four months) and so on.

As such, given that *khul'* has largely been categorized under *ṭalāq* by Muslim jurists, a forced no-fault dissolution of the marriage contract has largely been rejected, for this would be tantamount to accepting that repudiation can also be in 'the hands of the woman who took the husband's leg'. In the context of Islamic law, that would be abusurd as it would be a challenge to the very notion of patriarchy embedded in all the Prophetic traditions that address repudiation, be they Sunnī or Imāmī. It would be contrary to the foundational concept of the husband as the official performer of marital dissolution.

Despite this, a minority of pre-modern jurists have created or at least expanded loopholes and ambiguities within the law (as it will be seen in this chapter) that allows some level of

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Mu'assasah-yi Āl-i Bayt (Qum: Mu'assasah-yi Āl-i Bayt, 1414/1993), XIII, 79; Muḥammad Ismā'īl b. Muḥammad Ḥusayn Khwājū'ī al-Māzandarānī, *al-Rasā'il al-Fiqhīyah*, 2 vols., ed. Sayyid Mahdī Rajā'ī (Qum: Dār al-Kitāb al-Islāmī, 1411/1990), I, 27-28; Faḍl b. Ḥasan al-Ṭabarsī, *al-Mu'talaf min al-Mukhtalaf bayn A'immat al-Salaf*, 2 vols., ed. Mudīr Shānichī and Mahdī Rajā'ī (Mashhad: Majma' al-Buḥūth al-Islāmīyah, 1410/1989), II, 191, 222; 'Alī Mu'min al-Qummī al-Sabzawarī, *Jami' al-Khilāf wa-al-Wifāq*, ed. Ḥusayn Ḥasanī Bīrjandī (Qum: Zamīnah Sāzān-i Ẓuhūr-i Imām-i 'Aṣr, 1421/2000), 467; Mullā Ḥabīb Āllāh Sharīf al-Kāshānī, *Tashīl al-Masālik ilá al-Madārik fī Ru'ūs al-Qawa'id al-Fiqhīyah*,(Qum: al-Maṭba'ah al-'Ilmīyah, 1404/1993), 13.

[127] Ḥusayn al-Ḥillī, al-*Buḥūth al-Fiqhīyah*, ed. Sayyid 'Alī Baḥr al-'Ulūm (Beirut: Mu'assasat al-Manār, 1415/1994), 208.

[128] This principle seems to be much more emphasized and in use in modern times; however, its understanding has generally been present with the pre-modern jurists.

[129] Ibid, 208-209; this right can also be given to the guardian (*walī*) of an insane husband under this principle, see Mūsa b. Muḥammad al-Najafī al-Khwānsārī, *Risālah fī Qā'idat Nafī al-Ḍarar* (Tehran: al-Maktabat al-Muḥammadīyah, 1373/1953), 221.

female agency in divorce. These loopholes, although they do not actually grant women the right to a no-fault unilateral dissolution of a marriage (since the conceptual foundations of the law do not allow it), can nonetheless force the husband to dissolve the marriage, thus giving that power to the wife in actual practice.

Obligatory *Khul'* in Sunnī law

The major Sunnī schools enumerate five essential pillars (*rukūn*) of *khul'*, without which it cannot take place: 1) the cause or trigger for *khul'* (*mūjib*), which is the husband or his guardian, 2) the litigant (*qābil*), which is the wife or the one who liable for the object of exchange (*al-multazam lil-'iwaḍ/mu'awwiḍ*), 3) the object of *khul'* (*mu'awwaḍ*) which is the wife's vagina (*buḍ'*), 4) the object of exchange (*'iwaḍ*) or dower, and 5) the legal *khul'* formula (*ṣīghah*) that must be pronounced in order for the transaction to be established. This last pillar of *khul'*, that is the accepted formula,[130] consists of an offer (*ījāb*) and acceptance (*qabūl*).[131] In other words, *khul'* cannot be valid if the husband refuses the offer for *khul'* , as a contract and transaction cannot be forced on a free individual.

Therefore, the general position of the major Sunnī schools is that *khul'* cannot be made obligatory on the husband, or at least in its no-fault form. In its fault form, al-Jazīrī states that as *khul'* is a division of *ṭalāq*, and as regular *ṭalāq* can be made obligatory if the husband fails to

[130] The formula can be stated in various ways. One well-known formula is: "I separate [myself] from you through *khul'* based on such-and-such [object of exchange]" (*khāl'atuki 'alá kadhā*).
[131] *al-Mawsū'ah al-fiqhīyah*, XIX, 256.

provide for his wife or cannot perform sexually (*'ajz al-rajul 'an al-infāq wa- al-ityān*), then one can make *khul'* obligatory on those grounds as well.[132]

As far as I have seen, only the Ḥanafīs amongst the major Sunnī schools have allowed a loophole to exist with regard to obligating a husband to a no-fault *khul'* (or at least something that closely resembles a no-fault *khul'*).[133] As the Ḥanafīs do not require intention for repudiation, by extension, free will is not required either. As a consequence, they state that repudiation is valid even if a third party coerces the husband into repudiating his wife, be it through striking (*ḍarb*), imprisonment (*sajn*) or by taking his money (*akhdh al-māl*).[134] In other words, the wife can hire someone to compel her husband to repudiate her so as to immediately dissolve the marriage. If this seems strange or unrealistic, one should remember that divorce in traditional Muslim societies was and is a family affair. Court records shows that families frequently intervened to secure better conditions for female relatives in divorce proceedings.[135] It would have been possible and not unlikely that concerned and sympathetic family members or a judge would have compelled the husband to repudiate his wife. In fact, the Ḥanafīs historically went as far as allowing a wife to poison her husband in order to separate from him.[136]

Nevertheless, an important question is whether such a *khul'* would be considered a regular repudiation requiring the husband to pay the wife's dower, or if it would be counted as *khul'*.

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[132] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 470. As far as I know, this is to be decided by a judge who takes into account the specific circumstances of the couple.

[133] It is worth mentioning that my term 'no-fault' points to something only partly similar to its Western understanding, is largely distinct in Islamic law. It signifies a situation in which the spouses dissolve their marriage despite the fact that they are fulfilling their marital prerogatives and duties, which are in themselves different, depending on gender. This is a distinction that is mostly absent in the Western rights: based understanding of the matter, which largely understands 'no-fault' as an absence of infidelity and marital abuse.

[134] al-Jazīrī, *al-Fiqh 'alá al-Madhāhib al-Arba' ah,* IV, 362.

[135] See for example Ronald C. Jennings, "Women in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri", in *Journal of the Economic and Social History of the Orient*, Vol. 18, No. 1 (Jan., 1975), 83-97.

[136] Colin Imber, "Why Should You Poison Your Husband: A Note on Liability in Ḥanafī Law in the Ottoman Period", in *Islamic Law and Society*, vol. 1, no. 2, (1994): 206-216.

Although the subject of compelling the husband is discussed in legal works in chapters on *ṭalāq*, the Ḥanafīs state that in case of a forced repudiation (*al-ṭalāq al-mukrah*), the marriage is to be annulled (*faskh*).[137] In other words, the process ends up becoming a forced *faskh* instead of a *ṭalāq*, so that the wife forgoes or loses the right to her dower and all other payments the husband is normally responsible for. Although in theory they are different, they are almost identical in practice. For example, the dissolution for both is irrevocable and the wife, in addition, forgoes her rights to her dower along with all other debts owed to her before the dissolution such as payment for the suckling of her child.

Khul' is even defined as an 'elimination of the marriage contract' (*raf' al-'aqd fī al-ḥāl*),[138] which resembles the definition of *faskh*. For example, the Shāfi'ī jurist and theologian Jalāl al-Dīn al-Suyūṭī (d. 1505) defines *faskh* as a 'dissolution of the marriage contract's binding' (*ḥall irtibāṭ al-'aqd*).[139] Thus it seems that there is effectively no significant difference between *faskh* and *khul'*. One of the foremost classical Sunnī jurists, al-Zarkashī (d. 1391), goes so far as to say that when *khul'* is mentioned, what is discussed in reality is *faskh*.[140] Among the Ḥanbalīs, the term *faskh* is actually often used for *khul'*.[141] The only notable difference between *khul'* and *faskh* in the interpretation of the Ḥanafīs is that the husband in theory is obliged to maintain the wife during the waiting period in *khul'*, but not in *faskh*. However, practice in Ottoman Ḥanafī courts shows that it was standard that women gave up the right to maintenance.[142] As far as I have seen, *khul'* is otherwise indistinguishable from *faskh,* at least in

[137] Muḥammad b. Ḥassan al-Ṭūsī, *al-Khilāf*, 6 vols., ed. 'Alī Khurāsānī and Javād Shahristānī (Qum: Daftar-i Intishārāt-i Islāmī, 1407/1986), IV, 478.
[138] *al-Mawsū'ah al-fiqhīyah*, XIX, 238.
[139] Ibid, 236.
[140] Ibid.
[141] Ibid.
[142] Ronald C. Jennings, "Divorce in the Ottoman Sharia Court of Cyprus, 1580-1640", in *Studia Islamica*, No. 78 (1993), 157.

the practical result. In this sense, it is possible to argue that this striking similarity might be at the root of the constant disagreement among jurists over the categorization of *khul'*.

In conclusion, due to the similarities and oftentimes indistinguishable nature of *khul'* and *faskh* in Islamic law and also because of my desire to focus on practical results, I find it appropriate to include the above Ḥanafī loophole within the context of obligatory *khul'*.

Obligatory *Khul'* in Imāmī Law

There is no agreement amongst the Imāmīs on whether *khul'* is consensual or obligatory. The disagreement stems from two areas. The first is that Imāmī traditions on the matter are by and large ambiguous. The second concerns the question of whether the principle of 'Commanding what is Good and Forbidding what is Evil' (*al-amr bi-al-ma'rūf wa al- nahī 'an al-munkar*) can override the default principle of a man's free will in Islamic law. The second area is especially important as the principle of 'Commanding' plays a more significant role in Imāmī law than in Sunnī law, since it is an essential pillar of its 'Branches of Religion' (*furū' al-dīn*), which is the Imāmī equivalent of the Sunnī 'Pillars of Islam' (*arkān al-islām*).[143] Therefore, its usage in enforcing obligations and prohibitions vis-à-vis ambiguous legal matters is, as far as I have seen, more frequent.

[143] The Sunnīs base Islām on five pillars which establish the duties of a Muslim: 1) the profession of faith (*shahādah*), 2) the prescribed prayers (*ṣālah*), 3) prescribed alms-giving (*zakāt*), 4) prescribed fasting (*siyām*), 5) and the Ḥajj. The Imāmīs, however, divide the duties of a Muslim into ten pillars, which are called the 'branches of religion': 1) the prescribed prayers, 2) the prescribed fasts, 3) the prescribed alms-giving, 4) the prescribed tax (*khums*), 5) the Ḥajj, 6) Jīhād which is divided into two, the greater jīhād (*al-jīhād al-akbar*) and lesser jīhād (*al-jīhad al-aṣghar*). The former refers to the internal struggle between the ego and the spirit, and the latter refers to holy war or struggle in defense of Islam, be it physical or verbal. 7) Commanding what is Good (*al-amr bi-al-ma'rūf*) 8) Forbidding what is Evil (*nahī 'an al-munkar*), 9) Love for the Household of the Prophet (*tawallā*) and 10) Disassociating from the enemies of the Household of the Prophet (*tabarrā*). For an elaborate study of this subject, see Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2010).

The Traditions

The most important legal reference for Imāmī Traditions is *Wasā'il al-Shī'ah* by the Akhbārī or Tradionist jurist al-Ḥurr al-'Āmilī. The *Wasā'il* runs to twenty-nine volumes, covering all areas of law, ranging from ritual purity (*ṭahārah*) to blood-money (*dīyāt*). The work is an assembly of almost all the traditions pertaining to Imāmī legal codes, extracted from some of the major corpuses of Imāmī traditions such as *al-Kāfī* and *al-Tahdhīb,* as well as works from earlier generations, one hundred and eighty in all. It has come to be the most practical and widely used manual of *ḥadīth* in Imāmī law. The following is a translation of the chapter of *Wasā'il* on *khul'*:[144]

Chapter on the invalidity of khul' *and impermissibility of [granting] an [object of] exchange to the husband [in return for marital dissolution] until contempt* (karāhah) *is displayed by the wife:*

1) Imām al-Bāqir is reported to have said: If a woman says to her husband the [following] sentence "I will not obey you" (*lā uṭī'u laka*) in an explicit (*amran mufassaran*) or implicit fashion (*ghayr mufassarin*), it is permissible for him to take from her and he cannot take her back anymore [i.e. the repudiation becomes irrevocable].
2) al-Ṣadūq narrated the same tradition through his chain running from Muḥammad b. Ḥumrān to Muḥammad b. Muslim. Al-Kulaynī also narrated the same traditions through his chains running from 'Alī b. Ibrāhīm from his father and to Abī Baṣīr as well as from his chain running from Aḥmad b. Muḥammad b. 'Īsa to 'Alī b. al-Ḥakam.
3) Samā'ah b. Mihrān said: I said to Imam al-Ṣādiq that it is not permissible for a man to take from a woman separated through *khul'* (*mukhtali'ah*) until she utters these words in

[144] Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 279-282; Some of the expressions used in the following traditions concerning what the wife is supposed to say to her husband in order to establish *khul'* have been translated in a non-literal way, since a literal rendering would actually be incomprehensible.

full. Imam al-Ṣādiq replied: [that is] if she says "I will not obey God when it comes to you" (*lā uṭī'u Allāh fīk*), it is permissible for him to take from her what he finds.

4) Imām al-Ṣādiq is reported to have said: It is not permissible to separate from a woman through *khul'* until she says to her husband : "By God, I will not do anything for you (*lā abarru laka qisman*) and I will not obey you at all. And I will not perform the major ablution for you from my state of ritual impurity [after intercourse] (*janābah*) and I will have intercourse [with someone else] on your bed (*firāshak*) and I will permit myself upon you without your permission [i.e. I will step over your authority]". Indeed, the populace (*al-nās*) [i.e. Sunnīs] allow [*khul'*] without this [conditional utterance]. [Regardless,] if the wife says such to her husband, then it is permissible for him to take from her [in accordance with] that utterance (*ḥadīth*).
5) [al-'Āmilī adds]: Shaykh al-Ṣadūq narrated a similar tradition with an addition from Imam al-Ṣādiq who said: It is an utterance from her part, that is, [one which] he should not learn [as it is improper].
6) Imām al-Ṣādiq is reported to have said: the *mukhtali'ah* is the one who says to her husband: "Separate from me through *khul'* and I will give you what I took from you". [As such] it is not permissible for him to take from her anything until she says: "By God I will not do anything for you and I will not obey you at all and I will permit myself [to leave] your house without your permission". If she acts upon this without him hearing these words from her, it is [also] permissible to take from her.
7) Samā'ah said: I asked Imam al-Ṣādiq about the *mukhtali'ah* and he answered: It is not permissible for the husband to separate from her through *khul'* until she says: " I will not obey you at all and I will not observe the limits of God when it comes to you and I will

not perform the major ablution for you in regard to my ritual impurity [after intercourse] and I will have intercourse [with someone else] on your bed and I will bring someone into your house that you hate without letting you know about it" - and this is something that people do not say, but it is [to be] uttered by the wife herself.

8) Imām al-Ṣādiq said: If a man separates from his wife through *khul'* and she is his only wife and she is mature (*bā'inah*) [i.e. menopausal] and he [through his own initiation] addresses the subject himself (*huwa khāṭib min al-khuṭṭāb*), it is not permissible to separate through *khul'* until she pursues it herself [without him initiating it and] without him harming her (*yuḍirru bihā*) and until she says "I will not do anything for you nor will I perform the major ablution for you and I will bring someone into your house that you hate and I will have intercourse [with someone else] on your bed and I will not observe God's bounds". If all of this comes from her, then it is acceptable (*ṭāb*) for him to take from her.

9) Imām al-Ṣādiq said: It is not permissible for a man to separate from this wife through *khul'* until she says to her husband as the peers mentioned [in regard to what the wife is supposed to say]. Imām al-Ṣādiq [then added]: the people [i.e. Sunnīs, however] allow it without this. [Regardless], if she says that to her husband, [then] it is permissible for him to separate from her through *khul'* and it is permissible for her husband to take from her whatever is present.

10) Imām al-Ṣādiq said: In *khul'*, if the wife says "I will not perform the major ablution for you [in order to purify myself from my] ritual impurity and I will not do anything for you and I will have intercourse on your bed with someone you hate (*man takrahuh*). If she says this to him, then it is permissible for him to take from her.

11) Abī Baṣīr said: I asked Imām al-Ṣādiq about the *mukhtali'ah*, [that is, how does one separate from one's wife through *khul'*]? He answered: It is not permissible to separate from her through *khul'* until she says "I will not do anything for you and I will not obey you at all and I will have intercourse [with someone else] on your bed and I will infringe upon you[r rights] without your permission". If she says that, it [becomes] permissible to separate from her through *khul'* and it becomes permissible for him to take from her dower or more; and this is [in accordance with] the word of God: "There is no harm on them in what she may give to him". If he does this, then she separates from him and she owns herself [again]. [However], if she wants, she [is free] to marry him or not [as she wishes]. If she does decide to marry him again], then it will be considered her second [marriage with the same person].

This is the only relevant chapter in the "Book of *Khul'* and *Mubāra'āh*" in *Wasā'il* that might give us an indication as to whether or not *khul'* is consensual or obligatory.[145] Evidently, not a single one of these traditions (or any other in the chapter) tells us explicitly whether *khul'* is obligatory or not. The Imāmī jurists have utilized the above traditions to justify their positions through subjective understandings of the implicit message that the traditions convey, as I shall now demonstrate.

Men as Free Agents or 'Commanding what is Good and Forbidding what is Evil'?

The majority of Imāmī jurists have inclined towards making *khul'* consensual rather than obligatory. This position has been based on three factors; 1) repudiation can only be established (*īqā'ah)* by the husband, 2) *khul'* is a contractual transaction and therefore cannot be forced on

[145] The other chapters are largely about rulings pertinent to *khul'* such as the waiting period or largely repeat versions of traditions in the first chapter.

any party and 3) the husband by default cannot be obligated to do something by his wife, as he is a free agent. The last two themes, however, have been the most common. Even so, when 'obligatory' *khul'* is *explicitly* discussed, the Imāmī jurists exclusively rely on the principle of a husband's freedom of will or, more precisely, his 'exemption [as a free agent] from being compelled or obligated' (*barā'at al-dhimmah 'an al-wujūb*) by his wife.

I suspect the third point has taken precedence over the other two, for the following reasons: 1) The tradition on the husband's exclusive right to repudiation is a Sunnī one (and thus suspect). Moreover, historically speaking, it did not concern power relations between man and woman or husband and wife, but between men, or more precisely, husbands and slave masters or guardians. For the tradition was in fact about a man who had complained to the Prophet that his wife's slave-master was trying to force them to dissolve their marriage (as the slave-master was now coveting her) after he had allowed them to marry initially. To this, the Prophet replied: "Repudiation is in the hands of him who took the [wife's] leg"; in other words, repudiation cannot be initiated by the slave-master. 2) The argument that *khul'* is a contract or transaction, thus necessitating an initiation (*ījāb*) by the wife and acceptance (*qabūl*) by the husband, might have been problematic because Imāmī jurists have only regarded it as a symbolic transaction and not a real one, as confirmed by the contemporary jurist Ja'far Subḥānī.[146] This leaves (3), the idea that a man cannot, as a naturally free agent, be compelled to do something by his wife.

The minority of Imāmī jurists who did adopt the notion of obligatory *khul'* did so on the basis of the principle of 'Commanding what is Good and Forbidding what is Evil'. In other words, as the wife's contempt or *karāhah* puts her ability to observe God's bounds in question, it becomes obligatory on the basis of 'Forbidding what is Evil' (*nahī ʿan al-munkar*) for the

[146] Subḥānī, *Niẓām al-Ṭalāq*, 368.

husband to repudiate his wife through *khul'* so as to prevent the risk of her falling into sin, be it through disobedience in her movements (going out of the 'house' without permission), fulfillment of her sexual duties or even adultery. In the extant legal literature, the earliest jurist to have explicitly dealt with the question of obligatory *khul'* was Shaykh al-Ṭūsī. In a famous passage, al-Ṭūsī writes that:

> K*hul'* is obligatory if the woman says to her husband: "I will not obey you at all and I will not stand up for you at all and I will not perform the major ablution for you from my state of ritual impurity and I will have sexual intercourse on your bed with someone you hate if you do not repudiate me". When he hears these words from her, or he knows this through her state of rebelliousness in regard to something like that, and if she does not speak to him, then it is obligatory upon him to separate from her through *khul'* (*wajaba ʿalayh khalʿaha*).[147]

This ruling has large implications. It has the potential of breaking the patriarchal monopoly on power by men in marital dissolution. Because of the repercussions of such a position, some jurists argued that what al-Ṭūsī really meant by 'obligatory' was in fact an 'intense recommendation' (*shadīd al-istiḥbāb*). Commenting on al-Ṭūsī's passage, Muḥammad b. Idrīs al-Ḥillī (d.1201), for example, emphasizes that it is only an emphasis in recommendation (*ta'kīd al-istiḥbāb*) without necessity and obligation (*dūn al-farḍ wa-al-ījāb*). In sum, it is only an 'intense recommendation', and al-Ṭūsī's words, according to the author, are "out of place" (*fī ghayr mawḍi'*).[148] The reasoning behind his objection to a literal understanding of al-Ṭūsī is that a husband is by default "free" (*mukhayyar*) in separating from the wife through *khul'* or in repudiating her. Ultimately, repudiation is "in his hands" (*al-ṭalāq bi-yadihi*) and "no one can

[147] al-Ṭūsī, *al-Nihāyah fī Mujarrad al-Fiqh wa-al-Fatāwa* (Beirut: Dār al-Kitāb al-ʿArabī, 1400/1979), 529.
[148] Muḥammad b. Manṣūr b. Aḥmad b. Idrīs al-Ḥillī, *al-Sarā'ir al-Ḥāwī li-Taḥrīr al-Fatāwa*, 3 vols. (Qum: Daftar-i Intishārāt-i Islāmī, 1410/1989), II, 764.

force him to such" (*lā aḥad yajburuhu 'alá dhālik*).[149] 'Allāmah al-Ḥillī (d. 1325) also agrees with Ibn Idrīs on both levels. First, he states that a man by principle (*aṣl*) cannot be forced into *khul'*, as he is exempt from obligation in this regards (*barā'at al-dhimmah min wujūb al-khul'*).[150] Secondly, he comments on al-Ṭūsī's passage that what is "apparent (*ẓāhir*) is that the intention (*murād*) of the Shaykh in regard to that is the "intensity of the recommendation" (*shiddat al-istiḥbāb*)".[151]

The vast majority of Imāmī jurists, both classical or modern, have implicitly or explicitly rejected obligatory *khul'* following the same line of argumentation.[152] Some have also added another barrier by stating that *khul'* can only be established by initiation and subsequent acceptance (*bi-ijābihi wa qabūlihi*).[153] A few jurists have even gone so far as to say that even with *karāhah*, the Traditions indicate that dissolution of the marriage is not even recommended, but only subject to "permissibility" (*ḥillīyah/ibāḥah*).[154] The only exception that they allow in regard to it being a recommended act is with the usage of the 'principle of leniency in the

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[149] Ibid, 765.
[150] Ḥasan b. Yūsuf b. Muṭṭahar al-Ḥillī, *Mukhtalaf al-Shī'ah fī Aḥkām al-Sharī'ah*, 9 vols., ed. Gurūh-i Pazhūhish-i Daftar-i Intishārāt-i Islāmī (Qum: Daftar-i Intishārāt-i Islāmī, 1413/1992), VII, 383.
[151] Ibid.
[152] Other scholars, aside the ones mentioned, have also explicitly rejected the notion of obligatory *khul'*. See for example Mufliḥ b. al-Ḥasan Rashīd al-Ṣaymarī, *Ghāyat al-Marām fī Sharḥ Sharā'i al-Islām*, 4 vols., ed. Ja'far al-Kawtharānī al-'Āmilī (Beirut: Dār al-Hādī, 1420/1999), III, 266; Bahā' al-Din Muḥammad b. Tāj al-Dīn Ḥasan al-Iṣfahānī, *Kashf al-Lithām wa al-Ibhām 'an Qawā'id al-Aḥkām*, 11 vols., ed. Gurūh-i Pazhūhish-i Daftar-i Intishārāt-i Islāmī (Qum: Daftar-i Intishārāt-i Islāmī, 1416/1995), VIII, 187; Najm al-Dīn b. Ja'far b. Ḥasan al-Ḥillī (Muḥaqqiq al-Ḥillī); *Sharā'i al-Islām fī Masā'il al-Ḥalāl wa al-Ḥarām*, 4 vols., ed. 'Abd al-Ḥusayn 'Alī Baqqāl (Qum: Mu'assasah-yi Ismā'īlīyān, 1408/1987), III, 40; Zayn al-Dīn b. 'Alī al-'Āmilī, *Masālik al-Ifhām ilá Tanqīḥ Sharā'i al-Islām,* 15 vols., ed. Gurūh-i Pazhūhish-i Mu'assasah-yi Ma'ārif-i Islāmī (Qum: Mu'assasat al-Ma'ārif al-Islāmīyah, 1413/1992), IX, 411; Faḍil al-Miqdād, *Kanz al-'Irfān fī Fiqh al-Qur'ān*, 2 vols. (Qum: np, nd), II, 285; Muḥammad Muḥsin b. Shāh al-Fayḍ al-Kāshānī, *Mafātīḥ al-Sharā'i*, 3 vols. (np, nd), II, 322; al-Baḥrānī, *Ḥadā'iq al-Nāḍirah*, V, 555; Sayyid 'Alī b. Muḥammad b. Abī Mu'ādh al-Ṭabaṭabā'ī, *Riyāḍ al-Masā'il fi Taḥqīq al-Aḥkām bi al-Dalā'il*, 16 vols., ed. Muḥammad Bahrimand, Muḥsin Qadīrī and Karīm Anṣārī (Qum: Mu'assasat Āl al-Bayt, 1418/1997), XII, 361 also in his *al-Sharḥ al-Ṣaghīr fī Sharḥ Mukhtaṣar al-Nāfi'*, 3 vols., ed. Sayyid Mahdī Rajā'ī (Qum: Intishārāt-i Āyat Āllāh Mar'ashī Najafī, 1409/1988), II, 455. For an example of a modern scholar who represents the mainstream position of traditional Imāmīsm on the subject, see Sayyid Aḥmad Khwānsārī, *Jāmi' al-Madārik fī Sharḥ Mukhtaṣar al-Nāfi'*, 7 vols., ed. 'Alī Akbar Ghaffārī (Qum: Mu'assasah-yi Ismā'īlīyān, 1405/1984), IV, 589.
[153] Muḥammad Ḥasan b. Bāqir al-Najafī, *Jawāhir al-Kalām fī Sharḥ Sharā'i al-Islām*, 43 vols. ed. ' Abbās Kūchānī (Tehran: Dār al-Kutub al-Islāmīyah, 1367 H.Sh./1988), XXXIII, 47.
[154] al-Najafī, *Jawāhir al-Kalām*, XXXIII, 45; Sayyid Aḥmad Khwānsārī, *Jāmi' al-Madārik*, IV, 589.

Traditions' (*qā'idat al-tasāmuḥ fī al-sunan*).[155] This is as far as the jurists go in explaining the matter. The lack of explanation is itself significant, as it not only demonstrates the difficulty the jurists have in establishing the consensual nature of *khul'*, but also indicates an ill-defined and therefore more flexible loophole – which other jurists have exploited.

Despite their agreement on the rejection of obligatory *khul'*, al-Ṭūsī's comments are controversial and unsettled, as al-Shahīd al-Thānī (d. 1558) remarks.[156] First, 'Allāmah al-Ḥillī himself is unsure of al-Ṭūsī comments, as indicated by his use of the term 'seeming' (*ẓāhir*), which in Imāmī law is an indicator of uncertainty. Other jurists, such as Muḥaqqiq al-Ḥillī (d. 1277) have stated that al-Ṭūsī's position was an actual obligation[157] and not a recommendation, a view that implicitly appears to be held in al-Írawānī's *al-Fiqh al-Istidlālī,*[158] currently the standard introductory law text in Imāmī seminaries. I would myself agree that it is unlikely that al-Ṭūsī was referring to a recommendation instead of an actual obligation. This is due to the fact that in Imāmīsm, such indistinct and a illusive language is often restricted to works of ethics, whereas in law, concepts and verdicts are clear and direct, given the sensitivity of the enterprise.

That said, it is unclear why al-Ṭūsī took such a controversial position. It is possible that as he deemed *khul'* to be a *faskh* and not a *ṭalāq*, he felt more at ease arguing for an obligatory dissolution of the marriage as *faskh*, which simply happened not to be as explicitly patriarchal as *ṭalāq*. In other words, gendered power relations in *faskh* have generally been vague, as the annulment of the contract does not convey a very explicit sense of unilateral patriarchy, in

[155] This is a principle which jurists use at times to derive recommended acts from Traditions that do not explicitly indicate a recommendation. The enactment of the principle is limited, subjective and only binding on the jurist who utilizes it and his followers (*muqallidīn*).
[156] Zayn al-Dīn b. 'Alī al-'Āmilī, *Masālik al-Ifhām*, IX , 411; Muḥaqqiq al-Sabzawārī (d. 1679) also remarks that al-Ṭūsī's position is unclear (*ghayr wāḍiḥ*); see Muḥammad Bāqir b. Muḥammad Mu'min al-Sabzawārī, *Kifāyat al-Aḥkām*, 2 vols. (Iṣfahān: Markaz-i Nashr-i Iṣfahān, n.d), II, 383.
[157] Muḥaqqiq al-Ḥillī, *Sharā'i al-Islām*, III, 40; other jurists have also understood al-Ṭūsī in a similar way; see for example al-Fayḍ al-Kāshānī, *Mafātīḥ al-Sharā'i*, II , 322; 'Alī b. Muḥammad b. Abī Mu'ādh al-Ṭabaṭabā'ī, *Rīyāḍ al-Masā'il*, XII, 361.
[158] al-Irawānī, *al-Fiqh al-Istidlālī*, II, 435.

contrast to the institution of *ṭalāq* as established by the Prophetic Traditions. It is, however, more likely that al-Ṭūsī gave a primary role to the principle of 'Forbidding what is Evil', which could then override smaller, less important principles and legal assumptions. Although al-Ṭūsī does not explicitly state that he relied on this principle, there is no doubt amongst his followers and critics alike that this was the main legal mechanism behind his verdict.[159]

Amongst the major classical Imāmī jurists, five besides al-Ṭūsī, as far as I have been able to establish, are known to have deemed *khul'* obligatory, all under the rubric of 'Forbidding what is Evil', that is, preventing the wife from falling into the sins the Traditions describe. The five are:

1) Abū Ṣalāh Taqī al-Dīn b. Najm al-Dīn al-Ḥalabī (d. 1055)[160]
2) Qāḍī Ibn Barrāj (d. 1088)[161]
3) 'Imād al-Dīn Muḥammad b. 'Alī b. Ḥamzah al-Mashhadī (d. 1170)[162]
4) Quṭb al-Dīn Sa'īd b. 'Abd Āllāh al-Rāwandī (1177)[163]
5) Sayyid 'Izz al-Dīn Ḥamzah b. 'Alī Ibn Zuhrah al-Ḥalabī (d. 1189).[164]

It is difficult to discern why the above jurists decided to deviate from the mainstream position. This is because the legal texts seldom discuss the social contexts that lead them to rule the way they did, that concern being generally more present in works of ethics. Perhaps one reason is the need for the jurists to demonstrate that their conclusions are drawn strictly on the basis of the text and legitimate methods of reasoning that are at a distance from emotion and 'sociological'

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[159] 'Allāmah al-Ḥillī, *Mukhtalaf al-Shī'ah*, VII, 383.
[160] Abū Ṣalāh Taqī al-Dīn b. Najm al-Dīn al-Ḥalabī, *al-Kāfī fī al-Fiqh*, ed. Riḍā Ustādī (Iṣfahān: np, 1403/1982), 307
[161] Ibid. al-Ḥillī quotes his opinion from one of his non-extant works (*al-Kāmil*). His extant works, however, do not discuss obligatory *khul'*.
[162] 'Imād al-Dīn Muḥammad b. 'Alī b. Ḥamzah al-Mashhadī, *Wasīlah ilá Nayl al-Faḍīlah*, ed. Muḥammad Ḥassūn (Qum: Maktabat Āyat Āllāh al-Mar'ashī al-Najafī, 1408/1987), 331 .
[163] Quṭb al-Dīn Sa'īd b. 'Abd Āllāh al-Rāwandī, *Fiqh al-Qur'ān*, 2 vols. (Qum: Maktabat Āyat Āllāh al-Mar'ashī al-Najafī, 1405/1984), II, 194.
[164] Sayyid 'Izz al-Dīn Ḥamzah b. 'Alī Ibn Zuhrah al-Ḥalabī, *Ghunyat al-Nuzū' ilá 'Ilmay al-Uṣūl wa-al-Furū'*, (Qum: Mu'assasah-yi Imām-i Ṣādiq, 1417/1996), 374-375.

concerns. Furthermore, it is also likely that the jurists try to keep their arguments as concise as possible and establish default rulings. Those sociological concerns that do change their default positions generally arise outside the texts, in the context of a face-to-face interactive where the jurist can better assess the situation.

Thus, the evidence we have at hand is almost always limited to the deductive and interpretive mechanisms used in deriving the different rulings. If these intellectual processes and the play between them are closely examined (as I have done above), they can, on occasion, shed light on moral concerns behind legal views. Thus although the evidence is limited and indirect, as I have just explained, it is quite possible that the dissenting jurists might have been motivated by pity towards women in their societies who were trapped in miserable marriages and wished to give them a way out. It is also possible that they might have been motivated by pity for men who refused to repudiate their 'rebellious' wives as they were too attached to them.

What is clear, in any case, is that above all, these jurists gave prominence to the moral order of the society that they lived in, a phenomenon which Lawrence Rosen sees as the result-oriented reality of Islamic law.[165] This gives credence to the suggestion that their use of the principle of *al-nahī 'an al-munkar* or 'forbidding what is evil' indicates a concern with preventing disenchanted wives from being driven to vice and thus damaging the moral order. This approach, in fact, would not have been unlikely, as the fear of female sexuality and its 'deviance' or escape from male control is of primary concern in many pre-modern and indeed in modern patriarchal societies. Willem Floor, for example, notes that adultery was not a rare occurrence amongst (Shī'ī) women in nineteenth century Iran. Despite the high risk of honor killings, many women were dissatisfied with their sexual lives, as it often happened that their

[165] See Lawrence Rosen, *The Anthropology of Justice: Law as a Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

husbands were either significantly older than them or practiced polygamy and homosexuality and were thus sexually inattentive.[166] According to one observer of nineteenth century Shī'ī society in Iran, if "sodomy be the common vice of the men, adultery is said to be the special vice of the women, by which they retaliate."[167] Although times and mores change constantly in all societies, it is possible that similar sexual and marital dissatisfaction and tendencies towards adultery also existed amongst women in the times of the five jurists listed above and that interpreting Imāmī law in such a way so as to prevent such vices would have been an attractive or acceptable solution.

"Obligatory *Khul'*" in Jewish Law

Khul' is an Islamic and Arabic term and thus apparently alien to Judaism. However, Islam is an Abrahamic tradition, seeing itself as a successor to its Jewish predecessor. Both also sprang from and shared the same geographic milieu and Semitic environment and are defined by their orthopraxy. It is also important to note that the development of both legal systems largely took place in Iraq in the East as well as, to a lesser extent in Andalusia in the West. It is therefore not surprising that both religions would have influenced each other in the respective development of their law. One such example of inter-traditional and inter-legal influence is the great Jewish philosopher and jurist Rabbi Moshe ben Maimon, better known in English as Moses Maimonides (d.1204).

Maimonides was born in 1135 in Cordoba, Spain. Aside from Judaic studies, he spent significant time studying the sciences and philosophy of Islam and various works composed by Muslim scholars, which would likely have included works of law. After fleeing the Almohades

[166] Floor, *A Social History*, 97-109.
[167] Ibid, 103.

in Spain in 1148, Maimonides proceeded to Egypt and spent the rest of his life in Fustat, Egypt, where he died in 1204. Though we have no direct evidence, it is unlikely, given Maimonides' eclectic interests that he would not have picked up knowledge of Sunnī law during his sojourns in Spain, Morocco and Egypt. It is also possible that he would have been aware of some of the prominent principles of Ḥanafī law, Ḥanafism being popular at the time in Spain and Egypt.

Whatever the influence, there is an indirect but quite striking similarity between Maimonides' ruling concerning the forced divorce or release of a rebellious woman (*get moredet*) and the forced *khul'* or *faskh* in Ḥanafī law. I am not saying here that Maimonides' opinion was directly borrowed from Ḥanafī law, as coerced marriage dissolution seems to have existed before him in the verdicts of the "Geonim" and "Talmudic Sages". However, it is possible that his reformulation of coerced marital dissolution in Jewish law was influenced by what he knew from Ḥanafī law. For that matter, it is equally possible that Ḥanafī law was influenced in regard to forced dissolution by Jewish law, as it is known that Jewish converts influenced Islamic law and that Ḥanafī law itself was largely born in Iraq, the historic cradle of Jewish law. This, of course, is all speculation, inspired by striking similarities; further research is needed to see if the similarity is more than just a coincidence. Whatever the case, the similarity does throw light on the underlying structure on which the "loophole" of an obligatory "nofault" divorce is based.

The Get Moredet

As seen earlier, Jewish marriage dissolution seems to be more private in nature than in Islamic law. However, in complicated situations, sometimes the "aid" of the *beth din* or rabbinical courts was used to force the husband to participate in the dissolution. However, the *beth din* appears

only to go so far as to enforce the rights that already existed in the law; therefore it was still only the husband who could technically give the *get*, and not the *beth din*.[168] Nevertheless, the "Talmudic Sages" had decreed that when a woman was deserving of a *get*, coercion or force against the husband was allowed in order to force a *get*.[169] A woman's entitlement to a *get* is not no-fault. According to the Law, the following eight[170] are some of the situations which entitle the wife to a marital dissolution. Interestingly, there are parallels with *faskh* and *khul'* in Islamic law:

1) Impotence
2) "A loathsome chronic disease" (or what Rachel Biale calls any "serious defect" (*moom gadol*) which would include "boils" (a skin disease) and "polypus" (a disorder that causes bad smell).[171]
3) A husband whose job causes him to smell persistently.
4) "Ill-treatment of the wife", including wife-beating. Post-Talmudic Rabbis would consider "shameful un-Jewish treatment" refusing to let the wife visit her parents.[172]
5) If the husband apostatizes from Judaism.
6) "Moral dissolution," which includes "unnatural sexual acts", that is sexual acts forbidden in Jewish law.
7) "Refusal of co-habitation."
8) "Refusal to support the wife"; in other words, refusal to financially support and provide for her.

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[168] Haut, "The Alter Weeps: Divorce in Jewish Law", 50.
[169] Haut, *Divorce in Jewish Law and Life*, 23.
[170] Daiches, "Divorce in Jewish Law", 223. These official eight reasons are given by the *Shulkhan Arukh*, see John Paterson, "Divorce and Desertion in the Old Testament" in *Journal of Biblical Literature*, vol. 51 #2 (June 1932), 165.
[171] Biale, *Women and Jewish Law*, 85-86.
[172] Brayer, "The Role of Jewish Law Pertaining to the Jewish Family, Jewish Marriage and Divorce" in *Jews and Divorce*, 28. The view against wife-beating was held by notable Rabbis such as Rosh and Maharam of Rothenburg, see Biale, *Women and Jewish Law*, 93.

Some Rabbis added other situations such as polygamy and sexual incompatibility to this list; but again, these seem to be subject to disagreement.[173] If the husband's behaviour fit in one of these categories and the grounds were subsequently approved by the *beth din,* the wife had legal grounds to obtain a marital dissolution with application of force, which could possibly entail a threat of ex-communication, or even physical pain if the husband was non-compliant. However, this does not seem to have been absolute; for although the wife would have grounds to compel her husband to dissolve the marriage, the Rabbis might refuse to do so or simply not acknowledge them as valid grounds.

There was, however, another problem. In Jewish law, a *get* obtained under duress, which in the Talmud is known as a *get meuseh*, is void.[174] Some Rabbis nonetheless accepted that if the husband officially agreed to give the *get* (after coercion), it would be valid.[175] However, this resolution seems to have been weak, as coercion still made the idea of free will problematic; thus it appears that this option was rarely used.

Maimonides offered a clever solution to the problem. He argued that a husband would naturally want to follow the decree of the *beth din*, so that a refusal would be due to an 'evil inclination' (*yetzer hara*) overtaking him. When force is used against the rebellious husband, it weakens his evil inclination, allowing him to bring out his "good will" and comply with the *beth din*'s decree.[176] One might say that this seems to be a mechanism by which the husband's superior will is, at least in appearance, maintained. In other words, it is not that he is being forced by the wife, but that he is 'not himself' and only later comes to his 'senses'. There appears to be

[173] For a longer, more comprehensive list of a wife's grounds for divorce, see Brayer, "The Role of Jewish Law", 27-29.
[174] David M. Cobin. "Jewish Divorce and the Recalcitrant Husband: Refusal to Give a "Get" as Intentional Infliction of Emotional Distress" in Journal of Law and Religion. Vol. 4 #2 (1986), 407.
[175] Ibid.
[176] Haut, "The Altar Weeps: Divorce in Jewish Law", 50.

a strain in trying to maintain the husband's superior will. One can see this in how the judge divorces the wife 'on the husband's behalf' so as to make it seem that the wife's will does not surpass that of the husband's. This is the problem Muslim and Jewish scholars face where they seem to be trying to preserve and reconcile patriarchal power in the face of acute moral problems facing women: that is, how to give a woman the possibility of dissolving her marriage and not to make it appear as if the husband is being compelled by his wife.

This creative legal thinking seems to have had a direct effect on Maimonides' verdict concerning the *moredet*. A *moredet* was essentially a "rebellious wife" who "knowingly" violated the laws of the Torah or "conventional morality". Also included in this definition of a *moredet* is a wife who willingly refuses to have sexual relations with her husband.[177] All of this closely resembles the *nāshizah* (rebellious wife) in Islamic law. Accordingly, Maimonides argued that if a wife was considered a *moredet* due to her refusing sexual intercourse with her husband, the *beth din* had to compel the husband to repudiate her:

> A woman who denies her husband sexual intercourse is called rebellious [*moredet*]. They ask her why she has rebelled. If she says: "I despise him and I cannot bring myself to be possessed [sexually] by him," they compel him to divorce her. For she is not a captive that she should be possessed by one who is hateful to her. And she goes out with any *ketubah* payment at all.[178]

In combining these two rulings, Maimonides allowed the wife to force her husband into dissolving the marriage. In other words, if a woman wanted to end her marriage for any reason whatsoever, all she had to do is refuse sexual intercourse with her husband and say "I despise him" (*ma`us alay*) – a conception that bears a striking parallel with *karāhah* in Islamic law. Once

[177] Haut, *Divorce in Jewish Law and Life*, 146.
[178] Maimonides, *Mishneh Torah*, Hilkhot Ishut 14:8, translated and quoted from Biale, *Women and Jewish Law*, 91.

she did this for one year consecutively, she would be considered a *moredet* and the *beth din* would have no choice but to entitle her to a divorce, whereas before Maimonides' interpretation of forced marital dissolution, it would have been left to the discretion of the *beth din*. If, however, the husband refused to release her, it would be said that he was overcome by an evil inclination, as explained above, and thus force would be applied until he agreed to give a *get*. The negative side of this procedure, of course, was that the wife would go out without any dower or *ketubah* payment. This is also parallel to *khul'*, in which the wife forgoes her *mahr* after rebelling against her husband through *karāhah*.

According to Rachel Biale, Maimonides justified his interpretation of forced release on the basis of a woman being "fundamentally a free person"; i.e. a wife is not a 'captive' on whom the man can force himself on. In order to strengthen this verdict, Maimonides seems also to have referred to the classical prohibition against raping a wife.[179]

In addition to this, Maimonides also ruled that the husband should be obligated to grant his wife a *get* if he made her do things that "violated her dignity":

> A man who makes his wife vow that she would tell others what he says to her or what she says to him of the words of frivolity and jest which a man exchanges with his wife during sexual relations – this one shall be compelled to divorce her and give her her *ketubah*. For, she cannot be asked to be brazen and tell others such embarrassing things. And so also if he makes her promise to make the necessary efforts during intercourse so that she would not conceive, or if he makes her do silly or useless things. Such a man should divorce her and give her the *ketubah*.[180]

[179] Ibid.
[180] Ibid, 14:5, 91-92.

Maimonides' doctrine seems also to offer the possibility of forcing a divorce and the wife receiving the dower at the same time, if there is some specific harm that is done to her. This is akin to the husband having to repudiate his wife and pay her dower under the guise of the 'principle of no harm' in Islamic law.

Despite the creativity of Maimonides's legal thinking on marital dissolution in Jewish law and the liberating possibility it gave to women, his view appears largely to have been rejected in the following generations of Rabbis, both among the Ashkhenazim and Sephardim.

On the Ashkenazi side, Meir of Rothenburg (d. 1293) who was the "central rabbinic authority of thirteenth century" followed the verdict of Rabbi Jacob ben Meir (d. 1171, better known as Rabbenu Tam) in rejecting the idea that the *beth din* could enforce the *get* of a *moredet* .[181] Rabbenu Tam's opinion seems to have had the effect of ruling out the possibility that a husband could be compelled to divorce a rebellious wife; though the husband could still be forced if the affair fell under one of the already-established Talmudic categories of mandated dissolution. Rabbenu Tam appears to have been worried that Maimonides' view would afford women easy exit from "unwanted" marriages, if they were to meet other men whom they wanted.[182] Rabbenu Tam's opinion was finally so influential that it led Shlomo Riskin to remark that he "single-handedly changed the course of the halakhic attitude".[183] Rabbenu Tam's ruling in the twelfth century C.E became the accepted point of view for later generations. Even on the Sephardic side, Ibn Adret (d. fourteenth century) also rejected Maimonides' ruling. One of Ibn Adret's contemporaries went so far as to declare:

> It is impossible to say that we compel the husband to divorce her. For if so, there wouldn't be a son of Abraham alive whose wife would stay with him!

[181] Samuel Morrell. "An Equal or a Ward: How Independent Is a Married Woman according to Rabbinic Law?" in *Jewish Social Studies*, vol. 44, #3/4 (Summer-Autumn 1982), 201.
[182] Biale, *Women and Jewish Law*, 91.
[183] Rayner, "From Unilateralism to Reciprocity", 53.

> Whenever she would be angry with him, she would rebel and say, 'I can't stand him' [or 'I despise him'].[184]

Some Concluding Remarks

Marital dissolution reveals the dynamics of power in gender relations in both Jewish and Islamic law. The dilemma that faced jurists, classical and modern alike, was how to mediate between maintaining male power over marital and family laws and the problematic reality of the discontent and needs of women, or to put it another way, the reality of the breakdown of marriages. The absolute constriction of women by giving them no power of divorce was problematic in two senses: first, it posed a moral problem, as it was tantamount to the imprisonment of a human being; and second, the restriction could backfire, as it might (and in fact, as the concerns expressed in the books of law and some other records indicate, actually did) did give rise to 'unruly' female sexual behavior. This 'unruly' (*nāshizah*) behavior in turn threatened male control over female sexuality and threatened to destabilize the 'moral order' of society held dear by the jurists. Thus, some jurists developed and expanded loopholes within the law in order to deal with these problems. As seen with the case of Maimonides, such rulings could be motivated by his sympathy towards women. This also seems to be a motivation of the Ḥanafī ruling on forced *khul'* or *faskh* , since the Ḥanafīs went as far as ruling that a wife may poison a stubborn husband in order to free herself. It is possible that the Imāmīs might have been motivated by sympathy. However, what stood out above all in Imāmī formulation of obligatory *khul'* was a concern with securing moral order by offering women outlets and indeed concessions as a way of preventing them from committing what the jurists believed to be deadly sexual sins. These concerns finally opened up loopholes for women, through which they could

[184] Morrell, "An Equal or a Ward", 201.

initiate no-fault marital dissolutions. The "loophole" in other words, opened a way for practical solutions for practical problems. Although these loopholes did not empower women in *theory*, due to the persistent need in maintain the superior will of husbands, they nevertheless transferred a significant amount of power to women in *practice* (in a situation in which judges acted vis-à-vis husbands), thus seriously challenging the husband's power.

In reaction to this threatened modification of the moral order, jurists from both traditions were quick to dismiss such loopholes. They presented a danger to established patriarchy in marital affairs as some Rabbis explicitly said. The moral order of society understood as male power, control over female sexuality, and patriarchy was not something to be compromised or negotiated.

However, in the current individualistic globalized age where ideals of gender equality have become widespread and women increasingly attempt to assert their own rights, jurists now face the danger of losing their female adherents as many have become disenchanted with what they see as unfair advantages given to men. As such, in order to secure their following, some jurists, especially amongst the Imāmīs (due to the political conditions described in the beginning of this thesis), have looked back unto previous interpretations in order to develop laws of martial dissolution that would meet the concerns of a gender-aware society.

Why reach to the classical texts of the past? Apart from the circumstances of current legal learning described in the Introduction, citations of classical and traditional texts and views lend legitimacy to the interpretive enterprise. Legal opinions that appear or confess themselves to be novel tend to be mistrusted, as they seem artificial and cosmetic and most seriously, inauthentic and the product of 'outside' and 'secular' influences.

One example of a jurist who has attempted to adapt largely forgotten classical views to today's modern concerns is Ayatollah Yūsuf Ṣāniʿī, the subject of the next and final chapter.

Chapter Four: Ayatullah Yūsuf Ṣāni'ī and Obligatory *Khul'*

Introduction

This final chapter will discuss Ayatullah Yūsuf Ṣāni'ī's treatment of obligatory *khul'* in detail. The reason I have chosen Ṣāni'ī' as the subject of this chapter is for several reasons. First, he has risen to be the current leading *marji'* in the legal reformist camp in Iran. Second, he has the largest following amongst Iranian youth; his thought or method might thus represent the wave of the future. Youth and young adults are especially important as they represent about two-thirds of the total population of Iran, the country with by far the largest Shi'i population in the world. Ṣāni'ī's influence has in addition increased exponentially as he is currently the de facto successor of the establishment's longtime opponent, Ayatullah Ḥusayn Muntaẓirī (d. 2009), who was effectively the spiritual leader of Iran's reformist camp in both political and jurisprudential matters. Ayatullah Ṣāni'ī's influence is not restricted to the popular level, but it also reaches the governmental and high judicial circles since he held important political and legal positions within the government during the 1980s. This is in addition to his advantage of having been a longtime student and associate of the late founder of the Islamic Republic. A combination of all of these factors has given Ṣāni'ī an edge over other reformist *marji'*s such as the Ayatullahs Muḥammad Ibrāhīm Jannātī and Muḥammad Ḥusayn Bujnūrdī. These prominent jurists were not close associates of Khumaynī and also, despite their current positions in the country, spent most of their time studying under jurists such as Ayatullah Abū al-Qāsim Khū'ī (d. 1993), who was, incidentally, a staunch opponent of the Islamic Republic's late founder and his theories of theocratic governance. Additionally, they are relatively unknown and their influence has been

relatively limited in Iran, both on the popular[185] and the governmental level. This would also be the case with non-Iranian jurists such as the late Ayatullah Muḥammad Ḥusayn Faḍlallāh (d. 2010) who, although popular in the larger Imāmī world and in particular the Arab world, had little or no influence on legislation in Iran or even in Lebanon.

On the governmental and legislative level, Ṣāni'ī's views have been strongly supported by high-ranking officials such as the current chairman of Iran's Expediency Council (*Majma'-i Tashkhīṣ-i Maṣlaḥat-i Niẓām*)[186] and Assembly of Experts (*Majlis-i Khubrigān*),[187] 'Alī Akbar Hāshimī Rafsanjānī, and Iran's current Supreme Leader, Ayatullah 'Alī Khāmini'ī, although Ṣāni'ī's relationship with Ayatullah Khāmini'ī has waned significantly in light of the June 2009 election controversy. Although Ṣāni'ī has withdrawn from the government, he is still an important advisor to these leaders on the rights of women and non-Muslim minorities. For example, he has been in the forefront of demands for equal blood-money for non-Muslims and women in Iran (the former effort having recently succeeded). Ṣāni'ī has also been battling some of Iran's conservatives on the issue of polygamy as they have attempted to rescind a law that obliges husbands to obtain official permissions from their wives before marrying another wife. Ṣāni'ī argues that without the wife's consent, a husband's marriage to another woman is null and void and any relation that results from it is a sin and an act of fornication. On this subject, he made the following appeal to the government, "I pray that such a decision, which is oppressive to

[185] Another reason for their lesser influence on the popular level has been their relative inaccessibility. For example, Ṣāni'ī currently maintains an extensive online and local networks throughout the country where followers can have easy access to his views via his representatives who respond relatively quickly. This is in contrast to the small networks of jurists such as Jannāti. Over the years, I have personally tried to submit my queries through Jannāti's website; but I have rarely obtained any responses, and the responses I did receive simply directed me to his works, many of which exist only as papers and are not currently published (!) or are available in very limited print runs.
[186]The Expediency Council is an unelected administrative organization completely run by clerics. Its task is to resolve legislative conflicts between the Iranian parliament and the Guardian Council. Interestingly enough, Ṣāni'ī argues that the Council should be open to non-clerics and women. See Brian Murphy. *Iran's Next Vote to Show Power of Regime*, (Associated Press Writer: June 2, 2008).
[187] The Assembly of Experts is an organization that consists of jurists whose task is to monitor the Supreme Leader's actions. If the Supreme Leader is found to be doing a poor job or not abiding by Islamic Law, in theory, they are allowed to depose him. Furthermore, they are also responsible for electing Supreme Leaders when one passes away.

women, will not be made into law. God forbid that the Majlis should add another problem to the existing problems of women."[188] It might be said that Ayatullah Ṣāni'ī's influence over government decisions has come to an end due to his siding with the current oppositional 'Green Movement'. However, I would argue that this is not the case, as there are still members within the establishment who welcome Ṣāni'ī. In fact, through having become the de facto successor of Muntaẓirī, Ṣāni'ī's influence has in fact increased and as such, he is a jurist whose views cannot be ignored.

I have also focused on Ṣāni'ī in this study because he is the only current cleric I know of who has explicitly and thoroughly dealt with the question of obligatory *khul'*.[189] The only modern jurist I know of to have held a similar view was Ayatullah Khumaynī himself. In response to a letter from a woman who was seeking to dissolve her marriage from her husband due to certain hardships she was facing, Khumaynī replied:

> Caution demands that first, the husband must be persuaded, or even compelled, to divorce; if he does not, [then] with the permission of the judge, divorce is effected; [but] there is a simpler way, [and] if I had the courage [I would have said it].[190]

Although Khumaynī never made the 'simpler way' explicit, most likely due to his fear of the patriarchal establishment in the juristic as well as the (then) popular realm, Ṣāni'ī explains that what Khumaynī meant by this statement was the fact that if the husband refused to repudiate his wife, the refusal itself would be proof of hardship (*ḥaraj*),[191] related to the concept of 'harm' (*ḍarar*) as discussed above. Therefore, the wife would have the option of unilateral marital

[188] Hugh Sykes. *Iran Rejects Easing Polygamy Law*, (BBC News Online: September 2 2008): http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7594997.stm.
[189] Ṣāni'ī' is generally very thorough; see his current series *Fiqh va Zindigī* (Law and Life).
[190] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Contemporary Iran* (New Jersey: Princeton University Press, 1999), 164-165.
[191] Ibid.

dissolution, either through *khul'*[192] or *faskh*. Ṣāni'ī thus sees himself as following Khumaynī in making a case for obligatory *khul'*, and working out the argument in detail although with some differences as it will be seen.

The Life of Ayatullah Yūsuf Ṣāni'ī

According to his biography on his website,[193] Ayatullah Yūsuf Ṣāni'ī was born in the city of Nīkābād, Isfahan in 1937. His grandfather, Ayatullah Ḥajj Mullā Yūsuf (n.d) had been a close ally and 'message propagator' of Ayatullah Mirzā Muḥammad Ḥasan Shīrāzī's (d. 1896) 1891 anti-colonial Iranian Tobacco Movement. His father Ḥujjat al-Islām Shaykh Muḥammad 'Alī Ṣāni'ī (n.d) seems to have been a lower ranking cleric compared to Yūsuf Ṣāni'ī himself and his grandfather, as the title 'Ḥujjat al-Islām' suggests.[194]

Ṣāni'ī's website further reports that he entered the Shī'ī Seminary of Nīkābād in 1946 and later moved to Qum for more advanced studies (*dars-i khārij*) in 1951 in which he became a distinguished student of the greatest Imāmī jurist and sole *marji'*[195] of his time, Ayatullah Ḥusayn Burūjirdī (d. 1961). His entrance to Qum coincided with the rise of Muḥammad Muṣaddiq (d. 1967) as Prime Minister of Iran, which led to the nationalization of Iran's oil industry. In this time of upheaval, Ṣāni'ī witnessed Muḥammad-Rezā Shāh Pahlavī (d. 1980) fleeing Iran and his subsequent return under the British and CIA-orchestrated coup against Muṣaddiq in 1953, which reinstated British monopoly over Iranian oil. Nearly two years after

[192] Mir-Hosseini does not explicitly state *khul'* in her book, but says that she can "divorce herself" where the husband "loses the right to divorce and the wife acquires it". However, her translation of Ṣāni'ī 's explanation is problematic, because it alludes to a delegated repudiation, which is not what Ṣāni'ī means. After having contacted Ṣāni'ī 's office myself, they confirmed that what was meant by this statement was *khul'*.
[193] Yūsuf Ṣāni'ī , *Nigāh-i Kūtāh* can be found at http://saanei.org/page.php?pg=showbiography&lang=fa&id=10
[194] Ḥujjat al-Islām is normally a title reserved for mid-ranking clerics within the Imāmī hierarchy as compared to 'Ayatullah' which is the highest title one may receive.
[195] A jurist who has reached such a high level of legal knowledge that it becomes permissible to follow his derived rulings.

witnessing the coup, Ṣāni'ī became a devout and loyal student of Ayatullah Rūḥullāh Khumaynī (d. 1989) for eight years. This lasted until Khumaynī was exiled to Iraq in 1963 after publically criticizing the Shah for instituting what was known as the 'White-Revolution'. The White Revolution was a program which, according to its advocates, was meant to modernize Iran. Its critics believed that it was a program insisted by the West, and particularly by the United States, in order to 'colonize' Iran culturally and make it 'subservient' to a Western 'global-colonial market'.[196] The latter was the view that Ṣāni'ī would almost certainly have subscribed to.

It is reported that Ṣāni'ī had been the 'top student' of Khumaynī and he is said to display a sign on his office wall featuring the words of Ayatullah Khumaynī: "*I raised Ayatullah Ṣāni'ī like a son*."[197] These kinds of credentials and the publicizing of them are not unusual among Imāmī jurists; however, it is likely that they also serve to protect him from his critics amongst the conservative jurists who often attack him for his 'liberal' legal opinions.

Ṣāni'ī 's website further adds that at the incredible young age of twenty two, he received his degree in *ijtihād*, a rare degree which one attains after mastering Islamic legal knowledge and which allows holders to deduce their own laws. By 1975 at the age of thirty eight, Ṣāni'ī began giving his own *khārij* classes, a rank seldom achieved at this age.

After the 1979 Islamic Revolution, Ṣāni'ī joined the twelve member Guardian Council (*Shūrā-yi Nigahbān*), the most powerful institutional body in Iran after the office of the Guardian Jurist (*Walī al-Faqīh*), first held by Khumaynī. This placed Ṣāni'ī in the midst of Islamic Iran's legislative system, and he personally oversaw the bills and new laws that were passed in parliament. In this influential post, he was also, in the early 80s, an important member of the

[196] For a critique of colonial modernity in Iran under the former Shah, see Hamid Dabashi, *Iran: A People Interrupted* (New Press: New York, 2007).
[197] Nazila Fathi. *Ayatollah, Reviewing Islamic Law, Tugs at Ties Constricting Iran's Women*, (The New York Times: July 29 2001): http://query.nytimes.com/gst/fullpage.html?res=9900E1D8133DF93.htm

council drafting the constitution.[198] Later on, Ṣāni‘ī was appointed as Chief Prosecutor of Iran's Judiciary system, which gave him firsthand experience with procedural and substantive law in a modern Islamic state.

In sum, Ṣāni‘ī played an important role in Iran's transition from a secular to a religious state, and this allowed him to experience the challenges and assess the advantages and disadvantages of incorporating Islamic law into a modern state.

By 1984, Ṣāni‘ī resigned from his position and withdrew from the government altogether. He was subsequently replaced by Ayatullah Miṣbāḥ-i Yazdī who represented the more conservative camp. After retiring from his post, Ṣāni‘ī decided to retire to Qum to carry out research and rethink some of the more traditional legal opinions that had challenged him in his previous government position. These challenges largely pertained to gender and the rights of religious minorities, as well as issues relevant to the young such as the permissibility of music. In Qum, Ṣāni‘ī developed fresh legal opinions that attempted to reconcile notions of women and minority rights in Islamic law with modern views on gender and religious equality.

How these modern views came to challenge traditional perceptions is noteworthy. The challenges that the new government faced were in part influenced by the fact that after 1979, many conservative families trusted the new, segregated educational system and allowed their daughters to get a full education, whereas previously, girls were discouraged from doing so, especially in regard to higher education. The consequence was that women came to comprise over fifty-seven percent of university students and hundreds and thousands of women joined the work force.[199]

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[198] Ibid.
[199] Iran. *Saanei Rules For Equality of Sexes* (APS Diplomat Recorder: August 4th 2001).

This phenomenon led Ṣāni'ī to remark: "[s]oon women will be in charge of most important decision-making positions. We cannot insist that the past laws are universal and for all periods of time."[200] Naturally, women educated in modern institutions and imbued with modern understandings of gender equity would be less likely to settle for restrictive religious laws and would want more or less the same freedoms and rights in family and work life as men. This cultural shift pushed Ṣāni'ī to issue non-mainstream opinions such as equal blood-money (*diyah*) for men and women as well as Muslims and religious minorities, and equal value of the court testimony (*shahādah*) of men and women,[201] Muslims and non-Muslims. Ṣāni'ī also allowed women to hold positions that were previously the exclusive prerogative of men, such as judge, president, Friday prayer leader and *marji'*. The Ayatullah has also allowed women to initiate unilateral, no-fault marital dissolutions within the context of *khul'*, the subject of this chapter.

Legal Method

Given Yūsuf Ṣāni'ī's radical shift from mainstream conservative to liberal views, one would expect that his legal theory (*uṣūl al-fiqh*) and overall legal methodology would be innovative. He has, however, been careful to keep within the bounds of classical Imāmī methodology so as to preserve the legitimacy of his views and gain them wider-acceptance, including among his peers. His methodology is characterized by four features:

1) Use of the Qur'ān as an ethical paradigm in criticizing and shaping our understanding of Prophetic traditions, as well as a paradigm for an overall construction of an *ethical* law.

[200] Ibid.
[201] Although rare, these opinions are not entirely unique. A handful of Imāmī jurists, classical and present have held these views, such as allowing women to become judges, *marji'*s etc. In the case of equal witnessing, I know only of some rare Ḥanbalī cases in which a woman's testimony is considered equal to that of a man, see Mohammad Fadel, 'Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought' in *International Journal of Middle East Studies*, Vol. 29, No. 2 (May, 1997): 185-204.

This is opposed to a law derived largely through deduction, currently the mainstream methodology in Imāmī jurisprudence. In Ṣāniʿī's view, Qur'ānic ethics must function as the *ratio legis* when constructing the law in order to maximize divine justice (*ʿadālah*) in the Sharīʿah.

2) Use of reason (*ʿaql*). The use of reason is two-fold in Imāmī law. "Reason" refers to the use of deductive reasoning in deriving rulings. It may also refer to the determination of objective morality through reason and using that as a basis for deriving legal verdicts; for the Imāmīs traditionally agreed with the Muʿtazilīs, the rational theologians of Islam, that objective moral truths could be discovered through reason and thus could serve to interpret the Sharīʿah . Although this kind of *ʿaql* is traditionally a source of law in Imāmī jurisprudence, its use has become rare within Imāmī circles due to (in Ṣāniʿī's view) reliance on precaution (*iḥtīyāt*) in regard to how far reason can derive moral truths. Some jurists, including Ṣāniʿī, have been critical of this cautious stance as they believe it has caused Imāmī law to stagnate in face of modern realities and moral demands.[202]
3) Rigorous *isnād* criticism. Criticizing the chains of transmission has been one important tool which Ṣāniʿī has used in order to refute the views of his detractors.
4) Reference to classical jurists for controversial opinions. Novel opinions are generally unwelcome in traditionalist circles, as they are seen as being the product of 'outside secular' influences. A prominent feature of Ṣāniʿī's argumentation has been the attempt to legitimize his legal opinions through older, preferably pre-modern material.

[202] Other than Ṣāniʿī himself, other jurists such as Ayatullah ʿAbd Āllāh Javādī Āmulī have been advocates of the revival of *ʿaql* as a source of law in Islam. See for example his audio lessons discussing this matter: ʿAbd Āllāh Javādī Āmulī, *Ṣirāṭ al-Huda: Majmuʿah-yi Durūs-i Tafsīr-i Tartībī-i Qur'ān-i Karīm: Sūrah-yi Mubārakah-yi Ḥijr* (MP3).

Through his reliance on the Qur'ān as an ethical paradigm and *ratio legis* and emphasis on the use of *'aql* in deriving moral truths in particular, Ṣāni'ī has tried to portray himself as the most 'traditional of all'. His project is to renew the law, while not appearing to break with tradition.

Ṣāni'ī and Obligatory *Khul'* Divorce

This section will use two of Ṣāni'ī's works. The first and most important one is his *Vujūb-i Ṭalāq-i Khul' bar Mard*[203] (The Obligation of Khul' upon Men), which forms part of his 'Law and Life' series (*Fiqh va Zindigī*). The second is his large commentary on Khumaynī's *Taḥrīr al-Wasīlah*,[204] which is an edited transcription of Ṣāni'ī's *khārij* lessons. I will mostly deal with the former, as the latter does not discuss the matter extensively, since Khumaynī himself barely makes any reference to the subject.

Introducing Karāhah *in a Different Perspective*

After defining *khul'* and *karāhah* in the usual manner, Ṣāni'ī presents a different definition of *khul'* from the distinguished classical Imāmī jurist Fāḍil al-Miqdād (d. 1422). He considers that al-Miqdād's definition better reflects the reality of *khul'*:

> …the wife's *karāhah* in regard to her husband is on the same category (*makān*) of being [his] prisoner (*ma'sūrah*) by which she gives him something [in order to free herself].[205]

The common juristic understanding of *khul'* is that the wife is at fault, and that this fault is rooted in her rebelliousness. This perception is shared by both Islamic and Jewish understandings of

[203] Yūsuf Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard* (Qum: Maytham-i Tammār, 2008).
[204] Yūsuf Ṣāni'ī, *Fiqh al-Thaqalayn fī Sharḥ Taḥrīr al-Wasīlah: Kitāb al-Ṭalāq* (Tehran: Mu'assasat Tanẓīm wa Nashr Āthār al-Imām al-Khumaynī, 2001).
[205] Fāḍil al-Miqdād, *Tanqīḥ al-Rā'i li-Mukhtaṣar al-Sharā'i*, III, 359, Ṣāni'ī also traces a similar definition given by Muḥammad b. Ḥasan b. Yūsuf al-Ḥillī (d. 1369), see *Īḍāḥ al-Fawā'id fī Sharḥ Mushkilāt al-Qawā'id*, III, 375.

marital dissolution. It is the husband who finds fault with the wife, and thus repudiates her.[206] However, when it is the wife who seeks dissolution, she is legally categorized as rebellious, whether as a *nāshizah* in Islamic law, or a *moredet* in Jewish law. The legal description and terminology presumes innocence on the husband's part and guilt on the wife's part, whatever the reality or whatever the jurist himself might perceive. Put differently, the husband is (generally) understood as the subject of the conflict, whereas the wife is the object. She does not become the subject when the husband is at fault, but only when she rebels against established norms. Realizing the problematic consequences of such loaded terms, Ṣāni'ī, like Maimonides, seeks to redress the linguistic framing of the dissolution by situating the wife as a subject with the presumption of innocence.

The Divisions of Khul'

Relying on his preferred method of tracing his views to classical Imāmī jurists, Ṣāni'ī presents a brief account of 'Allāmah al-Ḥillī's four-fold categorization of *khul'* into forbidden (*ḥarām*), permissible (*mubāḥ*), recommended (*mustaḥabb*) and obligatory (*wājib*):[207]

1) Forbidden *Khul'*: If the husband compels his wife to *khul'* whilst the wife's relationship with the husband is harmonious, the process is void and the husband is forbidden from spending anything that he acquired from the wife through such means. This is in accordance with the consensus of the Imāmī school.[208] If the husband compels her for *khul'*, the process will be considered a revocable repudiation and the husband will be liable for the dower.

[206] Consider the Biblical description of repudiation as seen in chapter 1 where it is the husband who finds something 'obnoxious' (*ervet davar*) about his wife and 'writes her a bill of repudiation'.
[207] Ḥasan b. Yusuf b. Muṭahhar al-Ḥillī, *Qawā'id al-Aḥkām*, III, 156-157.
[208] Muḥaqqiq al-Ḥillī, *Sharā'i al-Islām*, III, 41.

2) Permissible *Khul‘*: If the wife despises her husband and fears that she will fall into sin vis-à-vis her husband's rights, then it is permissible for her to give him her dower or some other form of compensation so that he may repudiate her.
3) Recommended *Khul‘*: If the wife threatens to bring someone into the house whom the husband hates and alludes to a possible relationship with another man, *khul‘* is then recommended, according to jurists such as Ibn Idrīs and Muḥaqqiq al-Ḥillī.
4) Obligatory *Khul‘*: The reasoning is similar to the previous category, except that some jurists believe that *khul‘* becomes obligatory as opposed to recommended. At this point, after having agreed to a certain amount of compensation, the husband is obligated to repudiate the wife. Ṣāni‘ī adds that as much as the wife may make her hatred towards her husband explicit and even express a desire to marry someone else, the hatred does not need to reach a point where there would be fear of sin.[209] Rather, the wife may ask for *khul‘* based on any degree of *karāhah*, and the husband must repudiate her so that she may "live freely and continue on with her life."[210] This process, according to Ṣāni‘ī, is fair and just as the husband acquires the dower, either in full or in part, and the wife in return "reclaims ownership of her vagina".[211]

Ṣāni‘ī concludes that disagreement has largely revolved around the last point, that is, whether *khul‘* is obligatory or not. He states that, in opposition to the popular view amongst Imāmī jurists, four jurists have deemed it obligatory, these being: Shaykh al-Ṭūsī, Ibn Zuhrah, Abā al-Ṣalāḥ and Ibn Barrāj. Ṣāni‘ī, however, does not make mention of al-Rāwandī, despite the fact that he explicitly expressed such an opinion by adopting Shaykh al-Ṭūsī's phrasing. It is possible

[209] Yūsuf Ṣāni‘ī, *Vujūb-i Ṭalāq-i Khul‘ bar Mard*, 29.
[210] Ibid, 30.
[211] Ibid.

that he might not have considered al-Rāwandī's opinion very important, as no other jurist, as far as I have seen, has made explicit mention of him.

Criticizing those who hold **Khul'** *to be Non-Obligatory*

Those who deem *khul'* to be non-obligatory base their argument on two assumptions, according to Ṣāni'ī:[212]

1) The principle of exemption for men in regard to being obligated to *khul'*.
2) Absence of evidence in the Qur'an or traditions that indicate an obligation. In other words, the Qur'anic verse states that "*there is no sin upon them in what she may give to secure her release*", "there is no sin upon them" (*fa-lā junāḥ*) indicating a permission and not obligation. The relevant traditions are also said to state a permission and not an obligation.

Ṣāni'ī begins by criticizing the second assumption and states that it will be made clear later in his discussion that one cannot rely on the principle of exemption either.

First, Ṣāni'ī states that the verse is not discussing the permissibility of *khul'* as a legal category, but rather the permissibility of acquiring the wife's dower. That is, the verse and traditions are discussing an *exception* (*istithnā'*) to the default position of the impermissibility of acquiring the wife's dower, and not whether *khul'* is permissible or obligatory.

Second, if it is assumed that the verse is discussing the categorical permissibility of *khul'*, then it is only laying down the essential permissibility (*fī ḥadd nafsih wa bi-māhuwa huwa*) of *khul'*, a permission upon which contextualized rulings can be "built" on. What Ṣāni'ī is alluding to here is the view in Islamic law that all individual or social acts are to be categorized as either valid or invalid/void. Once the default validity of an act is established, rulings can be built on

[212] Ibid, 32.

this basis and further classified as neutral, recommended or obligatory. For example, the Qur'an in one instance states that:

> Indeed Safa and Marwah are among God's sacraments. So whoever makes hajj to the House [of God], or performs the ʿumrah, there is no sin upon him (*fa-lā junāḥ*) to circumambulate between them. Should anyone do good of his own accord, then God is indeed approving, all-knowing.[213]

The Qur'an states that there is "no sin upon him" who circumambulates at the Ḥajj pilgrimage; in other words, the essential permissibility or validity of the act is established. However, it is well-known that in Islam, circumambulation around the Kaʿba is obligatory; otherwise the pilgrimage is rendered invalid. Therefore, the stated validity of the act has obviously not been restricted to its basic permissibility only, but can be further classified as recommended, obligatory, or even as prohibited if an exceptional circumstance demands that the default position be overridden.

This, by extension, also includes acts that are by default prohibited, but can be categorized as permissible or even obligatory if an exception is introduced into the context. For example, swine meat is by default prohibited. However, if an individual is starving and no food except for swine is available, the prohibition, by virtue of this contextual exception, is lifted and eating it is either permissible or obligatory upon the individual if his life is in danger.

This is a legal phenomenon in Imāmī law which Ṣāniʿī categorizes as 'legal contextualism' (*ṭabīyat-i muṭlaqah*), a situation in which rulings are classified according to context and circumstance. This is opposed to areas of the law to which 'legal absolutism' (*muṭlaqah al-ṭabīyah*) apply where flexibility is impossible and contextuality and circumstance is irrelevant. One example that Ṣāniʿī offers is female repudiation, where a woman can never in any

[213] Qur'an: 2:158.

circumstance initiate the repudiation formula (i.e. '*anta ṭāliq*' or 'you [male] are repudiated'), this being an exclusive male prerogative.

In conclusion, Ṣāni'ī states that no jurist can include *khul'* in the category of legal absolutism, as there is utterly no evidence (*shāhid va qarīnah*) for it.[214] He further argues that if jurists assume that the verses and traditions establish the permissibility of *khul'* as a legal category, then they have categorized it as being in the category of legal contextualism by definition, and thus susceptible to the principle of 'Forbidding what is Evil'.

Why Khul' *is Obligatory*

Ṣāni'ī counts three bases on which *khul'* can be argued to be obligatory: 1) the Principle of Forbidding what is Evil, 2) Contractual Law (*'uqūd*) and 3) Reason (*'aql*).

Forbidding what is Evil

This principle is the primary basis on which *khul'* is made obligatory according to the minority classical opinion. The principle states that if a woman initiates *khul'* and the husband refuses, this puts her in danger of falling into sin. In order to remove that danger, a husband on principle is obligated to dissolve his marriage with his wife. However, three major objections are raised against this line of argument, each of which Ṣāni'ī replies to as follows:

a) Objection One: The objection is that if this applied to *khul'*, it would also apply to other forms of divorce as there is no reason to single out *khul'* as being a category by itself. Ṣāni'ī replies to this objection by arguing that this principle cannot be extended to normal repudiation, as it would be creating another legal dilemma by oppressing the husband. That is, a husband who does not have contempt or *karāhah* for his wife would not only

[214] Ibid, 36

suffer ‘psychological’ and ‘emotional’ distress, but would be punished financially as well, as he would have to pay his wife her dower. Therefore, such oppression cannot be allowed; thus positing *khul‘* as a distinct category is valid.

b) Objection Two: Forbidding what is Evil is only applicable to actual and not potential acts. In other words, the sin must be present in order to forbid it; thus *khul‘* cannot be obligatory on the basis of potentiality. Ṣāni‘ī writes that first, prevention is better than the cure; thus ‘forbidding’ (*nahī*) future sin is even more desirable. Second, both are the same, as their purpose is to either prevent a sin from occurring or prevent it from repeating itself. To prevent what has happened is absurd and would make the principle futile, as the act has already happened.

c) Objection Three: If it is assumed that *khul‘* is absolutely and unconditionally obligatory on the husband, then ‘Forbidding what is Wrong’ comes at the expense of the husband’s right, that is, his right to remain with his wife if he desires. If the argument is taken to its logical conclusion, then a slave-master would also lose the right to ownership over his slaves as they could threaten to fall into sin and thus obligate their master to free them. Additionally, applying the principle of *nahī* this way is contradictory, as by preventing one evil, it creates another. Answering this objection, Ṣāni‘ī agrees that the principle of *nahī* cannot be at the expense of someone else’s right, as it is morally wrong and contradictory to the spirit of the principle. However, he does not believe that the principle violates the husband’s right, since it operates in a way similar to a cancellation of a commercial transaction, in which the exchanged goods are returned to their original owners and no one’s rights are violated. In other words, although *khul‘* is a *ṭalāq*, it is

comparable to *faskh*.[215] In this context, the husband does not lose anything, as he acquires back the ownership to the wife's dower, while the wife in return acquires her original ownership over her vagina. As such, although the major premise is correct, the minor premise is irrelevant. Ṣāni'ī adds that another objection that might be raised is that a bad deed is still done to the husband as he is left wifeless, thus again contradicting the principle of "forbidding evil". Ṣāni'ī replies (to his own theoretical objection) that if we accept this line of argument, an evil is also committed against the wife under normal repudiations, as the wife is left husbandless. In reality, however, no one is oppressed, as everyone has their initial objects of exchange (at the time of marriage) returned to them. He also adds that the husband might even "profit more as he took sexual pleasure from the wife before dissolution" and "enjoyed them without cost…"[216]

Contractual Law

Marriage, Ṣāni'ī reminds us, is a contract between two parties. According to the people of reason (*'uqalā*), if free will (*ikhtiyār*) of action is given to one party, reason demands that the other party, who is a consenting individual freely partaking in the contract, should also be accorded that right. As such, if one party is allowed to cancel the contract, reason – in accordance with the principle of justice (*'adālah*) – states that the other party should also have that right, and this stance on contractual law, Ṣāni'ī points out, is agreed by all jurists. Therefore, if the husband has the right to cancel the marriage contract by paying the wife her dower, the wife should be allowed to cancel the marriage by forgoing the dower. At this point, Ṣāni'ī attempts to bolster the moral framework of his argument and its ethical *ratio legis* by appealing to the "Sharī'ah

[215] Ṣāni'ī, *Fiqh al-Thaqalayn*, 509.
[216] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 42.

principles of justice" (as he calls them) that is rooted in the Qur'an: "*The word of your Lord has been fulfilled in truth and justice. Nothing can change His words, and He is the All-hearing, the All-knowing*"[217] and anything contrary to this would be tantamount to oppression – and God is not an oppressor (*ẓālim*): "*Whoever acts righteously, it is for his own soul, and whoever does evil, it is to its detriment, and your Lord is not tyrannical to the servants".*[218]

It is also true that one may chose to forgo one's right to cancel a contract. However, Ṣāni'ī is quick to acknowledge that gender (or sex) "is not a choice" (*amr-i ghayr-i ikhtīyārī*);[219] therefore it cannot be a factor that strips the wife of her right to cancel the marriage contract. This notion of gender, according to Ṣāni'ī, is also made explicit in the Qur'an: "*To God belongs the kingdom of the heavens and the earth. He creates whatever He wishes; He gives females to whomever He wishes, and gives males to whomever He wishes*".[220]

The Rule of Reason (ḥukm-i 'aql)

"Reason"(*'aql*), according to Ṣāni'ī, deems it "shameful" (*qabīḥ*) that a man should be allowed to dissolve his marriage without the consent of his wife by giving her her dower, but deny a woman's right to do so by forgoing the dower. He is careful to state that reason is not infallible in deriving moral principles. When mistakes happen, the function (*muwaẓẓaf*) of the Sharī'ah is to correct the mistakes of such reasoning. However, it must do so in a clear fashion (*wāḍiḥ*) and on the basis of various explicit textual sources (*nūṣūṣ-i farāvān va ṣarīḥ*), rather than isolated traditions and pieces of evidence. Without these, our understanding of reason (*dark-i 'aql*),

[217] Qur'an; 6:115.
[218] Qur'an; 41:46.
[219] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 44.
[220] Qur'an: 42:49.

cannot be nullified. And according to Ṣāni'ī, no tradition exists that can override this understanding (*dark*). The only tradition that gives support to the opposing view is the one that states 'repudiation is in the hands of the one who took [the woman's] leg', which, according to Ṣāni'ī, if understood literally, is "against the principle of justice and rejection of oppression" (*mukhālif-i aṣl-i 'adl va nafī-i ẓulm)* in Islamic rulings[221] and does not meet the clear and explicit requirements needed to override the 'rulings' of reason. However, Ṣāni'ī reserves a thorough analysis and criticism of this tradition for another chapter.

Analysis of Objections against Obligatory **Khul'**

There are two main principles in the textual sources concerning obligatory *khul'*. The first is that the Prophetic traditions state that only the husband is to have the exclusive prerogative of marital dissolution. In other words, only husbands, by default, have the freedom to end their marriages. It is on this basis, I suspect, that classical Imāmī jurists argue that men are exempt from being obligated to *khul'*, in addition to, of course, the wider sense of gender order and authority within the patriarchal milieu. The second objection concerns the *khul'* settlement. The husband can technically ask for such a high sum of money that it would be impossible for the woman to pay, as he is legally allowed to ask for more than the dower. In order to fortify his argument, Ṣāni'ī attempts to deal with both problems.

The Traditions

The primary tradition by which Imāmī jurists make marital dissolution (be it through *ṭalāq* or *khul'*) an exclusively male prerogative is the following:

[221] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 45

> Muḥammad b. Yaḥya (*haddathnā*) [from] Yahya b. ʻAbd Allāh b. Bakīr [from] Ibn Lahīyʻah who reported to us from Mūsā b. Ayyūb al-Ghāfiqī, from ʻIkramah, from Ibn Abbās who said: A man came to the Prophet (May God's Peace and Blessings be upon him) and said: My slave-master (*sayyidī*) married me to his bondswoman (*amah*) and now wants to separate us. Ibn Abbās then said: The Messenger of God went up the pulpit (*minbar*) and said: There is nothing wrong for any of you in marrying his bondsman to his bondswoman. [However], if he wants to separate them afterwards [then he should know] that verily, repudiation is in the hands of the one who took [the woman's] leg' (*al-ṭalāq li-man akhadha bi-al-sāq*).[222]

In dealing with this tradition, Ṣāniʻī gives a twofold critique: 1) the tradition's chain of transmission (*sanad*) and 2) its meaning (*dalālah*).

1) Chain of Transmission: Ṣāniʻī states that there are two problems with this chain of transmission. First, the tradition is an exclusively Sunnī one and has not come through Imāmī chains of transmission. Second, according to Sunnī standards, its chain of transmission is faulty, as Ibn Lahīyah is considered weak (*ḍaʻīf*).[223] Even if we consider its other route of transmission (*ṭarīq*), it is still weak, as the chain contains al-Faḍl b. Mukhtār, who is also problematic.[224]
2) Meaning of the Tradition: Even if the tradition is accepted despite problems with its transmission, Ṣāniʻī does not believe that we can infer that marital dissolution is exclusively a male prerogative, as the tradition is intended to *restrict the slave-owner*

[222] Ṣāniʻī quotes this tradition from Ibn Mājah, *Sunan* (Beirut: Dār Iḥyā' al-Turāth al-ʻArabī, n.d), 349; Bayhaqī, al-*Sunan al-Kubrā,* (Damascus: Dār al-Fikr, n.d), XI, 270; al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, 4 vols. (Beirūt: Dār Ṣādir, n.d) IV, 37.
[223] See Muḥammad Ibn Saʻd, *al-Ṭabaqāt al-Kubrá*, 8 vols. (Beirut: Dār Ṣādir, n.d), VII, 516.
[224] al-Dhahabī, *Mīzān al-ʻItidāl fī Naqd al-Rijāl*, 4 vols., ed. Muḥammad al-Bājāwī (Beirut: Dār al-Maʻrifah,1980), III, 358.

from dissolving the couple's marriage and *not the wife* and not the wife from seeking to dissolve her marriage. As such, it is possible that the tradition is referring to a "third-party restriction" (*ḥaṣr-i iḍāfī*), limiting marital dissolution to the couple and not a third party i.e. the slave-owner (*mawlā*). This is as opposed to the tradition pointing towards an exclusive restriction (*ḥaṣr-i haqīqī*) whereby it is the sole prerogative of the husband to the exclusion of all others, including the wife. Whatever the interpretation, as the tradition can be understood in varying ways, Ṣāni'ī uses a principle in Imāmī legal theory that states "if [an alternative] possibility comes about, the [legal] inference is void" (*idhā jā'a al-iḥtimāl baṭala al-istidlāl*)[225] in order to invalidate the opposing position. In other words, since the tradition can be interpreted differently, it cannot be held as a solid proof for making *khul'* non-obligatory. Additionally, Ṣāni'ī states that even if we were to assume that the tradition points to an exclusive restriction, it nevertheless refers to a normal *ṭalāq* or a male initiated repudiation, and not *khul'*.

Either way, the tradition does not contradict obligatory *khul'*, as theoretically, it is the husband who is repudiating his wife even when *khul'* is obligatory. This argument also applies to another tradition that is used against obligatory *khul'*. The tradition reports that a woman gave her husband a dower and stipulated in her marriage contract that repudiation and authority over intercourse (*jimā'*) be in her hands, to which Imām al-Ṣādiq replied: "*she went against the Prophetic custom*" as "*the giving of a dower, repudiation and sexual authority is in his hands*" ('alayh al-ṣidāq wa al-jimā' wa-al-ṭalāq).[226] In other words, obligatory *khul'* does not, theoretically speaking, give the wife the right to repudiate her husband; but it only obligates him to repudiate her. Additionally, *khul'* by default is not obligatory so as to give the wife the

[225] It is alternatively called "if [an alternative] possibility comes about, the inference is dropped" (*idhā jā'a al-iḥtimāl saqaṭa al-istidlāl*), see al-Khwājū'ī al-Māzandarānī, *al-Rasā'il al-Fiqhīyah*, I, 81.
[226] Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXI, 289.

instantaneous right to marital dissolution. Rather, it only becomes so when the husband refuses to agree to the wife's initiation, as this not only puts her at risk of committing a sin, but more importantly, imposes hardship (*ḥaraj*) on her, "hardship" being a principle that can obligate the husband to dissolve the marriage.[227] The principle of hardship, as Ṣāni'ī sees it, is not restricted to *khul'*, as the husband can also be forced to repudiate his wife through regular *ṭalāq* by a judge if he is at fault and fails to respect her rights. Therefore, none of the traditions apply to *khul'*, as by default, it is not obligatory; and more importantly, it is still the husband who is repudiating the wife and not vice versa.

The Mahr *Settlement*

There are many traditions that unequivocally state that a husband may ask for more than the dower in a *khul'* settlement. This creates an important practical barrier against obligatory *khul'*, by far the most difficult and complex problem that Ṣāni'ī has had to deal with. In a *mubārā'ah* dissolution, the husband may not ask for more than the stated dower. However, in *khul'*, the husband may ask for more even if the demand is outlandish to the extent that the woman would be financially handicapped. In order to solve this problem, Ṣāni'ī seeks to play down those traditions that allow payment in excess of the *mahr* by pointing to inner contradictions, while supporting his own stance through recourse to the Qur'an.

First Group of Traditions

1) Samā'ah b. Mihrān said: I said to Imam al-Ṣādiq that it is not permissible for a man to take from a woman separated through *khul'* (*mukhtali'ah*) until she pronounces this utterance in full. Imam al-Ṣādiq replied: [that is] if she says "I will not obey God when it

[227] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 57.

comes to you" (*lā uṭī'u Allāh fīk*), it is permissible for him to take from her what he finds.[228]

2) Imām al-Bāqir is reported to have said: If a woman says to her husband the [following] phrase: "I will not obey you" (*lā uṭī'u lak*) in an explicit (*amran mufassaran*) or implicit fashion (*ghayr mufassarin*), it is permissible for him to take from her and he cannot take her back anymore [i.e. the repudiation becomes irrevocable].[229]

These authentic traditions are acceptable, according to Ṣāni'ī , as the traditions are within the category of circumstantial utterances (*maqām-i bayān*). In other words, traditions that use the sentence "it is permissible to take from her what he finds" and similar words do not lay down any principle where the husband by default can ask for more than the dower. Rather, they only permit that in particular circumstances if a judge deems it fit. What Ṣāni'ī is alluding to is that it is not rare for women to ask for low dowers when contracting their marriage, as the Prophet and Imāms often advised women to do so in order to dissuade couples from pursuing 'materialistic' interests. As such, many Shī'ī women in Iran have customarily stated their dowers to be flowers and candy sticks (*shākh-i nabāt*). However, if a dower is deemed to be low, then the judge may allow the husband to ask the wife for more than the stated dower. The opposite in Imāmī law is also valid. If a husband repudiates his wife but little or no dower was stipulated when the marriage was contracted, the judge may order the husband to give the wife a reasonable dower that is in accordance with the societal norms and her social status (*mahr al-mithl*). It is only, Ṣāni'ī argues, with the group of traditions pertaining to this norm that default principles can be derived.

[228] Ḥurr al-'Āmilī, *Wasā'il al-Shī'ah*, XXII, 279.
[229] Ibid.

Second Group of Traditions

1) Zurārah narrated from Imām al-Bāqir who said: In *mubārā'ah*, a man can only take less than the dower (*ṣidāq*); however, in *khul'*, he may take any amount he wishes and can take what they agreed upon, which can be equal to or more than the dower. The Imām again repeated: In *khul'* the husband may take as much as he wants.[230]
2) Samā'ah narrated that if he separates from her through *khul'*, then the dissolution is irrevocable and he is allowed to take from her what he assesses [to be appropriate in taking]. However, in *mubārā'ah* he is not allowed to take all of which he gave to her [in terms of dower].

Ṣāni'ī admits that both traditions are authentic. However, on the subject of *mubārā'ah*, they contradict another tradition that is equally authentic. This is the tradition from Abī Baṣīr in which he states that Imām al-Ṣādiq said the following about *mubārā'ah*: "*...it is not permissible for her husband to take from her except her dower or less than it*."[231] That the two traditions above state that one may not take the full dower while the third allows it is a clear contradiction, and Ṣāni'ī thus believes that they cancel each other out and lose their authoritativeness (*ḥujjīyah*).[232] It might be said that this contradiction does not exist in the traditions when they discuss *khul'*; however, Ṣāni'ī states they cannot be taken separately, as there is a connector (*'atf*) in one of the sentences (i.e.'*waw*', and) between both subjects. Therefore, the whole of both traditions must be cancelled.

[230] Ibid, 287.
[231] Ibid, 287-288.
[232] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 63.

As a consequence, one is left with two choices. According to the procedures of Imāmī jurisprudence, one either chooses (*takhyīr*) between the traditions, or drops them both and refers instead to the primary principles and rules of Islam (*uṣūl wa qawā'id al-awwalīyah*).[233]

Principle of Justice in Islam

Ṣāni'ī believes that the primary ethical principles and rules of Islam are in direct contradiction to allowing the husband to ask for more than the dower. He considers justice (*'adālah*) to be one of these principles. As such, the principle of justice must act as a scale (*mīzān*) and standard (*mi'yār*) for Islamic rulings, and not the other way around. What this implies, according to Ṣāni'ī, is that whatever 'justice says' is what religion says, and not that whatever is uttered by the jurists is just. As a consequence of this theological position, reason can produce laws based on the principle of justice. This, according to Ṣāni'ī, has been the historical position of both the Shī'īs and Mu'tazilīs.[234]

According to Ṣāni'ī, the pagan, pre-Islamic era (*jāhiliyah*) position was that religion is the measure (*miqyās*) for justice; and on this basis, people attributed all sorts of despicable (*zisht*) acts to religion. The Qur'an confirms this where it says to the pagans:

> When they commit an abomination, they say: "We found our forefathers practicing it and God has commanded it upon us". Say: "Indeed God does not enjoin abominations". Do you attribute to God what you do not know?![235]

[233] Ibid.
[234] Ibid, 65.
[235] Qur'an: 7:28.

The Qur'an as a Legal Paradigm

Discrimination in dower payments, Ṣāni'ī believes, is oppressive, as one spouse disadvantages and discriminates against the other based on gender, a matter in which one does not have a choice (*amr-i ghayr-i ikhtiyārī*). Discrimination of this sort is oppressive and thus cannot be in accordance with the Qur'an, as God says: "*...and your Lord is not an oppressor to His servants*".[236] Ṣāni'ī also refers to another Qur'anic verse on justice: "*We sent Our apostles with clear proofs, and We sent down with them the Book and the Scale so that mankind may uphold justice*."[237]

Ṣāni'ī does take into account certain criticisms directed against this methodology. The most important criticism is that this type of legal reasoning gives precedence to reason over authentic and authoritative texts. Ṣāni'ī responds that giving precedence to the Qur'an over traditions is the standard norm for all Muslims when assessing the credibility of any tradition. Thus, for example, authentic Imāmī traditions that claim that the Qur'an has been distorted (*taḥrīf*) have been rejected on the grounds that they contradict verses in the Qur'an that state that such a thing could never occur.[238] Ṣāni'ī notes that Imāmīs also reject authentic traditions when they conflict with rational principles; in which case, they should certainly be rejected if they conflict with the Qur'an. For example, many traditions state that the Prophet at one point missed his morning prayers; however, Imāmīs have been unanimous in rejecting the tradition as they conflict with Imāmī rational principles that stipulate that the Prophet must be completely infallible.[239] Therefore, Ṣāni'ī does not seem to believe that he is doing anything out of the

[236] Qur'an: 41:46.
[237] Qur'an: 57:25.
[238] Ṣāni'ī is making reference to various verses that indicate that God will protect the Qur'an from distortion. See for example Qur'an 15:9 where it is said that "*...and indeed We will preserve it*".
[239] The only exception to this rule was Shaykh al-Ṣadūq who was later on refuted by his own student Shaykh al-Mufīd. See Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 68.

ordinary and that he is actually following traditional methods of *ḥadīth* criticism. Ṣāni'ī makes it explicitly clear that he is not exercising independent reasoning upon the Qur'an and Prophetic tradition, as such a methodology would be conjectural (*ẓannī*) and dangerous. He states that the only rational principles one may use are those that are confirmed in the Qur'an and accredited Prophetic traditions, as those are infallible sources. Thus, Ṣāni'ī argues, the principles that he uses to shape his legal reasoning are in accordance with and confirmed by the divine sources.

However, Ṣāni'ī is careful to add that these principles are restricted to matters that do not pertain to ritualistic acts (*ta'abbudāt*), as ritual affairs are spiritual matters that cannot be judged rationally.[240] Social matters, on the other hand can be judged by reason, as they have more to do with the social welfare of the mundane world.

The Mahr as a Condition (sharṭ) *in the Marriage Contract*

One solution to the husband asking for a very large payment for *khul'* that has been put forth, as Ṣāni'ī states, is the use of contractual conditions by which the wife can stipulate that her husband may not ask for more than the dower if she were to initiate *khul'*. Ṣāni'ī believes that such an approach is problematic and also tantamount to oppression. In his view, contractual conditions of this kind have a deficiency (*naqṣ*), as they make justice for women conditional but universal for men. However, universal laws of justice cannot be conditional. It is also oppressive, as many women do not stipulate such things in their contracts for a variety of personal reasons (e.g. ignorance, carelessness etc.); therefore, to require a condition in the contract to protect oneself against excessive payment would be discriminating against a large portion of women who did not make this stipulation. Thus, Ayatullah Ṣāni'ī concludes, this law must be universal and unconditional.

[240] Ibid, 71.

The Qur'anic view on Mahr

Some, according to Ṣāni'ī, might argue that the verse "*...there is no sin upon them in what she may give to secure her release*"[241] does not put a limit on how much the husband may acquire from the wife. Therefore, the husband may ask for more than the dower in *khul'*. Ṣāni'ī challenges this view by arguing that the verse does not say that the husband can take whatever he likes from the wife, but only gives a choice to the wife where *she may give to him*. This makes it clear that it is her choice and not that of the husband. Furthermore, what she gives to him is of her dower, as that is what the previous sentence of the verse speaks about. To assume otherwise would be irrational, as the husband may ask for such an amount that it would be impossible for her to pay him, thus rendering the process of *khul'* impractical and futile.[242]

The Husband's Refusal of the Settlement

If, in the end, the husband refuses to agree with the *khul'* payment, Ṣāni'ī rules that his refusal is irrelevant, as his acceptance of the object of exchange (*fidyah*) or dower is not necessary. This is because, since the *khul'* settlement is not a real transaction (*li-'adam kawnihi mu'āwiḍah*) in which mutual agreement is needed, mentioning or hinting at an object of exchange (*badhl*) is not even necessary in the first place.[243]

[241] Qur'an, 2:229.
[242] Ṣāni'ī, *Vujūb-i Ṭalāq-i Khul' bar Mard*, 73.
[243] Ṣāni'ī, *Fiqh al-Thaqalayn*, 471.

Some Concluding Remarks

The 1979 Islamic Revolution in Iran was a great catalyst for change in Imāmī law. At previous turning points, such as the rise of the Safavid dynasty (1502-1736), the activity of jurists has largely focused on negotiating the legality of direct participation in temporal rule, something which in the view of Imāmī jurists was the prerogative of the Hidden Imām. The 1979 Revolution further reinvigorated the debate on participation of jurists in government, as this time the jurists were to assume direct political rule – an unprecedented event in Imāmī history. However, at this juncture, there was one legal question that was equally pressing for the jurists – how to deal with gender in a modern Islamic state. The jurists were no longer able to hold onto the restrictive interpretations of the law. They had to consider compromise and meditate on new interpretations that might be more acceptable to the demands of a modern society. Pressures for change were the result of two important developments: 1) the introduction of citizenship in a modern Islamic state and 2) the integration of the juristic class into the international arena and the pressures they faced from a gender aware national and international community.

Citizenship in an Islamic State

One of the central characteristics of the discourse of the Islamic revolutionaries' was Iranian nationalism. It is important to understand that a "state" and by extension an "Islamic state" is purely a modern phenomenon. Rooted in the concept of a state is the notion of national identity, by which citizenship becomes the ticket to full integration into the nation. Citizenship, in turn, assumes that citizens are to be accorded equal rights. The 'Islamic' state seen in Iran is therefore a synthesis of Islam or the Sharī'ah and nationalist discourse, which was and still is a central pillar in the jurists' revolutionary, anti-colonial ideology. However, there was an inherent

contradiction between the two: on the one hand, the popular juristic understanding was that men and women did not have the same rights in Islamic law, whether in marriage dissolution or blood-money (*diyah*) laws; while on the other hand the idea of citizenship assumed that all citizens were to have equal rights. Thus, in effect, the clerics became the victims of their own religious-nationalistic discourse as they attempted to synthesize two contradictory understandings. The net consequence of this was that Islamic law had to be re-interpreted in order to be compatible with one of the central discourses of the theocratic state as citizenship could not be compromised.

The International Arena and Gender Awareness

As a result of the entry of Islamic Iran and the ruling clergy into the international arena, the treatment of its citizens has become highlighted on the international scene. As a consequence, Iran has come under severe criticism and pressure in order to comply with notions of secular individualism which advocate gender and human equality. As Iran is concerned with its own image abroad as well as its image with a significant part of its population who also identify with these values, it can no longer avoid the question of gender. Many Iranian women have grown up in a gender aware world and have embraced the culture of gender equality, and so the state has little choice but to respond with some level of reform. The intricate juristic discourse described above, in all its traditional trappings, is a response to modern conditions and social aspirations. It remains to be seen if the Islamic Republic will respond as thoroughly as Ayatullah Ṣāni‘ī, an elderly and traditional religious figure, has done for the last two decades.

Conclusion

As an interpretive enterprise, *fiqh* is a dynamic and pluralistic activity. The interpretive, dynamic and pluralistic process of *fiqh* takes place in the context of various human conditions such as time, geography, culture, political conditions, and even the understanding of the language of sacred texts. This is why Muslim jurists as a whole have significantly differed on many legal issues. Differences between the Sunnī schools, however, have been significantly greater than those between the Imāmīs. This may be due to two factors. First, the territories and cultures that Imāmīsm was historically present in, as well as the number of their jurists, were very limited compared to the vast expanse and personnel that was available to Sunnīsm. Secondly and most importantly, differences were also shaped by various understandings of the sacred textual sources. Sunnīs were generally limited to the Qur'an and the Prophetic traditions as scriptural sources. As only few of the Qur'anic verses and Prophetic traditions dealt with law, the Sunnī schools of law resorted, most importantly, to deriving their legal verdicts through analogical reasoning (*qiyās*) and localized opinions (*ra'ī*). This contributed significantly to the disagreements (*khilāf*) that now exist in their law. As the 13th century Māliki jurist and Qur'an exegete al-Qurṭubī (d. 1273) remarked:

> the majority of [Sunnī] Sharī'ah rulings (*aḥkām al-Sharī'ah*) are founded on [sources of] speculation (*ẓann*) such as analogical reasoning (*qiyās*) and isolated Prophetic reports (*khabar al-wāḥid*).[244]

In addition to the Qur'an and Prophetic traditions, the Imāmīs also admitted the utterances of the Imāms of the Prophet's household (*ahl al-bayt*) into the corpus of ḥadīth. As the Imāms were

[244] Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 21 vols. (Tehran: Intishārāt-i Nāṣir-i Khusruw, 1364 H.Sh./1985), XVI, 332.

present during the crucial period of the development of the theological and legal schools in Islam between the seventh and ninth centuries, they (or those students of theirs who circulated and dictated in their name) played an important role in answering the legal and theological questions needed to construct a self-contained *madhhab,* which appears to have been functional by the time of Imām Muḥammad al-Bāqir (d. 743).[245] There is no way of knowing for certain if these were the sayings of the actual figures and that these opinions were not later attributions. The sayings - contrived or not - nevertheless served in establishing the Imāmī school of law. As a result of integrating the (attributed) detailed views of the Imāms into the Imāmī corpus of *ḥadīth*, the Imāmīs were able to construct their school without having the need to utilize analogical reasoning.[246] Consequently, the Imāmīs faced far less legal and theological disagreement than the Sunnī schools.[247] There were, of course, points where there were large differences; however these differences existed as a consequence of scriptural understanding and the acceptance of isolated reports (*khabar al-wāḥid*) as sources of the law. More importantly, the areas where disagreement existed (which were numerous) revolved, for the most part, around the intricate details of the law that dealt mostly with recommended (*mustaḥabb*) and hated (*makrūh*) acts. Disagreements on permitted (*ḥalāl*) and forbidden (*ḥarām*) acts was much rarer.[248]

Some might find that a better comparison would be between an individual Sunnī school and Imāmīsm; however, I believe that comparing them as Sunnī and Imāmī categories is more appropriate. I argue this for two reasons: first, Imāmīsm is not a single school of law, but rather

[245] Najam Iftikhar Haider, "The Birth of Sectarian Identity 2nd/8th century Kūfa: Zaydism and the Politics of Perpetual Revolution" (Ph.D. dissertation, Princeton University, 2007).
[246] The Imāmīs even went as far as forbidding *qiyās* as they considered it to be based on 'guess-work'. Although the Imāmīs for the most part did allow *ijtihād* in deriving new rulings, this was allowed based on either deductive reasoning (*istinbāṭ*) or a ruling's known operative causes (*'illah*). For an excellent survey on *qīyas* in Imāmī law, see Hossein Modarressi, "Rationalism and Traditionalism in Shî'î Jurisprudence: A Preliminary Survey", in *Studia Islamica*, No. 59 (1984): 141-158.
[247] See for example Shaykh al-Ṭūsī's *al-Khilāf* or Mughnīya's *al-Fiqh 'alá al-Madhāhib al-Khamsah* quoted earlier.
[248] See for example Sharīf al-Murtaḍā's *al-Intiṣār* quoted earlier.

two, namely Uṣūlīsm and Akhbārīsm. These have different legal methods - something akin to the methodological differences between the Sunnī schools. However, despite their methodological differences, their legal *responsa* have been quite similar.[249] Second, the Sunnī schools have been shaped by a common corpus of *ḥadīth* distinct from the body that has been used by the Imāmīs.[250] Therefore, it would only be appropriate to make a comparison between Imāmī law and individual Sunnī schools if they shared a common body of traditions.

Nevertheless, this largely (platform based) unified body of law in Imāmīsm did present a problem. Because most Imāmī juristic opinions can be explicitly found in the sacred sources, the law is more static, less flexible and less pluralistic than Sunnī law. As such, re-interpreting the law in accordance with modern sensitivities and notions of gender equality is more challenging for Imāmī jurists, as they are inevitably faced with deconstructing or actually doing away with explicit legal statements found in the scriptural sources. It is true that attempts to introduce sophisticated juristic reform may be more present in the Imāmī world, but this is the result of having an Islamic state ruled by religious jurists – something which is largely absent in the Sunnī world - and not a result of Imāmī law per se.

There is also another factor that restricts how far one may interpret Islamic, or indeed Jewish law to fit modern gender concerns. It is a fact that Islamic and Jewish sacred scriptures and laws are products of a pre-modern world. As such, they were born within a *communalist* socio-legal framework that emphasized the duties and roles of an individual towards the community. This perspective is quite opposed to modern *individualist* views or socio-legal frameworks that

[249] This becomes apparent after an analysis of Yusuf al-Baḥrānī's legal compendium *al-Ḥadā'iq al-Nāḍīrah* (an Akhbārī), whose views are largely harmonious with mainstream Uṣūlī Imāmīsm.
[250] This is not to say that Imāmīs have never used Sunnī traditions in forming their law, but that a different set of traditions have largely shaped Imāmīsm. Use of Imāmī ḥadīth by Sunnī scholars has been negligible, if not absent altogether.

emphasize the rights of an individual accorded to him or her by society. Within the modern paradigm, the notions of individual equality and by extension gender equality flow easily. It is, however, difficult to integrate ideas of gender equality in a communalist socio-legal framework. Such ideas are in conflict with the overwhelming emphasis in both traditions on duties and roles.

It should also be noted that arguing for equality in marital dissolution in Islamic law is easier than reforming notions of martial or more specifically sexual obedience[251] in the law. This is because divorce and some aspects of marriage may be discussed in a contractual framework, which allows an interpretor, to some extent, to make the idea of gender 'roles' secondary. This is evidently the strategy of Ayatullah Ṣāni'ī in his arguments concerning *khul'*. Gender prerogatives like sexual obedience or domestic restriction are much more difficult to mold and harmonize with current notions of gender freedom and equality; to do so would require a complete deconstruction and rejection of the many 'duly authenticated' scriptural sources that explicitly emphasize these gender prerogatives. In fact, it may require the outright rejection of these prerogatives. Even supposing that Ṣāni'ī wanted to address these issues (which so far I have not seen), I suspect that he would be severely limited in what he could accomplish. To even attempt to deconstruct this foundational aspect of the law would compromise his legitimacy in which he goes at great pains, as we saw above, to preserve.

Some Muslim modernists like AbdulKarim Soroush[252] (although not particularly known for his woman-friendliness) or Jewish feminist authors like Judith Plaskow[253] have nevertheless embarked on this project and attempted to harmonize the Islamic and Jewish traditions with

[251] I would like to thank Dr. Lynda Clarke of Concordia University for allowing me to borrow her coinage of this term.
[252] See 'Abd al-Karīm Surūsh, *Qabẓ va Basṭ-i Ti'ūrīk-i Sharī'at : Naẓariyah-'i Takāmul-i Ma'rifat-i Dīnī***,** (Tehran: Mu'assasah-yi Farhangī-i Ṣirāṭ, [2003]).
[253] See Judith Plaskow, *Standing again at Sinai : Judaism from a Feminist Perspective***,** San Francisco: Harper & Row (1990).

modern notions of human equality. However, they have (in my view) done so at the expense of the sacred sources by questioning their sacrality and foregrounding a secularized, historicized view of religion. At the present, this view holds little appeal for devout followers. Therefore, their attempts at reform, however compassionate and well intentioned, have found little legitimacy and their effects on the believing and religious masses have been minimal. For reform to be meaningful and legitimate for devout and believing persons in the Islamic and Imāmī world at least, it will require the efforts of high-ranking jurists who can meticulously reinterpret the law without compromising the sacred texts. Thus the role of high ranking jurists such as Ayatullah Yusuf Ṣāni'ī continues to be crucial. It may be argued that their position and expertise offer the most promising pathway for gender reform in law-oriented, patriarchal religions.

Yet, it must be understood that as the sacred texts are largely patriarchal in their proper foundations, reform will be limited if the sources are not to be compromised; this may be a reality that even the most ardent advocates of reform will have to accept.

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