

# Ten

## A WOMAN'S RIGHT TO TERMINATE THE MARRIAGE CONTRACT: THE CASE OF IRAN

Ziba Mir-Hosseini

### **The Problem**

The Islamic marriage contract reflects a patriarchal emphasis in society, and the disparity between men's and women's rights in the contract is sustained largely through the rules regulating its dissolution. Muslim jurists define marriage (*nikāh*) as a bilateral act (*'aqd*) in which a woman plays an active role: she is a party to the contract's formation in that she (or her guardian, *walī*) either offers or accepts the marriage. On the other hand, when it comes to the termination of a marriage contract, a woman's will is subordinated to that of her husband, who is given the right of *ṭalāq* (repudiation). As defined by jurists, *ṭalāq* is a unilateral act (*īqā'*), which acquires legal effect through the declaration of only the husband. A woman cannot be released from marriage without her husband's consent, although she can secure her release through offering him inducements by means of *khul'*, which is often referred to as "divorce by mutual consent." If she fails to secure his consent, then her only recourse is the intervention of the court and the power of the judge either to compel the husband to pronounce *ṭalāq* or to pronounce it on his behalf. Known in classical law as *faskh* (rescission), *tafriq* (separation), or *taṭlīq* (compulsory issue of divorce), this outlet became the basis on which women can obtain a court divorce in the contemporary Muslim world. The facility with which women can obtain such a divorce, and the grounds on which they can do so, vary in different schools of Islamic law and in different Muslim countries.<sup>1</sup>

Men's exclusive right to *ṭalāq* presents women with a real problem when the marriage is under strain or breaks down, and is an important target in feminist critiques of women's rights in Islam. It is a sword of Damocles in men's hands, which tilts the balance of power in marital relations in favor of the husband and ensures that women are kept in a state of limbo and disempowerment. Among the ways Muslim jurists proposed to redress this inequality—apart from the expansion of the grounds upon which a woman could obtain a court divorce—has been the insertion of a stipulation in the marriage contract by which the husband gives the wife the delegated right to divorce herself on his behalf. Known as *ṭalāq al-tafwīd*, this option is regarded by reformers and supporters of women's rights as

the most effective way to protect women. In the absence of legislation, it is argued, a delegated divorce stipulation is the only option in Islamic law to put women on par with men in terms of access to unilateral divorce.<sup>2</sup> This option has been dealt with extensively in the literature,<sup>3</sup> and I have no intention of discussing it at length here, except to point out that *ṭalāq al-tafwīḍ* fails not only to address the inequality inherent in the notion of *ṭalāq* but also to protect those women who most need protection: those whose husbands abuse their right to *ṭalāq*. This is so because it is premised on the notion that termination of marriage is a right that belongs to the man, who can use it in whatever way he chooses, including delegating it to his wife. So all depends on the good will of the man.

In practice it is neither common nor easy for a woman to acquire the delegated right to divorce. She (or her agent) must negotiate this at the time of marriage, when the parties are less likely to think of, and make provisions for, its breakdown, and indeed it is often seen as a bad omen even to mention the word *ṭalāq*, or to have a divorced person present during the *‘aqd* ceremony, let alone to negotiate such a right for the bride. If she tries to negotiate the right subsequently, for example in the course of a marital dispute, it is unlikely that she will be able to secure the necessary good will of the man.

Insertion of a stipulation is, thus, at best a half-solution, and at worst no solution at all. It can be effective only if it is compulsory, that is, if it is automatically inserted in every marriage contract, and then only if it is unconditional. To my knowledge no Muslim state has done this, and none is likely to do so. Iran is one of the few countries where the insertion of a delegated divorce stipulation in marriage is required by law, but, as we shall see, it is neither unconditional nor has it put women on a par with men in terms of access to divorce.

The issue of divorce must be tackled from a different angle. The question that must be asked is: Can the unequal construction of men's and women's rights to termination of the marriage contract be addressed within the parameters of Islamic law? If so, how, and under what conditions? These are the questions that I explore in this essay. I do so with reference to Iran, where the marriage contract has served as a medium for negotiating the gender inequalities inherent in classical Islamic law and where the issue of women's rights has been at the heart of jurisprudential debates in religious seminaries. The case of Iran indicates the potential of Islamic legal doctrine (*fiqh*) to redress the gender inequalities inherent in the marriage contract when the political will to do so is created. Women's massive participation in the popular revolution that led to the establishment of an Islamic Republic in 1979, and in Iranian political life since then, not only subverted notions of gender roles and relations constructed in traditional Islamic jurisprudence but made women a political force in Iran that no longer can be ignored. With the Shari'ā as the law of the land, its

custodians had no choice but to recognize the realities of contemporary life, including women's changed position in society, their expectations in marriage, and their increasing demand for equal rights with men. These realities led to questioning the jurisprudential constructions of gender rights in marriage and society, of which the notion of *ṭalāq* is one.<sup>4</sup>

In this chapter, I begin with an outline of salient features of the marriage contract in classical Shi'i law, with a view to identifying the assumptions behind the rules regulating its formation and dissolution. I then present and contextualize two juristic arguments that represent a radical break from these underlying assumptions. I came across these arguments in 1995 during fieldwork on gender discourses among the religious scholars in Qom, the site of learning and religious power in Iran.<sup>5</sup> Both of them are now in the public domain (published in two women's magazines), as part of a lively debate about women's rights in Islam that took a new turn and intensity with the creation of the Islamic Republic in 1979.

### **Marriage as Contract: Formation and Termination**

In line with other schools of Islamic law, in Shi'i law marriage is a contract imbued with religious ideals and values. It is one of the very few acts that cross the boundary between *'ibādāt* (ritual/spiritual acts) and *mu'āmalāt* (social/private acts).<sup>6</sup> In spirit, marriage belongs to *'ibādāt*, in that Muslim jurists define it as a religious duty ordained by God. In form, it comes under the category of *mu'āmalāt*, in that Muslim jurists define it as a civil contract between a man and a woman such that any sexual contact outside this contract constitutes the crime of *zinā* (fornication), and is subject to punishment. In its legal structure, marriage is a contract of exchange with defined terms and uniform effects and is patterned after the contract of sale (*bay'ʿ*), which has served as model for other contracts. Imbued with a strong patriarchal ethos, the essential components of the marriage contract are: the offer (*ṭijāb*) by the woman or her guardian, the acceptance (*qabūl*) by the man, and the payment of dower (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation, according to their mutual agreement.<sup>7</sup>

With the contract, a woman comes under her husband's *'iṣma* (authority, dominion, and protection), entailing a set of defined rights and obligations for each party: some with moral sanction and others with legal force. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in concepts of *tamkīn* (submission) and *nafaqa* (maintenance). *Tamkīn* (unhindered sexual access) is a man's right and thus a woman's duty, whereas *nafaqa* (shelter, food, and clothing) is a woman's right and a man's duty. A woman becomes entitled to *nafaqa* only after consummation of the marriage, and she loses her claim if she is in a state of *nushūz* (disobedience).<sup>8</sup> The contract establishes neither a

shared matrimonial regime nor identical rights and obligations between spouses: the husband is the sole provider and owner of the matrimonial resources and the wife is possessor of the *mahr* and her own wealth. The only shared space is that involving the procreation of children, and even here a woman is not expected to suckle her child unless it is impossible to feed it otherwise.

In line with the logic of the contract, a man can enter into more than one marriage at a time (up to four permanent ones in all schools, and in Shi'i law also as many temporary marriages (*mut'a*)<sup>9</sup> as he desires, or can afford), and he can terminate each contract at will: no specific grounds are needed, nor is the wife's consent or presence required. Under classical Shi'i law, to be released from her marriage a woman can either buy her husband's consent by means of *khul'* or *mubārāt* (Ar. *mubāra'a*, the so-called divorce by mutual consent) or resort to the option of *faskh* (annulment or rescission). In *khul'*, separation is claimed by the wife because of her extreme dislike (*ikrah*) of her husband, and there is no ceiling to the amount of compensation that she may be asked to pay. In *mubārāt* the dislike is mutual and the amount of compensation should not exceed the value of the *mahr* itself. In *faskh*, marriage is dissolved as a result of the absence or presence of a condition in one of the parties.<sup>10</sup>

Like *ṭalāq*, *faskh* is a unilateral act and comes under the category of unilateral acts in Shi'i law, but it is different from others in its legal structure and effects. First, it does not follow the formalities of *ṭalāq*: the pronouncement of a certain formula, the presence of witnesses, the woman being in the state of menstrual purity. Second, the wife is not entitled to any portion of her *mahr* if annulment occurs before consummation of the marriage; she is entitled to half of her *mahr* only if the annulment is due to her husband's inability to perform sexual relations. Third, although a woman needs to observe the same waiting period as in *ṭalāq*, the husband has no right to resume marital relations within this period. Fourth, *faskh*, regardless of how many times it happens between the couple, does not create a temporary or permanent bar between them, whereas the third *ṭalāq* creates a temporary bar to future marriage of the two and the ninth *ṭalāq* creates a permanent prohibition. Finally, both parties have a more or less equal right to seek the annulment of their marriage.<sup>11</sup>

A woman can resort to the option of *faskh* in two situations: the existence of a condition in the husband that makes the continuation of marriage untenable for her, or the absence of a condition in the husband that he claimed to possess at the time of marriage. As to the first, the husband's insanity or sexual defect (impotency, or absence of penis or testicles), either at the time of marriage or subsequently, constitutes the only grounds that enable a woman to terminate the marriage. As to the second situation, there is more flexibility and it varies with the kind of agreements that the parties have made at the time of marriage or stipulated in the contract.<sup>12</sup>

To exercise her right to *faskh*, a woman does not need to secure the consent of her husband or the intervention of the judge, although in the case of her husband's impotency she is required by the judge to wait for a year in case it is a temporary affliction.<sup>13</sup>

With this background, we can now return to the central question of this essay: Can there be an equal construction of the notion of divorce in Islamic law, in the sense that a woman's wishes are taken into account in terminating the contract in the same way as when the marriage is contracted?

### **Rethinking Women's Right to Termination: The Argument of Ayatollah Sane'i**

In September 1995, I posed the above question to Ayatollah Yusef Sane'i in a meeting arranged by the editor of *Payām-e Zan*, a women's journal run by male clerics and published by the Qom seminaries.<sup>14</sup> Sane'i is a high-ranking cleric who played a major role in transforming the legal system in the early years of the Iranian Revolution. He was the State Prosecutor-General and is a former member of both the Guardian Council and the Supreme Judicial Council, the two highest legal bodies in the Islamic Republic. He returned to Qom in 1984, and since then has devoted himself to religious scholarship and teaching. He is a prominent cleric with a reputation for progressive opinions on women's issues and family matters, exemplified for instance by his advocacy of family planning and of raising the legal age of puberty for girls from nine to thirteen.

Ayatollah Sane'i's response to my question was an emphatic "yes." He then produced the following correspondence in which Ayatollah Khomeini expressed a similar view:

In the name of God the Merciful  
To the Leader of the Islamic Revolution of Iran  
His Excellency Ayatollah al-'Uzma Imam Khomeini

After greetings and respect, certain issues get disputed in the Guardian Council and eventually your honored opinion is to be followed; among these are some articles of the Civil Code, one of which pertains to divorce: if the continuation of marriage causes the wife hardship (*'usr va ḥaraj*), she can demand divorce (*talāq*) by recourse to the religious judge (*ḥākim-i shar'*) who, after ascertaining the matter, will compel the husband to divorce, and if he refuses, the judge himself will conduct the divorce.

Some of the jurists (*fuqahā'*) in the Guardian Council reject this [that the judge can conduct a divorce] and argue that hardship (*ḥaraj*) is caused by the need to abide by the contract of marriage; even if the hardship argument is valid here, it can only remove the need to

abide by the contract and create for women the right of annulment (*faskh*). Given that instances in which annulment can take place are limited by consensus [of jurists], and [hardship] is not among them, therefore *faskh* is strongly ruled out.

Other jurists hold that the argument for hardship here is not confined to the requirement [to abide by the terms] of the contract, but the root of hardship is that *ṭalāq* is exclusively in the hands of the husband, and according to the harm argument we remove this exclusive control and through recourse to the religious judge and with proof of hardship, out of precaution, the husband is compelled to [pronounce] *ṭalāq* or the judge himself effects it. Please state your esteemed opinion on these matters.

#### In the Name of God

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

Ruhullah al-Musavi al-Khomeini

The above document, in effect a fatwa (legal opinion), is to be found in *Ṣaḥīfeh Nūr* (The Book of Light), which contains Ayatollah Khomeini's rulings and utterances. It is dated 1982, when pre-revolutionary divorce laws were being amended to eliminate any discrepancies with Shari'a. The question was posed by Ayatollah Sane'i to settle a dispute between himself and other members of the Guardian Council, the body whose task is to ensure that laws passed by the parliament are in line with Shari'a. The dispute was over the court's power to issue a divorce without a man's consent. Before any further discussion of the document and what Ayatollah Khomeini meant by "there is a simpler way," we need to put it into its context, which is that of the dismantling of the Family Protection Law and the resulting need to expand the grounds upon which a woman can obtain a divorce.<sup>15</sup>

The Family Protection Law (FPL), enacted in 1967 and regarded as one of the most progressive laws in the Muslim world, not only removed the husband's extra-judicial right to *ṭalāq* but also placed women on more or less equal footing with men in terms of grounds for divorce.<sup>16</sup> The FPL achieved this by means of procedural devices, thus avoiding an open confrontation with the Shi'i *fiqh* notion of divorce, which had been codified as part of the Iranian Civil Code (*qānūn-i madani*) and grafted onto a new judicial system in the early twentieth century.<sup>17</sup> These procedural devices made it an offense to register a divorce without a court certificate, subject to a penalty of imprisonment for six months to a year for all parties involved, including the registrar. This innovation had the effect of bringing

all divorces into the courts, which in effect amounted to the abolition of a man's right to *ṭalāq*. New courts were set up with their own procedural rules, empowered to deal with all types of marital disputes, and presided over by civil judges, some of them women. In the absence of the spouses' mutual consent to divorce, the court would, upon the establishment of certain grounds, issue a certificate referred to as "impossibility of reconciliation," which then enabled the party seeking the divorce to register it without the other party's consent. New marriage contracts were issued in which these grounds were inserted as stipulations, thus providing further legitimacy for the specific conditions upon which a divorce certificate could be obtained from the court.

As noted, under classical Shi'i law, in the absence of her husband's consent, the only grounds upon which a woman could seek the termination of her marriage were her husband's impotency or insanity. These had already been expanded in the 1930s, however, when *fiqh* rules of marriage and divorce were partially reformed and codified to include the husband's refusal or inability to provide for his wife, his refusal to perform his marital (sexual) duties, his maltreatment of her, and his affliction with a disease that could endanger her life (Civil Code, Articles 1129 and 1130). This was done by using the legal device of *tafḥīq*, that is, adopting provisions from other schools of Islamic law. To broaden these grounds further, the FPL resorted to another legal device: the insertion of stipulations into the marriage contract granting the wife the delegated right of *ṭalāq* after recourse to the court, where she must establish one of the listed conditions. Prior to 1967, it had been up to the woman, and in effect her family, to negotiate such a right. This seldom happened and, when it did occur was confined to the property-holding middle and upper classes. The FPL made these stipulations an integral part of every marriage contract.

To secure the approval of the clerical establishment, the draft of the FPL was discussed with high-ranking clerics, including Ayatollah Hakim, a leading Shi'i jurist resident in Najaf. Yet the militant clerics saw the reforms introduced by the FPL as an interference with Shari'a and a violation of sacred Islamic laws. In 1967, Ayatollah Khomeini commented:

The "Family Law," which has as its purpose the destruction of the Muslim family unit, is contrary to the ordinances of Islam. Those who have imposed [this law] and those who have voted [for it] are criminals from the stand-point of both Shari'a and the law. The divorce of women divorced by court order is invalid; they are still married women, and if they marry again, they become adulteresses. Likewise, anyone who knowingly marries a woman so divorced becomes an adulterer, deserving the penalty laid down by the Shari'a. The issue of such unions will be illegitimate, unable to inherit, and subject to all other regulations concerning illegitimate offspring.<sup>18</sup>

In February 1979, soon after the victory of the Revolution, Ayatollah Khomeini's office declared that the FPL was non-Islamic, and announced its suspension and the reinstatement of the Shari'a provisions for divorce as embodied in the articles of the Civil Code.<sup>19</sup> Six months later, the FPL courts were abolished and replaced by Special Civil Courts, which were presided over by a *ḥākim-i shar'* (judge trained in *fiqh*).<sup>20</sup> Established by an act with the same name, the new courts are in effect Shari'a courts. "Special" here denotes their freedom from the laws of evidence and procedure contained in the Civil Procedure Code, investing them with the same degree of discretionary powers as the pre-revolutionary FPL courts. Yet some of the reforms introduced under the FPL were retained, though in an ad hoc way and under a different legal logic. Men's unilateral (but not extra-judicial) right to divorce was restored: a divorce could be registered only when the two parties reached a mutual agreement. The only cases that had to appear in court were those where one party, either the husband or the wife, objected to the divorce or its terms.<sup>21</sup> Men were not required to provide grounds, while women could obtain a divorce only upon the establishment of grounds, which were basically the same as those available to them under the FPL. At the same time, measures were taken to compensate and protect women in the face of divorce as well as to expand their access to it. This was done, once again, by the insertion of new sets of stipulations into the marriage contract and by empowering the new courts to issue (or withhold) a divorce requested by a woman. This time, however, as *fiqh* rules could no longer be circumvented, new arguments for these measures had to be found within *fiqh*.

Since 1982, new standard marriage contracts have been issued carrying two stipulations that marriage registrars are required to read aloud to couples. The first, intended to deter men from using the *ṭalāq* option, entitles the wife to claim half the wealth that her husband has acquired during marriage, provided that the divorce is neither initiated by her nor caused by any fault of hers, the court deciding whether or not fault lies with the wife. The second stipulation, aimed at enlarging women's access to divorce, gives the wife the delegated right to divorce herself after going to court and establishing one of the conditions inserted in her marriage contract. This in effect enables women to obtain a judicial divorce on more or less the same bases as before the Revolution; the only difference is that, in conformity with the *fiqh* mandate on divorce, now the basis for these rights is the husband's agreement to them in the marriage contract. Interestingly, however, whether the husband actually agreed to these terms or not has no effect in practice, since the presence or absence of his signature under each clause is ignored and full power to grant the divorce lies with the judge.<sup>22</sup>

The next problem that had to be addressed was how to deal with cases where the marriage took place before 1982 and the contract did not contain



the second stipulation. This was solved by amending certain articles of the Civil Code. Article 1130 was amended to empower the judge to issue (or withhold) a divorce requested by a woman if he believes that the continuation of marriage will entail *‘usr va ‘haraj* (hardship and suffering). This is a general *fiqh* principle which allows a rule to be lifted when adherence to it creates hardship. In the sphere of marriage, its implication is that, for a woman, remaining married is a rule as long as her husband desires it; to be released from a marriage she needs to prove that its continuation is causing her harm. The divorce stipulation inserted in marriage contracts in 1982, which provides women with specific grounds upon which they can obtain a court divorce, can be seen as an attempt to identify and list circumstances that can render marital life intolerable to the wife. In other words, these amendments are modern Shi‘i jurists’ attempts to define the broad and vague concept of “hardship” in marriage.

### **Rethinking the Legal Form: Ayatollah Sane‘i’s Argument**

It was in this context that Ayatollah Khomeini’s intervention was sought, as the high-ranking jurists could not agree on the question of when a judge should exercise discretion to grant a divorce against the husband’s will or of what entails “hardship” for women in marriage. In his letter, Ayatollah Sane‘i sets out the two juristic positions on effecting a divorce without the husband’s consent, and asks for Ayatollah Khomeini’s opinion. Khomeini is obviously in favor of the second position, that is, giving the court a free hand in issuing a divorce requested by a woman on the grounds of “hardship.” He then adds “there is a simpler way, if I had the courage.”

This simpler way that even Ayatollah Khomeini had not dared to utter was, Ayatollah Sane‘i argued, that if a woman asks for a divorce but her husband refuses to give his consent, such a refusal is on its own the proof of her “hardship” in marriage. In such a case, either the wife can divorce herself—because, according to the *fiqh* principle of alleviating “hardship,” the husband loses the right to object to her desire for divorce—or, according to another general *fiqh* principle of “no harm” (*lā-darar*), she can demand that the marriage be dissolved through the option of *fāskh*.

I asked Ayatollah Sane‘i about the legal form that this type of separation would take. I reproduce our exchange:

Sane‘i: The form hasn’t yet been defined in our laws; as I said before, our laws are incomplete. This is what Imam [Khomeini] says; whenever marital life becomes difficult for a woman and we see that she can’t continue her marriage, she can annul (*fāskh*) the contract.

Mir-Hosseini: Does she need the permission of a religious judge?

Sane'i: Permission is merely a precaution, so that *ṭalāq* [is pronounced] instead of *faskh*. However, the significance of the whole argument is that there is no need, and a woman can separate. She goes to the court as a matter of formality, to have the separation registered, not to establish grounds for such a separation, according to *shar'* [divine law] as we understand it. Islam does not say that a woman must stay and put up with her marriage if it is causing her harm—never! When the Imam was asked about the situation of the wives of those who disappeared during the imposed war [with Iraq, 1980–1988], he wrote that these women can take a representative [for the husband] and divorce themselves.<sup>23</sup>

As elaborated by Ayatollah Sane'i, this view indicates a radical break from the assumptions underlying dissolution of marriage, and thus opens the way for addressing the inequalities inherent in the notion of *ṭalāq*. It takes into account a woman's wishes, and leaves it to her, not to the court or the judge, to decide whether the continuation of marriage causes her harm and hardship. This takes the notion of marriage as a contract of equal partners to its logical conclusion, that is, the consent of the two parties is required, not only in the formation of the marriage contract but also for its continuation. A woman's right to dissolve the contract through *faskh* puts her in more or less the same position as the man in terminating the marriage through *ṭalāq*. This is a far cry from the stance that Ayatollah Khomeini took in 1967 over the pre-revolutionary regime's reforms of the divorce laws.<sup>24</sup>

### **Rethinking Divorce Theories: The Arguments of Hujjat al-Islam Sa'idzadeh**

What remains implicit in Ayatollah Sane'i's arguments is made explicit in a paper by Hujjat al-Islam Muhsin Sa'idzadeh, entitled "The Foundation of the Equality Perspective in Modern *Fiqh*: The Case of Divorce," which deals with underlying *fiqh* assumptions and theories regarding marriage and its dissolution.<sup>25</sup> Sa'idzadeh is a young cleric, one of a new generation that has come of age intellectually in the Islamic Republic and has been influenced by ideas outside the traditional centers of Islamic learning in Iran. He is the most vocal clerical proponent of gender equality. In his writings on various aspects of women's rights in Islamic law, which have appeared in women's journals in Iran since 1992, he has tried to reconcile *fiqh* theories with current social realities.

His arguments stem from three points. First, divorce cannot be considered separately from *fiqh* theories and assumptions regarding marriage. Based on terms employed in the Qur'an and the sayings of the Prophet,

his “equality perspective” reaches the conclusion that marriage rests on the principle of “unilateral protection.” Second, according to the consensus of the jurists, marriage is a customary affair and was a pre-Islamic tradition. Islam accepted this tradition and did not create it. Unilateral protection was appropriate for that era, and since it was chosen by the people themselves, the new religion did not address the core theory on which divorce rested, but merely restricted men’s excessive power. To do so, it limited the number of wives a man could have and the number of times he could divorce the same woman. In other words, the Qur’an did not reform marriage and divorce as institutions (as they are the product of custom) but merely placed certain conditions on men, since the marriage contract places women under their protection. But Islam’s silence, not criticizing an existing situation or institution, does not necessarily mean that it ordains that situation or institution forever and disapproves of its modification.

The third and last of Sa’idzadeh’s underlying points is this: In deducing the terms of divine law, the first task of a jurist is to identify the subject of the ruling (*mawḍū‘ al-ḥukm*), just as a physician must make a correct diagnosis before finding a cure. The subject of marriage is the social and civil aspect of relations between the sexes. In other words, men and women are the subject of marriage and divorce, since both need each other and are parties to the contract. The error of previous jurists lies in their failure to correctly identify the subject of the rules of marriage and divorce. They have confused the cause (*‘illa*) of marriage (here, unilateral protection) with the subject of the ruling (here, civil relationship between men and women). Instead, says Sa’idzadeh, “unilateral protection” must be regarded as a social theory, reflecting the state of affairs of the society in which the Qur’an was revealed, not the subject matter of a divine ruling.

Having set the framework of his argument with these three points, Sa’idzadeh then elaborates on marriage practices at the time of the Qur’anic revelation. In the pre-Islamic era, he argues, only men were given social rights and responsibilities, and as a result the subject of marriage was understood to be men. With the marriage contract, women of the time came under the protection of the tribe (generally) and the husband (specifically), exactly like camels and sheep. Men could remove the protection at any time and release the women, since a woman was not a party to the contract but rather its subject. Unilateral protection was the basis of family links, and parts of this culture are still evident in the written sources and the idioms used. For example, “*ṭalāq*” in Arabic means “release,” to “untether” from the tie of protection. It is used to refer to either a camel that is untethered, no longer under the control of a drover, and free to graze where it wants, or a sheep that has left the herd and no longer has the protection of a shepherd. In that culture, the separation of

a sheep from the herd was analogous to that of a woman from her kin-group and tribe: the shepherd's care was like the control and protection provided by the husband.

Islam accepts the principle of protection, Sa'īdzadeh contends, but leaves its form to be defined by the people of each era. This is so because the form of protection, its framework, and the manner of its application are relative, changeable, and subject to the demands of time and place. In every time and place people can alter the form of this theory; since alteration in form (not nature) is permitted, the by-products—i.e., legal consequences—of this alteration are also permitted. The form that this principle took in early Islamic society was only one instance. Says Sa'īdzadeh:

We cannot assume that only this instance among many other instances of protection is sanctioned by a religion which is based on revelation and absolute reason! Our explanation and analysis, therefore, is that since that instance was accepted by the people of that era and was useful for them, it was left as it was. But people of this era want a different form. Islam does not concern itself with the form but with the principle.

The Qur'an did not reform marriage and divorce as institutions—as they are products of custom—but merely placed conditions on the man (the party who takes a woman and releases her). In other words, we are dealing precisely with the form [of protection] not the principle. So while retaining the principle, as it is the cause (*'illa*), we can now change its form and solve the problem of *ṭalāq*, as people of this era demand a new form and women no longer accept the old form.<sup>26</sup>

The essential issue that jurists must now address, according to Sa'īdzadeh, is the unilaterality or bilaterality of the protection. He continues:

In the present era, protection can take any one of the following forms, as accepted by people: (1) government protection of the family, (2) men's protection of the family (generally) and of women (specifically), (3) women's protection of the family, and (4) spouses' shared protection of the family. Acceptance of each of these forms will affect divorce in a different way. If we accept the first form, divorce will become governmental and will come under the control of the judge in charge, exactly like any other social contract, such as establishing and dissolving a company; the [distinct] form of judicial divorce stems from this. If we accept the third form, then divorce will be in the hands of women, exactly opposite to the second form, the one presently accepted by Muslim societies. If we accept the fourth form (which seems the most suitable for people of this era), then both men and women can divorce, and their rights in divorce become equal.<sup>27</sup>

In anticipation of, and to preempt, potential criticism, Sa'īdzadeh concludes his paper with a caveat:

In response to those who say that the rulings (*ahkām*) of religion are eternal and immutable, and that therefore the above deduction cannot be accepted, I must say: (1) eternity and immutability pertain to principles (*usūl*) and rulings, not details and forms (*ashkāl*)! We too consider the rulings of Islam to be eternal and immutable, but distinguish principles from forms; (2) as for “discerning the cause,”<sup>28</sup> the accepted views of the Shi'a have it that if the *mujtahid* [independent interpreter] jurist knows or discerns what the cause of a ruling is, or what were the reasons that influenced the creation of the ruling, then he can give a fatwa on the basis of his understanding. In other words, Shi'i *fiqh* views admit that once the cause of a ruling becomes clear to the jurist, by means of either rational or narrated proofs, he can act in accordance with his opinion. *Fiqh* views in recent years are more inclined than their predecessors towards the validity and proof of this view.<sup>29</sup>

Sa'īdzadeh's radical ideas and outspokenness have made him one of the victims of the struggle between modernists and traditionalists, which took a new turn after the unexpected victory of the “moderates” in the election of Mohammad Khatami as president in the spring of 1997. In June 1998, after the publication of an article in the now-closed liberal daily newspaper *Jāme'eh*, in which he compared religious traditionalists in Iran with the Taliban in Afghanistan, Sa'īdzadeh was arrested and detained without trial. He was released five months later, but “unfrocked”, that is, he lost his clerical position and is “forbidden-pen”—his writings cannot be published.

### **Conclusion**

The answer to the question with which I began this essay is “yes, there can be an equal construction of divorce in Islamic law, but not through the traditionally-recognized mechanism of a contract stipulation delegating the husband's rights to the wife.” Rather, the two arguments I have discussed are examples of the ways in which termination of marriage can be legally defined at the outset to accommodate social realities and contemporary women's aspirations for gender equality. These ideas are found in the comments of Ayatollah Sane'i and Hujjat al-Islam Sa'īdzadeh. What I find most significant about these two views is that neither is predicated on the notion of insertion of stipulations in the marriage contract, which, in my view, sidesteps the problem. Both jurists go back to fundamentals and ask new questions. In my view, no radical change can be argued and

sustained unless the whole notion of the gender relations informing the Islamic marriage contract is re-examined. This, in time, can open the way for radical and positive changes in Islamic law.

Whether this will ever happen, whether the new juristic arguments will ever be translated into legal rulings, depends on the balance of power between traditionalists and modernists in each Muslim country, and on women's ability to organize and participate in the political process. But it is important to remember two things. First, *fiqh* is reactive in the sense that it reacts to social realities, to the situation on the ground, and that it has both the potential and the legal mechanisms to deal with women's demands for equality in law. This is best seen in Ayatollah Khomeini's own radical shift in position *vis-à-vis* reforms of divorce laws in pre- and post-revolutionary Iran. This is potent proof of the extent to which political realities and expediencies can shape the views of custodians of the Shari'a. Yet what happened to Hujjat al-Islam Sa'idzadeh is another potent proof of the difficulties involved and the price that has to be paid for dissent from conventional views. His main offense was to expose to the public debates and arguments that traditionally belonged in the seminaries.

Finally, it is important to remember that *fiqh* is still the monopoly of male scholars, who not only continue to define the scope of women's rights in Islam but whose accredited knowledge of women and their rights comes from texts all written by men, all constructed with juristic logic, reflecting the realities of another age and a different set of interests. This monopoly needs to be broken, and it can be done only through women's participation in the production of knowledge.<sup>30</sup>

#### NOTES

This chapter is based on research conducted in Iran in 1995 and 1997, funded by the Nuffield Foundation and the British Institute of Persian Studies. I am grateful to both organizations for their generous help. The original draft was presented at the Islamic Marriage Contract conference at Harvard Law School, Islamic Legal Studies Program, January 29–31, 1999. I am grateful to Ann Elizabeth Mayer and Richard Tapper for reading and commenting on an early revision. The present chapter does not take account of publications since 2000, or of my own changed perspective, on both of which see Mir-Hosseini, "When a Woman's Hurt Becomes an Injury: 'Hardship' as Grounds for Divorce in Iran," in *Hawwa: Journal of Women of the Middle East and the Islamic World* 5:1 (2007), 111–126.

<sup>1</sup> Among the classical schools, the Maliki is the most liberal and grants woman the widest grounds upon which she can initiate divorce proceedings. Among modern states where Islamic law forms the basis of family law (not considering Turkey, where Islamic law is not the source of family law since Kamal Atatürk's reforms), in Tunisia women enjoy the easiest access to divorce in law. See Nasir<sup>2</sup>1990, 125–142. For reforms in divorce laws, see Anderson 1976; Mahmood 1972; El Alami and Hinchcliffe 1996.

<sup>2</sup> For a concise guide, see Carroll and Kapoor 1996.

<sup>3</sup> See, e.g., Carroll 1996.

<sup>4</sup> Although women active in Islamist politics did not—unlike their secular counterparts—openly challenge the gender discourse of the Revolution, by the late 1980s there were clear signs of dissent, as increasing numbers of women voiced objections to the discriminations that were placed on them in the name of the Shari'a. See Mir-Hosseini 1996; Mir-Hosseini 1996a.

<sup>5</sup> See Mir-Hosseini 1998 and 1999a.

<sup>6</sup> There are, of course, differences among the schools of Islamic law, but they share the same inner logic and patriarchal bias. See, for instance, Esposito 1982.

<sup>7</sup> For a concise discussion of the terms of the marriage contract and their adoption by legal codes in Arab countries, see El Alami 1992; and El Alami and Hinchcliffe 1996.

<sup>8</sup> *Nushūz* literally means “rebellion” and it implies the abandonment of marital duties. Despite the fact that it is acknowledged that such abandonment can take place on the part of both spouses, in *fiqh* sources the term *nāshīza* (rebellious) is used only in the feminine form and in relation to maintenance rights.

<sup>9</sup> For this form of marriage, see Haeri 1989.

<sup>10</sup> See Hilli 1985, 751–883; and Dāmād 1986, 341–443.

<sup>11</sup> See Katouzian 1989, 277–279.

<sup>12</sup> The essence is that after marriage the wife discovers the absence of a specified attribute (*ṣifa*) without which she would not have agreed to enter the contract.

<sup>13</sup> For a discussion of *faskh* in Shi'i law and its translation in contemporary Iranian family codes, see Mehrpour 2000, 112–123.

<sup>14</sup> For background to this journal, see Mir-Hosseini 1999a, chaps. 3 to 5.

<sup>15</sup> For pre- and post-revolutionary family laws in Iran, see Mir-Hosseini 1999, 192–196.

<sup>16</sup> Bagley 1971; Hinchcliffe 1968.

<sup>17</sup> Enacted between 1927 and 1935, those articles of the Civil Code that relate to marriage and divorce are in effect a simplification and codification of dominant opinion in Shi'i *fiqh*; for a brief account of Iranian family law, see Mir-Hosseini 1999.

<sup>18</sup> Algar 1985, 411.

<sup>19</sup> Communiqué of February 26, 1979, see Tabari and Yeganeh 1982, 232.

<sup>20</sup> For these courts, see Mir-Hosseini 1993.

<sup>21</sup> This was the case between 1979 and 1992, when the divorce laws were amended once again, requiring all divorces to appear in court. See Mir-Hosseini 1999.

<sup>22</sup> For the new grounds and their difference from FPL, and for court procedure in the 1980s, see Mir-Hosseini 1993, 54–83; and Mir-Hosseini 1998.

<sup>23</sup> For a fuller account of Ayatollah Sane'i's views, see Mir-Hosseini 1999a, 147–168.

<sup>24</sup> For changes in Khomeini's judicial rulings relating to women's rights, see Mir-Hosseini 2000.

<sup>25</sup> Published in *Payām-e Hajar* (journal of the Islamic Women's Institute headed by Azam Taleqani) Farvardin-Ordibehesht 1377 (April–May 1998), 51–53. For the text of the article in English and a discussion of Sa'idzadeh's views, see Mir-Hosseini 1999a, chap. 8.

<sup>26</sup> Mir-Hosseini 1999a, 270.

<sup>27</sup> *Idem.*

<sup>28</sup> *Tanqīḥ al-manāḩ.* Technically the phrase means “connecting the new case to the original case by eliminating the discrepancy between them.” See Kamali 1991, 213. Literally, *tanqīḥ* means purifying, *manāḩ* means cause; it implies that a ruling (*ḥukm*) may have more than one cause, and the jurist has to identify the proper one.

<sup>29</sup> Mir-Hosseini 1999a, 271.

<sup>30</sup> Although there are now a number of female scholars, they focus their energies mainly on the field of Qur’anic interpretation (*tafsīr*) rather than law (*fiqh*). For instance, see Hassan 1987 and 1996; Mernissi 1991; Wadud-Mohsin 1999.



The Islamic  
Marriage Contract  
Case Studies in Islamic Family Law

Edited by

Asifa Quraishi  
Frank E. Vogel

Published by the  
Islamic Legal Studies Program, Harvard Law School  
Distributed by Harvard University Press  
Cambridge, Massachusetts  
2008

Library of Congress Control Number: 2008939958

Copyright © 2008 by the President and Fellows of Harvard College  
All rights reserved  
Printed in the United States of America  
ISBN 978-0-674-02821-0